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December 1, 2006

ORIGINAL

Our File No. 20828-00101-60

FILED/ACCEPTED

DEC - 1 2006

Federal Communications Commission
Office of the Secretary

VIA HAND DELIVERY

Ms. Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C. 20554

Re: **Petition for Reconsideration**
Amendment of Section 73.202(b)
Table of Allotments
FM Broadcast Stations
(Port Norris, New Jersey; Fruitland and Willards, Maryland;
Chester, Lakeside, and Warsaw, Virginia)
MB Docket No. 04-409
RM-11108
RM-11234

Dear Ms. Dortch:

Transmitted herewith on behalf of MainQuad Communications, Inc., are an original and four copies of its Petition for Reconsideration in the above-referenced matter.

If there are any questions concerning this submission, please contact the undersigned directly.

Sincerely,

John M. Pelkey

Enclosures
JMP:yg

0+4

Before the
Federal Communications Commission
Washington, D.C. 20054

FILED/ACCEPTED
DEC - 1 2006
Federal Communications Commission
Office of the Secretary

In the Matter of	)	
	)	
Amendment of Section 73.202(b)	)	MB Docket No. 04-409
Table of Allotments	)	RM-11108
FM Broadcast Stations	)	RM-11234
(Port Norris, New Jersey; Fruitland and Willards,	)	
Maryland; Chester, Lakeside, and Warsaw,	)	
Virginia)	)	

Petition for Reconsideration

MainQuad Communications, Inc. ("MainQuad"), through counsel, hereby petitions for reconsideration of the Commission's *Report and Order*, released October 13, 2006, in the above-captioned proceeding. As will be demonstrated below, the *Report and Order* erred in two respects. First, it established reference coordinates for the allocation at Lakeside, Virginia, that conflict with the reference coordinates proposed by MainQuad in a facilities modification application filed with respect to WARV-FM, Petersburg, Virginia, on April 28, 2005. That application did not seek to construct new facilities, but instead sought to correct the coordinates for the WARV-FM facility that had been in place for at least twelve years. The application as filed was fully spaced with the reference coordinates that had then been established by the Commission for the proposed Lakeside, Virginia, facility. By adopting coordinates for the Lakeside allocation that are different than those that were in place at the time that MainQuad filed its application, the *Report and Order* has created a short-spacing situation that is inconsistent with the Commission's own rules. Second, and more fundamentally, the *Report and Order* erred in failing to consider whether CXR Holdings, Inc. ("CXR"), which had proposed the Lakeside allocation, was properly entitled to first local service credit given the

Report and Order's failure to consider whether Lakeside is part and parcel of the Richmond urbanized area pursuant to the standards established in *Faye and Richard Tuck, Inc.*, 3 FCC Rcd. 5374 (1988). As a result, the *Report and Order* must be reversed.[1]

I. Introduction

This proceeding stems from a Petition for Rule Making filed on August 18, 2003, by Dana J. Puopolo wherein Mr. Puopolo proposed that Channel 299A be allocated to Port Norris, New Jersey, as a new allotment. On November 5, 2004, the Commission issued a *Notice of Proposed Rulemaking* in which it solicited the submission of comments and counterproposals. Such a counterproposal was submitted by CXR. Pursuant to that counterproposal, CXR would have its WDYL(FM) change channel from Channel 266 to Channel 265; upgrade from Class A to Class B1; and change community of license from Chester, Virginia, to Lakeside, Virginia. In its counterproposal, CXR specified reference coordinates of 37°, 36', 8" NL; 77°, 22', 09" WL. An entry was then made in the Commission's database setting forth these coordinates as the reference coordinates for the proposed Lakeside allocation.

During the course of an inspection of its WARV-FM, Petersburg, Virginia, MainQuad learned that the coordinates listed on the station's license were incorrect and apparently had been incorrect ever since the filing of the application by a previous owner seeking authority to construct WARV-FM at its present location some twelve years earlier.[2] In the process of performing the engineering studies to determine whether WARV-FM is properly spaced if the correct coordinates are used, however, MainQuad discovered that the coordinates for the

[1] A summary of the October 13 *Report and Order* was published in the Federal Register on November 1, 2006, 71 Fed. Reg. 64153-54. This Petition for Reconsideration is thus timely filed. See 47 C.F.R. §1.429(d).

[2] MainQuad has since sold WARV-FM, but continues to have an interest in the outcome of this proceeding due to contractual obligations. In addition, one of the MainQuad principals resides in the Richmond, Virginia, market and thus has an interest in ensuring that the Commission properly adheres to its policies with respect to WDYL(FM), a station that is located within the Richmond market.

constructed WARV-FM facility were short-spaced to the reference coordinates specified by CXR in its counterproposal. So as to permit MainQuad to file the requisite application to correct the WARV-FM coordinates, MainQuad requested that the Commission staff specify 37°, 36', 48" NL; 77°, 21', 46" WL as the reference coordinates for the proposed Lakeside allocation. MainQuad provided the Commission with a map and an allocation study demonstrating that, from MainQuad's proposed reference coordinates, CXR would be able to achieve the requisite 70dBu coverage of Lakeside while, at that same time, meeting all relevant spacing requirements.

MainQuad's April 15, 2005 Letter Request was served upon both Mr. Pupolo and counsel for CXR. CXR did not oppose MainQuad's request during the ensuing 10 days and, on April 28, 2005, MainQuad filed the requisite coordinate correction application. By the time that MainQuad filed its coordinate correction application, the reference coordinates established by the Commission in its database for the Lakeside allocation were such that the MainQuad coordinate correction application was fully spaced to the Lakeside allocation. After the reference coordinates had been changed in the Commission's database and after MainQuad had filed its coordinate correction application, CXR objected to the change in the reference coordinates for the Lakeside allocation.

II. The *Report and Order*

Despite the fact that it had previously changed the reference coordinates for the proposed Lakeside allocation in such a way as to permit the filing of the WARV-FM coordinate correction application, the Commission in the *Report and Order* adopted the reference coordinates that had originally been proposed by CXR. The effect of this action is to create a situation wherein reference coordinates that have been established by the Commission after the filing of an application are inconsistent with that previously-filed application. The unfortunate consequence

of the *Report and Order's* action is thus to cause the Lakeside allocation to be inconsistent with the spacing requirements established by the Commission.

Section 73.208(b), which governs the separations that must be observed in a licensing proceeding, is quite clear as to the requirements that MainQuad was required to observe at the time that it filed its coordinate correction application. Specifically, the separations to be observed by MainQuad were to be "determined by the distance between the coordinates of the proposed transmitter site . . . and ... [the] Reference coordinates *designated by the FCC...* ."[3] Thus, the Lakeside reference coordinates that were to be used by MainQuad in its coordinate correction application were the coordinates specified by the Commission, not the coordinates requested by CXR. In the present case, it is undisputed that, at the time that MainQuad filed its coordinate correction application, the reference coordinates set forth by the Commission in its database for the Lakeside facility were such that the MainQuad application was fully spaced to the proposed Lakeside allocation.

Accordingly, it was error for the *Report and Order* to adopt reference coordinates that are short-spaced to the WARV-FM coordinate correction application.

The *Report and Order* also erred in failing to apply the *Tuck* criteria to determine whether the CXR proposal should be considered to be providing first local transmission service. The Commission explained in *Tuck* that no credit for first local service is to be awarded if a proponent proposes service to a community that is dependent upon, and contiguous to, a central city. A set of criteria were established by the Commission to be used by the Commission staff in determining whether a proposed community of license was sufficiently dependent upon the core community that its needs for self expression would be adequately met by a broadcast facility licensed to serve any of the communities in the metropolitan area. The *Report and Order*,

[3] Emphasis added.

however, failed to apply any of the *Tuck* criteria, finding that no *Tuck* analysis was necessary inasmuch as CXR is proposing to change communities of license from one community within the Richmond urbanized area to another community in the Richmond urbanized area.

With all due respect, the *Report and Order's* application of *Tuck* makes little sense. If the *Report and Order's* analysis were correct, it would mean that any licensee seeking to change its community of license would receive a "free pass." It could propose to move to a community that is no more than an undifferentiated bedroom community of the core community and receive credit for providing first local service to that proposed community of license, even though the effect of granting that credit might be to preclude the establishment of a new station to serve a community that is more in need of radio service. In fact, that is precisely what has happened in the present case. According to BIA, Lakeside, which is part of the Richmond urbanized area and located within the Richmond Arbitron Metro Market, receives ample service from approximately 40 stations in the Richmond market. Moreover, the residents of Lakeside will not receive any new service as a result of the *Report and Order's* holding. Those residents already receive WDYL(FM). By contrast, Port Norris, New Jersey, is not part of any urbanized area and is not part of an Arbitron market. It needs FM service. By refusing to apply the *Tuck* criteria to the CXR proposal, however, the *Report and Order* has insured that Port Norris will not receive its own radio station. The *Report and Order*, rather than permitting a net increase in the number of radio stations that are serving the public, will simply insure that WDYL(FM) will be able to increase its coverage over the Richmond metropolitan area. Such a result is directly contrary to both the very purpose behind Section 307(b) of the Communications Act and the Commission's allotment priorities.

As a result, the *Report and Order* must be reversed.

Respectfully submitted,

MAINQUAD COMMUNICATIONS, INC.

By: _____

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December 1, 2006

CERTIFICATE OF SERVICE

I, Marwa Hamze, an employee of Garvey Schubert Barer, hereby certify that I have on this 1st day of December, 2006, sent copies of the above "Petition for Reconsideration" by first-class, United States mail, postage prepaid, to the following:

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