

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20554**

In the Matter of	)	
	)	
Revision of Procedures Governing Amendments	)	MB Docket No. 05-210
to FM Table of Allotments and Changes	)	RM-10960
of Community of License in the Radio Broadcast	)	
Services	)	

To: The Commission

**PETITION FOR RECONSIDERATION OF WILLIAM B. CLAY**

1. In accordance with 47 CFR 1.429, William B. Clay respectfully petitions the Commission to reconsider portions of its *Report and Order* in the above-captioned rule making<sup>1</sup>. This petition is timely filed within 30 days of the Commission's public notice of its decision<sup>2</sup>. Brief citations below refer to comments filed in this rule making unless otherwise specified.

**I. SUMMARY**

2. The Commission should reconsider certain of its decisions for at least three reasons:
  - a. It is not evident from the *R&O* that the Commission fulfilled its obligation under the Administrative Procedures Act and its own Rules to consider all relevant comment.
  - b. Some decisions are justified by their popularity with commenters and by unsubstantiated claims while contrary evidence on the record of this rule making is irrationally ignored.
  - c. Some aspects of the rules thus adopted demonstrably fail to fulfill the Commission's 307(b) obligations as previously interpreted by the Courts and explicated by the Commission itself.
3. To rectify these errors, we ask that the Commission eliminate local transmission service as an FM channel allotment criterion or, alternatively, ensure that licensees who claim allotment

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1 "R&O," FCC 06-163, adopted Nov. 3, 2006 and released Nov. 29, 2006.  
2 71 FR 76208, Dec. 20, 2006.

preference for such service are subject to strong incentives to provide meaningful transmission service to their community *of license* ("COL").

## **II. FLAWS IN THE RULE MAKING PROCEEDING**

### **II.A. Failure to Consider Relevant Comment**

4. The Administrative Procedure Act ("APA") at 5 USC 553(c) requires an agency conducting a rule making proceeding to consider "the relevant matter presented." The Commission's rules at 47 CFR 1.425 direct, "The Commission will consider *all relevant comments and material of record* before taking final action in a rulemaking proceeding ..." (emphasis added).

5. The *Notice of Proposed Rule Making* ("NPRM") of this rule making states at ¶ 28:

We seek comment ... particularly with regard to the effect on the fair, efficient, and equitable distribution of radio service under Section 307(b). ... We seek comment on whether these well-developed policies are sufficient to limit the relocation of radio stations from rural areas to communities in or adjacent to Urbanized Areas. ... Are there other procedures that should be implemented to ensure that Section 307(b) or any other concerns pertaining to applications to change a station's community of license will receive full consideration?

6. The *R&O* makes no mention of at least three issues on the record of this proceeding that respond directly to the *NPRM*'s queries and are thus unquestionably relevant to the proceeding.

a. The absence of any tangible incentive for FM stations whose change in community of license ("CCOL") is enabled by recourse to first local service preference to actually provide the local self-expression that is the primary reason for that preference (Crawford *Comments* at ¶¶ 14-15; Mullaney *Comments* at pp. 5-7; Clay *Comments* at ¶¶ 19-27).

b. Controlling influence of the old two-step process upon FM channel allotment policies and the Commission's opportunity in a one-step process to rationally consider the signal population coverage information now available to it (Clay *Comments* at ¶ 28 and footnotes 46 and 47).

- c. Unfavorable interaction of the rule changes with the concerns of the Commission's ongoing *Localism* inquiry (Entercom *Comments* at pp. 7-8; Clay *Comments* at ¶¶ 38 and 57).

Given the statutory and regulatory mandates cited earlier, these omissions are unlawful as described by the *APA* at §706(D).

## **II.B. Decision-Making by Popularity, Not Fact**

7. The existing CCOL process has operated for over 15 years to relocate hundreds of FM stations, but the *R&O* provides no statistical evidence to show that existing FM channel allotment priorities (which the new process incorporates without significant modification) adequately safeguard 307(b) concerns<sup>3</sup>. Instead, it proudly points to the large majority of commenters who support the new process<sup>4</sup>. A majority of enthusiastic (and self-interested) comments is not a rational substitute for objective analysis of data describing the results of the policies in question.

8. At least two commenters provided statistical and graphic evidence that the existing policies *fail* to prevent the rural-to-urban migration<sup>5</sup> about which the Commission professes concern<sup>6</sup>. Instead of describing this evidence and considering its interpretation, the *R&O* simply repeats a tired old article of faith, "... our minimum distance separation standards and spectrum congestion will limit substantial urban migration"<sup>7</sup> without citing any supporting data.

9. It is undeniable that frequency separation rules set a ceiling upon the number of full-power FM stations that may be located in a given urban area, but that is not by itself sufficient ground upon which to conclude that existing channel allotment criteria prevent substantial rural-

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3 *R&O*, ¶¶ 6-10.

4 *R&O*, footnotes 8 and 22.

5 Crawford *Comments*, ¶¶ 18-25 and attached *Exhibit*; Clay *Comments*, ¶¶ 29-32, *Reply Comments*, ¶¶ 8-11, and earlier pleadings cited therein.

6 *NPRM*, ¶ 28.

7 *R&O*, ¶ 10.

to-urban migration. The Commission is obliged to rationally evaluate proffered statistical and graphic evidence even if it has found it more convenient not to produce such an analysis itself.

10. Decisions based on unsubstantiated claims in the face of uncontested contrary objective evidence appear to be unlawful as described by the *APA* at §706(E).

### **II.C. Ineffective Safeguards for 307(b) Obligations**

11. The R&O seems to apply the following circular reasoning:

- Existing FM channel allotment policies were adopted to safeguard 307(b) obligations.
- The new CCOL process can effectively implement the existing policies.
- Therefore, the new process provides sufficient 307(b) safeguards.

12. This circular logic carefully evades the obvious facts surrounding current use of first local service allotment preference (and, indeed, the clear motive for this "streamlining" initiative):

- Judicial concerns repeatedly constrained the old two-step CCOL process from giving signal population coverage much influence over FM channel allotment decisions.
- The resulting stress on community independence to the virtual exclusion of signal population coverage criteria creates a mechanism that actually *favors* rural-to-urban migration.

13. It could be argued, "OK, there might be a problem with first local service preference, but that's irrelevant to streamlining the CCOL process." Good rhetoric, but short on facts. Analysis of *Petitions for Rulemaking* filed since July 1, 2003 shows the following percentages of CCOL hinge upon a grant of first local service allotment preference<sup>8</sup>:

- 73% of all channels subject to CCOL.
- 91%, excluding channel swaps and backfills with no net change in communities of license.

Thus, the ability of the new CCOL process to effectively safeguard the Commission's 307(b)

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<sup>8</sup> Exhibits A-D provide details of this analysis.

obligations depends almost entirely upon the effectiveness of the first local service allotment preference to fulfill its objectives.

14. As *Tuck* makes abundantly clear, the Commission's objective for its first local service preference is to provide local self-expression for the community *of license*<sup>9</sup>. While such local transmission service is compatible with service to a station's broader market or coverage area, it is distinct from that broader service. No evidence on the record of this rule making demonstrates that first local service preference as currently applied yields this distinctive local self-expression for communities *of license*. On the contrary, we have supplied evidence that it fails to do so<sup>10</sup>.

15. Recognizing that the data we first provided the Commission are by now seven years old, we have updated them. The updated data show the following signal population coverage in new communities of license to which first local service preference was more recently applied<sup>11</sup>:

- completed CCOL proceedings that provided signal population coverage data: 29
- median protected contour population resident in COL 1.0%
- maximum protected contour population resident in COL 5.4%

16. Given the complete absence of any rule or policy defining "local transmission service" or compelling licensees to provide it to their communities *of license*<sup>12</sup>, market forces are the principal remaining motivation for licensees to provide such service. The tiny COL audience shares cited above are unlikely to provide that motivation. Several commenters have addressed

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9 *Faye & Richard Tuck*, 3 FCC Rcd 5374 (1988), cites local self-expression for the community *of license* as the benefit of local service three times at ¶¶ 20, 22, and 32. More recently, the *Localism NOI (Notice of Inquiry on the Matter of Broadcast Localism*, MB Docket No. 04-233) at ¶ 2 cites the Supreme Court's observation that "[f]airness to communities [in distributing radio service] is furthered by a recognition of local needs for a community radio mouthpiece."

10 Clay *Comments*, ¶¶ 22, *Reply Comments*, ¶14, and earlier pleadings cited therein.

11 See Exhibit C, Group 2, successfully completed CCOL proceedings.

12 Clay *Comments*, ¶¶ 22, 26-27 and earlier pleadings cited therein.

this issue, but neither the Commission nor proponents of the new rules have provided any countervailing evidence.

17. The new rules require licensees to inform the Commission of the signal coverage proposed for a prospective COL, yet fail to make any specific provision for use of this newly-available information. This process provides no assurance that a rational link will be established between the criteria that qualify the proposed facility for first local service preference and the principal determinant of the transmission service that would be provided consequent to that preference. Absence of such a rational link has been held unlawful under the *APA* at §706(A).

### **III. RELIEF SOUGHT**

#### **III.A. Eliminate Transmission Service Preference or Make its Promise a Reality**

18. The suggestions of our *Comments*<sup>13</sup> are a reasonable remedy for the ineffectiveness and abuse that ensue from irrational application of the first local service allotment preference. The Commission should eliminate transmission service as an allotment preference criterion or ensure that licensees are motivated to provide local self-expression for the community *of license* of any facility whose channel allotment is based upon first local service preference.

#### **III.B. Reconsider Expeditiously**

19. Because of the flaws in this rule making described above, the Commission has failed to rationally show that the rules we contest and the CCOL they enable are in the public interest.

20. CCOL are rapidly "locked in" by the interaction of frequency-spacing rules with subsequent new allotments, channel upgrades, and other CCOL. Thus, Commission may soon be in the position of removing communities' local service without rationally showing that those changes are indeed in the public interest. It is thus of great public interest that the Commission reconsider promptly, before CCOL pursuant to the new rules become practically irreversible.

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<sup>13</sup> Clay Comments, ¶¶ 40-42.

### III.C. Ripeness for Judicial Review

21. The Commission has failed for more than three years to rule upon contentions that the first local service channel allotment preference as currently applied utterly fails to provide local self-expression for new communities of license<sup>14</sup>, the Commission's stated reason for that preference. This delay has blocked judicial review of criteria that we contend are arbitrary, capricious, and thus unlawful, but that continue to be the basis for repeated grants of CCOL.

22. The Commission's Rules at §1.429(j) allow recourse to judicial review of rule making proceedings without first petitioning the Commission for reconsideration. However, precedent including the recent *Sprint v. FCC* decision<sup>15</sup> shows that the new rules are not yet ripe for such review, despite the clear flaws in rule making we describe above.

23. Since its introduction of non-competitive CCOL<sup>16</sup>, the Commission has never (or nearly never) allowed *Tuck's* geographic and coverage criteria<sup>17</sup> to trump its community independence criterion. However, the Commission continues to recall those latent criteria in its CCOL decisions, and it could give them greater weight in a one-step process in which CCOL requests provide real rather than hypothetical data on transmitter site, power, and coverage. This resembles the situation in *Sprint v. FCC*, in which the Court averred that a policy that *could* lead to unlawful results is not ripe for judicial review unless and until it *has* yielded such results.

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14 *Application for Review of Franklin Communications, et.al.*, MM Docket No. 99-322, RM-9762, filed Dec. 15, 2003 and *Application for Review of William B. Clay*, File No.

BPH-20020116AAG, Facility ID 52553, filed Feb. 5, 2004.

15 *Sprint v. FCC*, US Court of Appeals for the DC Circuit, No. 02-1229, dec. June 17, 2003, p. 9.

16 47 CFR 420(i), "*Community of License*," 4 FCC Rcd 4870 (1989) and 5 FCC Rcd 7094 (1990).

17 *Tuck*, ¶¶ 39-40.

#### **IV. CONCLUSION**

24. The Commission has failed to respond to timely and relevant comments showing that some rules adopted in this proceeding fail to rationally implement the Commission's obligation to distribute FM radio broadcast licenses fairly and efficiently, as required by 47 USC 307(b). We have identified the overlooked or ignored comments and updated the statistical evidence supporting our claims. We ask that the Commission reconsider this "relevant matter" and adopt rational and effective remedies for the problems it describes.

Respectfully submitted,

William B. Clay  
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Charlotte NC 28211

January 18, 2007

#### **Exhibits**

The following exhibits are included in this document file.

- A. Analysis Methodology.
- B. Columns and Codes in Exhibits C and D.

The following exhibits are supplied as independent document files.

- C. FM Changes in Community of License requested between 07/01/03 and 12/17/06.
- D. Petitions for Rule Making filed between 07/01/03 and 12/17/06.

## Exhibit A: Analysis Methodology

Statistical data provided at ¶¶ 13 and 15 above were calculated as described below.

1. The Commission's Electronic Comment Filing System ("ECFS") was queried for Petitions for Rule Making (document type code "PU") filed between July 1, 2003 and December 17, 2006.
2. If the Commission had not yet assigned an "RM" or docket number, the Petition was discarded.
3. Remaining Petitions were selected if they regarded the FM broadcast service and were:
  - a. a request for a change in community of license ("CCOL") or
  - b. a request for new channel allotment that elicited a counterproposal including a CCOL.
4. The results of this selection process (including discards) are shown at Exhibit D.
5. For each selected Petition, the documents available on ECFS were examined to identify each FM channel affected by the Commission's decision or (for pending proceedings) by the Petition or Counterproposal.
6. For each channel change identified as altering or adding a community of license ("COL") -- including new channels incorporated in CCOL proposals -- the following data were sought from ECFS documents and from queries of <http://maps.google.com>:
  - a. Whether first local service channel allotment preference was granted (or requested).
  - b. Whether the CCOL was a backfill or swap that avoided a net change in local service.
  - c. New (or unchanged) channel and class.
  - d. Losing and gaining COL.
  - e. Population of gaining COL.
  - f. Population within old and new protected contours.
  - g. Local transmission service remaining at the losing COL.
  - h. Nearest larger city to the gaining COL, when the channel allocated (or requested) might at least partially cover that urban area while still providing city-grade coverage of the new COL. (This analysis does not take frequency spacing rules into account and is therefore only *suggestive* of the urban coverage licensees may be seeking in their CCOL. It is provided as a courtesy and is not cited as fact in this *Petition for Reconsideration*.)
7. Based on these data, the following figures were computed:
  - a. Percentage of CCOL based on first local service preference.
  - b. Percentage of population within protected contour resident in the new COL (for channel changes in which items 5.e and 5.f were provided on the record).

## Exhibit B: Columns and Codes in Exhibits C and D

The descriptions below use the following abbreviations:

- COL community of license
- CCOL change in community of license
- ECFS Electronic Comment Filing System, source of documents examined by this study

### **Exhibit C Columns** (columns that are self-explanatory are not listed)

Each data row in Exhibit C describes a single FM *channel* change. Adjacent rows bearing the same sequence number describe individual COL-impacting changes in the same *proceeding*. Data items that describe the proceeding as a whole are reported only in the data row identified by an underscore ("\_") sequence number suffix.

**seq** unique ID for each Petition for Rule Making identified in this study (Underscore suffix marks the apparent primary CCOL channel of the proposal; suffixes a, b, c, etc., mark other COL-impacting channel changes of the proposal.)

**st cd** status code indicating the state of the proceeding on 12/17/06:  
a Commission has assigned RM or docket number to a filed Petition  
b Notice of Proposed Rule Making issued  
c Counterproposal filed  
d R&O issued  
n all proposals in proceeding denied for procedural or technical defects  
r denial or dismissal pending reconsideration or review  
w Petition withdrawn

**dkt** Commission-assigned docket or RM number

**type** type of change:  
ccol simple change in community of license for channel in service  
ccolub CCOL for unbuilt facility  
ccolbf CCOL that backfills a lost channel at a losing COL  
ccolswap CCOL that swaps community of license of two channels  
new new channel allotment included in a CCOL proposal

**# chan chgs.** number of channels modified, excluding C0 downgrades pursuant to 47 CFR 1.420(g) note 2

**new 1st local** count of one if channel claims new first local service preference, else zero

**special loss** impact at losing community:  
 only FM moving channel was only FM at losing COL  
 only NC FM only non-commercial FM service remains at losing COL  
 U1LS moving channel was unbuilt first local service at losing CL  
 1LS moving channel was first local service at losing COL

**call** call sign named in proceeding; may now be outdated

**pop** covered population, when specified on record of proceeding  
 losing pop population within old protected contour (or losing coverage)  
 gaining pop population within new protected contour (or gaining coverage)  
 COL pop population of gaining COL

**tot/diff** meaning of "pop" data:  
 tot population data are total within protected contour  
 diff population data are net losing/gaining population  
 n/c proponent claims no change in site, power, and thus coverage

**COL %** percent of covered population resident within COL; *i.e.*, COL audience share  
 (When "tot/diff" is "diff", this figure inaccurately overstates COL audience share.)

**urban cvg. increase** nearby city for which the CCOL may provide increased coverage  
 (When suffixed "-", the city is nearby but potential coverage increase is not evident.)

**Exhibit D Columns** (columns that are self-explanatory are not listed)

Exhibit D reports the results of a December 17, 2006 ECFS query of all documents of type "PU" (Petitions for Rule Making) filed on or after July 1, 2003.

**seq** unique ID; correlates line items between Exhibits C and D

**Rec Dt** date of receipt of initial Petition for Rule Making

**status** last document type of the following available in ECFS for this proceeding:  
 NO TRY no RM or docket number assigned; proceeding not examined  
 NOT FOUND Petition not found in ECFS (*e.g.*, misclassified document)  
 PET RM Petition for Rule Making  
 NPRM Notice of Proposed Rule Making  
 COUNTER PROP Counterproposal  
 R&O Report & Order issued

**# docs** number of documents filed in ECFS for this proceeding

**Proc** FCC proceeding ID ("RM" or docket number or temporary group ID)

**svc/issue** service or issue addressed by this Petition for Rule Making

**type** specified for FM service only; see type codes for Exhibit C, above