

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

MOTION FOR STAY

Prometheus Radio Project respectfully requests that the Commission stay the processing of any change in community of license applications submitted pursuant to the Commission's *Report and Order*, In the Matter of Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services, until the Commission has acted on pending Petitions for Reconsideration. The *Order* provides for a streamlined process that allows broadcasters to move into communities much more quickly and with much more ease than previously allowed.

While on its face the *Order* may seem harmless, in reality this streamlined process could compromise the Commission's duty to promote the public interest. Because of the potential harm to the public interest, in January 2007, William B. Clay, among others, filed a Petition for Reconsideration requesting the Commission analyze the effect of the *Order* in the context of the current policies effectuating the moves of broadcasters from one community to another. The Commission has yet to rule on the Petition for Reconsideration. Thus, absent a stay, communities could either face the loss of the existing local broadcast outlets that serve the communities' needs and/or be subject to a broadcaster that fails to serve the local community it is required to serve. Accordingly, it would be in the public interest for the Commission to grant this Motion for Stay until the Commission has

resolved the pending Petitions for Reconsideration.

INTRODUCTION

On November 29, 2006, the Commission adopted a streamlined procedure for requests for change of community of license (“CCOL”) by AM and FM broadcast stations. *Report and Order, In the Matter of Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services* 21 FCCRcd 14212 (2006) (“*CCOL Order*”). Specifically, the streamlined procedure made “changes of community of license for commercial full-power AM standard band and commercial and noncommercial educational (“NCE”) FM broadcast stations a minor modification.” *Id.* at ¶ 1. In other words, the original two-step process, which involved a rule making process before being able to file a CCOL application, was replaced with a one-step CCOL application process, on a first-come, first served basis. *Id.* at ¶ 4. Consequently, the Commission has made it easier for AM and FM broadcasters to abandon rural communities to move towards urban communities and, in some cases, displace or encroach upon low power FM (LPFM) stations.

Because of the harm these CCOL moves could cause, several parties, including William B. Clay, timely filed Petitions for Reconsideration of the *CCOL Order*. Prometheus Radio Project (“Prometheus”) also filed a statement supporting Mr. Clay’s Petition for Reconsideration (“Clay Reconsideration”). *See* Statement of the Prometheus Radio Project in Support of Petition of Reconsideration in MB Docket 05-210 (“Reconsideration Statement”). The basis of the Reconsideration Statement and the Clay Reconsideration was the Commission’s failure to raise or comment on the concerns raised by Prometheus and other commenters. In particular, the Clay Reconsideration and Prometheus’ Reconsideration Statement raised concerns over the Commission’s *Tuck Policy*

relating to CCOL applications. The *Tuck Policy* is intended to ensure that a broadcaster's move to a new CCOL will not result in service to an already served urbanized area. See *Faye & Richard Tuck, Inc.*, 3 FCC Rcd 5374 (1988). In other words, the *Tuck Policy* prevents a rural to urban migration by a broadcaster. However, commenters voiced concerns that the *Tuck Policy* was failing to serve its intended purpose, while at the same time harming localism. Additionally, Prometheus raised concerns over the effect these moves would have on LPFMs, namely that LPFMs could suffer from interference or even be displaced.

These concerns are not superfluous; several commenters have documented that broadcasters have previously exploited the CCOL procedure and *Tuck Policy* to move closer to major metropolitan areas, under the pretense that the broadcaster intends to provide the community that it is moving into with its first local transmission outlet. See, e.g., Comments of REC Networks, Comments of Charles Crawford, Comments to Notice of Proposed Rule Making, William B. Clay, Reply Comments of Prometheus Radio Project and Media Access Project. For example, one station was granted a CCOL from Anniston, Alabama to College Park, Georgia on the basis that the broadcaster would be providing first local service to College Park. See Comments of Charles Crawford at Exhibit 21. As it turns out, College Park is within the Atlanta listening area. There are numerous, similar examples.¹ See Comments of Charles Crawford. Despite these concerns, it appears the Commission has yet to determine whether the *Tuck Policy* is in fact serving its purpose and those communities which are the basis for CCOLs are benefitting from the broadcaster's presence in its community.

¹Mr. Crawford notes that of the 54 known reported decisions that applied the *Tuck Policy*, all but one of those CCOL applications were granted on the claim that the broadcaster would be providing the community with first local transmission service. See Comments of Charles Crawford 10-15.

LPFMs are also being threatened. Most recently, on January 29, 2007 station KMJE requested a CCOL to move from Gridley, California to Woodland, California. If the move is approved, KMJE will interfere with LPFM station KDRT-LP's signal. The level of interference will likely cause KDRT-LP to cease operations and be removed from the air to keep it from interfering with the KMJE.

While the new streamlined procedure may alleviate certain burdensome administrative procedures, the new procedure, coupled with the Tuck analysis, now makes it easier for broadcasters to exploit the CCOL process for private, economic benefit at the expense of their duty to service the public. Because of the ease of change, Mr. Clay and Prometheus predicted that, absent modifications to these policies, the streamlined, minor modification procedure would result in an acceleration in rural to urban migration of radio stations. Prometheus also predicted, as it did in its Reply Comments, that a streamlined minor modification process would result in an acceleration in harm to LPFM stations. Unfortunately, absent a stay, it is likely that Prometheus' prediction will come to fruition. That is, based on the CCOL applications recently filed with the Commission, rural communities and LPFM stations are already threatened with the loss of local broadcast service.

The *CCOL Order* went into effect January 20, 2007. Within three weeks after the new rules went into effect, CCOL applications quickly began being filed with the Commission. As of March 30, 2007, CCOL applications have been submitted for nearly 140 full-power FM facilities, over 100 of which are seeking a CCOL based on a claim of first local transmission service. This is nearly a 145% increase from the 96 CCOL applications submitted in the preceding 3 and one-half years (July 1, 2003 - December 17, 2006).² If the pending CCOL applications are granted, this will result in over 70 LPFM facilities facing signal interference, no less than 10 of which would be forced to shut down

²It appears there was a stay in the applications starting in the summer of 2005.

operations due to the interference. *See* Exhibit A. Additionally, if the CCOL applications are granted, no fewer than 30 moves could result in rural to urban migration.³ *See* Exhibit B. Because of the pending irreparable harm that LPFMs and rural communities face, Prometheus requests that the Commission issue a stay on the *CCOL Order* pending resolution of the Petitions for Reconsideration.

ARGUMENT

In considering whether to grant a stay, the Commission must consider: (1) the likelihood that Petitioner will prevail on the merits of the Petition for Reconsideration;⁴ (2) the likelihood that Petitioner will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the Commission grants the stay; and (4) the public interest in granting the stay. *Virginia Petroleum Jobbers Assoc. v. FPC*, 259 F. 2d 921, 925 (D.C. Cir. 1958), *modified*, *WMATA v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir.1977).

I. Petitioner Will Likely Prevail on the Merits of the Petition for Reconsideration.

The Commission has been asked to reconsider the *CCOL Order* based on the Commission's failure to adequately address the concerns raised by a number of commenters during the proceedings in MB Docket No. 05-210. *See, e.g.*, Comments of REC Networks, Comments of Charles Crawford, Comments to Notice of Proposed Rule Making, William B. Clay, Reply Comments of Prometheus Radio Project and Media Access Project. Commenters were concerned that the Commission's policy

³The analysis is based on the number of CCOL applications providing a showing of community independence based on the Tuck analysis.

⁴The probability of success upon reconsideration is not a controlling or deciding factor for granting a stay. "Probability of success is inversely proportional to the degree of irreparable injury evidenced. A stay may be granted with either a high probability of success and some injury, or *vice versa*." *Cuomo v. U.S. Nuclear Regulatory Com'n*, 772 F.2d 972, 974 (D.C. Cir. 1985). As discussed more fully below, it is abundantly clear that absent a stay, communities and LPFM stations will be irreparably harmed.

regarding CCOL applications were failing to serve the public interest. Specifically, they argued that a streamlined process, combined with the Commission's reliance and lenient application of the *Tuck Policy* in granting certain CCOL applications, would exacerbate rural to urban migration of radio stations and the harm to LPFM stations.

As part of the Section 307(b)⁵ showing, the Tuck analysis is applied when a first local transmission service claim is sought for a community that falls within an urbanized area. *See CCOL Order*, ¶ 11. The Tuck analysis is intended to ensure that a proposed CCOL, on a claim of first local transmission service, will not result in additional service to an already served urbanized area. *See Faye & Richard Tuck, Inc. Memorandum Opinion and Order*, 3 FCC Rcd 5374 (1988). *See also, Romar Communications, Inc. And KM Communications, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 23128, ¶¶ 6-7 (2004). As a result, the *Tuck Policy* helps to prevent a broadcaster from using the CCOL procedure to migrate from a rural to urban area. Thus, it is presumed the Tuck analysis ensures that the local community, upon which first local transmission service is based, is in fact the recipient of the applicant's resources. That is, localism and the public interest will be served because the applicant will cater to the local community, which will have and benefit from an outlet for local expression.

However, the Commission failed to remedy or even attempt to address repeated and documented concerns that the Commission's current reliance on the Tuck analysis has failed to ensure that a

⁵ Section 307(b) provides for the allocation of facilities and states:

In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

proposed CCOL allotment promotes localism or the public interest pursuant to 47 USC §307(b). *See* Comments of REC Networks, Comments of Charles Crawford, Comments to Notice of Proposed Rule Making, William B. Clay, Reply Comments of Prometheus Radio Project and Media Access Project. Instead, the Commission simply recites the language of the statute, promising that “[i]n performing Section 307(b) analyses under the new procedures ..., [the Commission] will carefully consider whether an application would promote the fair, efficient, and equitable distribution of radio service.” *CCOL Order* at ¶ 11. As part of the 307(b) analysis, the Commission further promises that the Tuck analysis “will be carefully applied in considering Section 307(b) showings submitted in support of first come-first served applications to change communities of license....” *Id.* However, not once did the Commission address concerns that its reliance on the Tuck analysis had failed to promote the public interest or localism, or provide evidence to suggest that the Tuck analysis is indeed accomplishing its intended goal.

While the Commission is not obligated to provide notice and comment on policy declarations, the Commission “cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy.” *See Pacific Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38-39 (D.C. Cir. 1974). Thus, the Commission must be able to justify that its reliance on a stated policy is in the public interest and at some point, the Commission has an obligation to consider “the underlying validity of the policy itself.” *Pacific Gas & Elec.*, 506 F.2d at 38-39; *see also, Panhandle Producers & Royalty Owners Ass’n v. Economic Regulatory Admin.*, 822 F.2d 1105, 1110 (D.C. Cir. 1987). Indeed, the Commission has recognized its duty to be “alert to the consequences of its policies and should stand ready to alter its rule if

necessary to serve the public interest more fully” when it previously reexamined its own policy regarding license renewals. *See FCC v. WNCN Listeners Guild*, 450 U.S. 582, 603 (1981).

Yet, in the current proceeding, the Commission failed to reevaluate the effectiveness of its Tuck analysis to ensure that communities and local expression were being served. Indeed, evidence was provided that suggested that broadcasters were exploiting the policy to move near or into urbanized areas and potentially ignoring their community of license. *See* Comments of Charles Crawford. Yet, the Commission boldly stated that “there is nothing in the record to suggest that broadcasters will attempt to use this new procedure to thwart existing policies.” *CCOL Order* at ¶ 11. Since, the Commission failed to justify its reliance on the Tuck analysis, despite criticism raised by commenters, the Commission should grant and rule favorably on the Petitions for Reconsideration.

II. Rural Communities And LPFMs Will Be Irreparably Harmed Absent a Stay, While the Granting of a Stay Will Cause Little Harm To Others.

If the recent wave of applications is granted, there can be no doubt that many communities and LPFMs will be irreparably harmed. Exhibit A demonstrates that approximately 70 LPFMs will face interference issues, approximately 10 of which may have to cease operating. Exhibit B demonstrates that over 30 requests for a CCOL could result in rural to urban migration. In the event reconsideration is granted, absent a stay, once the applications have been granted and applicants have moved their operations, the effect on communities and LPFMs will not be reversible. It would be costly and inconvenient, and in most cases impossible, to return to the *status quo ante*. Consequently, some communities will be deprived of the benefits flowing from a broadcast service in their community.

On the other hand, a stay would merely postpone the broadcasters’ applications for a CCOL if reconsideration is not granted. Thus, applicants who have already filed applications would still be

able to move forward once the Commission has acted on the Petitions for Reconsideration. While the granting of some CCOL applications would benefit some communities, a stay would not deprive these communities of those benefits, but rather postpone the benefits to another date. Thus, the granting of a stay will prevent the public and LPFMs from irreparable harm, while causing little or no harm to broadcasters and the public.

III. The Public Interest Would Be Served By the Grant of a Stay.

Pursuant to Section 307(b), the Commission is required to ensure that any allocation result in service to local communities. Indeed, the Commission has recognized that the “importance of [its] Section 307(b) criteria is directly tied to the fact that broadcasters must provide programming that is responsive to the interests and needs of their communities of license, and the concomitant importance of local radio service to the communities served.” *CCOL Order* at ¶ 4. Yet, despite evidence that its current 307(b) analysis, which includes the policy to consider the Tuck criteria, has instead resulted in an abuse of the Commission’s rules, the Commission failed to address those concerns.

CONCLUSION

The Commission has an obligation to ensure that its current policies are achieving their goals and serving the public interest. Absent a stay, communities and LPFMs all across the country could be negatively affected; communities, despite valid expectations, will not have access to the local service promised and LPFMs, which genuinely fill the void left by an absence of local service will either cease to exist or be limited in their service. Thus, it is in the public interest for the Commission to grant a stay until the Commission has resolved concerns raised over its new allotment procedure.

Respectfully submitted,

/s/

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April 30, 2007