Before the
FEDERAL COMMUNICATONS 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
Attn: Office of the Secretary

REPLY TO OPPOSITION OF
AMERICAN MEDIA SERVICES, LLC, ET AL.

1. William B. Clay hereby replies to the *Opposition to Petitions for Reconsideration of William B. Clay and Charles Crawford* ("*Opposition*") filed in the captioned rule making on August 30, 2007 by American Media Services, LLC, Mattox Broadcasting, Inc., and the Minority Media and Telecommunications Council ("Opponents"). This *Reply* is timely filed in accordance with 47 CFR 1.429(g) and 1.4(h). The terms "*NPRM*" and "*R&O*" below refer to the *Notice of Proposed Rule Making* and *Report and Order* in the captioned rule making adopted on June 9, 2005 and November 3, 2006, respectively.

2. The *Opposition* calls "puzzling" the assertion of our *Petition for Reconsideration*[1] that the captioned rule making violated the Administrative Procedure Act for want of a factual basis (*Opposition* ¶7). It then lists a number of supposedly relevant issues that it claims the Clay *Petition* fails to factually address.

> ... Clay and Crawford submit no factual or rational basis for their claim that the old system, relying as it did on outdated distinctions, should remain in place. ...

1 Filed on January 18, 2007 in the captioned rule making ("Clay *Petition*" or "*Petition*").

> Ultimately, they provide no reason to treat similarly situated licensees differently .... They also provide no evidence to refute the notion that re-engineering can provide more opportunity .... (*Opposition* ¶¶7-8)

3. This reasoning suffers from at least two flaws. First, the *Opposition* simply ignores the arguments of the Clay *Petition*, which raises only three narrowly specific issues. The *Opposition* fails to factually refute any of the three rule-making defects the Clay *Petition* describes in detail. Where the *Petition* provides references to ignored comments (¶¶4-6), point-by-point explication of irrational arguments (¶¶7-12), and statistical evidence that the Commission's third FM channel allotment preference fails to yield its sole claimed benefit (¶¶13-16 and Exhibit C), the *Opposition* rebuttal offers ... nothing.

4. Second, one need not argue in favor of outdated distinctions or unequal treatment of licensees nor against spectrum re-engineering to assert that the rule making is procedurally or substantially flawed. Even if rectifying its flaws prevents remedying shortcomings perceived by the Opponents, those who point out such flaws are hardly obligated to justify or correct the preexisting shortcomings the *Opposition* laments.

5. Further, the Clay *Petition* did not issue a "radical call to roll back such interim reforms[2] as 'Tuck' showings" (*Opposition* ¶7). The Clay *Petition* does not challenge *Tuck's* community independence criteria in any way[3]. Rather, it contends that the *R&O* failed to consider or adopt processes suggested by commentators to ensure that the *Tuck* criteria are applied with the rationality demanded by the Administrative Procedure Act[4].

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2 A 19-year-old decision that's been applied in hundreds of FM move-ins and was retained unaltered in this rule making is an "interim reform?" What might be permanent?

3 Neither does the Clay *Petition* contest Crawford'*s* argument that *Tuck* is insufficiently rigorous to be lawfully applied.

4 *Petition* ¶6a and 17. The Clay *Petition* does not repeat, but is consistent with, our contention in other pleadings that the Commission's application of *Tuck* is arbitrary,

6. The *Opposition's* opening arguments (¶¶2-6) at first glance seem to be legally insignificant – little more than an attack upon the arguments of two neolithic old grouches who would turn back the clock and block expansion of the broadcasting equivalents of motherhood and apple pie. This rhetoric fades when stood against the specific and unanswered facts of the original *Petition*.

7. The Commission will recall that the Clay *Petition* addresses a single aspect of the captioned rule making: (mis)application of the first local transmission service allotment preference. While the *Opposition* asserts that the *Petition* would block substantial public interest benefits, it does not engage with that policy issue, but meanders into discussion of other matters in this proceeding.

8. The Clay *Petition* sets forth facts showing that the first local service preference – which defines "community" in strictly geographic terms – is routinely conferred upon facilities that have no market or regulatory incentive to provide the "local transmission service" upon which that preference is justified (*Petition* ¶15-16 and Exhibit C). We ask that this irrational and thus unlawful practice be ended (*Petition* ¶18).

9. The *Opposition* claims in response, "... should the Commission establish the kind of regime sought by Messrs. Clay and Crawford, exiting stations would be stuck in place". It argues that the resulting FM allotment system with an "adherence geographic and jurisdictional lines" would prevent "the kind of re-engineering required to unlock spectrum" that can "increase both opportunity and diversity in more populated areas and allow for new stations to utilize vacated spectrum" (*Opposition* ¶5).

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capricious, and unlawful (*Comments* of William B. Clay filed in the captioned rule making on September 30, 2005, ¶¶19-28 and other pleadings cited therein).

10. To the extent the *Opposition* proves that the Clay *Petition* threatens the ability of newly-adopted processes to break the "nostalgic" bonds of geography in allocating FM channels to communities of interest defined by other dimensions[5], it supports the *Petition's* contention that the first local transmission service preference is conferred with complete disregard for its clearly-stated objective[6].

11. The *Opposition* argues in favor of geographically-defined communities, too.

> [Clay's] proposal to eliminate the first local service allocation priority would block communities from gaining local transmission service .... Local school sports enthusiasts, community political activists and local religious congregations would find it harder to have their voices heard when the only outlets are elsewhere in the region. (*Opposition* fn 3)

It is precisely this attractive fable that is the object of the Clay *Petition*. As already noted, the Clay *Petition* factually demonstrates that most recent FM "move-ins" have no discernible incentive to provide services like those touted by the *Opposition*. Why does the *Opposition* fail to back up its argument with data to substantiate its claim? Perhaps because the data show just the opposite.

12. We've seen that the *Opposition* characterizes the product of the rule making (absent corrections sought by Clay and Crawford) as a modernized FM channel allotment system that serves dimensions of "community" beyond geography, that enables new entrants (especially minorities) to become licensees, and that permits more spectrum-efficient re-engineering of FM channel assignments[7] (Opposition ¶¶4-5). There's just one

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5 Such as linguistic, cultural, or ethnic communities; *Opposition* ¶4.

6 *Faye & Richard Tuck, Inc., Memorandum Opinion and Order*, 3 FCC Rcd 5374 (1988, "*Tuck*"), cites local self-expression for the community *of license* as the benefit of local service three times at ¶¶20, 22, and 32.

7 Meritorious objectives indeed, and we share the *Opposition's* enthusiasm for all of them.

problem with this claim: it contradicts the insistence of both rule making proponents[8] and the Commission[9] that the the FM channel allotment criteria of the past were not changed.

13. Clay's and Crawford's *Comments* and *Petitions for Reconsideration* in this rule making demonstrate that the Opponents' characterization is closer to the truth. Alas, they also show the supposed public interest benefits that the Opponents laud are the product of an unlawfully-applied FM channel allotment policy.

14. The *Opposition* may be an eloquent call for an FM channel allotment system capable of adjudicating among more complex and competing social, economic, and engineering objectives than the existing system was designed to confront (*Opposition* ¶¶2-6). It implicitly supports our contention that the first local service allotment preference is often conferred upon facilities that do not provide meaningful local transmission service to their geographically-defined communities of license. However, it does *not* factually refute any of the arguments raised by the Clay *Petition*.

15. In essence, the *Opposition* holds out two public policy benefits. First, it avers that a community-of-license free-for-all, with no limit of four, would expand service because it would vacate channels as stations rush to a more urban setting, and new entrants exploit the new vacancies. But there is no basis to assume that areas being deserted as uneconomic by incumbents will prove attractive to new entrants, and naturally, the *Opposition* presents only supposition, not evidence.

16. Second, the *Opposition* avers that the fruit of the present proceeding will be

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8 *See*, for example, *Comments on and Opposition to Petitions for Reconsideration of Cox Radio, Inc.* filed in the captioned rule making on August 30, 2007, Section III, p. 6.

9 *R&O* ¶¶10-11.

enhanced service to underserved minorities, especially in the inner city. In confronting this argument, we wish to be clear. We agree that FM radio has fallen behind the times in addressing service needs of language and ethic minorities and we agree that the urban scene often is seriously underserved and that new entry to broadcasting is needed. Unfortunately, there is absolutely no reason to assume that any of these needs will be met by changes in the current proceeding, which shuffles geographic areas and does nothing about the incremental and by now almost total repeal of local service requirements for local broadcasters. Having no evidence to suggest that any of the audience needs they mention will be enhanced by the measures they endorse, the *Opposition* offers none.

17. We have no need to address any supposed conflict between urban and rural areas. Both are served inadequately by commercial radio today. But to the extent that the law mandates a fair distribution among all communities, neither the parties in Opposition nor the Commission may repeal the last of the rules imposing a balance.

18. We therefore repeat our plea that the Commission act expeditiously upon our *Petition for Reconsideration* and grant the relief it seeks.

Respectfully submitted,

William B. Clay
5629 Charing Place
Charlotte NC 28211

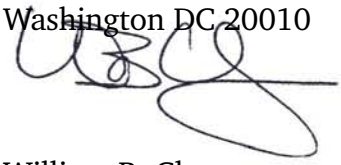
September 12, 2007

Certificate of Service

I hereby certify that on this day of September 12, 2007, I caused to be served by first-class mail, postage prepaid, a copy of the foregoing *Reply to Opposition* upon Counsel or an Officer of the subject Opponents:

Frank R. Jazzo
Howard M. Weiss
Michael W. Richards
Fletcher, Heald & Hildreth PLC
1300 N. 17th Street, 11th Floor
Arlington VA 22209

David Honig
Minority Media and Telecommunications Council
3636 16th Street NW, Suite B-366
Washington DC 20010



William B. Clay