Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the matter of:	)	
	)	
Policies To Promote Rural Radio	)	MB Docket No. 09-52
Service and To Streamline Allotment	)	RM-11528
and Assignment Procedures	)	

To: The Secretary

PETITION FOR PARTIAL RECONSIDERATION, SECOND REPORT AND ORDER

Summary

The Commission's new urbanized area coverage presumption for FM channel allotments is a step in the right direction, but it is neither broadly effective nor legally sound. It bars some possible changes in community of license that should be regarded as not deserving of any first local service preference. But it permits many others that are equally lacking in the semblance of public benefit.

Instead, the Commission should adopt a universal policy that directly links "local service" allotment preferences to the community or collection of communities *most likely to benefit* from the transmission service provided by *any* FM facility, replacing the new policy that governs only those few facility changes which penetrate Census-defined urbanized areas. The cost of this reform in administrative and licensee resources would be no higher, but the opportunities for abuse – at long last – would be measurably reduced.

I. Introduction.

1. William B. Clay is grateful that the Commission has acted to curb the sustained and systematic abuse of its "first local service" preference by incumbent licensees that has subverted the objectives of its beneficial and well-proven FM channel allotment policies. However, in accordance with 47 CFR § 1.429, Mr. Clay respectfully requests that the Commission reconsider its newly-adopted "urbanized area service" presumption for FM broadcast applications that seek a channel allotment by recourse to a "first local service" preference.[1]

2. The policy defined at ¶¶ 30, 35, and 38 of the *2nd R&O* is a step in the right direction, but it is neither broadly effective nor legally sound. When a proposed facility would cover "50 percent or more of an urbanized area, or ... could be modified to provide such coverage, [it] will be presumed to be a proposal to serve the urbanized area rather than the proposed community."[2] This rebuttable presumption applies only to a small minority of FM channel allotments.

3. The new policy effectively denies recourse to a first local service preference for some allotments that do not, by any reasonable measure, merit such a preference, but it will permit many more such grants that are equally antithetical to the public interest. Moreover, it imposes a new burden on licensees to demonstrate a negative: that a proposal cannot be "modified to provide such

1 Defined in the *Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rule Making* ("*2nd R&O*") of the subject rule making, FCC 11-28, adopted March 3, 2011, 26 FCC Rcd 2556, public notice of which was given in the *Federal Register* on April 6, 2011, 76 FR 18942 at ¶¶ 17-18.

2 2nd R&O, ¶ 30.

coverage," along with the Commission staff burden to review this abstract claim.

4. The new policy suffers from the same defect (at somewhat reduced scale) as its predecessor: wherever a "local service" allotment preference is granted and the urbanized area service presumption does *not* apply, no process or criterion ensures a rational link between the the objective served by the "local service" preference and the actual new transmission service that the facility is likely to render. Still, Commission policy explicitly *presumes* that a "licensee will serve its community," no matter how tiny a community the licensee chooses to name on its license.[3] A presumption such as this, lacking any stated or even reasonably inferred justification, is arbitrary and capricious[4] – and thus unlawful under the *Administrative Procedure Act*.[5]

II. First Local Service: a Clear Objective, Implemented Badly.

5. The single purpose of the Commission's "first local service" preference for FM channel allotments is simple, unambiguous, and has been repeatedly asserted since its creation: to provide "an outlet for local self-expression" to the community *of license* ("COL").[6]

6. Prior to the deregulatory changes of 1981-1998, a variety of Commission rules compelled licensees to provide some level of "transmission service" (*i.e.*,

3 *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1982) at 102, ¶ 37; *Chillicothe and Ashville Ohio*, Memorandum Opinion and Order, 18 FCC Rcd 22410 (2003) at 22411, ¶ 4.
4 *See*, *e.g., Burlington Truck Lines v. US*, 371 US 156, 168-9 (1962); *Bechtel v. FCC (II)*, 10 F.3d 875, 887 (1993).
5 Specifically, at 5 USC § 707(2)(A).
6 *See*, *e.g.*, *Faye & Richard Tuck* ("*Tuck*"), 3 FCC Rcd 5374 (1988), ¶¶ 20, 22, and 32.

programming focus over and above mere provision of good signal reception ["aural service"]) to their community *of license*. Nowadays, only one explicit transmission service obligation to the community of license remains: that the community be named during hourly "station IDs" – along with any other communities that a station chooses to promote as its service area, 47 CFR § 73.1201(b). This "public benefit" is neither substantial nor exclusive. Standing alone, it cannot support the award of a valuable channel allotment preference upon any proposed facility.

7. Our broadcast system, as it has evolved, is supported though advertising and seeks audience maximization. Only one strong and durable incentive remains for a licensee to focus programming on a specific community or group of communities: to attract a larger or more profitable audience than may be had by other programming choices. When a station covers many discrete municipal entities, it generally would be irrational for its program choices to focus on just one community that comprises only a small fraction of the station's coverage area. That is the foundation of the new urbanized area service presumption: where much of an urbanized area – even one comprised of several distinct communities – is served, the *whole* urbanized area is the presumed beneficiary of the new service.

8. However, a similar principle applies equally outside of urbanized areas. It is arbitrary for the Commission to assume, *absent any strong and durable*

incentive, that a licensee will provide distinctive "self-expression" to a community that is a small fraction of a station's covered population merely because the station's coverage does not substantially penetrate an urbanized area recognized by the U.S. Census.

III. Most Changes in Community of License are Exempt from the New Presumption.

9. Mr. Clay showed earlier in this proceeding that the urbanized area service presumption as originally proposed would apply to at most 62 (38%) of the 164 first local service changes in COL that were granted in the first 18 months of the "streamlined" process to change COL.[7] Even outright opponents of the new policy needed to acknowledge, "Of the 561 city of license change applications filed under the new rules between January 2007 and the comment date, only 7.5 % proposed to move into urbanized areas."[8]

10. Provision of an "outlet for local self-expression" to the community *of license*, as noted above, is the Commission's sole rationale for its first local service allotment preference. It appears undisputed that somewhere between 62% and 92% of non-competitive changes in COL can continue to seek that preference unfettered by the new policy. Yet in most such instances, the licensee will have no incentive – either commercial or regulatory – to provide any distinctive "local

7 *Comments* of William B. Clay, filed July 13, 2009 in the subject proceeding, ¶¶33-38 ("*Clay Comments*").
8 *Notice of Ex Parte Meeting*, various broadcasters and the Minority Media and Telecommunications Council, filed February 23, 2011 in the subject proceeding ("*Opponents' Ex-Parte*"), p. 1, 3rd bullet item.

self-expression" to their new community of license. No public interest purpose is shown for even one of these changes, all of them blessed automatically under the new regime.

11. Comments filed in this proceeding described at least two methods to award "local service" allotment preferences so that they would be conferred only upon facilities that are likely to produce meaningful transmission service to their communities of license.[9] Both methods appear no harder for applicants to prepare and for Commission staff to review than the earlier policies.[10]

IV. Meritorious Community Changes Do Not Need a First Local Service "Trump Card."

12. Those who oppose more rigorous vetting of claims to a "first local service" allotment preference assert a variety of attractive public-interest benefits for their community changes:

- Minority licensees enter urban markets from which they have long been excluded.[11]
- Ownership diversity increases in markets with highly-concentrated ownership.[12]
- Broadcast enterprises struggling with declining markets and revenues are

9 *Comments* of Mullaney Engineering Inc., filed July 13, 2009 in the subject proceeding, at 4; *Clay Comments*, ¶¶ 50 and 55-61.

10 Whatever policy is used, the corresponding analytical tools are developed only once for each engineering software package, not for each facility.

11 *Opponents' Ex-Parte*, p. 1, 6th bullet item and p. 2, 1st bullet item.

12 *id*, p. 1, 2nd and 4th bullet items ("new entrants creating diversity" refers to ownership, not ethnic, diversity).

strengthened.[13]

- Outlying areas where spectrum is freed by facility moves can obtain new facilities.[14]
- Markets that are underserved on a channel-per-capita basis receive additional channels.[15]

When the COL is a small fraction of the covered population, none of these alleged benefits contributes to the Commission's sole stated objective for its first local service channel allotment preference: providing an outlet for local self-expression to the community *of license*.

13. Nonetheless, rather than seeking community changes by promising these benefits, licensees often play the "first local service" trump card. The Commission rarely denies this tactic, despite its often transparently flimsy rationale – even in non-urbanized areas.

14. Resort to these lofty public interest factors would be unnecessary for facility changes that are genuinely meritorious under Commission channel allotment policy. As the *2nd R&O* notes at ¶ 39, licensees may seek the fourth allotment preference, "other public interest matters," whenever their proposed changes increase public benefit as evaluated under the Commission's well-established allotment criteria. Mr. Clay's objection is to a superficial reform that

13 *id*, p. 2, 2nd bullet item.
14 *id*, p. 1, 5th bullet item.
15 *2nd R&O*, ¶¶ 15-17.

purports to honor "first local service" benefit, where that has not been shown by the proponents and is not stated or claimed – because it cannot be – by the migrating incumbent licensees. The new plan makes first local service a definitional circularity, and as such completely arbitrary.

V. Requested Remedy.

15. In FM broadcast allotment proceedings, the Commission should replace its recently-adopted urbanized-area service presumption – which applies to only a minority of cases – with a universal policy that directly links grant of any "local service" preference to the community or collection of communities *most likely to benefit* from the transmission service provided by a facility proposed in *any* geographic area, not just for facilities whose coverage penetrates urbanized areas recognized by the US Census.

Respectfully submitted,
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May 6, 2011