

FCC Clarifies Aspects of Rural Radio Order

October 15, 2012

On October 12, 2012, the Federal Communications Commission (FCC or Commission) released a Second Order on Reconsideration (Second Recon Order) of the Second Report and Order (Rural Radio Order) released in March 2011. As described in a previous Client Alert, the Rural Radio Order restricted allotment of new stations in urban areas and further limited a station's ability to change its community of license. The Second Recon Order denied several petitions for reconsideration on the basis that their arguments were already considered as part of the Rural Radio Order, but it also granted in part other petitions and clarified the Commission's policies for evaluating mutually exclusive applications and considering changes to a station's community of license under Section 307(b) of the Communications Act.

***Tuck* Factor Clarification**

In the Rural Radio Order, the Commission established the rebuttable Urbanized Area Service Presumption (UASP) that when a station proposes (1) to serve a community located in an urbanized area or (2) to cover or with a minor modification could cover more than 50 percent of an urbanized area, the 307(b) analysis will treat that application as serving the entire urbanized area rather than just the named community. For new stations or community of license change applications, this presumption could be rebutted by a showing based on the three-pronged *Tuck* test with emphasis on the first two prongs. Concerning the *Tuck* factors, the Second Recon Order agreed that the presence of a dedicated ZIP code as an indicator of community independence should be given little weight. In addition, the FCC clarified that applicants would be provided wide latitude in presenting facts to rebut the UASP beyond the *Tuck* factors.

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Clarification of Standards for Community of License Applications

The Commission made several clarifications of its procedures for evaluating community of license applications:

- When determining gain and loss areas for an FM station changing its community of license, the contours should be calculated using the authorized transmitter coordinates for the current facility and the transmitter coordinates specified for the proposed new or modified facility.
- In determining the number of reception services in gain and loss areas, the service contour originating at the currently authorized and proposed transmitter coordinates shall be the signal level evaluated for non-reserved band FM stations. Meanwhile, for AM stations, the signal level evaluation will be the predicted or measured daytime 2.0 mV/m groundwave contour, calculated from the current and proposed transmitter coordinates using authorized facilities.
- For the gain and loss calculations in Priority (4) analyses, applicants should not count vacant FM allotments but should count all full-service AM (including daytime-only AM), FM and NCE FM stations.
- Applicants will not be required to submit *Tuck* showings where (1) both the current and proposed communities are located in the same urbanized area or (2) the current facilities cover, and the proposed facilities would or could be modified to cover, more than 50 percent of the same urbanized area with a daytime principal community signal. However, applicants proposing this intra-urbanized area move may not claim a Priority (3) preference unless it also makes a showing to rebut the UASP. Without this showing, the applicant must claim a preference under Priority (4).

Cases Subject to the New Rules

The Second Recon Order clarified that the Rural Radio Order's procedures would not apply to either (1) applications for minor modification of a station for a new community of license filed before April 20, 2009; or (2) FM allotment proceeding where the petition for rule making had been filed prior to April 20, 2009.

Additionally, the Commission clarified that the revised Section 307(b) procedures would not apply to any pending community of license change application or FM allotment proceeding in which a decision on the application, or allotment Report and Order, was released prior to March 3, 2011. The FCC said it would also entertain requests for waiver of the revised procedures on a case-by-case basis should there be other inequities in previously-filed applications.

Denial of Petition Arguments

The Commission denied several petitions that the agency claimed repeated arguments that it already rejected as part of the *Second R&O*. Specifically, the FCC rejected arguments that the rules "ignore marketplace realities" and held that because an applicant is the sole decision maker for where to locate a station, "[i]f it makes no economic sense to propose a station in a given area then there should be no applicants for that area." The Commission also found that rural residents needed more protection than the ability to augment "base level" over-the-air radio with satellite subscription services or other broadcast media.

In addition, the FCC rejected arguments that the rules were arbitrary and capricious.