

Before the
Federal Communications Commission
Washington, D.C. 20554

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| In the Matter of |) | |
| |) | |
| Amendment of Section 73.202(b), |) | MB Docket No. 02-199 |
| Table of Allotments, |) | RM-10514 |
| FM Broadcast Stations. |) | |
| (Magnolia, Arkansas, and Oil City, |) | |
| Louisiana) |) | |

MEMORANDUM OPINION AND ORDER

Adopted: August 14, 2013

Released: August 16, 2013

By the Commission:

1. **Background.** The Commission has before it an Application for Review filed on March 25, 2004, by Access.1 Louisiana Holding Company, LLC (“Access.1”), licensee of several radio stations in the Shreveport, Louisiana, Urbanized Area¹ (the “AFR”) and various related pleadings.² Access.1 seeks review of the January 30, 2004, decision³ of the Media Bureau (“Bureau”), denying Access.1’s Petition for Reconsideration of the Report and Order in this allocations proceeding.⁴ The *Magnolia R&O* granted a Petition for Rule Making filed by Columbia Broadcasting Company, Inc. (“Columbia”), the predecessor of Cumulus Licensing, LLC (“Cumulus”) as licensee of Station KQHN(FM) (formerly KVMA-FM) (the “Station”),⁵ for a class downgrade and change of community for

¹ Access.1 is the licensee of Stations KBTT(FM), Haughton, Louisiana, KSYR(FM), Benton, Louisiana, KOKA(AM), Shreveport, Louisiana, KDKS-FM, Blanchard, Louisiana, KLKL(FM), Minden, Louisiana, and KTAL-FM, Shreveport, Louisiana/Texarkana, Texas.

² These pleadings include: (1) an Opposition to Application for Review, filed on April 9, 2004, by Columbia Broadcasting Company, Inc., the former licensee of Station KQHN(FM) (formerly KVMA-FM), Magnolia, Arkansas; (2) a Reply filed on April 22, 2004, by Access.1; (3) a Motion for Leave to File Supplement to Application for Review and a Supplement to Application for Review (the “Supplement”) filed on February 9, 2005, by Access.1; (4) an Opposition to Motion for Leave to File Supplement filed on February 28, 2005 by Cumulus Licensing, LLC; and (5) a Reply to Opposition filed on March 10, 2005, by Access.1.

³ See *Magnolia, Arkansas, and Oil City, Louisiana*, Memorandum Opinion and Order, 19 FCC Rcd 1553 (MB 2004) (“*Magnolia Reconsideration Decision*”).

⁴ See *Magnolia, Arkansas, and Oil City, Louisiana*, Report and Order, 18 FCC Rcd 8542 (MB 2003) (“*Magnolia R&O*”).

⁵ Cumulus acquired control of Columbia on January 30, 2004, pursuant to Commission consent. See File No. BTCH-20020522AAH. Thereafter, Cumulus became the assignee of the Station by grant of a short-form assignment application. See File No. BALH-20041210AAP. For purposes of simplicity, unless otherwise noted, the licensee of the Station will be referred to herein as Cumulus. At the request of Cumulus, in 2005, the Commission further changed the community of license of the Station from Oil City to Waskom, Texas. See *Dubach, Natchitoches, Oil City, and Shreveport, Louisiana, and Groesbeck, et al., Texas*, Report and Order, 20 FCC Rcd 19495 (2005).

the Station from Channel 300C1 at Magnolia, Arkansas, to Channel 300C2 at Oil City, Louisiana.⁶ The Bureau concluded that the relocation of the Station to Oil City did not constitute a “move-in” to the Shreveport, Louisiana, Urbanized Area because Cumulus had demonstrated under the then-existing *Tuck* test⁷ that Oil City is sufficiently independent of the Shreveport Urbanized Area to warrant a first local service preference.⁸ The Bureau also declined to consider, in the context of this proceeding, Access.1’s request that the Commission clarify and revise its procedures regarding “move-ins” to urbanized areas, finding that such a request should be made in a separate rule making petition.⁹

2. On review, Access.1 argues that the Bureau erred: (1) in determining that Oil City was independent of Shreveport under the *Tuck* test; (2) in declining to adopt Access.1’s proposed processing policy of requiring a certification by the community of license modification proponent that it will not select a site that would provide substantial service to the urbanized area; (3) in finding that the proposed reallocation would serve the public interest because approximately 2,000 persons would be reduced from five to four aural services and Magnolia would be left only with an AM station with limited nighttime service; (4) in finding that the relocation of the Station to a more urbanized area would result in a preferential arrangement of allotments;¹⁰ and (5) in not adequately addressing its allegation that Cumulus had engaged in misrepresentation and lacked candor in claiming a first local service priority at Oil City and then, after approval of the reallocation, filing an application¹¹ for modified Station facilities that would place a 70 dBu signal over the entire Shreveport Urbanized Area.¹² Access.1 also argues that the Commission’s *Tuck* policy in general is arbitrary and capricious because it is not supported by any measurable method of determining local program service and is inconsistent with the Commission’s newly adopted Arbitron radio market definition for the multiple ownership rules.¹³

3. **Discussion.** We have carefully reviewed the *Magnolia Reconsideration Decision* and the full record of this rule making proceeding. We conclude that Access.1 has not demonstrated that the Bureau erred with respect to the first three issues noted above that it raises in its AFR. The *Magnolia*

⁶ See *Magnolia R&O*, 18 FCC Rcd at 85443.

⁷ See *Faye and Richard Tuck, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 5374 (1988) (establishing eight factors to determine whether a suburban community is independent of a nearby central city).

⁸ See *Magnolia Reconsideration Decision*, 19 FCC Rcd at 1555, ¶¶ 5-7.

⁹ *Id.*, 19 FCC Rcd at 1556 n.6.

¹⁰ See *Amendment of the Commission’s Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, Report and Order, 4 FCC Rcd 4870 (1989) (“*Community of License R&O*”), *recon. granted in part*, Memorandum Opinion and Order, 5 FCC Rcd 7094 (1990) (“*Community of License MO&O*”).

¹¹ File No. BPH-20030610ADI (“Oil City Modification Application”).

¹² In its Supplement, Access.1 argues that the January 13, 2005 filing by Cumulus of a Request for Special Temporary Authority (“STA Request”) to operate Station KQHN(FM) on a different channel and at reduced power to prevent interference to U.S. Air Force equipment at nearby Barksdale Air Force Base provides further evidence of Cumulus’s lack of candor in seeking a first local service priority at Oil City. This allegation is discussed at ¶¶ 7-8, *infra*. It also questions for how long the Station’s reduced service to Oil City, which Cumulus acknowledges in the STA Request to be “deficient”, will continue. This issue was subsequently mooted when, at Cumulus’s request, the Commission changed the Station’s community of license to Waskom, Texas. See *Dubach, Natchitoches, Oil City, and Shreveport, Louisiana, and Groesbeck, et al., Texas*, Report and Order, 20 FCC Rcd 19495, 19500 (2005). Therein, the Commission noted that its action would be subject to the resolution of the AFR in this proceeding. *Id.* at 19499, n.19.

¹³ See AFR at 20-23.

Reconsideration Decision and the *Magnolia R&O* sufficiently addressed the issues raised, and we uphold those decisions for the reasons stated therein.¹⁴

4. We believe, however, that some additional discussion is warranted regarding the remaining issues raised by Access.1 in its AFR. First, Access.1 claims that the Bureau failed to prevent the migration of Station KQHN(FM) from a rural community to an urban area as it maintains is required by the analysis announced in the Commission's *Community of License* proceeding.¹⁵ We disagree and find that the Bureau appropriately applied the then-applicable *Community of License* procedures in finding that that Oil City is an independent community from the Shreveport Urbanized Area. Contrary to Access.1's allegations, the overall purpose of the analysis established in the *Community of License* proceeding was not to prevent the migration of rural stations to urban communities, as it maintains,¹⁶ but to encourage "changes to the tables of allotments that would result in a better overall arrangement of allotments."¹⁷ In so stating, the Commission recognized that "an artificial or purely technical manipulation" of its policies could result in a migration of stations from rural to urban areas.¹⁸ To prevent such manipulation, the Commission directed the staff to apply the *Tuck* test to safeguard against such manipulation. That is exactly what occurred in this case. Cumulus submitted a *Tuck* showing, which was reviewed by the staff and, based in part on that review, the Bureau approved the proposal in the *Magnolia Reconsideration Decision*. Accordingly, we find that the Bureau's disposition of the Petition for Rule Making was fully consistent with the analysis set forth in *Community of License* proceeding.

5. Further, Access.1 argues that Cumulus engaged in misrepresentation and/or has shown a lack of candor as to whether the proposal would be a "move-in" to the Shreveport Urbanized Area and that the Bureau erred in dismissing this argument as "frivolous."¹⁹ Misrepresentation involves false statements made to the Commission with intent to deceive.²⁰ In this case, Access.1 has not alleged any specific "false statements" by Cumulus. On the contrary, the Petition for Rule Making specified allotment reference coordinates of a theoretical fully spaced²¹ site from which the proposed new community of license could receive adequate service from the Station.²² The specification of reference

¹⁴ The *Magnolia Reconsideration Decision* did not accept Access.1's Second Supplement to its Petition for Reconsideration, filed on January 28, 2004, in which Access.1 challenged, for the first time, Cumulus's *Tuck* showing, filed on July 29, 2003. The Bureau explained that the Second Supplement was not authorized under Section 1.429(d) of the Rules and that, in any event, it contained no new information of decisional significance. See *Magnolia Reconsideration Decision*, 19 FCC Rcd at 1556 n.2. We concur with these Bureau determinations and agree that dismissal of that pleading was appropriate. As a separate and independent ground for our decision, we agree with the Bureau on the merits that a majority of the eight *Tuck* factors are present here – factor 1 (percentage of working-age residents who work in the community); factor 2 (newspapers and other media); factor 3 (community identity); factor 4 (elected government); factor 5 (post office and zip code); and factor 8 (fire and police protection). Partial credit was warranted for factor 6 (businesses, medical facilities, mass transit) and factor 7 (advertising market). Access.1 contends that this case is similar to *Greenfield and Del Rey Oaks*, Report and Order, 11 FCC Rcd 12681 (MMB 1196) ("*Greenfield*"). We disagree. Unlike here, in *Greenfield*, the proposed new station community did not satisfy a majority of the *Tuck* factors.

¹⁵ See AFR at 11, citing *Community of License R&O*, 4 FCC Rcd at 4873.

¹⁶ AFR at 11.

¹⁷ *Community of License R&O*, 4 FCC Rcd at 4872.

¹⁸ *Community of License MO&O*, 5 FCC Rcd at 7096.

¹⁹ See AFR at 13-14.

²⁰ See *Fox River Broadcasting, Inc.*, Order, 93 FCC 2d 127, 129 (1983).

²¹ See 47 C.F.R. § 73.207.

²² See 47 C.F.R. § 73.315.

coordinates in an FM allotment petition for rule making is not an implicit pledge by the petitioner to build at that site. Indeed, under our then-existing procedures, a rule making petitioner was allowed to specify a different transmitter site at the application stage.²³ Frequently, different sites are specified in the implementing application because a petitioner may not know the ultimate application site at the rule making stage or because it may desire to specify a short-spaced site under Section 73.215, which is not allowed at the rule making stage. Consistent with this approach, Cumulus specified a different transmitter site in its implementing application. Thus, absent any extrinsic evidence to the contrary, which Access.1 has failed to produce, a misrepresentation allegation based on the specification of a different application site is speculative.

6. Access.1's lack of candor argument, based on Cumulus's decision not to specify the reference coordinates in the construction permit application, fails for similar reasons. As noted above,²⁴ reference coordinates are used solely for technical purposes. Thus, the plan to propose a different transmitter site, including one that would permit service to the entire Shreveport Urbanized Area, is fully consistent with the proffered reference coordinates, even if that plan was in place at the time of the filing of the initial Oil City Petition for Rule Making. Nor does the existence of such a plan put at issue Cumulus's pledge to serve Oil City. The Commission has consistently held that it will presume that an applicant will meet its local programming obligations and that the alleged failure to do so is more appropriately addressed in the context of a station's license renewal application.²⁵ On these facts, we find no "concealment, evasion [or] other failures to be fully informative"²⁶ by Cumulus and no basis on which to infer a Cumulus motive to engage in such conduct. Accordingly, we conclude that Access.1's lack of candor allegation is without merit.

7. To further support its lack of candor allegation, Access.1 claims that Cumulus's need to file its STA Request was foreseeable, that Cumulus was aware that its proposed facility would provide deficient service to Oil City and was part of a plan to reallocate Station KQHN(FM) to the Shreveport market.²⁷ It cites language in a 1996 letter from the Federal Aviation Administration providing notice that any future change in transmitter site would require FAA approval and notes that Cumulus did not request such FAA approval in connection with its application to implement the rule making change. In opposition, Cumulus submits a declaration from its Director of Engineering, explaining that the interference problem was completely unforeseeable, a result of the radio receivers used in Air Force aircraft that operated out of the Barksdale Air Force Base.²⁸ Cumulus also contends that its STA Request was a perfectly reasonable effort to keep the station on the air in light of its notification of the interference

²³ See, e.g., *Saltville, Virginia, and Jefferson, North Carolina*, Memorandum Opinion and Order, 15 FCC Rcd 24296, 2497 (2000) (permitting reallocation and upgrade of an FM station's channel class at a specific transmitter site that was different from the theoretical reference coordinates for the channel). While the *Magnolia* proceeding was pending, the Commission amended its Rules to allow a licensee or permittee to change its community of license by filing a minor modification application, instead of a petition for rule making. See *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212 (2006), *recon. pending*. Under this new procedure, an applicant specifies both a theoretical "allotment" site and an application site at the same time in its application.

²⁴ See *supra*, n.21 and n.22.

²⁵ See *Suburban Community Policy, the Berwick Doctrine and the De Facto Reallocation Policy*, Report and Order, 93 FCC 2d 436 (1983); *WBBK Broadcasting Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 5906 (2000); *William Clay*, Letter, 23 FCC Rcd 8412, 8420 (MB 2008).

²⁶ *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983).

²⁷ See Access.1 March 10, 2005, Reply at 1-2.

²⁸ See Cumulus February 28, 2005, Opposition to Motion for Leave to File Supplement, Ex. 4, Declaration of Gary Kline ("Kline Declaration").

problem from the Commission. Finally, it argues that ensuing events are not probative of Cumulus's intent.²⁹

8. We find that Access.1 has not raised a substantial and material question of fact regarding Cumulus's candor. By proposing to side-mount on an existing, registered tower, Cumulus was not required to request FAA approval merely because it specified a new channel.³⁰ In these circumstances, Cumulus's surprise at the FAA objection is reasonable.³¹ We also find credible the unrebutted declaration of Cumulus's Director of Engineering. We agree with his statement that this sort of FAA objection is an extremely rare event.³² Finally, we agree with Cumulus that the steps it took to keep the Station on the air by relocating it to a new community were both appropriate and reasonable.³³

9. Access.1's criticism appears to be that the former Commission processing policy could be manipulated by an applicant proposing a reallocation from which it can cover 100 percent of an urbanized area but proposes a transmitter site from which it will not cover the urbanized area.³⁴ However, the Commission subsequently revised its policies to eliminate this potential problem and presumes that a proposal should be treated as a "move-in" to an urbanized area if it would *or could* serve 50 percent or more of an urbanized area. In such a case, the applicant may rebut that conclusion by making a *Tuck* showing with regard to its proposal.³⁵ In any event, as noted above, Cumulus submitted such a showing, during the reconsideration stage of this rule making proceeding, which underwent the Bureau's scrutiny to determine if its application would be a "move-in" to the Shreveport Urbanized Area, the Bureau concluding that it was not.³⁶ Under these circumstances, we conclude that no misrepresentation or lack of candor occurred.³⁷

10. Finally, we address Access.1's contention that the Commission's then-existing *Tuck* policy in general is arbitrary and capricious. This argument is procedurally defective because the Bureau was not afforded an opportunity to pass on it, and we will, therefore, dismiss it.³⁸

²⁹ See *id.* at 2-4.

³⁰ See File No. BPH-20030610ADI, Section III, Question 5.

³¹ The cited language in the FAA's 1996 No Hazard Determination is of no probative value. This is standard language contained in all No Hazard Determinations and therefore would not have provided notice to Station KQHN(FM) of a particular interference issue, such as that presented by the Barksdale aircraft equipment.

³² See Kline Declaration; see also *Pacific Junction, Iowa*, Report and Order, 26 FCC Rcd 16253 (MB 2010).

³³ See *Dubach, Natchitoches, Oil City and Shreveport, Louisiana, and Groesbeck, et al., Texas*, *supra*. The Station's reallocation to Waskom, Texas, is now final.

³⁴ See AFR at 16.

³⁵ See *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rule Making, 26 FCC Rcd 2556, 2572, 2577, ¶¶ 30, 38 (2011) (subsequent history omitted) ("*Rural Radio*").

³⁶ See Cumulus July 29, 2003, Opposition to Petition for Reconsideration and Opposition to Motion for Stay at 5-10.

³⁷ See *Valley Broadcasting Company*, Decision, 4 FCC Rcd 2611, 2617 (Rev. Bd. 1989) ("when accurate information previously supplied by a party is a matter of open Commission record, an intent to categorically misrepresent . . . is difficult to find"), citing *Intercontinental Radio Inc.*, Decision, 98 FCC 2d 608, 639 (Rev. Bd. 1984).

³⁸ See 47 C.F.R. § 1.115(c) ("[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass"). We note that the Bureau did not conduct a *Tuck* analysis in the *Magnolia R&O*. By letter dated January 20, 2004, the Bureau first requested Columbia and Cumulus to submit such a showing as a result of their filing of the *Oil City Modification Application* that proposed Station facilities that would cover the Shreveport Urbanized Area. This request came after Access.1 had filed its

(continued...)

11. ACCORDINGLY, IT IS ORDERED, that the Application for Review filed by Access.1 Louisiana Holding Company, LLC IS DENIED, pursuant to Section 5(c)(5) Communications Act of 1934, as amended,³⁹ and Section 1.115(g) of the Commission's Rules.⁴⁰

12. IT IS FURTHER ORDERED, that the Motion for Leave to File Supplement to Application for Review and the Supplement to Application for Review filed by Access.1 Louisiana Holding Company, LLC ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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Petition for Reconsideration. Nevertheless, although Access.1 responded with its January 28, 2004, "Second Supplement to Petition for Reconsideration" attacking the specific *Tuck* showing submitted by Columbia and Cumulus as not demonstrating the independence of Oil City from the Shreveport Urbanized Area, it failed to raise before the Bureau the arguments about the general appropriateness of the *Tuck* analysis that it now presents to the Commission.

³⁹ 47 U.S.C. § 155(c)(5).

⁴⁰ 47 C.F.R. § 1.115(g).