

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 99-240
Table of Allotments,)	RM-9503
FM Broadcast Stations.)	
(Albemarle and Indian Trail,)	
North Carolina))	

MEMORANDUM OPINION AND ORDER

Adopted: April 28, 2004

Released: May 20, 2004

By the Commission: Commissioner Martin issuing a statement.

1. The Commission has before it an Application for Review filed by Monroe Broadcasting Company (“Monroe Broadcasting”) directed to the *Report and Order* in this proceeding.¹ Susquehanna Radio Corp. (“Susquehanna”) has filed an Opposition² to that Application for Review. For the reasons stated below, we deny Monroe Broadcasting’s Application for Review.

Background

2. At the request of Susquehanna, licensee of Station WABZ(FM) (“WABZ”), Channel 265A, Albemarle, North Carolina, the *Report and Order* reallocated Channel 265A to Indian Trail, North Carolina, as that community’s first local broadcast radio transmission service, and modified Station WABZ’s license to specify operation on Channel 265A at Indian Trail. The request was filed pursuant to Section 1.420(i) of the Commission’s rules, which permits the modification of a station’s authorization to specify a new community of license without affording other interested parties an opportunity to file a competing expression of interest.³ In considering a reallocation proposal, we compare the existing allotment to the proposed allotment to determine whether the reallocation would result in a preferential arrangement of allotments. We make this determination using the FM allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*.⁴

¹ *Albemarle and Indian Trail, North Carolina*, 16 FCC Rcd 13876 (MMB 2001) (“*Report and Order*”).

² Susquehanna requested a 15-day extension of time to file its opposition pleading, claiming it had not been properly served with a copy of the Application for Review herein. For good cause shown, we grant Susquehanna’s request and will consider Susquehanna’s opposition pleading.

³ *See Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990).

⁴ 90 FCC 2d 88 (1982). The FM allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters. Equal weight is given to priorities (2) and (3).

3. The *Report and Order* waived the provisions of Section 73.207 of the Commission's rules⁵ to allow Susquehanna to change its community of license from Albemarle to Indian Trail, North Carolina, despite the fact that the new allotment was not fully spaced, because it would eliminate two existing short-spacings and significantly reduce a third short-spacing, permit an increase in WABZ's station facilities to 6 kilowatts effective radiated power at 100 meters in antenna height above average terrain, and provide the first local broadcast radio transmission service to Indian Trail. The *Report and Order* also determined that even though the community of Indian Trail was within the Charlotte, North Carolina, Urbanized Area, Indian Trail was sufficiently independent from the Charlotte Urbanized Area that Station WABZ was entitled to credit for providing a first local service to Indian Trail pursuant to the criteria set forth in relevant case law.⁶ The *Report and Order* further found that reallocating Station WABZ to Indian Trail, a priority (3) proposal under the FM allotment priorities, was preferable to retaining that station in Albemarle, a priority (4) proposal.⁷ Finally, the *Report and Order* concluded that there was no merit to Monroe Broadcasting's argument that the reallocation should be treated as a fourth local service to the city of Monroe rather than a first local service to Indian Trail. In this regard, the *Report and Order* rejected Monroe Broadcasting's assertion that Indian Trail is highly dependent upon or interdependent with the city of Monroe, the county seat of Union County.

4. On review, Monroe Broadcasting asserts that (1) the *Report and Order* erred by considering the elimination of two short-spacings and the significant reduction of a third short-spacing to be a "higher priority" under Section 307(b) of the Communications Act of 1934, as amended ("the Act") than the question of whether the reallocation from Albemarle to Indian Trail would result in a preferential arrangement of allotments; and (2) the *Report and Order* erred by holding that because Monroe was not designated by the U.S. Census as being an Urbanized Area, there was no need for Susquehanna to demonstrate Indian Trail's independence from Monroe. In this regard, Monroe Broadcasting claims that Susquehanna's 70 dBu signal contour would encompass all of Monroe (2000 U.S. Census population of 26,228) and most of Union County and that the record evidence indicates that Indian Trail (2000 U.S. Census population of 11,905) is dependent upon and interdependent with Monroe. Monroe Broadcasting argues that evidence proffered under the eight *Tuck* factors⁸ establishes Indian Trail's dependency upon Monroe.

⁵ 47 C.F.R. § 73.207 sets forth minimum distance separations between FM broadcast stations.

⁶ Specifically, the Bureau analyzed the question of Indian Trail's independence from Charlotte pursuant to the criteria set forth in *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988) ("*Tuck*"). See also *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951) ("*Huntington*").

⁷ Two other aural services would continue to be licensed to Albemarle.

⁸ Under *Tuck*, the Commission set forth eight criteria for determining whether a specified suburban community is independent of the central city of an urbanized area. These criteria include: (1) the extent to which the community residents work in the larger metropolitan area rather than the specified community; (2) whether the smaller community has its own newspaper or other media that covers the community's local needs and interests; (3) whether community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area; (4) whether the specified community has its own local government and elected officials; (5) whether the smaller community has its own telephone book provided by the local telephone company or zip code; (6) whether the community has its own commercial establishments, health facilities and transportation systems; (7) the extent to which the community and central city are part of the same advertising market; and (8) the extent to which the specified community relies on the larger metropolitan area for various municipal services, such as police, fire protection, schools, and libraries. 3 FCC Rcd at 5378.

5. With regard to the eight *Tuck* factors, Monroe Broadcasting observes that even though 11.3 percent of Indian Trail's work force is employed in Indian Trail, 10.9 percent of that workforce is employed elsewhere in Union County. It argues that because Monroe is the "closest community to Indian Trail in Union County and the economic and business center of that county," we should presume that the referenced 10.9 percent of the work force works "in or adjacent to Monroe"⁹ (*Tuck* factor 1). Further, Monroe Broadcasting observes that Indian Trail is served by mass media centered in Monroe, including the Monroe Enquirer Journal, Cablevision of Monroe, and three AM stations licensed to Monroe (*Tuck* factor 2). In this regard, Monroe Broadcasting also claims that Indian Trail is part of the Monroe advertising market and depends upon Monroe-based media for local advertising (*Tuck* factor 7). Observing that Indian Trail has recently annexed much land and population adjacent to Monroe, Monroe Broadcasting claims that this annexation demonstrates that the growth of Indian Trail and Monroe is toward each other. (*Tuck* factor 3). While recognizing that Indian Trail has its own local government (*Tuck* factor 4), Monroe Broadcasting claims that all municipal services are provided by Union County (*Tuck* factor 8). Monroe Broadcasting also asserts that Indian Trail does not have its own telephone book, but is included in an area telephone book that includes Charlotte and Monroe (*Tuck* factor 5). Finally, Monroe Broadcasting acknowledges that Indian Trail has its own commercial establishments (*Tuck* factor 6), but observes that Indian Trail is located adjacent to Monroe, which is the commercial, economic and business center of Union County.

6. Susquehanna's Opposition to Monroe Broadcasting's Application for Review states that the *Report and Order* addressed the short-spacing issues first because the Bureau had to determine whether Susquehanna's proposal was acceptable for filing and consideration before a Section 307(b) analysis could be made. Susquehanna also asserts that Monroe Broadcasting failed to demonstrate that prior case precedent or Commission policy requires a licensee seeking to change its community of license to demonstrate its independence from all nearby communities where such communities are not located within an urbanized area. Therefore, Susquehanna argues that the *Report and Order* was correct in determining that there is no need for Susquehanna to demonstrate Indian Trail's independence from Monroe. In addition, Susquehanna contends that even assuming that Susquehanna was required to demonstrate Indian Trail's independence from Monroe, the record evidence shows Indian Trail's independence from Monroe as well as Charlotte. In light of the foregoing, Susquehanna requests that the Commission deny Monroe Broadcasting's Application for Review.

Discussion

7. Monroe Broadcasting's arguments are without merit. First, the *Report and Order* did not give "higher priority" to short-spacing considerations than it gave to the question of whether the reallocation from Albemarle to Indian Trail would result in a preferential arrangement of allotments. The reallocation of Channel 265A at Indian Trail does not comply with the Section 73.207 spacing requirements. The *Report and Order* properly concluded that a waiver was warranted because the reallocation would eliminate two short-spacings and reduce a third short-spacing. Having resolved this threshold issue in Susquehanna's favor, it was then necessary to consider whether Susquehanna's proposal to change its community of license from Albemarle to Indian Trail, North Carolina, would result in a preferential arrangement of allotments pursuant to Section 307(b) of the Act.

⁹ Monroe Broadcasting's Application for Review at 3.

8. Second, we affirm the staff's conclusion that the Indian Trail reallocation would result in a first local aural transmission service under priority 3 of the FM allotment priorities. In this regard, we observe that Monroe is not designated by the U.S. Census as being a "central city" in an Urbanized Area.¹⁰ Under existing policy and the facts of this case, Susquehanna is not required to demonstrate that Indian Trail is independent of Monroe in order for Susquehanna to receive credit for providing a first local service to Indian Trail. *Huntington* is a limited exception to our policy that each community should have a local service.¹¹ The Commission has rejected prior attempts to expand *Huntington* to attribute services in communities of fewer than 50,000 persons to smaller, adjacent communities.¹²

9. Monroe Broadcasting cites *Beaufort County Broadcasting Co. v. FCC*¹³ for the proposition that, in a non-metropolitan context a party may, under *Huntington*, demonstrate the interdependence of two adjacent communities in order to overcome the presumptive award of a first local broadcast radio transmission service preference. It concedes that the burden of proof would be higher in a non-metropolitan context, but contends that it has met this burden. We disagree. As explained below, the *Beaufort* court explicitly rejected the contention that the dependence of one non-metropolitan community on another presumptively establishes that outlets in the latter community would sufficiently meet the needs of the dependent community. Moreover, Monroe Broadcasting has not shown that radio broadcast outlets in Monroe, in fact, meet the needs and interests of Indian Trail residents.

10. The Commission has long recognized that each community has a "crucial" need for a first local transmission service.¹⁴ The *Huntington* doctrine was developed as a narrow exception to this policy, requiring the Commission to disregard political boundaries when an applicant designates, as its proposed community of license, a suburban community that is an integral part of a larger metropolitan community and the applicant's proposed facilities would provide service to the entire metropolitan area.¹⁵ It is an "exceptional" policy that can be used to set aside a "determinative" Section 307(b) analysis such as the award of a first local transmission service preference.¹⁶

¹⁰ The Bureau of the Census defines an Urbanized Area as an area consisting of central places and adjacent densely settled areas that in total have a minimum population of 50,000 persons. The *Report and Order* relied on 1990 U.S. Census data. Monroe was not listed in the 1990 U.S. Census as a central city in an Urbanized Area, or as part of the Charlotte Urbanized Area. See Bureau of the Census, U.S. Dep't of Commerce, Pub. No. 1990 CPH-2-35, *1990 Census of Population and Housing, North Carolina*. The 2000 U.S. Census includes almost all the population of Monroe (25,365 out of 26,228 people) in the Charlotte Urbanized Area. See the Internet maps of the Charlotte Urbanized Area at: <http://ftp2.census.gov/geo/maps/urbanarea/uaoutline/UA2000/ua15670>.

¹¹ *Tuck*, 3 FCC Rcd at 5376.

¹² See *Rose Hill, North Carolina, et al.*, 11 FCC Rcd 21223, 21230 (MMB 1996), *recon. denied*, 15 FCC Rcd 10739 (MMB 2000), *app. for rev. denied*, 16 FCC Rcd 15610 (2001) ("*Rose Hill*") (city of 25,000 persons is "too small" for raising *Huntington/Tuck* concerns under change of community precedent.)

¹³ 787 F. 2d 645, 653-54 (D.C. Cir. 1986) ("*Beaufort*").

¹⁴ See *FCC v. Allentown Broadcasting Co.*, 349 U.S. 358, 359-62 (1955).

¹⁵ *Beaufort*, 787 F.2d at 651.

¹⁶ E.g., *Miners Broadcasting Service, Inc. v. FCC*, 349 F.2d 199, 200-01 (D.C. Cir. 1965).

11. In *Beaufort*, the court declined to extend the *Huntington* presumption to closely related non-metropolitan communities. It noted that the petitioner had failed to demonstrate that “transmission service conditions in . . . [such] communities compel or even support a general assumption that any such community . . . would . . . have its needs satisfied by outlets in the contiguous community or communities.”¹⁷ The Court upheld the Commission’s determination to apply a more stringent *Huntington* test with non-metropolitan communities.¹⁸ It concluded that the petitioner had failed to make an affirmative factual showing that the radio stations in surrounding communities provided programming service that met the needs of the community that would otherwise gain a first local service.¹⁹

12. Monroe Broadcasting’s arguments fail for these very same reasons. Monroe Broadcasting has not provided “adequate reasons” to extend *Huntington* as a general policy matter to contiguous non-metropolitan areas.²⁰ In these circumstances, a traditional *Tuck* analysis demonstrating the interdependence of the two communities would not, of itself, establish that Indian Trail’s transmission needs are satisfied by stations in Monroe. We agree with Monroe Broadcasting that under *Beaufort* a petitioner may seek to establish on a case-by-case basis that the needs of a “dependent” community are satisfied by other outlets. We conclude, however, that Monroe Broadcasting wholly fails to make the requisite “affirmative factual showing”²¹ based on the “substantial evidence”²² standard upheld by the *Beaufort* Court.

13. The evidence cited by Monroe Broadcasting pursuant to the *Tuck* criteria does not demonstrate that Indian Trail is dependent upon Monroe or adequately served by the Monroe stations. Most importantly, there is no evidence in the record regarding the extent to which the three AM stations licensed to Monroe, in fact, provide programming responsive to the needs and interests of Indian Trail. Monroe Broadcasting also has provided no data on the percentage of the Indian Trail workforce that works in Monroe. We find unpersuasive its reliance on Indian Trail’s recent annexation of land and population adjacent to Monroe. This action equally suggests the opposite conclusion – that Indian Trail is a vital and growing independent community. Although Union County provides many municipal services to both Monroe and Indian Trail, this fact is not probative of Indian Trail’s dependence on Monroe, the county seat for Union County. Moreover, we note that Indian Trail has its own commercial establishments and local government, and does provide certain municipal services for its residents.

¹⁷ *Beaufort*, 787 F.2d at 654.

¹⁸ *Id.* at 653-54.

¹⁹ *Id.* at 654.

²⁰ See *Miners Broadcasting Service, Inc. v. FCC*, 349 F.2d at 201 (FCC bears burden of justifying extension of “exceptional” *Huntington* doctrine).

²¹ *Beaufort*, 787 F.2d at 654.

²² See *Beaufort County Broadcasting Co.*, 94 F.C.C. 2d 572, 576 (Rev. Bd. 1983).

14. Based on this analysis, we find that Monroe Broadcasting has not met its heavy evidentiary burden. We cannot conclude on the scant record before us that radio outlets in Monroe satisfy the needs and interests of the 11,905 residents of Indian Trail for local self expression. We affirm the reallocation of Channel 265A from Albemarle to Indian Trail. This reallocation would provide a first local service to Indian Trail, and thus advances priority 3 under the FM allotment priorities.

15. Accordingly IT IS ORDERED That the Application for Review filed by Monroe Broadcasting Company, Inc. IS DENIED.

16. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**STATEMENT OF
COMMISSIONER KEVIN J. MARTIN**

Re: Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Albemarle and Indian Trail, North Carolina), Memorandum Opinion and Order.

Local radio stations play an important role in their communities, providing local news, information and entertainment to residents, and generally serving as good corporate citizens in the local community life. This is particularly true in smaller towns, where the radio stations are limited in number. Yet there are still rural areas of our country that do not have even one local radio station. As a native of this part of North Carolina, I am therefore particularly pleased to approve the first local broadcast radio service in Indian Trail. I hope this new station serves the community well.