JOINT DISSENTING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS
AND
COMMISSIONER JONATHAN S. ADELSTEIN

Re: ***Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Evergreen, Alabama and Shalimar, Florida), MB Docket No. 04-219; In the Matter of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Lincoln and Sherman, Illinois), MM Docket No. 01-120.***

One of the more tangible ways in which the Commission's arcane allotment policies have an impact on localism is how we address the migration of radio stations from rural to urban markets.

Not to make light of a serious matter, but this has almost become a parlor game. The goal of the game—whether you're applying for a new station or a station currently licensed to a rural area—is to move as close to a big market as possible. The closer you get to a big market, the more potential listeners you can reach and hence the more advertising dollars you can attract.

But there's a catch—at least there's supposed to be. The Commission is required by Section 307(b) of the Communications Act "to provide a fair, efficient, and equitable distribution of radio service" to "the several States and communities." The FCC cannot simply permit radio stations to relocate from rural areas to well-served urban markets without violating that mandate.

That's when the game gets interesting. Under our FM allotment rules, the Commission will give a preference to any applicant that proposes to serve a community with ***no*** current licensees—*i.e.*, not that the community doesn't receive radio service (it could receive service from dozens of stations) but that no station lists that particular community as its "community of license." That's where a good atlas comes in handy. The next step is to scour the maps to find a community near an urban area that doesn't yet have any stations licensed to it. You win the game if you get the FCC to grant you a preference for providing "first service" to a close-in suburban community while being able to cover the larger market.

On their face, these cases certainly seem to fit that pattern. Why else would Saga want to change its community of license from Lincoln, Illinois (population 15,369) to the much smaller Sherman, Illinois (population 2,871)—other than Sherman's adjacency to the Springfield urban market? Similarly, why else would Gulf Coast seek to change its community of license from Evergreen, Alabama (population 3,630) to tiny Shalimar, Florida (population 718)—other than Shalimar's proximity to the Ft. Walton urban market?

The Commission is supposed to keep the game honest by declining to grant "first service" preferences for communities that are not truly independent of the nearby urban market. This determination is made by applying the three-pronged *Tuck* test.[1] It is not so much the *Tuck*

[1] The *Tuck* standard examines: (1) the station's proposed signal coverage over the urbanized area (the "Coverage Factor"); (2) the relative population size and distance between the suburban community and the urban market (the "Relative Size and Distance Factor"); and (3) the independence of the suburban community, based on various factors that would indicate self-sufficiency (the "Independence Factor"). *See Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988).

test itself but the majority's lax application that causes me concern. As described below, the majority's *Tuck* analysis is so feeble that it scarcely amounts to a test at all.[2]

The Coverage Factor. The majority finds that the Sherman station could serve most, if not all, of the Springfield Urbanized Area, and that the Shalimar station would "invariably" serve a significant portion of the Ft. Walton Urbanized Area. Nevertheless, the majority "sees no public benefit" in encouraging stations to reduce their coverage areas in order to satisfy *Tuck*, and thus simply ignores this factor. The majority misses the point. To some extent, we are trying to assess the intent of the stations involved. Are they primarily interested in serving the smaller community or the broader urban market? Signal coverage may not be determinative on that question, but it is not irrelevant.

The Relative Size and Distance Factor. Sherman is 6.7 miles from the center of Springfield with a population less than 3% of Springfield's size (2,871 vs. 111,454). Shalimar is less than 1.5 miles from Ft. Walton Beach—the communities actually are separated by only six-tenths of a mile across Choctawhatchee Bay—and its population is less than 4% its size (718 vs. 19,973). In light of *RKO*—in which the Commission made an unfavorable finding based on a smaller community that was 16 miles from the urban market and 11% of its size—one would think that the majority would make an unfavorable finding here. But the majority ignores the distance factor altogether and relies on a staff decision for the astonishing proposition that a community with ***less than 1%*** of the relative population of the larger market is not enough to justify an unfavorable finding. If that is true, the second *Tuck* factor may as well be eliminated entirely.

The Independence Factor. In both of these cases the majority concludes that a majority of the eight indicia of "independence" support a favorable finding—5 1/2 out of 8 favorable in *Sherman*, and 5 out of 8 favorable in *Shalimar*.[3] But these findings do not withstand scrutiny.

One indicia is work patterns: do the residents of the smaller community remain in the community for work or do they commute to the larger market? The majority speculates that up to 40% of Sherman residents work in Sherman "or its immediate environs" based on the fact that (1) the driving time from Sherman to the center of Springfield is approximately 15-25 minutes, and (2) census data shows that 40% of Sherman residents commute 15 minutes or less to work. But there's no reason to suppose that all Springfield jobs are located in the center of the city. The Springfield airport, for instance, is closer to Sherman than the city center. Moreover, Sherman is only about 3 miles long and 3.1 square miles in total area.[4] Given its size, any Sherman resident

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[2] At one time, the Commission took the *Tuck* standard seriously. In *RKO General*, 5 FCC Rcd 3222 (1990), the Commission refused to give an applicant credit for providing "first local service" to Richmond, California, a community of 74,676 residents located 16 miles northeast of San Francisco across the San Francisco Bay. The Commission found that the three *Tuck* factors weighed against a granting a Section 307(b) preference to Richmond because of its interdependence with the San Francisco urban market. First, the Commission found that the proposed Richmond facilities were identical to facilities other applicants had proposed to serve the broader San Francisco market. Second, the Commission found that Richmond was located only 16 miles from San Francisco and only had 11% of the population. Finally, applying the eight indicia of independent communities set forth in *Tuck*, the Commission found that there was insufficient evidence that Richmond was truly independent of San Francisco (*e.g.*, only 35.1% of Richmond residents worked in Richmond, Richmond did not have a major public hospital or a local public transportation system, and Richmond was served by 25 other radio stations licensed to San Francisco).

[3] The majority does not give full credit for one of the indicia in *Sherman* because while Sherman has its own zip code it does not have its own phone book.

[4] *See* http://www.shermanil.org/images/village_map/VILLAGE_MAP.pdf

with a commute longer than ten minutes is unlikely to work in the community, thus making the likely number of residents who work in Sherman closer to 7.8% (the Census Bureau estimate of Sherman residents who work less than ten minutes from home).

The Shalimar facts are even more compelling. Shalimar is only about one mile long. At 30 miles per hour, it would take only two minutes to drive the length of the community. The average commute time for Shalimar residents is 16.3 minutes. Somehow, the majority concludes from these facts "that a significant number of Shalimar residents work in or very near Shalimar." This astonishing assertion is unsupported in the record and contrary to common sense.

Another indicia is the "perception of community leaders and residents." The majority makes a favorable finding in *Shalimar* based on a letter from the Town Manager referring to "the strong sense of community." If this is sufficient, we may as well just permanently assign this factor to the favorable column and save the postage.

A third indicia is whether the smaller community has its own commercial establishments, health facilities, and transportation systems. The idea is to assess whether the community is self-sufficient or whether it relies on the larger community to meet its basic needs. Here, neither of these communities has the types of businesses one would expect to find in a truly independent community. For instance, there is no indication that either community has a grocery store, a hospital, a department store, a dry cleaner, or a drugstore. Nevertheless, the majority finds this factor is met in both cases based on a hodgepodge of "local businesses" that just about any community could satisfy.

Thus, it appears that neither of these applications should have passed muster under *Tuck* (although Sherman is a somewhat closer case). If the majority wants to change the *Tuck* standard, it should do so openly rather than maintaining the pretense of a test but draining it of any practical effect. I am not proposing that we eliminate *Tuck*, only that we enforce it. At the same time, I recognize that we have sought comment on a proposal to authorize a station to change its community of license to any community within the same market, provided that if the community being vacated is left without a radio station, the vacating licensee must underwrite the cost of a new LPFM station in the vacated community for the period of one year.[5] I express no view on that proposal, but believe strongly that whatever rules we adopt in this area must actually be enforced. Creating rules without adequate enforcement only invites cynicism about the Commission's processes and unduly favors Washington insiders who understand the way the game is played.

In the end, of course, this is no game. The residents of Lincoln, Illinois have lost one of their three local stations (and only commercial FM station), and the residents of Evergreen, Alabama have lost one of only two local stations (and their only FM station). Those stations were allowed to pack up and leave because the Commission no longer provides a meaningful check under Section 307(b). The pay-off for station owners can be swift. Gulf Coast Broadcasting has already sold its Shalimar station to radio giant Cumulus and the station is now part of Cumulus's four-station cluster in the Ft. Walton market. So Gulf Coast won a big payday and Cumulus was able to further consolidate its holdings in Ft. Walton.

Game over.

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[5] *See Report and Order and Third Notice of Proposed Rulemaking,* 23 FCC Rcd 5922 (2008), ¶ 98.