

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

In the Matter of
Threshold Communications
Application for Construction Permit
Station KVNW(FM), Napavine, Washington
File No. BNPH-20110630AHJ
Facility ID No. 189494

SECOND ORDER ON RECONSIDERATION

Adopted: July 26, 2022

Released: July 27, 2022

By the Commission:

I. INTRODUCTION

1. The Commission has before it, for the third time, a case involving a comparison of communities under section 307(b) of the Communications Act of 1934, as amended (Section 307(b)), for an allotted but unbuilt FM station. Threshold Communications (Threshold) obtained the allotment, at Clatskanie, Oregon, at auction, but now proposes to relocate the allotment to become the first local transmission service at Napavine, Washington. In April 2017, the Commission affirmed a Media Bureau (Bureau) decision granting the community change that Threshold proposed. Premier Broadcasters, Inc. (Premier) filed a petition for reconsideration of the Commission’s affirmation, which the Commission denied in May 2019, taking the opportunity at that time to clarify certain evidentiary burdens surrounding such change-of-community cases. Premier now comes before us with a Second Petition for Reconsideration (Second Petition) challenging the Reconsideration Order. For the reasons set forth below, we dismiss in part and deny in part the Second Petition and again affirm the grant of the community change.

II. BACKGROUND

2. Applicant Threshold was the winning bidder in Auction 91 for an FM allotment on Channel 225C3 at Clatskanie, Oregon (the “move-out” community). It proposed in its amended long-form application (Amended Application) to change the allotment’s community of license to Napavine, Washington (the “move-in” community), based on a showing that the allotment at Napavine represented a

1 47 U.S.C. § 307(b) (“In considering applications for licenses, and modifications and renewals thereof . . . the Commission shall make such distribution of licenses . . . among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same . . .”).

2 Threshold Communications, Memorandum Opinion and Order, 32 FCC Rcd 3656 (2017) (Order), affirming Donald E. Martin, Esq. and Meredith S. Senter, Esq., Letter Order, Ref. 1800B3-AD (MB Sept. 13, 2016) (2016 Letter Decision).

3 Petition of Premier Broadcasters, Inc. for Reconsideration (filed May 22, 2017) (May 2017 First Petition).

4 Threshold Communications, Order on Reconsideration, 34 FCC Rcd 4201 (2019) (Reconsideration Order).

5 Second Petition for Reconsideration of Premier Broadcasters, Inc. (filed June 28, 2019).

6 The Order and Reconsideration Order contain an extensive background on this long-contested application, which need not be reiterated here. See Order, 32 FCC Rcd at 3656-57, paras. 2-3; Reconsideration Order, 34 FCC Rcd at 4201-04, paras. 2-6.

higher section 307(b) priority than the allotment at Clatskanie.⁷ Premier objected to the community change, claiming that the move-out community of Clatskanie had a greater need for new radio service, and arguing that application of the Commission's urbanized area service presumption (UASP) demonstrated that moving the proposed station to Napavine did not represent a preferential arrangement of allotments.⁸ The Bureau denied Premier's objection and petition for reconsideration, and the Commission affirmed the Bureau's denials,⁹ and further affirmed the Commission's decision on review when Premier sought reconsideration of that *Order*.¹⁰

3. In the *Reconsideration Order*, the Commission clarified certain aspects of application of the UASP, based on the novel invocation of the presumption in this case. Specifically, the Commission delineated the burdens of production of evidence and of persuasion regarding the evidence, as these apply to the applicant's ultimate burden of demonstrating that the proposed community of license change represents a preferential arrangement of allotments under section 307(b). The Commission clarified that, once the UASP has been triggered, the party rebutting the UASP,¹¹ whether the presumption is being applied with respect to the move-in community (as is more typical) or the move-out community (as here), bears the burden of production of evidence on each of the three rebuttal factors that stem from the Commission's *Rural Radio* precedent: first, that the proposed community is truly independent of the urbanized area; second, of the community's specific need for an outlet for local expression separate from the urbanized area; and third, the ability of the proposed station to provide that outlet.¹² The Commission clarified further that if the opponent of the community change satisfies its burden of production with respect to each of the three factors, the UASP drops out of the case and the burden of persuasion then lies

⁷ Under section 73.3573(g) of the Commission's rules (Rules), applicants seeking to change the community of license of an FM station must demonstrate that the proposed community change constitutes a preferential arrangement of allotments under Section 307(b). Threshold submitted evidence that showed the Napavine allotment was Priority (3), whereas Clatskanie was Priority (4), which is less preferable than Priority (3).

⁸ The UASP is a rebuttable presumption that, when the community proposed for a radio allotment is located in an urbanized area or the station would, or could through a minor modification application, provide principal community-strength coverage to more than 50% of an urbanized area, we will treat the application, for Section 307(b) purposes, as proposing service to the entire urbanized area rather than service to the less urban named community of license. 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, 2567, para. 20 (2011) (*Rural Radio or Rural Radio Second R&O*). The UASP is designed to prevent applicants from claiming to provide the first local transmission service to a smaller community when in fact the station will focus on service to an adjacent urbanized area. Threshold had demonstrated that the Clatskanie allotment would cover more than 50% of the Longview, Washington-Oregon Urbanized Area (Longview Urbanized Area), and thus that it could not be considered a first local transmission service at Clatskanie under the UASP. As the allotment would represent the first local transmission service at Napavine, Washington, the Napavine allotment was a higher priority and thus the proposed move represents a preferential arrangement of allotments.

⁹ See *supra* note 2.

¹⁰ See *Reconsideration Order*.

¹¹ *Id.* at 4207-08, para. 13 (citing *Verizon Tel. Cos. et al.*, Memorandum Opinion and Order, 26 FCC Rcd 15849, 15863, para. 20 (2011) ("a rebuttable presumption does not shift the burden of proof to defendants; rather, it requires defendants to come forward with evidence that rebuts or meets the presumption.") (citing *Cablevision Sys. Corp. et al. v. FCC*, 649 F.3d 695, 716 (D.C. Cir. 2011) ("Under the APA, agencies may adopt evidentiary presumptions provided that the presumptions (1) shift the burden of production and not the burden of persuasion, and (2) are rational.") (citations omitted)).

¹² See *Rural Radio Second R&O*, 26 FCC Rcd at 2572, para. 30. As framed in the *Reconsideration Order* and applied in this case, the three rebuttal factors are: (1) whether the move-out community is truly independent of the urbanized area; (2) whether the move-out community has a specific need for an outlet for local expression separate from the urbanized area; and (3) the ability of the proposed station to provide that outlet. *Reconsideration Order*, 34 FCC Rcd at 4207-08, para. 13.

with the proponent of the community change (here, Threshold) to demonstrate that the move-out community should be considered under Priority (4) because the proposed station would serve an urbanized area.¹³ If the proponent meets its burden of persuasion with respect to one or more of three factors (*e.g.*, it shows under the first factor that the move-out community is *not* truly independent of the urbanized area), it will prevail.¹⁴

4. Having clarified these burdens as applied to this case, the Commission concluded that Premier (the party attempting to rebut the presumption) did not meet its burden of production as to one of the three necessary rebuttal evidence factors under *Rural Radio*.¹⁵ On alternative and independent grounds, the Commission concluded that “even assuming Premier met its burden of production on all three *Rural Radio* factors . . . Threshold met its burden of persuasion and has demonstrated that Clatskanie is *not* truly independent of the Longview Urbanized Area under the first *Rural Radio* factor (‘whether the community at issue is truly independent of the urbanized area’).”¹⁶

5. Premier, however, claiming that the Commission “should have given the parties an opportunity to meet their newly assigned evidentiary burdens,” as well as the “opportunity to review and contest any facts that the [Commission] found as a result of its own research,” now seeks reconsideration for the second time before the Commission in this case.¹⁷

III. DISCUSSION

A. The Commission Properly Concluded that Premier Failed to Meet Its Burden of Production

6. We dismiss in part and deny in part Premier’s latest petition for reconsideration. Throughout this proceeding Premier argued that it should be allowed to rebut the UASP with regard to the move-out community of Clatskanie, and it submitted evidence in an attempt to support the rebuttal for which it advocated. In the *Reconsideration Order*, the Commission agreed with Premier and concluded that, to the extent the UASP is applied, in whatever context, it may be rebutted, and agreed with Premier that rebuttal evidence must be considered.¹⁸ In considering such rebuttal evidence, the Commission in the *Reconsideration Order* reiterated, then applied the rebuttal methodology set forth in the 2011 Second Report and Order in the *Rural Radio* proceeding.¹⁹ Thus, in the *Reconsideration Order* the Commission

¹³ *Id.* at 4208, para. 14 (citing *Harlem Taxicab Ass’n v. Nemes*, 191 F.2d 459, 461 (D.C. Cir. 1951) (“When substantial evidence contrary to a presumption is introduced, . . . ‘the presumption falls out of the case. . . .’”) (citations omitted)).

¹⁴ *Id.*

¹⁵ *Id.* at 4209, para. 16 (“Although we conclude that Premier has met its burden of production under factor one of the *Rural Radio* rebuttal evidence (‘whether the community at issue is truly independent of the urbanized area’) (citation omitted), we conclude that Premier has failed to meet its burden of production under factor two of the *Rural Radio* rebuttal evidence (‘whether the community has a specific need for an outlet for local expression separate from the urbanized area’).”), citing *Rural Radio Second R&O*, 26 FCC Rcd at 2573, para. 30).

¹⁶ *Reconsideration Order*, 34 FCC Rcd at 4210, para. 17.

¹⁷ Second Petition at iii.

¹⁸ *Reconsideration Order*, 34 FCC Rcd at 4207-09, paras. 11-14.

¹⁹ *Id.* at 4207, para. 12. See *Rural Radio Second R&O*, 26 FCC Rcd 2556. Thus, the Commission made clear the details of the UASP rebuttal methodology early in this proceeding. Despite Premier’s claims to the contrary, the Commission did not depart from the policies adopted in the *Rural Radio* decisions. Second Petition at n.10. In the *Rural Radio Second R&O*, the Commission provided that the three-pronged *Tuck* test (and the various factors thereunder) could be used to meet the showing under the *first* factor of *Rural Radio* (“the proposed community is truly independent of the urbanized area”), but the Commission was also open to alternatives to the *Tuck* test and its associated factors with respect to the first *Rural Radio* factor. *Rural Radio Second R&O*, 26 FCC Rcd at 2573-74, para. 30. See also *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment*

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did not change the three *Rural Radio* rebuttal factors, but merely explained their application in this particular factual context, and clarified the respective evidentiary burdens between parties seeking to invoke and to rebut the UASP.²⁰ Having thus agreed with Premier that it should be allowed to rebut Threshold's claimed UASP at the move-out community, the Commission considered the rebuttal evidence presented by Premier.²¹ We accordingly find that Premier has not only had ample opportunity to submit material demonstrating that it has met its burden of production in this case, it has in fact availed itself of that opportunity on multiple occasions, but has failed to meet its evidentiary burden. We therefore reject Premier's claim that it lacked opportunities to submit evidence meeting its burden of production.²²

7. The extensive record in this proceeding contains several examples of Premier attempting to demonstrate it met its burden of production, with the staff and the Commission considering the evidence it presented.²³ In its petition for reconsideration of the staff's initial letter decision granting the Application,²⁴ Premier summarized what it labeled "probative evidence to rebut the [UASP]" that had

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_____ *Procedures*, Second Order on Reconsideration, 27 FCC Rcd 12829, 12835-36, para. 12 (2012) (*Rural Radio Second Reconsideration Order*) (explaining that *Tuck* addresses the issue of independence but that the Commission will provide "wide latitude to present whatever facts [applicants] deem appropriate to our evaluation" of independence). The *Tuck* test is a three-pronged test evaluating (1) the degree to which the proposed station will provide coverage to the urbanized area; (2) the size and proximity of the proposed community of license relative to the central city of the urbanized area; and (3) the independence of the proposed community of license from the urbanized area. *Faye and Richard Tuck*, Memorandum Opinion and Order, 3 FCC Rcd 5374 (1988) (*Tuck*). We determine a community's independence from the urbanized area under the third prong of the test with an additional eight factors enumerated in *Tuck*. See *Tuck*, 3 FCC Rcd at 5378, para. 36.

The Commission, however, never stated that all three *Rural Radio* factors are interchangeable with the three-pronged *Tuck* test, as Premier argues. Second Petition at n.10. This is supported by the text of the *Rural Radio Second R&O* where the Commission discusses the *Tuck* test and its associated factors as used to demonstrate that the proposed community is "independent" from the urbanized area, but then stated "a compelling showing sufficient to rebut the urbanized area service presumption *must also include* evidence" under the second *Rural Radio* factor (that is, "the community's need for an outlet for local expression" based on "factors such as the community's rate of growth; the existence of substantial local government necessitating coverage; and/or physical, geographical, or cultural barriers separating the community from the remainder of the urbanized area"). *Rural Radio Second R&O*, 26 FCC Rcd at 2573-74, para. 30 (emphasis added). In other words, the *Rural Radio Second R&O* established the second *Rural Radio* factor as an addition to the independence factor (that is, the first *Rural Radio* factor).

²⁰ *Reconsideration Order*, 34 FCC Rcd at 4207-09, paras. 11-14. While Premier notes that Section 309(e) of the Act provides that the "burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant," this provision applies when the Commission has "formally designated [an] application for a hearing," a situation not applicable here. 47 U.S.C. § 309(e). See Second Petition at 5.

²¹ *Id.* at 4207, 4209-10, paras. 11, 15-16.

²² To the extent Premier argues that Threshold's local public notice of its application should have specified the need to submit evidence to rebut the presumption, see Second Petition at 3, 5, the Commission's local public notice rules do not require such information. See 47 CFR § 73.3580(f) (2014) (requiring the local public notice to include the following information: name of applicant, purpose of application, date of filing, call sign and frequency, facilities sought (type and class of station, power, location of studios, transmitter site and antenna height), exact nature of the amendment). See also 47 CFR § 73.3580(b)(2) (2020).

²³ See, e.g., *Reconsideration Order*, 34 FCC Rcd at 4206-07, paras. 6, 11 (holding that while Premier was correct that it was entitled to submit rebuttal evidence on the issue of whether Threshold's proposed station would constitute an additional service to the Longview Urbanized Area, "after considering the record, including the evidence submitted by Premier," Threshold's proposed station at Clatskanie would, in fact, constitute such a service and should therefore be considered under Priority (4), other public interest matters).

²⁴ 2015 Letter Decision.

been submitted by various Clatskanie residents, community groups, and local officials.²⁵ It concluded that “[u]sing the evidence before it, the Bureau must complete the Section 307(b) analysis as instructed by *Rural Radio*. That evidence shows that the [UASP] is rebutted in the instance of Clatskanie.”²⁶

8. Similarly, in its application for review, Premier asserted that the Bureau failed to consider whether the UASP had been rebutted, concluding that the staff “ignored—in fact the [Letter] Decisions fail to reference at all—evidence that rebutted the presumption.”²⁷ Premier then argued that the staff, “[h]aving concluded that the UASP is triggered . . . should have considered whether the presumption has been rebutted.”²⁸ Insisting that the Commission address the issue of “how the burden of proof should be applied in this case,” Premier not only opined as to how it believed the burden of proof should be applied, but stated:

In the event that the Commission decides to consider this case *de novo*, it should consider the following. Premier, together with residents and leaders of Clatskanie, have presented substantial and unrefuted evidence showing that Clatskanie “is both independent of the urbanized area and has a palpable need for a local service.” (citation omitted)²⁹

9. Thus, Premier not only contemplated that the Commission might undertake *de novo* review, it recapitulated the evidence already in the record that it believed would satisfy its burden of production on both the issue of Clatskanie’s independence from the Longview Urbanized Area and its specific need for an outlet for local expression separate from the urbanized area. In fact, the latter issue—that of Clatskanie’s need for a separate outlet for local expression—was the one on which the Commission found Premier’s evidentiary showing to be inadequate.³⁰ Premier recognized in its petition for reconsideration of the *Order* that it had attempted to meet its burden, when it stated that it had “extensively discussed the factors favoring retention of the allotment in Clatskanie,”³¹ and had “urged the

²⁵ Request of Premier for Clarification and Petition for Reconsideration, filed Aug. 6, 2015, at 7-8.

²⁶ *Id.* at 8.

²⁷ Application of Premier for Review, filed Oct. 17, 2016, at 1-2.

²⁸ *Id.* at 11-13.

²⁹ *Id.* at 13.

³⁰ See *Reconsideration Order*, 34 FCC Rcd at 4209-10, para. 16 and nn.51-52. The Commission in the *Reconsideration Order* did, in fact, consider Premier’s evidence as to factor two of the *Rural Radio* rebuttal evidence (“the community’s specific need for an outlet for local expression separate from the urbanized area”). See *supra* note 23; *Rural Radio Second R&O*, 26 FCC Rcd at 2573-74, para. 30. Although the Commission acknowledged Premier’s evidentiary showing, it examined that showing and found that Premier failed to meet its burden of production. *Reconsideration Order*, 34 FCC Rcd at 4209-10, para. 16.

³¹ We reject, however, Premier’s mischaracterization of certain aspects of the *Reconsideration Order*. For example, Premier suggests that the Commission incorrectly required it to provide all three types of evidence listed in the *Rural Radio Second R&O* pertaining to the second *Rural Radio* factor (“the community’s specific need for an outlet for local expression separate from the urbanized area”). Second Petition at 10-11. With respect to this factor, the Commission explained that “an applicant may rely on factors such as the community’s rate of growth; the existence of substantial local government necessitating coverage; and/or physical, geographical, or cultural barriers separating the community from the remainder of the urbanized area.” In the *Reconsideration Order*, the Commission did not state or imply that all three types of evidence were required to meet the burden of production under the second *Rural Radio* factor. Rather, based on its review of the record, the Commission concluded that Premier had failed to meet its burden of production under the second *Rural Radio* factor. *Reconsideration Order*, 34 FCC Rcd at 4209-10, para. 16.

Premier also notes that the evidence supporting the second *Rural Radio* factor may include “the existence of substantial local government necessitating coverage,” whereas evidence supporting the first *Rural Radio* factor (based on the fourth factor under the third prong of the *Tuck* test) includes “whether the specified community has its own local government and elected officials.” Second Petition at n.8. Because the Commission found that Premier

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Commission to consider the comments submitted by Clatskanie’s residents, elected representatives and civic organizations,” concluding that “[t]he Commission’s continued refusal to consider these comments and to compare needs of the people of Clatskanie is arbitrary and capricious.”³²

10. Having repeatedly claimed that the staff and Commission ignored what it termed the “substantial evidence” of Clatskanie’s need for a radio transmission service,³³ Premier now asserts that it is entitled to present still more evidence. We disagree.³⁴ As noted above, Premier presented its full case to the Commission in anticipation of *de novo* review, which the Commission undertook based on the extensive record compiled in this matter beginning with Premier’s initial informal objection, filed over eight years ago.³⁵ It is long established that “[w]e cannot allow the appellant to sit back and hope that a decision will be in its favor and then, when it isn’t, to parry with an offer of more evidence.”³⁶ Finally, we are mindful that section 309(j) of the Communications Act requires us, in applying our systems of competitive bidding for broadcast construction permits, to promote, among other things, “the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays.”³⁷ To afford Premier additional bites at the evidentiary apple would further delay the provision of new radio service at Napavine, contrary to the express Congressional intent. Thus, we conclude that Premier has had multiple opportunities to provide evidence meeting its burden of production and has availed itself of those opportunities.

11. While Premier also claims the Commission did not acknowledge certain evidence it submitted earlier in this proceeding when it concluded that Premier failed to meet its burden of production under the second *Rural Radio* factor, we find such claims unavailing. Premier claims that it provided evidence under the second *Rural Radio* factor – i.e., whether Clatskanie has a specific need for an outlet for local expression separate from the Longview urbanized area. It points to “physical, geographical, or

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had met its burden of production on the first *Rural Radio* factor, Premier argues that the Commission “necessarily found that Premier had met any burden of production” with respect to local government under the second *Rural Radio* factor. *Id.* We disagree because the required evidence is different. The second *Rural Radio* factor specifies evidence of “substantial” local government that “necessitate[s]” coverage, whereas the fourth factor under the third prong of the *Tuck* test relevant to the first *Rural Radio* factor specifies only that the community has “its own local government and elected officials.” Satisfaction of the burden of production with respect to the latter does not satisfy the burden of production with respect to the former.

³² May 2017 First Petition at 10. Additionally, in its June 16, 2017, Reply to Threshold’s Opposition to the May 2017 First Petition, Premier once again accused not only Threshold, but the Bureau and the Commission of ignoring “the substantial evidence in the record demonstrating that Clatskanie is a community independent of Longview, with a need for its own radio station.” Reply at 3.

³³ See *supra* note 30.

³⁴ In its Second Petition, Premier for the first time puts forth what it claims is evidence that Clatskanie has a substantial local government and provides a Google Maps image purporting to show mountainous terrain between Clatskanie and Longview. Second Petition at 6, 16. We dismiss this purported evidence and Premier’s claims based on it because they could have been raised earlier in this proceeding, and Premier’s attempt to raise them now is untimely. See 47 CFR § 1.106(c), (p)(2). Likewise, Premier in its Second Petition attempts to raise for the first time questions about definitional terms such as the meaning and relevance of a “community’s rate of growth”; what constitutes evidence of “substantial” local government; why statements from town officials or business leaders should be considered despite the Commission’s decision in the 2011 *Rural Radio Second R&O* that it will not accept such “self-serving statement[s].” See Second Petition at 11, 13-15. As these terms were introduced in the 2011 *Rural Radio Second R&O*, such questions could have been raised earlier in this proceeding, and Premier’s attempt to raise them now is untimely. See 47 CFR § 1.106(c), (p)(2).

³⁵ Premier filed its informal objection August 27, 2012.

³⁶ *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941).

³⁷ 47 U.S.C. § 309(j)(3)(A).

cultural barriers” separating Clatskanie from Longview in its 2012 Informal Objection.³⁸ In that Informal Objection, however, Premier simply asserted that “Clatskanie is not located adjacent to or nearby another community. To the contrary, Clatskanie is a relatively isolated community.”³⁹ Mere assertions of isolation, however, do not amount to evidence of “barriers” justifying a need for its own radio station.

12. Premier repeats its claim that in its 2012 Informal Objection it provided evidence of “barriers” by asserting that the mountains surrounding Clatskanie “‘shield’ radio signals from Longview radio stations,” and that “[a]s a result, no FM radio station provides actual 60 dB μ coverage to the entire city” of Clatskanie⁴⁰ notwithstanding prior rejection of it. In the *Reconsideration Order*, the Commission explained why this purported evidence was simply not accurate, describing a staff engineering analysis showing that all of Clatskanie receives abundant radio reception service.⁴¹ In fact, the same software tools, methodology, and data used in the *Reconsideration Order* demonstrate this radio reception service includes 70 dB μ service from one of the three Longview FM stations,⁴² and 2 mV/m service from both Longview AM stations.⁴³ Moreover, 11 FM stations provide all of Clatskanie with 60 dB μ service,⁴⁴ and five AM stations provide Clatskanie with 2 mV/m daytime service.⁴⁵ Although Premier attempts to contrast the staff showing of signal coverage to Clatskanie with its own supplemental Longley-Rice analysis, the Commission has long limited the use of such supplemental showings. Citing the fact that such supplemental analyses “are inherently more complex than the standard contour prediction method and the underlying assumptions are often open to varying interpretations,” the Commission has clarified that supplemental showings are accepted only from applicants “to demonstrate compliance with the main studio rule or to demonstrate coverage of the principal community by the principal community contour, as required by the rules.”⁴⁶ Thus, the Commission’s standard methodology confirms that Clatskanie receives

³⁸ See Second Petition at 5-6 (citing 2012 Informal Objection at 9).

³⁹ 2012 Informal Objection at 9.

⁴⁰ Second Petition at 6-7, 12-13 (citing 2012 Informal Objection at 14, Exh. C). To the extent Premier claims that no Longview FM radio station provides 60 dB μ coverage to Clatskanie, as discussed below, we note that our analysis shows that station KUKN(FM), Longview, Washington, provides 70 dB μ service to all of Clatskanie. Additionally, over 50% of Clatskanie receives 60 dB μ service from station KLWO(FM), also at Longview, Washington.

⁴¹ As explained in the *Reconsideration Order*, in accordance with the Commission-prescribed methodology, the Commission determined the number of reception services in the alternative service areas using the signal strength set forth in section 73.215(a)(1) for FM stations (60 dB μ service contours), considering actual terrain, and used the 2.0 mV/m groundwave contour for AM stations, as set forth in in section 73.182(d) of the Rules. *Reconsideration Order*, 34 FCC Rcd at 4209, para. 16 n.52 (citing *Rural Radio Second Reconsideration Order*, 27 FCC Rcd at 12837-12838 (referencing the section 73.215(a)(1) FM service contour and the AM predicted or measured daytime 2.0 mV/m groundwave contour for “gain and loss area calculations”)).

⁴² We reference the stronger and smaller 70 dB μ contour because the Rules specify that an FM station must provide a minimum field strength of 70 dB μ over the principal community to be served. 47 CFR § 73.315. The 70 dB μ contour has also been used to determine whether the UASP should be triggered. See *Reconsideration Order*, 34 FCC Rcd at 4202, n. 9. Here, 100% of Clatskanie receives 70 dB μ service from station KUKN(FM), Longview, Washington.

⁴³ See *infra* notes 44-45. Section 73.182(d) of the Rules defines the primary service area for AM stations as 2 mV/m for communities with more than 2,500 people and 0.5 mV/m for communities with less than 2,500 people. Even applying the stricter 2 mV/m standard to Clatskanie, as the Commission instructed in the *Rural Radio Second Reconsideration Order*, see *supra* note 41, our analysis shows abundant service.

⁴⁴ The 11 FM stations providing 60 dB μ service to Clatskanie are KKRZ, KXL-FM, and KINK, Portland, Oregon; KTJC and KLYK, Kelso, Washington; KPPK, Rainier, Washington; KUKN, Longview, Washington; KRQT, Castle Rock, Washington; KKCW, Beaverton, Oregon; KLTH, Lake Oswego, Oregon; and KXJM, Banks, Oregon.

⁴⁵ The five AM stations providing such service are KXTG and KPOJ, both at Portland, Oregon; KEDO and KBAM, both at Longview, Washington; and KPAM, Troutdale, Oregon.

abundant radio reception service from full-service AM and FM stations licensed to Longview, Washington, as well as a total of 16 full-service AM and FM stations licensed to communities in southern Washington and northern Oregon.⁴⁷

13. Premier also claims that it provided evidence under the second *Rural Radio* factor of “the existence of substantial local government necessitating radio coverage” in its 2012 Informal Objection⁴⁸ and its 2016 AFR.⁴⁹ But, Premier merely showed that Clatskanie *has* a local government. It did not provide evidence of a “substantial” government that “necessitat[es] radio coverage.” While the *Reconsideration Order* stated that Premier did not provide evidence under the second *Rural Radio* factor that Clatskanie is growing,⁵⁰ we acknowledge that Premier did attempt to provide such evidence in its 2012 Informal Objection: an increase of 209 people over a 10-year period, resulting in a 14% increase over ten years.⁵¹ But this sole piece of evidence of what amounts to scant growth over a 10-year period is insufficient to meet Premier’s burden of production under the second *Rural Radio* factor.⁵²

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⁴⁶ *Amendments of Parts 73 and 74 of the Commission’s Rules to Permit Certain Minor Changes in Broadcast Facilities Without a Construction Permit*, MM Docket No. 96-58, Report and Order, 12 FCC Rcd 12371, 12402-03, paras. 70-71 (1997). We further note that the Commission declined to approve the use of supplemental showings “to establish city coverage from an FM allotment reference site located beyond the 70 dBu contour, as predicted by the standard contour prediction method in [47 CFR § 73.313].” *Id.* at 12402, para. 69. In this case, Premier submitted supplemental Longley-Rice showings, not as an applicant attempting to demonstrate community coverage, but rather to negate community coverage that was demonstrated using the standard contour prediction method.

⁴⁷ We note that Premier uses the Longley-Rice propagation model to generate an area map analysis of FM station coverage (60 dBμ contour coverage), therefore producing different results than we require of an applicant. 2012 Informal Objection at Exh. C. Premier, however, has failed to provide sufficient data and information that would allow us to assess the validity of its results, such as a contour analysis. *See* 47 CFR § 73.313(e).

⁴⁸ *See* Second Petition at 15 (“Premier did offer the following evidence: Clatskanie was incorporated in 1891; the city has a mayor and a city council; and the city provides police, water and sewer services.”) (citing 2012 Informal Objection at 8).

⁴⁹ *See id.* at 15 (“Commenters from Clatskanie provided additional evidence that Clatskanie is part of a fire district that includes no part of the Longview urbanized area, and a school district.”) (citing 2016 AFR at Exh. E).

⁵⁰ *See Reconsideration Order*, 34 FCC Rcd at 4209-10, para. 16.

⁵¹ *See* Second Petition at 11-12 (citing 2012 Informal Objection at 9 (comparing the 2000 Census and the 2010 Census)).

⁵² *See Verizon Tel. Cos. Et al.*, Memorandum Opinion and Order, 26 FCC Rcd 15849, 15862, para. 19 (2011) (explaining that a burden of production cannot be met by “producing just *any* evidence, no matter how unpersuasive”; rather, the evidence put forth to rebut a presumption must be “substantial, sufficient, persuasive, or exculpatory”) (citing *Harlem Taxicab Ass’n v. Nemesh*, 191 F.2d 459, 461 (D.C. Cir. 1951); *McCann v. Newman Irrevocable Trust*, 458 F.3d 281, 288 (3d Cir. 2006); *Johnson v. Shalala*, 60 F.3d 1428, 1435 (9th Cir. 1995); *Garvey v. National Transp. Safety Bd.*, 190 F.3d 571, 579 (D.C. Cir. 1999)). Moreover, we note that community change and other FM allocations cases that favorably discuss rate of growth figures typically report growth percentages much greater than 14%. *See, e.g., Burlington and Cary, North Carolina*, Report and Order, 20 FCC Rcd 10965, 10966, para. 7 (MB 2005) (population of Cary, North Carolina, tripled in 1970s and doubled in 1980s and 1990s, supporting *Tuck* showing of community independence); *Bald Knob and Greenbrier, Arkansas*, Report and Order, 19 FCC Rcd 17458, 17458, para. 3 (MB 2004) (population of Greenbrier, Arkansas, grew 43% between 1990 and 2000, supporting community change from Bald Knob, Arkansas); *Shawnee and Topeka, Kansas*, Report and Order, 19 FCC Rcd 931, 933, para. 8 (MB 2004) (tripling of Shawnee, Kansas, population since 1970, with 26.3% increase from 1990 to 2000, supported *Tuck* finding of independence from Kansas City); *St. Maries, Idaho, and Spokane, Washington*, Report and Order, 14 FCC Rcd 17012, 17020, para. 20 (MMB 1999) (“vigorous growth” of Post Falls, Idaho, of 43% between 1990 and 1996 supported *Tuck* showing of independence from Spokane, Washington).

14. In short, after full consideration of the evidence Premier presented specifically to rebut the UASP, we affirm the decision that Premier failed to meet its burden of production under the second *Rural Radio* factor.

B. The Commission Properly Concluded that Threshold Met Its Burden of Persuasion

15. We also affirm our decision, on alternative and independent grounds, that “even assuming Premier met its burden of production on all three *Rural Radio* factors . . . Threshold met its burden of persuasion and has demonstrated that Clatskanie is *not* truly independent of the Longview Urbanized Area under the first *Rural Radio* factor (“whether the community at issue is truly independent of the urbanized area”).”⁵³ To the extent Premier relies on new evidence in challenging this finding, we dismiss it on procedural grounds.⁵⁴ Premier also criticizes the *Reconsideration Order* to the extent it cites publicly available data from the City of Clatskanie web site, but the *Reconsideration Order* specifically notes that even without this data Threshold still met its burden of persuasion under the first *Rural Radio* factor.⁵⁵ In any event, we find Premier’s criticisms of the publicly available data relied on by the Commission do not upset our finding that Threshold met its burden of persuasion under the first *Rural Radio* factor.⁵⁶

16. In addition, the Commission’s reliance on urbanized area signal coverage from the Clatskanie allotment coordinates presents no issue. As the Commission has observed, the allotment

⁵³ *Reconsideration Order*, 34 FCC Rcd at 4210, para. 17.

⁵⁴ In addressing the second prong of the *Tuck* test (“the size and proximity of the proposed community of license relative to the central city of the urbanized area”), the *Reconsideration Order* explained that the distance between the city centers of Clatskanie and Longview is only 15 miles via US Route 30. *See Reconsideration Order*, 34 FCC Rcd at 4210, para. 18. In its Second Petition, Premier does not question the validity of this distance. Second Petition at 8-9. Rather, it attempts for the first time to introduce evidence it claims shows the two city centers are isolated from one another despite this short drive. *Id.* We dismiss this purported evidence and Premier’s claims based on it because they could have been raised earlier in this proceeding, and Premier’s attempt to raise them now is untimely. *See* 47 CFR § 1.106(c), (p)(2).

⁵⁵ Second Petition at 7-8. *See Reconsideration Order*, 34 FCC Rcd at 4204, note 64.

⁵⁶ In assessing the eight factors under the third prong of the *Tuck* test (“independence of the proposed community of license from the urbanized area”), the Commission concluded that some factors tended to support the position that Clatskanie is independent from Longview while other factors did not. *See Reconsideration Order*, 34 FCC Rcd at 4211, para. 19. With respect to factor six (“whether the community has its own commercial establishments, health facilities, and transportation systems”), the Commission explained that only approximately 13 local for-profit businesses were listed in Clatskanie and Clatskanie’s website listed health facilities located only in Longview and in Astoria, Oregon. *See id.* In its Second Petition, Premier corrects the record by noting that Clatskanie’s website now lists three health facilities, including one in Clatskanie. Second Petition at 7-8. In the *Reconsideration Order*, the Commission acknowledged that Premier offered some evidence in support of the position that Clatskanie is an independent community under the third prong of the *Tuck* test, but the Commission found that the record overall was insufficient to overcome the finding under prongs one and two. *See Reconsideration Order*, 34 FCC Rcd at 4211, para. 19. Premier’s minor correction to the record evidence on the location of health facilities, which addresses just one piece of evidence in one factor of an eight-factor analysis under the third prong of the *Tuck* test, does not alter the Commission’s ultimate conclusion.

In addition, in responding to Premier’s claim that the Washington-Oregon state line makes Clatskanie geographically distinct from Longview, the Commission in the *Reconsideration Order* noted that the U.S. Census Bureau designated the urbanized area here as the state-hyphenated Longview, *Washington-Oregon* urbanized area. *See Reconsideration Order*, 34 FCC Rcd at 4210, note 63. While Premier in its Second Petition notes that the vast portion of Columbia County, OR (where Clatskanie is located) lies outside of the Longview, WA urbanized area, Second Petition at n.3, this does not undermine the Commission’s decision that a state-line standing alone is not a geographic barrier between two communities, as supported by the U.S. Census Bureau’s designation of state-hyphenated areas. *See Reconsideration Order*, 34 FCC Rcd at 4209, note 51 and 4210, note 63.

coordinates form the basis for determining proper FM spacing and community coverage and establish core rights for auction participants. While Premier argues that we should examine whether it is feasible for Threshold to build facilities at the allotment coordinates,⁵⁷ we find that construction at the allotment coordinates is not infeasible. Premier cites to its Response to Bureau's 307(b) Analysis as "Premier's evidence showing that it is not feasible to build a tower at the Clatskanie reference coordinates."⁵⁸ We disagree. That response merely argued that the site at that time was forested and did not have electric service.⁵⁹ The need to clear a forested site and arrange for electric service, however, does not preclude the construction of a radio station. Accordingly, we affirm our decision, on alternative and independent grounds, that even assuming Premier met its burden of production on all three *Rural Radio* factors, Threshold met its burden of persuasion under the first *Rural Radio* factor.

IV. ORDERING CLAUSE

17. For the foregoing reasons, and pursuant to sections 4(i), 303(r), and 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 405(a), and section 1.106 of the Commission's rules, 47 CFR § 1.106, Premier's Second Petition for Reconsideration **IS DISMISSED IN PART AND DENIED IN PART**.⁶⁰

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁵⁷ See Second Petition at 18.

⁵⁸ *Id.*

⁵⁹ Premier Response to Bureau's 307(b) Analysis, Engineering Statement at 4-5.

⁶⁰ On June 3, 2022, Premier filed a Motion to Supplement Second Petition for Reconsideration, along with a proposed Supplement to Second Petition for Reconsideration, contending that because the Census Bureau in March 2022 abolished the "urbanized area" classification, dividing geographic areas only into "urban areas" and "rural areas," this recent decision "directly affects" our use of the UASP. Motion to Supplement Second Petition for Reconsideration at 1. We deny the Motion to Supplement because it has no bearing on this case. The UASP established by the Commission in the *Rural Radio Second R&O* requires assessment of principal community-strength coverage over an "urbanized area," which the Commission found were populous areas to be distinguished from "smaller communities and rural areas" that received fewer radio stations. *Rural Radio Second R&O*, 26 FCC Rcd 2556 at paras. 19-29. The fact that the Census Bureau retired the urbanized area classification beginning with the 2020 Census does not undermine the applicability of the UASP or its reliance on urbanized areas. The Census Bureau published urbanized areas in connection with the 2010 Census, which we rely on here. We will continue to rely on urbanized area classifications based on the 2010 Census.