

*Before the*  
**FEDERAL COMMUNICATIONS COMMISSION**  
**Washington, DC 20554**

In the Matter of	)	
	)	
Policies to Promote Rural Radio Service	)	
And To Streamline Allotment and	)	MB Docket No. 09-52
Assignment Procedures	)	
	)	

**COMMENTS OF**  
**PROMETHEUS RADIO PROJECT AND**  
**NATIONAL FEDERATION OF COMMUNITY BROADCASTERS**

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## SUMMARY

Prometheus and NFCB are pleased with the Commission's recognition that its current distribution process for broadcast frequencies pursuant to 47 U.S.C. §307(b) requires fundamental changes. A §307(b) priority based on ensuring that any identifiable community is able to receive "first local transmission" is inappropriate for a mature service. This preference is especially inappropriate since the current implementation of §307(b) allows an increase of service to urban populations, which already likely receive a great deal of broadcast service. Moreover, reliance on the current analysis under Section 307(b) in allocating licenses prevents the Commission from fulfilling its goals of localism and diversity.

The Commission's current implementation in allocating these available channels in both the commercial and noncommercial band encourages abuse and runs contrary to its goals to award licenses that will promote diversity and localism. For example, Prometheus, in an independent analysis of community of license changes, documents that of the changes in communities of license between January 19, 2007 to July 8, 2008, none of the licensees claiming the first local transmission service actually had a studio located within their community of license. This abuse is especially harmful since radio continues to be a vital asset both for broadcasters and listeners. Thus, it is especially imperative that the Commission allocate valuable broadcast spectrum with an eye towards its statutory mandate to serve the public interest.

Low power stations and local communities are especially at risk when full-power stations decide to move their community of license from one community into another community, which is closer to a larger, urban area. These full-power stations rely on 47 U.S.C. §307(b) to justify the move. In some cases, the full-power station moves into a community already being serviced by a low power station, which faces the threat of being taken off the air by the full-power station.

Low power stations often play important roles in local communities, providing localized service that full-power stations do not. In fact, the goal of LPFM service was to “create a class of radio stations designed to serve very localized communities or underrepresented groups within communities.” Report and Order, *Creation of Low Power Radio Service*, 15 FCCRcd 2205, 2208 (2000). LPFM stations serve small neighborhoods, isolated rural areas, or possibly small subsets of urban cities themselves. While the Commission has recently taken action to ensure that low power stations are not knocked off the air by the full-power station, the current change in the community of license process pursuant to Section 307(b) is still subject to abuse and does not further or take into account the Commission’s statutory goal of localism and service to the actual community of license.

Because of these flaws, Prometheus and NFCB encourage the Commission to adopt an approach which recognizes that commercial licensees are most likely intending to serve the most populous community in their service area and not the stated community of license. Prometheus and NFCB applaud the Commission’s recognition that a station proposing service that will reach an urbanized area is likely to offer service primarily to that area, and therefore should not receive a preference for service to a different community. While Prometheus and NFCB agree with the Commission’s proposal, Prometheus and NFCB ask the Commission to go further. Specifically, Prometheus and NFCB urge that the Commission assume the local community or urbanized area within a primary service contour with the greatest number of residents is the actual community of license.

To the extent flexibility is needed for those licensees that actually wish to serve a community that is not the most populated community in its service area, Prometheus and NFCB encourage the Commission to establish a very narrow test to override the presumption of service

to the most populous community. Specifically, Prometheus and NFCB propose that the population of the community of license must account for at least ten percent of the total population within the 60 dBu service contour. Also, Prometheus and NFCB propose that localism requirements be placed on licensees that claim this preference, while serving a population largely outside of its proposed community of license.

In addition, Prometheus and NFCB urge the Commission to immediately implement the Tribal Priority, rather than waiting for all questions in the rural radio proceeding to be resolved. Prometheus and NFCB consider the Tribal Priority an appropriate and welcome first step in the implementation of the Commission's commitment to recognize, through its policies, the inherent sovereignty of Indian Tribes.

Finally, Prometheus and NFCB suggest the Commission look at its §307(b) analysis more broadly. The current rulemaking does not address some of the abuse that occurs in the noncommercial band. Similar to the commercial band, the noncommercial allocation system does not place any importance on the communities served and simply "counts ears" to determine which proposed licensee will serve more individuals. For this reason, the Commission should open a proceeding that will consider the flaws in the implementation of §307(b) in the noncommercial service and throughout radio more generally.

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Media Access Project, on behalf of Prometheus Radio Project (“Prometheus”) and the National Federation of Community Broadcasters (“NFCB”), respectfully submits these Comments in response to the Commission’s *Notice of Proposed Rulemaking* seeking comment on ways to ensure that the Commission’s statutory goal of distributing radio licenses is fair and equitable. *See In the Matter of Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, 24 FCCRcd 5239 (2009).

In allocating licenses, the Commission has relied on its traditional interpretation of Section 307(b). However, the current §307(b) analysis is inappropriate for a mature service, especially in urban areas where the population in question already likely receives a great deal of broadcast service. To ensure that the Commission fulfills its goals under §307(b), as well as furthering its statutory goal to promote localism and diversity, Prometheus and NFCB encourage the Commission to view the §307(b) analysis based on the station’s intended service to the community of license, rather than based on whether the station’s intention is to serve a large, urban area. Prometheus and NFCB also ask the Commission to immediately implement the

Tribal Priority, rather than waiting for all questions in the rural radio proceeding to be resolved. Finally, Prometheus and NFCB urge the Commission to begin a rulemaking that will address the issues and abuses related to §307(b) in both the commercial and noncommercial band.

**I. THE CURRENT IMPLEMENTATION OF §307(b) IN THE COMMERCIAL BAND DOES NOT PROMOTE SERVICE TO COMMUNITIES OF LICENSE AND HARMS LOW POWER RADIO STATIONS.**

**A. Background and Introduction.**

The FM band has proven to become a valuable resource, which various parties - both new entrants and incumbents - are attempting to access, as evidenced by recent history at the Commission. *See e.g.*, Report and Order, *In the Matter of Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, MB Docket No. 07-172 (rel. June 29, 2009) (adopting rules allowing AM stations to retransmit signals on eligible FM translator stations); Miller Communications, Inc., *et al.*, *Petition to Allow FM Translator Licensees to Locally Originate Programming*, RM-11331 (April 27, 2006); Comments of Prometheus Radio Project *et al.*, *In the Matter of Creation of a Low Power Radio Service*, MM 99-25 (Aug. 2, 2005) (seeking *inter alia* the creation of spectrum for LPFM service); Prometheus Radio Project *et al.*, *Emergency Petition for Freeze on Pending FM Translator Applications*, MB 99-25, AUC-03-83-B (March 9, 2005) (notifying the Commission of the illegal speculation of translator licenses). The Commission itself has recognized that “[d]emand for radio spectrum is, if anything, increasing.” Third Report and Order and Second Further Notice of Proposed Rulemaking, *Creation of a Low Power Radio Service*, 22 FCCRcd 21912, 21933 (2007) (“*LPFM 2007 Order*”).

In return for the use of the valuable resource, broadcasters who are fortunate to have access to spectrum are required to serve their communities based on the long-standing principle

that broadcasters serve as trustees for the exclusive use of limited spectrum. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380 (1969). Thus, in allocating the spectrum, the Commission is required to ensure that the grant of a license will serve the public interest. *See* 47 U.S.C. §307(a). The Commission is also required to allocate licenses in a “fair, efficient, and equitable” manner, 47 U.S.C. §307(b), so that all communities have the opportunity to receive and transmit service. However, increasing evidence demonstrates that the current implementation of Section 307(b) is a perversion of its intention to provide reasonable distribution of broadcast services, while at the same time harming the Commission’s goal to ensure that licensees are serving the public interest, especially with respect to the licensee’s community of license.

Section 307(b) provides that “[i]n considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.” 47 U.S.C. §307(b). Currently, in the commercial band, the Commission’s public interest analysis pursuant to Section 307(b) focuses on 4 separate priorities:

- (1) First full-time aural reception service;
- (2) Second full-time aural reception service;
- (3) First local transmission service; and
- (4) Additional services.

*In re: Applications of Richard and Faye Tuck, Inc.*, 3 FCCRcd 5374, 5376 (1988). The second and third priorities are given equal weight. *Id.* The Commission relies on an eight-part test under *Tuck* to determine how to implement priority (3). The fourth priority, which has been held to include other public interest factors, “encompasses any other factors that the Commission may

take into consideration.” *In re Quorum Radio Partners of Va., Inc.*, 23 FCCRcd 857, 860 (2008).

**B. Community of License Changes Thwart the Intent of §307(b).**

The current implementation of §307(b) has resulted in unintended consequences with respect to community of license changes. In particular, application of the Commission’s *Tuck* policy relating to change in community of license (“CCOL”) applications has resulted in a perversion of the intent of Section §307(b). The *Tuck* policy is intended to ensure that a broadcaster’s move to a new community of license will not result in service to an already served urbanized area. *See Faye & Richard Tuck, Inc.*, 3 FCCRcd 5374 (1988). In other words, the *Tuck* policy is intended to prevent a rural to urban migration by a broadcaster. However, there is evidence to indicate the *Tuck* policy is failing to serve its intended purpose, while at the same time harming localism and diversity.

In other proceedings, a number of parties have documented that broadcasters have previously exploited the CCOL procedure and *Tuck* policy to move closer to major metropolitan areas, under the pretense that the broadcaster intends to provide the community that it is moving into with its first local transmission outlet. *See, e.g.*, Comments of REC Networks, MB Docket No. 05-210 (Sept. 29, 2005); Comments of Charles Crawford, MB Docket No. 05-210 (Sept. 30, 2005) (“Crawford Comments”); Comments of William B. Clay, MB Docket No. 05-210 (Sept. 14, 2005); Reply Comments of Prometheus Radio Project, MB Docket No. 05-210 (Nov. 1, 2005).

For example, one station was granted a CCOL from Anniston, Alabama to College Park, Georgia on the basis that the broadcaster would be providing first local service to College Park. *See Crawford Comments at Exhibit 21.* As it turns out, College Park is within the Atlanta

listening area. There are numerous, similar examples. *See* Crawford Comments. Consequently, in most cases, claiming first local transmission service to the community of license (“COL”) is simply the vehicle to serving a larger urban area,<sup>1</sup> and the COL does not benefit from having its own local voice.

In fact, as William Clay reports in his comments in this proceeding, an analysis of every CCOL granted from January 19, 2007 to July 8, 2008 reveals that 50 percent of the new communities of license comprised two percent or less of the total population served by the station. Furthermore, Prometheus conducted an independent analysis of community of license changes between January 19, 2007 to July 8, 2008, where the licensee claimed first local transmission service for a Section 307(b) priority preference. The analysis found that none of the licensees claiming the first local transmission service actually had a studio located within their COL. *See* Attachment A. Although locating a studio within the COL is not required, this is nonetheless a useful indicator of a station’s relationship (or lack thereof) to its community of license.

A large number of CCOL applications claim a dispositive preference pursuant to Priority (3) on the claim that the broadcaster will be providing the community with its first local transmission service. These types of moves especially harm localism and diversity since the relocations approved under the current *Tuck* policy are generally thinly veiled attempts at entry into lucrative urbanized areas from smaller rural areas. Consequently, when stations move out of smaller communities, those communities lose their existing local outlet.

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<sup>1</sup> Mr. Crawford notes that of the 54 known reported decisions that applied the *Tuck Policy*, all but one of those CCOL applications were granted on the claim that the broadcaster would be providing the community with first local transmission service. *See* Comments of Charles Crawford 10-15.

The unintended consequences of the current interpretation of 307(b) were exacerbated when the Commission adopted a streamlined procedure for change in community of license applications. *See* Report and Order, *In the Matter of Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, 21 FCCRcd 14212 (2006). In 2006, the Commission adopted a streamlined procedure for requests for a change of community of license by AM and FM broadcast stations. *See id.* Specifically, the original two-step process, which involved a rule making process before being able to file a CCOL application, was replaced with a one-step CCOL application process, on a first-come, first served basis. *Id.* at 14213-14. This new procedure eliminated many steps, such as an opportunity for public scrutiny. Thus, while the new streamlined procedure may have alleviated certain burdensome administrative procedures, the new procedure, coupled with the *Tuck* analysis, has made it easier for full-power broadcasters to exploit the CCOL process for private, economic benefit at the expense of their duty to service the public. Consequently, the Commission has made it easier for broadcasters to abandon small or rural communities to move towards larger urban communities and, in some cases, displace or encroach upon LPFM stations as outlined below.

**C. Low Power Stations And Local Communities Are Threatened By The Current Interpretation And Application Of Section 307(b).**

LPFMs (and as a result, the local communities they serve) are also threatened by CCOL applications. For example, in 2005, an LPFM station was faced with a full-power station changing its community of license, which would have forced the LPFM station off the air. *See* Josh Sanburn, *Community Radio Lobbies to Stay Alive*, THE FINANCIAL EXPRESS,

<http://www.financialexpress.com/news/Community-radio-lobbies-to-stay-alive/141590/0> (June 13, 2005).<sup>2</sup>

In light of the new streamlined procedure, Prometheus provided the Commission with a list of threatened stations. *See* Prometheus Radio Project Letter, MM Docket No. 99-25 (April 26, 2007); Prometheus Radio Project, Notice of Oral *Ex Parte* Presentations, MM Docket No. 99-25 (March 5, March 8, May 18, June 1, June 14 and June 19, 2007). Prometheus urged the Commission to fulfill its statutory obligation to promote localism and diversity by preserving and protecting LPFM stations which are inherently local in nature. *Id.* Further, the Commission

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<sup>2</sup> Josh Sanburn reported that:

For most of his working life, Jim Price has been helping others establish community radio stations in every state of the country. But now, as president of his own station in Ringgold, Ga., he could soon be out of a job.

Price runs WBFC-LP in northern Georgia, a low-powered radio station that serves his community through broadcasting local Southern gospel music and public service announcements.

But about 60 miles north of Ringgold in McMinnville, Tenn., Clear Channel Communications, which owns hundreds of radio stations across the country, is waiting for an application to go through the Federal Communications Commission that would allow it to begin broadcasting on Price's frequency.

“They moved in on the channel that I chose back in 2000,” Price said. “Two of us can’t operate on the same channel. That is the threat, and I’ve got nowhere to go.” For Price to continue broadcasting, he would have to reapply for an LPFM frequency and possibly move his station elsewhere.

Price, who established his LPFM station in March 2004, is among many local radio presidents, broadcasters and producers who are feeling the heat of conglomerates like Clear Channel.

itself noted that it had identified approximately 40 LPFM stations that could be displaced.<sup>3</sup>  
*LPFM 2007 Order*, 22 FCCRcd at 21938.

One example of LPFM encroachment enabled by the new streamlined procedure is the case of KDRT-LP. In 2007, full power station KMJE requested a CCOL to move from Gridley, California to Woodland, California. This move would have interfered with LPFM station KDRT-LP's signal, and the level of interference would have caused KDRT-LP to cease operations and be removed from the air to keep it from interfering with KMJE.

As with all applications for COL changes, KMJE certified that it had attached "an exhibit containing information demonstrating that the proposed community of license change constitutes a preferential arrangement of station assignments under Section 307(b) of the Communications Act of 1934, as amended (47 U.S.C. Section 307(b))." *See Results of Chico Licensee, LLC, KMJE, Gridley, CA, Exhibit 32, FCC Form 301, Section III-B, Question 18, Summary of Proposal; Preferential Arrangement of Allotments Under Section 307(b)* at [http://fjallfoss.fcc.gov/prod/cdbs/forms/prod/getattachment\\_exh.cgi?exhibit\\_id=613268&formid=301&q\\_num=532](http://fjallfoss.fcc.gov/prod/cdbs/forms/prod/getattachment_exh.cgi?exhibit_id=613268&formid=301&q_num=532). In this attachment, KMJE argued that since the COL change would "enable KMJE to provide a second local (transmission) service to the much more populous community of Woodland," it deserved preferential arrangement of allotments under Section 307(b). *Id.* KMJE also claimed priority 4 due to the fact that it would serve a "substantial net gain in the population." *Id.*

The case of KDRT-LP highlights the ineffectiveness with which §307(b) priorities rate local service. While KDRT could boast over *693 locally produced* public affairs shows which

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<sup>3</sup> In response to the Commission's commitment to localism and diversity and its concern that LPFM stations could face displacement, the Commission modified the interference rule and adopted waiver policies to save LPFMs from being taken off the air and to promote and preserve the public interest. *See generally, LPFM 2007 Order.*

were broadcast between January 2005 and April 2007, with over 400 studio guests ranging from Mayors, UC Davis Chancellors, three different bestselling authors, a Colonel in the US Air Force, City Managers, City Council candidates, world-renowned scientists and many local heroes ranging from homeless activists to dance team captains, KMJE only had to show an increase in population reached. The Commission eventually modified its rules and opened the previously unavailable 95.7 frequency for KDRT-LP, at great expense to their limited resources.

**II. A SECTION 307(b) PREFERENCE SHOULD BE BASED ON ACTUAL SERVICE TO THE COMMUNITY OF LICENSE.**

Based on this experience, the Commission has correctly recognized that the implementation of §307(b) relies, to the detriment of the public interest, a great deal on the number of people receiving service. *See* 24 FCCRcd at 5244 (“reliance on the difference in populations receiving new service in already abundantly served areas may have an adverse impact on the fair distribution of service in new AM and FM station licensing and may be inconsistent with statutory and policy goals”). Importantly, the Commission has noted that in “the case of competing Priority (3) applications, awarding a dispositive preference based on the population of a community located in or adjacent to an Urbanized area may be antithetical to the public interest.” *Id.*

The Commission has suggested a more thorough evaluation of the intended reception area before awarding a preference. The Commission has suggested it “should place greater emphasis on the scope of reception service to be provided to an Urbanized Area, rather than using the reception service analysis merely as a stepping-stone to a potentially dispositive *Tuck* analysis.” *Id.* Specifically, the Commission has tentatively concluded:

that any new station proposal that would be located within an Urbanized Area or would place a daytime principal community signal over 50 percent or more of an Urbanized Area, or that could

be modified to provide such coverage based on existing spectrum availability or rule-compliant power or pattern modifications from a site covering the same proposed community of license, should be deemed a proposal to serve the Urbanized Area rather than the proposed community. In such an instance, absent effective rebuttal of the presumption, we would not award a Priority (3) dispositive preference.

*Id.* In other words, the Commission will focus on determining intended service to the Urbanized Area to decide whether a Section 307(b) preference should be awarded. *Id.* at 5244, 5247.

Prometheus and NFCB applaud the Commission's recognition that a station proposing service to an urbanized area is likely to offer service primarily to that area, and therefore a station should not receive a preference for service to a different community pursuant to 307(b) under these circumstances. However, while Prometheus and NFCB believe that the proposed change moves in the right direction, it does not go far enough. Instead, Prometheus and NFCB urge the Commission assume that the local community or urbanized area within a primary service contour with the greatest number of residents is the community of license.

The Commission has asked whether other criteria should be considered in evaluating a proposed CCOL. *Id.* at 5247. Prometheus and NFCB generally favor the type of approach submitted by William Clay in this proceeding. Mr. Clay's proposal recognizes the reality that stations serve the largest population centers within their service areas, rather than serving the community of license the station selected to obtain a §307(b) preference. Specifically, the Commission should base a Priority (3) preference based on the relative size of the rural community of license within the total service area, not on the basis of the percentage of urban area covered.

For example, when reviewing a new station or community of license change proposal, the Commission could presume that the community with the largest population is the community of

license, and then determine whether a preference should be awarded on the presumed community of license. Another way of looking at this is by considering the rank of the COL among the other communities in the service area. In this case, no preference should be given unless the listed COL in the application ranks the highest in population served since the presumption would be that the applicant does not intend to serve the listed COL. Essentially, this type of framework puts a priority on the community of license and service to that community, rather than focusing on the urbanized area.

**III. THE COMMISSION SHOULD ADOPT A REBUTTABLE PRESUMPTION BASED ON LOCALISM, RENDERING THE *TUCK* ANALYSIS INVALID.**

Of course, any applicant should be provided an opportunity to rebut the presumption that the applicant intends to serve the largest community within its proposed contour. The presumption should only be rebuttable if the applicant can demonstrate that its service to the specified COL will be distinguishable from the services performed for the other communities to which the licensee will be broadcasting. Thus, for a broadcast station that serves populations outside of its community of license, the station must demonstrate particular service to its specified community of license.

To that end, Prometheus and NFCB propose that the population of the COL must account for at least ten percent of the total population within the 60 dBu service contour, to ensure that egregious abuse does not take place. Prometheus and NFCB propose also that there be localism requirements placed on licensees that claim this preference, while serving a population largely outside of its proposed COL. Specifically, the Commission should require the licensee (1) to produce eight hours of locally-originated content per day and (2) to maintain the location of the main studio within the community of license. This is consistent with prior Commission precedent.

For instance, the Commission has established already other priorities when considering allowing a full-service station to change its community of license. *See Memorandum Opinion & Order, Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCCRcd 7094, 7097 (1990). Most notably, “a proposal which would reduce the number of communities enjoying local service is presumptively contrary to the public interest.” *Id.* That is, the “public has a legitimate expectation that existing service will continue, and this expectation is a fact we must weigh independently against the service benefits that may result from reallocating a channel from one community to another....” *Id.* Thus, full-service stations should not automatically receive a change of community of license when requested.

Full-service stations are already obligated to make a §307(b) showing, and the rebuttable presumption merely ensures that such a showing does in fact reflect a benefit to the public. Moreover, pursuant to the fourth factor, the Commission can consider whether the applicant will provide locally originated programming to determine whether, pursuant to Section 307(b), the community would benefit from the full-power service. While there currently may not be any express requirement that a station applying for a change in its community of license or a new licensee demonstrate that it provides such programming, the rebuttable presumption allows a station to accept this voluntary obligation to ensure that the COL is served. A requirement to serve the local community by providing local programming recognizes that Congress's decision to license frequencies to local communities was to ensure that each community was provided a broadcast outlet for local expression. The presumption assures that communities will not be stripped of a service that caters to the community.

In addition to allowing an applicant to rebut the presumption, the Commission should ensure that applicants maintain their commitment to “local service” claims by requiring applicants to adhere to certain criteria. For example, applicants should not be able to later make technical changes that will lower coverage to its COL. Further, the Commission should continue to adopt measures that will save communities from losing their local outlet for expression. Thus, Prometheus and NFCB agree with the Commission that no COL change should be allowed if it would result in areas with no or only one reception service. *See* 24 FCCRcd at 5287.

Finally, with a shift in the Commission’s framework in applying the §307(b) analysis, the *Tuck* analysis no longer retains any viability. Its initial purpose was to serve as a metric to deter abuse of the allocation process. However, the Commission has correctly recognized that abuse of the process remains. Additionally, the *Tuck* analysis does not provide any means of ensuring that the licensee will actually serve its COL.

#### **IV. THE COMMISSION SHOULD ADOPT A TRIBAL PREFERENCE.**

The Commission has also requested comment on a proposed new priority in FM allotments, AM filing window applications and NCE FM filing window applications for federally recognized Tribes, Tribal consortia, Tribal members, and entities controlled by Tribes or Tribal members (“Tribal Priority”). Prometheus and NFCB commend the Commission for this step and await future efforts to improve telecommunications, and particularly radio service, in Tribal lands. Prometheus and NFCB consider the Tribal Priority an appropriate and welcome first step in the implementation of the Commission’s commitment to recognize, through its policies, the inherent sovereignty of Indian Tribes.

As discussed at greater length in the comments submitted by Native Public Media, a Tribal Priority does not rely on racial or ethnic identification, but rests on the inherent sovereignty of Indian Tribes, as well as the responsibility of the federal government to honor its trust relationship with Tribes as domestic dependent nations. Given the complexity and likely duration of the larger rural radio, Prometheus and NFCB urge the Commission to immediately implement the Tribal Priority, rather than waiting for all questions in the rural radio proceeding to be resolved.

**V. IN ADDITION TO THE CURRENT PROPOSED MODIFICATIONS, THE IMPLEMENTATION OF SECTION 307(b) IN BOTH THE COMMERCIAL AND NONCOMMERCIAL CONTEXT SHOULD BE MORE BROADLY EXAMINED.**

The proposed modifications to the Commission's current implementation of §307(b) are a welcome proposal to curb some of the most serious abuses in the application of Section 307(b) to commercial licensees. However, NFCB and Prometheus wish to point out that abuse of §307(b) is not limited to the commercial sector. Moreover, the broader problems with §307(b) would most likely be fixed with a more sweeping review and consideration of the underlying manner in which §307(b) is implemented. While the Commission's historic considerations of §307(b) were appropriate when they were adopted, when radio was still a new service, changes over time in the Commission's other rules, and most important the maturation of the service, dictate that a new underlying approach is in order.

While some immediate steps arising from this proceeding are appropriate, Prometheus and NFCB recommend a separate, broader proceeding considering a revision in how §307(b) is analyzed altogether. Specifically, the Commission should turn to its long-term policy goals of localism and diversity in granting new radio licenses and eschew sole reliance on the efficiency approach that has guided its work in the past. While considering service to unserved geographic

regions may have been appropriate in the past, fair distribution of service in the modern context must be reexamined.

**A. Abuse of §307(b) Occurs in the Noncommercial Educational Service.**

Although the Commission has not considered the effect of the current application of §307(b) on the Noncommercial Educational (“NCE”) service, Prometheus and NFCB encourage the Commission to also open a proceeding to consider allotment procedures in the NCE service. Currently, the §307(b) process in the NCE service is, in some ways, even more subject to games and perverse incentives than the commercial service. In 2000, the Commission modified its implementation of §307(b) away from the approach used in the commercial service at the same time that it abandoned comparative hearings in favor of a point system. *See Report and Order, Reexamination of the Comparative Standards for Noncommercial Educational*, 15 FCCRcd 7386 (2000). The Commission concluded that §307(b) would be implemented through a threshold determination of which noncommercial applicant provided first or second noncommercial service to more people, and adopted minimum levels of populations reached to ensure that the differences among applicants would be significant.

However, the new system does not place any importance on the communities served and simply “counts ears” to determine which proposed licensee will serve more individuals. Because NCE applicants design their proposed service areas in a fluid environment, they are able to craft very ingenious proposals to maximize the listeners served, even when it makes little sense as a matter of designing an audio service. Applicants can also manipulate the §307(b) preference to gain a bargaining chip, without intending to serve the community of license or build the facilities specified in their application.

For instance, an applicant is able to evade the §307(b) restriction by pressuring other mutually-exclusive applicants to settle prior to receiving its §307(b) preference. Specifically, an applicant proposes a service area that bridges both a densely populated area and a much less populated area. By proposing a service area that includes a geographic area with a significant “under-served” population, it is able to claim a first local service sufficient to win under §307(b). However, rather than simply awaiting its victory under §307(b), the applicant seeking to evade the §307(b) obligation can pressure mutually exclusive applications to settle. When the other mutually exclusive applications settle, the tentative licensee that claimed §307(b) is able to receive a license free of any restriction to actually construct the large station. It is much less expensive for them to offer to compensate other applicants for their costs than it is to actually construct an undesirable station. In addition, it can influence other applicants that are likely to lose anyway to avoid its own obligations to the public interest.

This almost happened in a situation currently pending in Troy, NY. Here, the tentative licensee, with an application located in Esperance, NY offered approximately \$10,000 to an applicant within their MX group in Troy, NY for the withdrawal of the Troy group’s application. The Esperance station would serve a much smaller population than the proposed station in Troy, but if the Esperance group succeeded in buying out its competition, there would be nothing to hold the Esperance group from moving their proposed facility to Troy, or any other geographic area covered by that MX group. The Troy applicant did not accept the offer, instead choosing to wait for the 307(b) process to run its course.

In this instance, the Troy group was a non-profit organization formed in 1980 “to address common needs of nonprofit organizations providing electronic media programs and services to artists, organizations and the general public in areas including, but not limited to, production,

distribution, exhibition, research, preservation, appreciation, and to further development of this field.” See Application of Pax et Bonum, *Exhibit 12* at [http://fjallfoss.fcc.gov/cgi-bin/ws.exe/prod/cdbs/forms/prod/cdbsmenu.hts?context=25&appn=101213039&formid=340&fac\\_num=175490](http://fjallfoss.fcc.gov/cgi-bin/ws.exe/prod/cdbs/forms/prod/cdbsmenu.hts?context=25&appn=101213039&formid=340&fac_num=175490). On the other hand, the winning applicant had not been an incorporated entity for two years, but claimed the Established Local Applicant point without any proof that it had even been an organized group for two years. See Application of Media Alliance, *Exhibit 2* at [http://fjallfoss.fcc.gov/prod/cdbs/forms/prod/getattachment\\_exh.cgi?exhibit\\_id=553608&formid=340&q\\_num=5010](http://fjallfoss.fcc.gov/prod/cdbs/forms/prod/getattachment_exh.cgi?exhibit_id=553608&formid=340&q_num=5010). The case of Troy, NY highlights the ineffectiveness with which §307(b) priorities rate local service in the NCE band and demonstrates the need for the Commission to also review and revise §307(b) procedures in the NCE band.

As stated earlier, the §307(b) process in the NCE service is, in some ways, even more subject to abuse incentives than the commercial service. Under the current system, an NCE FM applicant is eligible to receive a Section 307(b) preference if it would provide a first or second reserved band channel NCE aural service to at least ten percent of the population (in the aggregate), within the proposed station’s service area, provided that the population served is at least 2,000 people. See 47 C.F.R. § 73.7002(b). If only one applicant qualifies for a “fair distribution” preference, the preference is dispositive. If more than one applicant in a mutually exclusive group qualifies for the preference, the Commission compares each applicant’s first service population coverage totals. An applicant will receive a dispositive fair distribution preference by proposing a first NCE aural service to at least 5,000 more potential listeners than the next highest applicant’s first service total. If no applicant is entitled to a first service preference, the Commission considers combined first and second NCE aural service population totals and applies the same 5,000 listener threshold. *Id.*

When it adopted this new system, the Commission did not conduct an extensive analysis of its decision to abandon a more detailed factual finding about the relative need of various communities. It justified its decision by saying, the “first service/second service type of analysis proposed, while derived from commercial broadcasting, is more readily adapted to an NCE point system, and more consistent with our ongoing goal to evaluate applications quickly, with minimal burden on applicants and on the staff.” *See Report and Order, Reexamination of the Comparative Standards for Noncommercial Educational*, 15 FCCRcd 7386, 7395 (2000). However, this emphasis fails to promote the Commission’s goals of localism and diversity.

**B. Defects in a Purely Numerical Approach and Emphasis on Unserved Listeners.**

The new system does not place any importance on the communities served and simply “counts ears” to determine which proposed licensee will serve more individuals. Because NCE applicants design their proposed service areas in a fluid environment, they are able to craft ingenious proposals to maximize the listeners served, even when it makes little sense as a matter of designing an audio service. For example, a potential applicant that identifies a clear, but small, geographic community and proposes a service contour well-suited to that community, will lose out to a proposal that is simply large, but has no thoughtful connection between the service proposed, the character of the licensee and the community in question. This is particularly unfortunate since prior to 2000, the primary factor which the Commission used to choose among NCE licensees was “the extent to which each of the proposed operations will be integrated into the overall educational operation and objectives of the respective applicants.” *See New York University* 10 Rad. Reg. 2d 215 (1967) cited in Further Notice of Proposed Rulemaking,

*Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 13 FCCRcd 21167, 21168 (1998).<sup>4</sup>

An emphasis on numbers alone is problematic in the NCE service, whose goals are to extend beyond maximizing revenue toward provision of niche content, unserved communities, linguistic minorities and rural areas. In fact, Congress required the Commission to reserve some channels in the FM service for educational, instructional, and cultural purposes. By focusing on the educational nature, noncommercial radio allows time for thoughtful attention to voices and discourse that may not render significant economic gain. Simply focusing on the population served dilutes the notion of placing value in educational programming.

Beyond the flaws in implementing the system as the Commission intends it to be implemented, there are also opportunities for abuse that circumvent the Commission's rules. Because the Commission grants a preference to a station based on the size of the population served, it requires a potential licensee to construct the station as built in order to obtain a §307(b) preference. An applicant is not supposed to propose a large station, win via §307(b) and then reduce the size of the station when it is actually built. However, in some cases, this is exactly what happens.

Moreover, even if the larger applicant did not circumvent the §307(b) obligation, the victory of the station that serves more unserved listeners is often problematic for the Commission's broader goals as well. For example, in the Troy, NY example discussed above,

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<sup>4</sup>A credit for so-called "integration" was overturned by the courts in 1993 because applicants were allowed to quickly sell or transfer the radio station, thus depriving the public of the benefit of local management. See *Reexamining the Comparative Standards for NCE Applicants*, 15 FCCRcd 7386, 7389 (2000); *FCC v. Bechtel*, 10 F.3d 875 (D.C. Cir. 1993). The Commission remedied this problem when it adopted its low power radio regulations because it required applicants to hold and use the licenses it received under the credit for three years. *Creation of a Low Power Radio Service*, 22 FCCRcd. 21912, 21920 (2007); 47 CFR § 73.865(c).

even if the station were constructed as proposed, the winning applicant, under the Commission's other policy goals, is not a superior applicant. This is because it is likely the station would have no locally originated programming from the COL or even have its studio located in the COL.

**C. Implementation of §307(b) Should be Reconsidered More Broadly.**

Section 307(b) directs the Commission to “distribut[e] ... licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.” 47 USC § 307(b). For many years the Commission has considered this directive to mean ensuring that all potential radio listeners in the U.S. have access to a radio service, and that the Commission should grant a substantial advantage to a potential licensee that would provide service originating in a particular community that currently has no originating service. While there are still distinct groups in the country who deserve to receive a first radio service, for example the chronically underserved Native American population, in reality the vast majority of the U.S. receives radio service. Further, as demonstrated in these comments and in the comments in this docket, current licensing rules provide no advantage to a community that gains an originating service. At this time, when radio service is a fully mature medium, it is no longer appropriate for the “efficiency” portion of §307(b) to trump all other policy priorities of the Commission as it currently does.

Admittedly, historically, the Commission has considered geographic distribution the most important element of the proscription of 307(b). But nothing in the statute mandates that geographic distribution of originating service should overcome all other policy priorities governing communications policy in the U.S. as it does now. The Commission has multiple statutory policy priorities that deserve equal weight with those articulated in 307(b). Section 1 of the Communications Act directs the Commission to “to make available, so far as possible, to

all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid efficient nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication....” 47 USC § 151. Other provisions govern the noncommercial service, preferences for diversity, and other policy priorities. The Commission is required to ensure that broadcasters serve the public interest, *see* 47 U.S.C. §307(a), which the Commission has determined means to promote competition, localism and diversity. *See* Further Notice of Proposed Rulemaking, *2006 Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 21 FCCRcd 8834, 8837 (2006). A rethinking of the balancing among each of these priorities would be a useful enterprise as the Communications Act reaches its 75th year.

Given the broader implications of the 307(b) in both the commercial and noncommercial service, and the need to look at this statutory priority in comparison with other statutory mandates, Prometheus and NFCB strongly encourage the Commission to begin a broader proceeding to consider how 307(b) might more appropriately be implemented in light of the other competing statutory mandates and the changes in service and technology presently impacting commercial and noncommercial radio broadcasting.

## **VI. CONCLUSION**

Radio continues to be a vital resource for local communities, and is imperative that the Commission allocate valuable broadcast spectrum with an eye towards its statutory mandate to serve the public interest. However, the current §307(b) analysis is inappropriate for a mature

service and does not effectively further the Commission's statutory goal to promote the public interest. Prometheus and NFCB encourage the Commission to view the §307(b) analysis based on the station's intended service to the community of license, rather than based on whether the station's intention is to serve a large, urban area. Prometheus and NFCB also ask the Commission to immediately implement the Tribal Priority, rather than waiting for all questions in the rural radio proceeding to be resolved. Finally, Prometheus and NFCB urge the Commission to begin a rulemaking that will address the issues and abuses related to §307(b) in both the commercial and noncommercial band.

Respectfully submitted,

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# **ATTACHMENT A**