

Suburban Community 307(b) Issue  
 Suburban Community-FM Station

Report and Order adopted eliminating the suburban community policy, used in licensing AM stations, and its FM corollary, the *Berwick* doctrine. Henceforth, the Commission will presume that compliance with rules pertaining to service to community of license will indicate an applicant's intent to serve that community and not a nearby central city.

-*Suburban Community Policy*  
 BC Docket No. 82-320

FCC 83-81

BEFORE THE  
 FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

The Suburban Community Policy, the *Berwick* Doctrine, and the *De Facto* Reallocation Policy

BC Docket 82-320

REPORT AND ORDER

(Adopted: February 17, 1983 Released: March 14, 1983)

BY THE COMMISSION: COMMISSIONER QUELLO DISSENTING IN PART AND ISSUING A STATEMENT; COMMISSIONER SHARP DISSENTING IN PART AND ISSUING A STATEMENT.

*Introduction*

1. Before the Commission is the *Notice of Proposed Rulemaking*, 47 Fed. Reg. 29282, published July 1, 1982 and the comments filed in response to that *Notice*. In the *Notice*, the Commission sought comment on whether the public interest requires the continuation of three policies used in the licensing of radio and television stations. The policies, adopted to aid the Commission in fulfilling its responsibilities under § 307(b) of the Communications Act, 47 U.S.C. § 307(b), are the suburban community policy, used in authorizing AM radio, and the *Berwick* doctrine and the *de facto* reallocation policy, used in authorizing FM radio and television stations. We have reviewed carefully the comments filed in this proceeding. The comments indicate that the policies frequently are used for anticompetitive purposes. Commenting parties also contend that the policies have frustrated rather than furthered the goals of § 307(b) by inhibiting

the establishment of stations in small communities located nearby larger ones. Consequently, based on our analysis of the comments and for the reasons that follow, we believe that the mandate of § 307(b) can be fulfilled without reliance on these policies which, we conclude, no longer serve the public interest and should be eliminated. We emphasize, however, that elimination of these policies will not eliminate or modify § 307(b) of the Communications Act. Our obligation to implement that statutory responsibility continues and will be faithfully carried out.

### *Background*

2. The *Notice* set out Commission responsibilities under § 307(b) of the Communications Act. Section 307(b) requires the Commission to "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." Prior to the Radio Act of 1927, radio licensees generally were free to locate their radio stations in any preferred location subject to the then-existing minimal limitations against electrical interference. The result was "an unjustifiable grouping of stations within limited areas. There are within 50 miles of Chicago, 40 stations; of New York, 38; of Philadelphia, 22; and of San Francisco, 22." 67 Cong. Rec. 5479 (1926) (remarks of Representative White). To dilute this concentration of radio stations in and around large cities, Congress enacted Section 9 of the Radio Act of 1927, which provided, *inter alia*, that

the licensing authority shall make such a distribution of licenses, bands of frequency of wave lengths, periods of time for operations, and of power among the different States and communities as to give fair, efficient, and equitable radio service to each of the same. Pub. L. No. 69-632, ch. 169, § 9, 44 Stat. 1166. By this statutory provision, Congress authorized the newly created Federal Radio Commission "in passing upon a license to consider its proposed location and the area to be served" and directed the Commission to "effect an equitable geographical distribution of stations over the entire country." 67 Cong. Rec. 5479 (1926).

3. Unsuccessful efforts were made to include in Section 9 language requiring the Commission to consider "the right of each state to have allocated to it" a certain quota of frequencies. 68 Cong. Rec. 2557 (1927). However, the following year, a compromise amendment to Section 9 was enacted which directed the Commission to allocate frequencies among five zones, each composed of several states. The frequencies were to be allocated in accordance with a formula based on population. Pub. L. No. 70-195, 45 Stat. 373. In 1934, Congress reenacted Section 9, as amended, into the Communications Act, as Section 307(b). Two years later, in 1936, Congress deleted the five-zone scheme, which had proved to be mechanistic

and unsatisfactory. This restored the original language of Section 9 of the Radio Act of 1927. Pub. L. No. 74-652, 49 Stat. 1475, 47 U.S.C. § 307(b). Thus, the legislative intent behind the original Section 9 of the Radio Act is still controlling today; namely, to effect an equitable geographical distribution of stations across the entire nation.

4. The Commission implemented § 307(b) in commercial FM radio and TV by establishing and incorporating in its rules a Table of Assignments for each service.<sup>1</sup> These tables provide for a distribution of channels to specific communities throughout the United States based, in part, on fixed mileage separations. The Commission determined that

effectuation of the distribution of radio facilities in such a manner that the result is fair, efficient and equitable and otherwise in the public interest from the standpoint of the listening and viewing public of the United States (Sections 303 and 307(b)) . . . can best be achieved by the adoption of a Table of Assignments. . . .

*Sixth Report and Order on Television Allocations*, 41 FCC 148, 151 (1952). The licensing procedure for FM and television is a two-step process. Step one fulfills the § 307(b) obligation by making available for licensing only a frequency which has been assigned to a specific community on the Table of Assignments. If the applicant is desirous of utilizing the frequency in another community, he or she must petition for a rulemaking to amend the Table of Assignments. In step two of the licensing procedure, applications are processed in order to ascertain that the applicants have the requisite qualifications to be licensees of the Commission. If there is more than one applicant for a frequency, a comparative hearing takes place in order to determine the party most worthy of the grant. The *Notice* explained that Commission rules permit a station to be located within 15 miles (TV or Class B/C FM) or 10 miles (Class A FM)<sup>2</sup> of the community listed in the Tables.<sup>3</sup> If multiple applicants apply for a single frequency within the 15-mile or 10-mile limit, and these applications propose different communities of license, then a second § 307(b) determination is made during the comparative hearing.

5. In contrast, AM radio frequencies are allocated on a demand

<sup>1</sup> See, *Sixth Report and Order on Television Allocations*, 41 FCC 148, 151-153 (1952). *Revision of FM Broadcast Rules*, 40 FCC 747, 757 (1963). 47 C.F.R. § 73.202 contains the FM Radio Table of Assignments and 47 C.F.R. § 73.606 contains the Television Table of Assignments.

<sup>2</sup> A Class A FM station is designed to render service to a relatively small community, city, or town, and the surrounding rural area. A Class B FM station is designed to render service to a sizeable community, city, or town, or to the principal city or cities of an urbanized area, and to the surrounding area. A Class C FM station is designed to render service to a community, city, or town, and large surrounding area.

<sup>3</sup> The 10- and 15-mile rule for FM is found at 47 C.F.R. §§ 73.203(b) of the rules. The 15-mile rule for TV is found at 47 C.F.R. § 73.607(b).

basis, with an applicant requesting the desired community and providing engineering exhibits to show the absence of harmful interference to existing stations. Section 307(b) considerations are made during the one-step proceeding to process the construction permit application. A hearing can result if petitions to deny are filed raising substantial and material questions of fact or if there are mutually exclusive applications.

6. Objectives and priorities guide the Commission's § 307(b) determinations. These set up preferences for applicants proposing to establish a station in an underserved community or in a community lacking broadcast service. Because the preferences are based on § 307(b) considerations, they can be conclusive in a mutually exclusive licensing contest.<sup>4</sup> The Commission feared that preferences could create incentives for applicants to try to prevail on the § 307(b) issue by designating as the community of license an underserved community proximate to a larger, more lucrative community, which was the intended recipient of the service. Thus, in an attempt to determine which community an applicant actually *intended* to serve, the Commission created the policies that are under study in this proceeding.

7. The suburban community-central city setting presented the Commission with its first occasion to test intent. Designation of a suburban community without a local transmission service could garner an applicant a § 307(b) preference while, at the same time, permitting coverage of the larger metropolitan community, not favored under § 307(b). Out of this situation, the suburban community policy was promulgated. The *Notice* stated that the suburban community policy, adopted in 1965 and modified in 1975 to apply principally in hearings involving mutually exclusive license applicants, is applicable where

the applicant's proposed 5 mV/m daytime contour would penetrate the geographic boundaries of any community with a population of over 50,000 persons and having at least twice the population of the applicant's specified community . . . a presumption will arise that the applicant realistically proposed to serve that larger community rather than its specified community.

*Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, 2 FCC 2d 190, 193 (1965) ("*Suburban Community*"). Related to this is the *Berwick Doctrine*, which applies the public interest considerations underlying the AM suburban community policy to FM radio and television, but without benefit of the presumption. *Berwick Broadcasting Corp.*, 12 FCC 2d (Rev. Bd. 1968); 20 FCC 2d 393 (1969); *sub. nom. P.A.L. Broadcasters, Inc.*, 40 FCC 2d 546 (Rev. Bd. 1973). *De facto* reallocation is

<sup>4</sup> *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 348 (1955).

[a]n attempt to utilize a channel assigned to one community in order to establish a broadcast service in another community, thereby depriving the assigned community of service from that channel.

*Hall Broadcasting Co., Inc.*, 71 FCC 2d 235, 237 (1979).

8. The *Notice* explained that the instant rulemaking proceeding was prompted, in part, by a remand of *Communications Investment Corporation v. FCC*, 641 F.2d 954 (1981) ("CIC"), by the United States Court of Appeals for the District of Columbia. In that case, the Court reviewed two actions of the Commission granting construction permits for two FM<sup>5</sup> radio stations in Utah. The *CIC* court said that the Commission had failed to follow its own and court precedent in authorizing, without a hearing, a transmitter location that objectors claimed constituted *de facto* reallocation of two class C FM stations from their city of license to a larger community. The court derived from the precedents nine factors<sup>6</sup> for determining when an evidentiary hearing is required on *de facto* reallocation and *Berwick* doctrine issues before a transmitter location can be approved. The court, however, invited our review of the policies. Based on that invitation and on our continuing evaluation of the relevancy of all our rules and policies in furthering the public interest, we undertook this rulemaking proceeding.

9. The *Notice* sought comment on whether the policies under review herein continue to be necessary in implementing §307(b) in light of the extensive dispersion of radio and television services throughout the United States. The *Notice* also expressed concern that the policies may impose unwarranted costs on the public and the parties involved in licensing new or improved service. This occurs, according to the *Notice*, when allegations that a proposed facility will not serve its designated community are made, not in furtherance of a fair, efficient, and equitable distribution of service, but in order to delay or to impede the authorization of new service and new competition, most often in smaller communities. We asked

<sup>5</sup> *D & B Broadcasting Co., Inc.*, 67 FCC 2d 570, *reconsid. denied*, 67 FCC 2d 1116 (1978); *Ben Lomond Broadcasting Co.*, 68 FCC 2d 1331 (1978).

<sup>6</sup> The nine factors are: the ratio of the population of the city of license to that of the larger city; the ratio of the distance between the proposed site and the city of license to the distance between the site and the larger community; the ratio of the signal strength in the city of license to the signal strength in the larger city; a loss area in the city of license or surrounding areas; whether the proposed site is already in use by larger city stations; whether the station is commonly owned with an AM station in the larger city and plans to share programming, staff or facilities with it; whether the station has evinced a prior intent to locate in the larger city; whether the station proposes to move its studio to the larger city; and whether there is a unique advantage to the site proposed.

comment on whether the benefits to be derived from the policies warrant the costs involved.

10. The *Notice* also sought comment on whether the term "community" should be redefined for §307(b) purposes in application processing to mean, not the specified community, but the metropolitan area effectively covered by the signal of the proposed station. Utilization of such a definition, said the *Notice*, would remove the comparative preference for designating as the community of license an underserved suburb while proposing power sufficient to cover a metropolitan area. The final item on which we sought comment was an implementation scheme in the event that the policies were deleted.

### *Comments*

11. Comments were filed by parties representing two main interests: those generally concerned about the policies in question and those with matters pending before the Commission involving the policies.<sup>7</sup> One theme enunciated by commenting parties favoring retention of the policies centered on the Commission's responsibility to challenge, as stated by Seven Parties,<sup>8</sup> "disingenuous" applications. These were defined as construction permit applications specifying, as the community of license, a small community that is nearby a large or metropolitan community the applicant actually intends to serve. In a similar vein, Dempsey and Koplovitz said that, if the policies were removed, the Commission "will be plagued with questions of good faith, (and) undisclosed motivation for service to the larger more lucrative market," as long as an advantage can be earned under §307(b). Chatterbox, Inc. and Commanche Broadcasting, Inc. warn that "the evils sought to be averted by the policies still exist."

<sup>7</sup> See Appendix A for a list of the commenting parties. On August 6, 1982, Southern Minnesota Broadcasting Co., Antares Broadcasting Co., and four FM applicants commenting jointly, Beaufort County Broadcasting Co., Dutchess Communications Corp., Carson Valley Broadcasting Company, and Jack A. Carpenter ("Beaufort"), requested the Commission to accept late filed comments. Because the filings were only one day late and in the interest of developing a full record in this proceeding, the comments have been accepted and considered. In similar fashion, "Beaufort" filed reply comments one day late, which, for the same reasons, will be accepted. On September 9, 1982, Channel 287, Inc., requested leave to respond to the reply comments of Mid-States Broadcasting, Inc. Because this unauthorized filing refers to a specific application pending before the Commission and otherwise raises no new or significant issues relevant in this rulemaking, it is denied. Denton Channel Two Foundation, Inc. filed a Motion to Strike portions of the reply comments of Public Communications Foundation for North Texas who, on October 6, 1982, filed an opposition. Because the Motion to Strike refers to matters pending in a restricted adjudicative proceeding, the Motion to Strike is granted.

<sup>8</sup> Joint comments filed by: Alegria I. Inc., Alegria, II, Inc., Alegria III, Inc., Big Time Radio, Inc., the Orange County Broadcasting Corporation, Santa Maria Radio, Inc., and Sonrisa, Inc. ("Seven Parties").

12. Parties favoring deletion of the policies generally agreed with Ben Lomond<sup>9</sup> who stated that the policies "are relics of an earlier age when there was a paucity of local transmission services." Atlantic Broadcasting Corporation expressed a similar conviction: "[A]lthough the policies may have served legitimate public policy concerns years ago, they have outlived their usefulness and, in fact, may actually undermine the policies underlying §307(b)." Gordon & Healy Chartered, declaring that the policies have denied local facilities to suburban American communities, submitted that, "It makes no sense in 1982 to view such current proposals [for new service] in light of American social structure of 1965 when the Suburban Community Policy was first adopted."

13. The comments presented divergent views on the benefits smaller communities, the intended beneficiaries under §307(b), have reaped from these policies. Buena Vista Telecasters of Texas, Inc., Chatterbox and Edward O. Fritts stated that elimination of the policies will hurt smaller communities because stations licensed to those communities will direct service to nearby larger areas and ignore the needs of the smaller communities. Ward & Mendelsohn, P.C., believes that the suburban community policy, or a suitable replacement, is necessary to "prevent abuse, but that significant communities which merit their own local outlet (due to a reasonable population benchmark) should not lose their valid §307(b) interests merely because they are located near a still larger community." Atlantic states that tastes and interests of persons living in large and small communities proximate to each other are not so divergent that service to one precludes service to another. Buena Vista, although urging retention of the policies, notes that "the frequencies for which applications are pending, or for which no applications have yet been filed, tend to be those available for suburban or outlying communities." Arch Communications commented that "hindrance of competition, hearing costs and delays, the realization of §307(b) objectives through past allocation decisions and the existence of other rules and policies to assure that licensees will direct their service to their specified communities of license" are persuasive reasons for abolishing the policies.

14. Eight different parties<sup>10</sup> focused on the 10- and 15-mile rules as a solution to the *Berwick* doctrine. Because the Tables of

<sup>9</sup> Joint comments of Ben Lomond Broadcasting Company, KDAB, Inc., and Wasatch Broadcasting Partnership ("Ben Lomond").

<sup>10</sup> The parties are: ABC, Inc.; Joint Comments of Beaufort County Broadcasting Co., Dutchess Communications Corp., Copper Valley Broadcasting Co., Jack A. Carpenter ("Beaufort"); Dempsey and Koplovitz; Gordon & Healy; Joint Reply Comments of Arcatel, Inc., Lockhart Omni Communications, Inc., Cen-tex Broadcasting Corporation, Texas Professional Communications, Inc., and Lockhart Radio, Inc. ("Lockhart"); Ward and Mendelsohn; McKenna, Wilkinson and Kittner ("McKenna"). Joint Comments of Forward Communications Corp., Group One Broadcasting Co., Guaranty Broadcasting Corp., Lake Huron Broadcasting

Assignment constitute the Commission's decision as to the "fair, efficient and equitable" distribution of FM radio and TV stations mandated by §307(b), these parties contended that the rulemaking proceeding to amend the Tables should satisfy and conclude the §307(b) question for those services. In other words, step one of the licensing process should resolve all §307(b) determinations. As stated by Ward & Mendelsohn

[A]ny party wishing to apply for a channel in a community other than that specified in the Table of Assignments or in a Petition for Rulemaking (to specify a new channel assignment) shall do so in the course of the Commission's initial allocation procedures rather than via an application.

15. The *Notice's* request for comments on a redefinition of community elicited varied responses. Arch Communications stated that without such a redefinition, unwarranted preferences could become acute. Buena Vista, Ward & Mendelsohn, National Radio Broadcasters Association (NRBA), and Gordon & Healy warned about the impossibility in many instances, due to geographic configurations, of covering a specified community with the requisite signal and avoiding penetration of larger nearby communities with the same signal. Dempsey and Koplovitz suggested that the proposal be treated as one for the largest community to which "significant"<sup>11</sup> principal-city service is provided, regardless of the community specified. Southwest Radio Enterprises disagrees with a redefinition of community. It states, however, that if such a definition is adopted, it not be applied to Class A FM facilities, which are designed to serve small local communities. Buena Vista and NRBA warn that applicants receiving conclusive §307(b) preferences by proposing power sufficient to serve underserved communities could later amend to increase power and/or move their transmitter, thereby providing service to a larger more lucrative community. Ogden Broadcasting Service, Inc. cautions that such a redefinition "would defeat the important policy goals of §307(b) by virtually insuring that smaller communities situated near larger communities will never acquire their own local broadcast transmission services."

16. In commenting on the *de facto* reallocation policy, the Denton Channel Two Foundation and Communications Investment Corporation said that as long as the Tables of Assignment are retained, so must the *de facto* reallocation policy in order to insure that applicants do not subvert the Table. McKenna, recognizing that "inconsistent application of the *de facto* reallocation doctrine has

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Corp., Shamrock Broadcasting Co.; Inc., Ralph C. Wilson Industries, Inc., Summit Radio Corp., Wilson Communications, Inc., WKRQ-TV, Inc. ("Licensees").

<sup>11</sup> Significant could mean, according to Dempsey and Koplovitz, "provision to the larger community of at least 50% of the service that would satisfy any of the applicable principal community criteria."

generated considerable confusion, which has only been heightened by the *CIC* decision," suggests a *de facto* reallocation test based on the nine-factor *CIC* test. The National Association of Broadcasters (NAB) suggested a similar test. Taft Broadcasting Co. believes that the nine-factor analysis in the *CIC* case constitutes a reasonable approach to *de facto* reallocation, which the Commission should reaffirm. Gordon & Healy suggested that enforcement of Commission rule §73.315(b) which states that the FM transmitter should be located as near the center of the proposed service area as possible, would solve the *de facto* reallocation problem for FM. On the other hand, Ben Lomond finds that the distinctions some commenters draw about the importance to §307(b) of the *de facto* reallocation policy as opposed to the importance to §307(b) of the suburban community policy and the *Berwick* doctrine are not persuasive.

17. Putbrese and Hunsaker suggests an alternative if the policies are eliminated. The Commission should adopt a policy holding that in cases "where there are mutually exclusive applicants for broadcast licenses in which there is overlap of 50% or greater of the proposed primary service contours of the proposals, then no § 307(b) preference would be awarded."

18. The *Notice's* request for comment on the implementation process should any or all of the policies be abandoned, elicited the full range of options. Seven Parties and Southwest Radio Enterprises said that the current policies should be applied to all applications that have been "cut-off." Arch states that, should the three policies be eliminated and community redefined, those decisions should be applied in all pending cases. Ben Lomond states that the retroactive effectiveness of the abolition of the policies could be so disruptive to cases far into the hearing process that it may be prudent to have various implementation programs dependent on the category of case. Denton believes that *de facto* reallocation issues already designated for hearing should not be deleted.

### Discussion

19. Before discussing our decision on the policies under consideration in this item, we believe it important to focus attention on one view expressed by some of the commenting parties. These parties warn of the misrepresentation that is rife when an applicant applies for a facility in a community proximate to a community larger or more lucrative than the designated one. These parties state that the instant policies must be continued so that the Commission can look behind the declarations about community of license made in the application and/or related documents in order to ascertain the real intent of the applicant with regard to the primary community to be served. We acknowledge that such misrepresentations may occur. Nevertheless, policies which attempt to guard against the eventuality of such behavior should be discarded if they are ineffectual or

disserve the overall public interest, as long as other means are available to deter misrepresentations. In this case, statutory and regulatory provisions concerning candor and veracity required on applications, amendments and related statements of fact filed with the Commission adequately respond to the concerns of the parties. Section 312(a)(1) of the Communications Act, 47 U.S.C. 312(a)(1),<sup>12</sup> empowers us to revoke a station license for false statements knowingly made in applications. Section 73.3513(d) of our rules, 47 C.F.R. § 73.3513(d), states that willful false statements made in applications, amendments and related statements of fact are punishable by fine and imprisonment.<sup>13</sup> Stating one community of license, while intending to render primary service to another community fails the candor and veracity test. The requirements for candor and veracity in all dealings with the Commission are mandated by the Communications Act and by our rules. *RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981). We remind all applicants that those requirements pertain whether or not the instant policies are maintained.

20. On the basis of the record adduced, we have determined that the policies in question, which attempt to ascertain an applicant's intent with respect to the community to be served, should be abolished. Due to the growth in broadcast services, suburban locations are oftentimes as attractive to licensee applicants as nearby cities. Thus, we no longer see a substantial likelihood that, merely because of proximity to larger urban areas, licensees will provide inadequate service to their communities. Moreover, these policies inhibit entry into unserved communities because they increase costs to suburban applicants and cause delays in processing. In addition, the policies provide incumbent stations a means to delay competition from new suburban stations and thereby retard competition in metropolitan markets. Consistent with this analysis is the indication, gleaned from a review of the cases, that the test for determining intent under the suburban community policy and *Berwick* doctrine may be invalid for that purpose. For these reasons the policies in question undermine the goal of Section 307(b), to

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<sup>12</sup> Sections 312(a)(1) reads as follows:

The Commission may revoke any station license or construction permit—

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308.

<sup>13</sup> Section 73.3513(d) reads as follows:

Applications, amendments, and related statements of fact need not be submitted under oath. Willful false statements made therein, however, are punishable by fine and imprisonment, U.S. Code, Title 18, Section 1001, and by appropriate administrative sanctions, including revocation of station license pursuant to Section 312(a)(1) of the Communications Act.

distribute broadcast services fairly, efficiently, and equitably, and should therefore be abolished.

21. *Suburban Community Policy and the Berwick Doctrine*. We begin the rationale for our decisions with the suburban community policy and its FM corollary, the *Berwick* doctrine.<sup>14</sup> Because the *de facto* reallocation policy is so closely related, much of our reasoning applies with equal validity to that policy. The oldest of the policies, the suburban community policy, was adopted in 1965. At that time, the Commission was faced with the problem of processing "rising numbers of applications for suburban communities, which would be entitled to a first transmission service preference in a comparative hearing." *Suburban Community Policy*, 2 FCC 2d at 191. The Commission also had been instructed by the U.S. Court of Appeals for the District of Columbia to establish or clarify the standards used to distinguish between suburban applicants for the same frequency. *Miners Broadcasting Service, Inc. v. Federal Communications Commission*, 349 F.2d 199 (1965). The suburban community policy was the Commission's response to those events.

22. The suburban community policy was designed to further § 307(b)'s mandate for a fair, efficient, and equitable distribution of service by "testing" the AM radio applicant's intent to serve the suburban community designated rather than a metropolitan center located nearby. The test consists of the applicant's evidence that:

1. The suburban community has programming needs, separate and distinct from the central city;
2. Those needs are unmet currently;
3. The applicant's programming proposal will meet the specific, unsatisfied programming needs of the suburb; and
4. Advertising revenues generated within the specified community are adequate to support the programming proposal.

This is a rugged test. An applicant subject to the presumption can attempt to rebut it without a hearing through the submission with the application of information on the four issues. An applicant has to demonstrate that its community has separate and distinct programming needs which are currently unmet by existing stations. Establishing with competent and probative evidence that existing stations are not serving the community's programming needs is a difficult task. Normally, program logs and/or portions of an existing station's renewal application are not detailed enough to satisfy the required showing. Moreover, there is little incentive for existing stations, whose personnel are the most knowledgeable and thus most competent witnesses, to provide assistance. Consequently, reliance is often placed on costly programming surveys. This evidentiary problem is

<sup>14</sup> The *Berwick* doctrine is rarely invoked in licensing proceedings for television stations because, by virtue of their technical specifications, television stations are designed to serve regional areas.

exacerbated by the fact that the nearby larger community normally has a number of aural facilities whose programming has to be surveyed. In addition, it is not unusual for these nearby stations to direct at least some programming to the smaller suburban community. With regard to demonstrating the source and adequacy of projected revenues, again an applicant is faced with a difficult burden. While the suburban community policy specifically stated that dependence on revenues from other communities would not necessarily be determinative, applicants still have to make an effort to demonstrate the source of their revenues. The only reliable means of obtaining this information involves surveying potential advertisers. Thus, not only are the standards somewhat confused, but even when understood, the evidentiary burdens are time consuming and costly to meet. The burdens of proof required to rebut the presumption were criticized by the United States Court of Appeals for the District of Columbia in 1972. In the Court's view, applicants were left "devoid of any guidelines as to the type and degree of evidence required to rebut the commission's Policy Statement." *Northern Indiana Broadcasters, Inc. v. F.C.C.*, 459 F.2d 1351 (1972). Although the Court thought it incumbent upon the Commission to clarify the standards used to grant or deny licenses in suburban communities, the Commission itself has not since 1972 had occasion to resolve a suburban community proceeding after hearing.<sup>15</sup>

23. We have analyzed the reported cases involving the suburban community issue and find what we believe is a disturbing variance in success on rebutting the presumption. When there is only one applicant for a frequency, the suburban applicant has been more successful in rebutting the presumption than when there are competing applicants. This is true in cases in which the presumption was rebutted without a hearing<sup>16</sup> as well as in cases in which the presumption was rebutted in a hearing.<sup>17</sup> When the suburban applicant was not successful in rebutting the presumption in a

<sup>15</sup> *Radio Wheeling*, 85 FCC 2d 486, 490 (Rev. Bd. 1981).

<sup>16</sup> *Pettit Broadcasting Co.*, 21 RR 2d 317 (1971); *David Ortiz Radio Corp.*, 16 FCC 2d 798 (1969); *Wood & Watkins*, 12 RR 2d 97 (1968); *KACY, Inc.*, 15 FCC 2d 33 (1968); *WTOW, Inc.*, 11 FCC 2d 277 (1968); *Burlington Broadcasting Co.*, 9 RR 2d 1119 (1967); *Virginia Broadcasters*, 9 FCC 2d 205 (1967); *Major Market Stations, Inc.*, 8 FCC 2d 13 (1967); *Donnelly C. Reeves*, 6 FCC 2d 531 (1967); *Du Page County Broadcasting Inc.*, 5 FCC 2d 557 (1966); *Clay Broadcasters, Inc.*, 4 FCC 2d 932 (1966). *Wood & Watkins, Burlington, DuPage County and Virginia Broadcasters* involved two or more applicants.

<sup>17</sup> *Progressive Broadcasting Co.*, 54 FCC 2d 638 (1975); *Hymen Lake*, 46 FCC 2d 560 (1974); *Great Southern Broadcasting Co.*, 14 FCC 2d 176 (1968); *Jupiter Associates, Inc.*, 12 RR 2d 889 (1968); *Mount-Ed-Lynn, Inc.*, 9 FCC 2d 986 (1967); *Jersey Cape Broadcasting Corp.*, 2 FCC 2d 942 (1966); *Southington Broadcasters*, 2 FCC 2d 936 (1966). *Progressive Broadcasting Co.* was the only mutually exclusive licensing contest case.

hearing, he typically was competing with another for the frequency.<sup>18</sup> These results seem to indicate that, prior to 1975 when the policy was relaxed to exclude most singleton applicants, an applicant who was not vying with another applicant for one frequency had a good chance of convincing the Commission that the designated community truly would be the community served. However, that outcome was not so certain when another applicant joined the contest for a single outlet. We are concerned that the test can be manipulated by the competing applicant so that it becomes not a measurement of intent but a tool useful in defeating a suburban community applicant.

24. Settlements of mutually exclusive licensing contests frequently result in the demise of the suburban community applicant.<sup>19</sup> This result leads us to question whether the burden of rebutting the presumption creates an incentive seemingly at odds with the goals of § 307(b). For example, as a result of the settlement in *H-B-K Enterprises*, the application designating the suburban community of Grandview, Missouri, vying for its first local service, dropped out, and Kansas City, Missouri, was awarded its sixth local service.

25. The Commission acknowledged that the suburban community policy presented a significant obstacle to the authorization and improvement of AM radio service in 1974. In that year, the Commission initiated a rulemaking proceeding designed to liberalize AM radio allocations policies. In the *Notice of Proposed Rulemaking*, 39 Fed. Reg. 42920, published on November 27, 1974, we sought comment on whether or not the rule changes proposed would be effective in encouraging more AM applications if the suburban community policy remained unaltered. The *Report and Order* concluding the proceeding found that, unchanged, the suburban community policy would obstruct the goals sought to be achieved by liberalizing § 73.37 of the rules in order to encourage AM applicants. Therefore, the Commission relaxed the suburban community presumption to apply primarily in mutually exclusive licensing contests

<sup>18</sup> *Centreville Broadcasting Co.*, 50 FCC 2d 261 (1974); *James E. Reese*, 45 FCC 2d 315 (1974); *Broadcasters 7, Inc.*, 46 FCC 2d 282 (1974); *What the Bible Says, Inc.*, 28 FCC 2d 551 (1971); *Harry D. and Robert E. Stephenson*, 33 FCC 2d 763 (1969); *Kittyhawk Broadcasting Corp.*, 20 FCC 2d 1011 (1969); *Augustus L. Cavallaro, Jr.*, 15 FCC 2d 4863 (1969); *Tri-State Broadcasting Co., Inc.*, 19 FCC 2d 1042 (1969); *Tidewater Broadcasting Co., Inc.*, 12 FCC 2d 471 (1968); *Northern Indiana Broadcasters, Inc.*, 13 FCC 2d 546 (1968); *KWEN Broadcasting Co.*, 10 FCC 2d 753 (1967); *Boardman Broadcasting Co., Inc.*, 10 FCC 2d 422 (1967); *Goodman Broadcasting Co.*, 10 FCC 2d 141 (1967); *Lebanon Valley Radio*, 2 FCC 2d 683 (1966). *Centreville, Cavallaro, Tri-State, Northern Indiana* and *Goodman* were singleton applicants.

<sup>19</sup> *Ditmer Broadcasting Co., Inc.*, 23 FCC 2d 283 (Rev. Bd. 1970); *Sundial Broadcasting Co., Inc.*, 17 FCC 2d 614 (Rev. Bd. 1969); *Howard M. McBee*, 19 FCC 2d 800 (1969); *H-B-K Enterprises*, 15 FCC 2d 683 (Rev. Bd. 1968); *Logan Broadcasting Co.*, 10 FCC 2d 166 (1967).

in which a hearing was required irrespective of the suburban community issue. We said

By amending the rules . . . while continuing to impose the significant burden of the § 307(b) presumption, particularly on applications for improvements to existing facilities, we would merely be removing one so-called artificial barrier while leaving another in its place.

54 FCC 2d at 21.

26. In 1969, the Review Board applied the public interest considerations underlying the suburban community policy in an FM licensing case and the *Berwick* doctrine was born. In its decision on the merits in the *Berwick* proceeding, decided *sub nom. P.A.L. Broadcasters, Inc.*, 40 FCC 2d 546 (1973), the Review Board made clear that the suburban applicants for an FM facility had the burden of proving the same four sub-issues that the Commission had adopted for AM suburban applicants. *See*, paragraph 22, *supra*. However, in two recent cases that we affirmed, the Review Board has criticized those standards as "unworkable, unduly burdensome, and not reasonably related to the Commission's concern" about an applicant's intent to serve the designated community rather than a nearby larger one. *Radio Wheeling, Inc.*, 85 FCC 2d 486, 489 (Rev. Bd., 1981). In *Bie Broadcasting Co.*, 81 FCC 2d 1 (Rev. Bd., 1980), the Review Board rejected outright use of the standards. Thus, the *Berwick* doctrine, as traditionally applied, has been found to be infirm as a test for determining an FM applicant's intent. This result parallels our determination with respect to the suburban community policy, as outlined above. It is appropriate, therefore, that these tests be abolished.

27. We are mindful that the policies were promulgated in order to protect underserved, small, and suburban communities, favored under § 307(b), by assuring they actually receive the service promised. As we said when promulgating the suburban community policy, "developing deserving suburban communities" should be protected in situations where the

propagation of a competitive signal over a heavily populated area of substantial size, . . . (has) led to our licensees' serving the transmission and reception needs of that area rather than the transmission needs of their specified communities.

2 FCC 2d at 193. The suburban community policy and the *Berwick* doctrine responded to what apparently was considered the inevitable intent of a small market licensee: to *abandon* the needs of its designated market in those situations in which its signal was able to reach a more populous community. Although that assumption may have been valid in 1965, changes in the broadcasting industry since that time, especially in radio, make the assumption invalid today.

28. The major change of relevance to the present proceeding is the growth since 1965 in the number of broadcasting facilities. At

the end of fiscal year 1965, there was a total of 5,630 AM and FM radio stations in operation and 681 commercial and educational television stations.<sup>20</sup> By the end of fiscal year 1981, that number had grown to 9,087 for radio and 1,035 for television.<sup>21</sup> Growth in the number of stations has increased competition in the industry and created the incentive for broadcasters to discover discrete markets within which to provide an economically viable service. For example, it is possible that a station could earn more revenues as the single station in a 40,000 person community rather than the 11th station in a nearby community of 400,000 persons. Identification with and service of a small community becomes economically feasible after an increase in the number of players in an industry fractionalizes a market.<sup>22</sup>

29. Another change in the broadcasting industry of relevance to this proceeding is the role of demographics, creating an economic incentive for a broadcaster to establish a station in a small community to serve a particular type of audience, instead of in a larger, more heterogeneous nearby community. For example, there are 122 radio stations utilizing Spanish language programming for twenty or more hours per week.<sup>23</sup> Not all these stations are licensed to large metropolitan communities. Among the communities in this category are: \*tab546,1

The *Broadcasting/Cablecasting Yearbook, 1982* also lists 151 all news radio stations. This kind of programming appeals to a specialized audience usually described by broadcasting entrepreneurs as well educated and middle income. Among the communities receiving service from all-news stations are the following:<sup>24</sup> \*tab546,2

Thus, it is plausible that a broadcaster can fashion a service targeted for a specific community characteristic, such as ethnicity, educational level or cultural preference and find the service economically remunerative enough to be disinclined to abandon the smaller community for the larger.

30. We believe the policies may be used to stem the establishment of competing stations. In practice, the policies are frequently invoked by stations in large communities against the establishment of new or improved service in smaller communities.<sup>25</sup> Moreover, a

<sup>20</sup> *FCC Annual Report, 1965.*

<sup>21</sup> *FCC Annual Report, 1981.*

<sup>22</sup> *See generally, Inquiry and Proposed Rulemaking; Deregulation of Radio*, 44 Fed. Reg. 57636, published October 5, 1977, for an analysis of competition in radio markets.

<sup>23</sup> *Broadcasting/Cablecasting Yearbook, 1982*, at D-94.

<sup>24</sup> *Id.*, at D-91.

<sup>25</sup> *Communications Investment Corp. v. FCC*, 641 F.2d 954 (1981); *Home Service Broadcasting Corp.*, 68 FCC 2d 1135 (1978).

*Berwick* issue is not limited to mutually exclusive licensing contests as is generally true in AM radio since 1975.<sup>26</sup> It can be contained in Petitions to Deny new applications and applications for improved facilities. If the small community applicant is unsuccessful in passing the stringent test created by these policies, new or improved service will be denied to the small community. This is a result at odds with Commission policy fostering competition in the broadcasting industry and with the objectives of § 307(b). If the suburban community policy and the *Berwick* doctrine have worked against the purposes of § 307(b), the statutory provision they were formulated to implement, then their continuation is mere folly. The test for overcoming these policies is a rugged one involving high expenditures for lawyers and engineers who participate in hearings with a resulting delay in the authorization of new service in the smaller community.<sup>27</sup> This tends, ironically, to benefit stations in the larger, metropolitan markets by delaying or frustrating the establishment or improvement of competing stations in nearby smaller markets.

31. After considerable reflection, we fail to see the deleterious effect on the public living in small communities from our authorization of a station that designates the small community as its community of license, locates its main studio in that community, places the requisite signal over the community, fashions a programming proposal to meet the needs and interests of the smaller community, and then also competes in the larger metropolitan area that includes the community of license. The station failing to live up to its obligations to the community of license risks a renewal challenge. In the *Notice of Proposed Inquiry and Proposed Rulemaking* in BC Docket 80-130, 45 Fed. Reg. 26390, published April 18, 1980, we said about the *Berwick* doctrine: "Even if it's true that the station intends to compete in the metropolitan market, this does not mean that it would not be able to offer programming responsive to the needs of this smaller locality." We continue to believe that statement to be true.

32. Many commenting parties in this proceeding discussed the so-called 10- and 15-mile rules, 47 C.F.R. §§73.203(b) (FM) and 73.607(b) (TV). These rules permit an FM or TV station to be licensed to an unlisted community within ten miles (Class A FM) or 15 miles (Class B/C FM and TV) of a community contained in the Tables of

<sup>26</sup> In the *Report and Order* relaxing the applicability of the suburban community policy to mutually-exclusive licensing contests primarily, the Commission affirmed its continuing concern about the intent of applicants with regard to their community of license and stated that it would entertain suburban community issues where warranted even outside a mutually-exclusive contest. 54 FCC 2d at 22. See e.g., *Home Service Broadcasting Corp.*, 68 FCC 2d 1135 (1978).

<sup>27</sup> The *CIC* court quoted from one party's pleadings that a hearing in that case would have meant a delay of up to two years and an estimated cost of \$50,000 for attorney's fees.

Assignments without petitioning for a rule making to add the community to the Table. These rules were adopted at the time the Tables were adopted.<sup>28</sup> Their purpose was "to preserve flexibility and to permit adjustments . . . upon demand and need in communities other than those listed in the table without going through the rule making procedure." *Notice of Proposed Rulemaking*, FCC 68-54, 33 Fed. Reg. 917, published January 25, 1968. The Commission was well aware of the fact that in adopting a Table of Assignments it was impossible to predict population trends or pinpoint community development. However, "a Table coupled with the flexibility present in a 'twenty-five mile rule,' [now the 10-and 15-mile rule] provides the best means to insure an efficient *present* distribution of channels." 40 FCC at 758. (emphasis added) We also noted, that, "the question of future flexibility becomes increasingly academic as the available FM channels are put to use by present day applicants." *Id.* The decision to provide for flexibility within the limited geographical area surrounding each listed community was appropriate for the early days in which the new services were being established. That condition does not exist today. Television and FM radio are mature, thriving services, well dispersed throughout the United States.<sup>29</sup> We no longer have to foster and facilitate their development as we did when the Tables of Assignments were adopted. In addition, the rules create an unnecessary burden on applicants and the Commission alike. The issues raised under the rules are issues that can be resolved more efficiently and at lower cost to both the applicant and the Commission in a rulemaking proceeding than in a hearing.<sup>30</sup> Therefore, we have decided to eliminate the 10- and 15-mile rules. This, of course, does not mean that applicants are foreclosed from applying for communities 10 or 15 miles from listed communities.

<sup>28</sup> *Sixth Report and Order on Television Allocations*, 41 FCC 148, 209 (1952); *Revision of FM Broadcast Rules, Third Report, Memorandum Opinion and Order*, 40 FCC 747, 763 (1963). In FM, §73.203(b) originally permitted a station to locate within 25 miles of a listed community without amending the Table of Assignments. This rule was changed in 1968 to 10 miles for Class A stations and 15 miles for Class B and C stations. *Amendment of Section 73.203(b) Concerning the Availability of FM Channels to Unlisted Communities*, 12 FCC 2d 660 (1968).

<sup>29</sup> The Commission has found that "there is no part of the contiguous 48 states which lacks at least some aural broadcast service, and almost no place . . . where multiple skywave services are not available." *Clear Channel Broadcasting in the AM Broadcast Band*, 78 FCC 2d 1345, 1356 (1980). Similarly, in the television service, the Commission has stated that the "Table of Assignments . . . was designed to provide service to as large a part of the population as was possible and at the same time to provide local outlets for as many communities as possible . . . the goals of the Table have been largely achieved . . ." *Inquiry Into the Future Role of Low-Power Television Broadcasting*, FCC 80-503, 45 Fed. Reg. 69178, 69179 (Oct. 17, 1980).

<sup>30</sup> §307(b) determinations are based on, *inter alia*, the number of transmission services in competing communities, the number of reception services in each, and the size of the communities involved.

Our decision only means that the applicant must petition for a rulemaking in order to add the community to the Table. Henceforth, all §307(b) issues will be concluded in the rulemaking proceeding, which is step one of the licensing process. Step two will be concerned solely with establishing the qualifications of the applicants and, when there are competing applicants, deciding which applicant should prevail.

33. *De Facto Reallocation.* The *de facto* reallocation policy is closely related to the *Berwick* doctrine.<sup>31</sup> It is applicable only in the FM and TV services and does not require a central city-suburban community setting. The Commission has made clear that two essential elements must be present in order for a proponent to prevail on an allegation of *de facto* reallocation: (1) redirection of the service of an FM or TV station from its community of license in such a manner as to constitute its removal from that community, and (2) its effective use to provide service to another community. *Central Alabama Broadcasters, Inc.*, 68 FCC 2d 1339, 1340 (1978); *Hall Broadcasting Co., Inc.*, *supra*. The policy is most often invoked in proceedings to modify existing facilities, for example, to change a transmitter site or to increase power. If, as a result of such a proposal, the station's signal either reaches another community, typically a larger one, or penetrates more of it, the stage is set for a *de facto* reallocation allegation.

34. Some commenting parties have urged that the *de facto* reallocation policy is essential in safeguarding the integrity of the Tables of Assignments and, through the Tables, §307(b). Others have contended that our requirements for, *inter alia*, the requisite signal over the community of license,<sup>32</sup> and the location in that community of the station's main studio,<sup>33</sup> are adequate safeguards. As we will outline below, we find that the policy has many of the same infirmities we found to be present in the suburban community/*Berwick* policies. Therefore, based principally upon those same reasons, and upon the fact that in many instances the *de facto* reallocation policy is indistinguishable from the *Berwick* doctrine, we have determined that the *de facto* reallocation policy no longer serves the public interest and should be abolished.

35. Our major concern with the policy is that rather than furthering the purposes of §307(b), the *de facto* reallocation policy, as applied, has frustrated that end. It is most often invoked against small market stations. The frequent proponents of the policy are

<sup>31</sup> See, *CIC*, 641 F.2d at 967, n. 82.

<sup>32</sup> 47 C.F.R. §§73.188 (AM); 73.315 (FM); 73.685 (TV).

<sup>33</sup> 47 C.F.R. §73.1125. "The Commission has frequently ruled that a station is identified by the place where its studios are kept, not the location of its transmitter or antenna." *Community Telecasting Co. v. FCC*, 255 F.2d 891, 893 (1958).

licensees located in larger communities who will face increased competition as the result of an application to modify or improve facilities filed by licensees in nearby smaller communities.<sup>34</sup> The arguments proponents make in support of *de facto* reallocation are strikingly similar to those made by proponents of the suburban community/*Berwick* policies: that a station in the smaller community will, as the result of the modification, direct its service to the larger community thereby abandoning its community of license, undermining the Tables, and subverting the goals of §307(b). Changes in the industry, as we described above, no longer pre-ordain such results. Moreover, the policy places a burden on the establishment and improvement of service in small communities that is not in keeping with the objectives of §307(b). We are also convinced that the policy too frequently is invoked to preclude additional competition. Such a result is an abuse of the policy.

36. Because the *de facto* reallocation policy does not require a central city-suburban community relationship, its applicability is broader than that of the suburban community policy and the *Berwick* doctrine. More than ten years ago, in a case in which a Chicago station filed a petition to deny raising *de facto* reallocation against a Gary, Indiana station filing to relocate its transmitter, we said:

[W]e did not intend to prohibit a Gary station from serving large portions of the city of Chicago as it is simultaneously providing primary service to Gary. . . . A *de facto* reallocation issue does not arise merely because a licensee proposes an extension of a station's service area, and in some circumstances, the retention of the station's main studio in its community of license may itself constitute sufficient contact with the community to rebut any presumption of reallocation. *Rhode Island Television Corp. v. FCC*, 320 F.2d 762 (1963); *Community Telecasting Co. (WXTV) v. FCC*, 255 F.2d 891 (1958).

*General Media TV, Inc.*, 27 FCC 2d 861, 863 (1971). The policy can be invoked without regard to the size of the communities involved. Even though the smaller of two communities is an independent, non-suburban, and thriving city, worthy and capable of supporting its own stations, an application to modify the license of a station in that community will likely prompt an allegation of *de facto* reallocation from a licensee in the larger community.<sup>35</sup> The policy also can be

<sup>34</sup> *Son Broadcasting, Inc.*, 79 FCC 2d 598 (1980); *Hall Broadcasting Co.*, 71 FCC 2d 235 (1979); *D and B Broadcasting Co. (KDAB)*, 67 FCC 2d 243 (1978); *Central Alabama Broadcasters*, 68 FCC 2d 1339 (1978); *Magic Box Media*, 65 FCC 2d 45 (1977); *Kaiser Broadcasting Corp.*, 62 FCC 2d 246 (1977); *Great Trails*, 59 FCC 2d 916 (1976); *Robert P. Adams*, 36 FCC 2d 479 (1972); *General Media TV, Inc.*, 27 FCC 2d 861 (1971); *WSTE-TV*, 11 FCC 2d 1013 (1968).

<sup>35</sup> In the *CIC* case, Salt Lake City stations raised the issue of *de facto* reallocation against Ogden, Utah stations that located their transmitters in an antenna farm

invoked without regard to the type of station involved. For example, a Class C FM station is a wide area station designed to serve a community, city or town *and* a large surrounding area. Similarly, television stations are capable of serving wide areas. However, if such a station applies to modify its signal strength to the highest permitted, an allegation of *de facto* reallocation would undoubtedly be forthcoming from a licensee in a community receiving a new or strengthened signal.<sup>36</sup> The fact that Class C FM and television stations are supposed to serve wide areas is not enough to deflect an allegation of *de facto* reallocation or even to avoid a hearing on the allegation.<sup>37</sup>

37. The *CIC* majority constructed its nine-factor test for determining when a hearing must be held on a *Berwick* or *de facto* reallocation issue from precedents found in four cases decided between 1963 and 1969.<sup>38</sup> The record of Commission action in this area, however, includes other cases whose holdings are at variance with the outcomes cited by the *CIC* majority. Several of these cases pre-date the 1978 Commission action in the cases consolidated in *CIC*,<sup>39</sup> while others are more recent. In three cases decided before Commission action in *CIC*, *Grindstone Broadcasting Corp.*, 41 RR 2d 1107 (1977); *Magic Box Media, Inc.*, 65 FCC 2d 45 (1977); and *Public Service Broadcasters, Inc.*, *supra*, we found that the mere fact that a station proposes to put a city-grade signal over a larger nearby community, in addition to its designated community, is not sufficient to lead to the conclusion that the station intends to serve the larger community.<sup>40</sup> Since Commission action in the *CIC* case, we have continued to move away from designating *Berwick* and *de facto* reallocation issues. In *Hall Broadcasting Co., Inc.*, *supra*, the Commission could not find that a *de facto* reallocation would occur when the transmitter of a Class C FM station was moved to a point

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located near Salt Lake City. This location apparently cured a multipath interference problem, caused by terrain, that impaired reception of the Ogden stations in Ogden. Judge Wald, in dissent, noted, that the Salt Lake City stations were received in Ogden more clearly than was Ogden station *KDAB* before its move.

<sup>36</sup> *WSET-TV*, 80 FCC 2d 233 (1980); *Sarasota-Bradenton*, 70 FCC 2d 699 (1979); *Hall Broadcasting*, 71 FCC 2d 235 (1979).

<sup>37</sup> *Radio Wheeling*, 85 FCC 2d 486 (1981).

<sup>38</sup> *Wometco Enterprises, Inc. v. FCC*, 314 F.2d 266 (D.C. Cir. 1963) (per curiam), *rev'g Scripps-Howard Radio, Inc.*, 22 RR 1054 (1962); *Louisiana Television Broadcasting Corp. v. FCC*, 347 F.2d 808 (D.C. Cir. 1965) (per curiam), *rev'g St. Anthony Television Corp.*, 2 RR 2d 348 (1964); *Santa Fe Television, Inc.*, 18 FCC 2d 741 (1969); *Berwick Broadcasting Corp.*, 20 FCC 2d 393 (1969).

<sup>39</sup> See *CIC*, 641 F.2d at 977, where majority seems to believe that only one case with a contrary holding pre-dated Commission action in *CIC*.

<sup>40</sup> See also, *General Media Television, Inc.*, 27 FCC 2d 861, 863 (1971); *Almardon, Inc.*, 16 FCC 2d 395, 399 (Rev. Bd. 1969); *David Ortiz Radio Corp.*, 46 FCC 2d 341, 342 (Rev. Bd. 1974); *Congaree Broadcasters, Inc.*, 40 FCC 2d 297, 300 (Rev. Bd. 1973).

midway between the community of license and a larger community and the antenna height was increased, permitting greater coverage of the larger community. Nor would we designate a *de facto* issue in *Bie Broadcasting Co.*, 81 FCC 2d 1 (1980) and *Radio Wheeling, Inc.*, 85 FCC 2d 486 (1981). Many years ago, a similar decision withstood judicial scrutiny. In *Rhode Island Television Corp. v. FCC*, 320 F.2d 762, 766 (1963), the Court approvingly quoted the Commission's conclusion:

The mere fact that as a result of the proposed modification, WTEV will improve its signal to the Providence area from Grade B to Grade A does not warrant [the conclusion that there has been a channel reassignment]. In fact, WTEV will continue to be a New Bedford station, will maintain its main studio in New Bedford, will place a principal city signal over that community and will be primarily responsible for providing for the needs of that community under the Rules. Accordingly, grant of the proposal will not change the channel assignment.

The court's unequivocal statement twenty years ago has not resulted in a disciplined use of the policy. Rather, the policy has been invoked to frustrate more competition despite our consistent rejection of such a course. The trend we have documented now must be concluded by abolition of the policy. Anything less would permit future use in a manner we find inconsistent with the public interest.

38. In the future, we will examine applications to determine compliance with our licensing rules. If that exists, we will presume the licensee intends to serve the community designated. Compliance with the rules will result in the requisite signal to the community of license, location of the main studio in that community and a programming proposal that will serve the needs of the community of license. Abolition of this policy does not mean that we will countenance subversion of our rules or the Tables. However, we believe the risk of a renewal challenge for failure *actually* to serve the designated community constitutes a more effective regulatory tool than utilization in advance of guidelines and factors that are inexact in divining intent. Abolition of the *de facto* reallocation policy also means that it will not be available for anti-competitive purposes. Ten years ago, in approving an assignment of license application in which *de facto* reallocation was raised by a petitioner to deny, we said:

[P]etitioner is in effect asking us to hold a hearing to determine whether the assignee will do what it has affirmatively represented it would do. In effect, we are being asked to determine, in advance, whether the assignee will operate KUTE as it has proposed it would. In view of the assignee's explicit representations regarding its proposed operation of KUTE, a hearing on this question is clearly unnecessary. Moreover, such a hearing would deprive the

assignee of the opportunity to demonstrate its good faith. *Brandywine-Main Line Radio, Inc.*, 4 RR 2d 697, 702 (1965). *Robert Adams*, 38 FCC 2d 1, 4 (1972). By abolishing the policy, we will return to that position.

### *Redefinition of Community*

39. The *Notice* asked for comment on whether the term "community" should be redefined for §307(b) purposes to mean, not necessarily the community specified on the application, but the community actually receiving service as a result of the power proposed. We have reviewed carefully the record in this proceeding to determine if it supports such an action. We have determined that it does not. The current definition of community has guided our §307(b) determinations through the years. To change from that concept to one based on a larger geographical or urbanized metropolitan area standard, for example, requires that our action be supported by an adequate record and a rational basis for making the change. We do not believe that we have that record before us in this proceeding. Consequently, we decline to adopt the proposed redefinition.

40. Our refusal to change the concept of community for §307(b) purposes at this time does not foreclose the possibility of doing so in the future. A rulemaking in which comments are elicited on such questions as the benefits to the public interest of a new definition, the costs that may be involved in making a change, the different geographical standards that could be substituted, and the standard that would be preferable could well provide the adequate basis to support a decision to change the concept in the future.

41. *Implementation.* We believe that the public interest requires the implementation of these decisions with respect to the suburban community policy, the *Berwick* doctrine and the *de facto* reallocation policy upon adoption of this *Report and Order*. Permitting the policies abolished herein to be used, even in pending application contests, would simply continue what we have found to be adverse to the public interest. Therefore, effective with the adoption of this *Report and Order* we will:

1. Process AM radio applications without application of the suburban community policy;
2. Process petitions to amend the TV Table of Assignments without application of the *Berwick* doctrine;<sup>41</sup>
3. Process FM and TV applications for new service or for modification to existing service without application of the *Berwick* doctrine and the *de facto* reallocation policy; and
4. Delete from all hearings, in progress and scheduled to

<sup>41</sup> The *Berwick* doctrine is not entertained in petitions to amend the FM Table of Assignments. *FM Assignment Policy and Procedures*, 90 FCC 2d 88 (1982).

start after adoption of this *Report and Order*, all issues based on the suburban community policy, the *Berwick* doctrine and the *de facto* reallocation policy.

42. Deletion of §§73.203(b) and 73.607(b) of our rules, the 10- and 15-mile rules, will be phased in. Applications already on file as of the date of the adoption of this *Report and Order* that utilize these rules, will be processed under the rules. Applications filed after the date of adoption of this *Report and Order* utilizing the 10- and 15-mile rule will be accepted only if such an application is tendered as a valid competing application to one the staff has already found acceptable for filing under the 10- or 15-mile rule.

43. *Regulatory Flexibility Act Final Analysis*. The rule and policy changes effected herein are appropriate in light of the changes that have taken place in the broadcasting industry. These revisions will also facilitate the establishment of additional radio and television facilities by abolishing issues that give rise to costly hearings with resultant delays in new service.

44. We received no public comments which specifically addressed the initial regulatory flexibility analysis contained in the Notice of Proposed Rulemaking. Since the decisions we are making in this proceeding relieve an economic burden, especially for licensees in small communities, our action is consistent with the purposes of the Regulatory Flexibility Act. Other alternatives that we might have adopted would have achieved more limited benefits.

45. Accordingly, IT IS ORDERED, pursuant to the authority contained in Section 4(i) and 303, of the Communications Act of 1934, as amended, 47 U.S.C. §§4(i) and 303, that effective as stated herein, Part 74 of the Commission's Rules is amended by the deletion of §§73.203(b) and 73.607(b). IT IS FURTHER ORDERED, that, effective *April 20, 1983*, the suburban community policy, the *Berwick* Doctrine, and the *de facto* reallocation policy are abolished. IT IS FURTHER ORDERED, that this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION  
WILLIAM J. TRICARICO *Secretary*

APPENDIX A

Comments submitted:

Alegria I, Inc., *et al.*:

Algeria II, Inc.

Alegria III, Inc.

Big Time Radio, Inc.

Orange County Broadcasting Corp.

Santa Maria Radio, Inc.

Sonrisa, Inc.

Association of Maximum Service Telecasters  
Arch Communications Corp.  
Atlantic Broadcasting Corp.  
Beaufort County Broadcasting Company, *et al.*:  
    Dutchess Communications Corp.  
    Copper Valley Broadcasting Company  
    Jack A. Carpenter  
Ben Lomond Broadcasting Co., *et al.*:  
    KDAB,, Inc.  
    Wasatch Broadcasting Partnership  
Buena Vista Telecasters of Texas, Inc.  
Chatterbox, Inc.  
Communications Investment Corp.  
Commanche Broadcasting, Inc.  
Carl Como, Ronette Communications Corp.  
Dempsey and Koplovitz  
Denton Channel Two Foundation, Inc.  
Edward O. Fritts  
Gordon & Healy, Chartered  
Historic Hudson Valley Radio, Inc.  
Kaldor Communications, Inc.  
The Honorable Thomas N. Kindness, Member of Congress from Ohio  
McKenna, Wilkinson & Kittner  
National Radio Broadcasters Association  
National Association of Broadcasters  
Mark Pierce  
Puerto Rico Broadcasting, Inc.  
Putbrese & Hunsaker  
Southern Minnesota Broadcasting Co. and Antares Broadcasting Co.  
Southwest Radio Enterprises, Inc.  
Taft Broadcasting Co.  
Town and Country Broadcasting, Inc.  
Ward & Mendelsohn, P.C.  
Reply Comments Submitted:  
    American Broadcasting Companies, Inc.

Arcatel, Inc., *et al.*:

Lockhart Omni Communications, Inc.

Cen-Tex Broadcasting Corp.

Texas Professional Communications, Inc.

Lockhart Radio, Inc.

Atlantic Broadcasting Corp.

Beaufort County Broadcasting Co., *et al.*:

KDAB, Inc.

Wasatch Broadcasting Partnership

Buena Vista Telecasters Of Texas, Inc.

Community Television of Connecticut, Inc.

Forward Communications Corporation, *et al.*:

Group One Broadcasting Company

Guaranty Broadcasting Corp.

Lake Huron Broadcasting Corp.

Shamrock Broadcasting Co., Inc.

Ralph C. Wilson Industries, Inc.

Summit Radio Corp.

Wilson Communications, Inc.

WKRK-TV, Inc.

Mid-States Broadcasting, Inc.

National Association of Broadcasters

Ogden Broadcasting Service, Inc.

Public Communications Foundation for North Texas

Sanger Telecasters, Inc.

South Florida Broadcasting Company, Inc.

United Church of Christ, Office of Communication

WDOD of Chattanooga, Inc.

Ward & Mendelsohn, P.C.

February 17, 1983

Statement of

FCC Commissioner James H. Quello

Dissenting in Part

In re: The Suburban Community Policy, the *Berwick* Doctrine and the *De Facto* Reallocation Policy

I support these new policies, but I dissent from the Commission's refusal to consider broadening the definition of community in this proceeding.

DISSENTING STATEMENT OF COMMISSIONER STEPHEN A.  
SHARP

Re: The Suburban Community Policy, the *Berwick* Doctrine and the *De Facto* Reallocation Policy

I dissent from the Commission's action because, under the guise of administrative convenience, it returns us to the pre-*Berwick* era without a new answer to the problems as to which the *Berwick* doctrine and its brethren have proven to be an inadequate solution. In so doing, the *Report and Order* exhibits a basic misunderstanding of the nature of major market radio broadcasting. This flaw stems, I believe, from an attempt to justify the original result in the Ogden-Salt Lake City dispute (while avoiding a second reversal and remand) rather than solving the underlying problem. As a result, this proceeding skews the rational, market-based decisions of broadcasters in a manner not mandated by statute and is thus fundamentally inconsistent with the deregulatory principles to which we have sought to adhere.

*Problems in the Report and Order*

This ad hoc approach to policy-making leads to muddled facts and questionable logic weakening the credibility of the *Report and Order's* entire analysis. For example, paragraph 20 states that "[d]ue to the growth in broadcast services, suburban locations are oftentimes as attractive to licensee applicants as nearby cities." The decision offers no factual support for this conclusory statement and fails to show how, to the extent suburban locations *are* attractive, such attractiveness is not due to the Section 307(b) preference accorded applicants for such communities.

The discussion in paragraphs 27 through 29 provide the clearest example of the frailty of this decision. The *Report and Order* confuses "small market licensees" with suburban applicants and confuses a "market" with a community of license. It labels as an "assumption" the economic necessity of today's major market radio stations: service to an area beyond the borders of a particular suburb. It states that "small, and suburban communities" are "favored under Section 307(b)" without any basis in the record, the statute or the legislative history and in the face of contrary indications in paragraphs 2 and 3. While the decision catalogues the growth of broadcasting and increased competition, it fails to show the relevance of national totals to the suburban community issues at hand.

From the general, the *Report and Order* leads to the specific, arguing that "it is possible that a station could earn more revenues as a single station in a 40,000 person community rather than the 11th station in a neighboring community of 400,000 persons." While

a station with no competition in a community some distance from a metropolitan area could earn substantial revenue, the unsupported suggestion that this is as true for the single licensee in a suburban community blinks at reality.

While a station may be the only licensee in a particular suburb, it is compared with and competes for revenues against all of the other stations in that metropolitan radio market. In nearly every case, a close "identification with service of a small community" in a metropolitan market will ensure that the station will be the 11th rated station if, indeed, it is rated at all. The "fractionalization" of larger markets is both the result of and the reason for distinctive formats based on content designed to appeal to a specific category of listeners generally spread over a geographic area larger than the specific community of license. The two lists in paragraph 29 further demonstrate the unstated and unsupported assumptions which underlie the decision. Even to the extent all news radio usually appeals to a "well educated and middle income" audience, the fact that over ninety percent of such stations are within metropolitan areas does not lend much credence to the implication that serving audiences in more than the community of license is not important for a station's viability. Indeed, without an analysis of the service area demographics for the listed stations, the relevance of paragraph 29 is questionable at best.<sup>1</sup>

### *An Alternative Analysis*

I agree that the *Berwick*, suburban community and de facto reallocation doctrines and the 10- and 15-mile rules, have failed to provide the Commission with an effective means to determine whether broadcast applicants intend to serve suburban municipalities rather than the heart of the market, the center city. Instead, they may have been devices of delay and great cost to both parties and the Commission, often animated by anti-competitive motives.

However, their elimination merely uncovers the deeper issue. The Commission's administrative embellishment of Section 307(b) of the Act has provided an incentive for applicants to seek a suburban community of license in the form of a dispositive preference vis-a-vis those who openly seek to serve a center city. To the extent this regulatory gloss has deterred applicants from serving the market of their choice, it has given rise to *Berwick* et al. as a means of testing their true intent.

To my mind, it is this governmental incentive which is crucial. By

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<sup>1</sup> There are factual problems with the lists as well. For example, many people in Henderson, Nevada would be surprised to learn they were not part of the Las Vegas metropolitan area.

removing it, as I proposed, *Berwick* issues would, perforce, disappear as well.<sup>2</sup> My proposal would eliminate any Section 307(b) preference available for an applicant as compared with a mutually-exclusive applicant who seeks a community of license within the same metropolitan statistical area ("MSA"). Thus, in the AM band, the city of license sought would mean the MSA in which that city lies. In the FM and TV bands, the city identified in the Tables would be interpreted to mean the MSA in which that city is located. Thus, an applicant could, if consistent with our technical requirements, apply for any city within the MSA, without a rulemaking and without affecting its Section 307(b) status relative to others in the same MSA. Other technical, coverage, service and studio requirements remain in force. Section 307(b) preferences would continue to be available in situations where a competing applicant seeks a city of license outside of the MSA.

Four objections have been raised in opposition to my proposal. First, it is alleged to be inconsistent with the Commission's reliance on each applicant forthrightly to state its intent to serve its proposed city of license. My proposal purportedly denies that such reliance is feasible and therefore would obviate the intent issue entirely (at least within MSAs). Such an analysis misperceives my approach and, indeed, stands it on its head. No reason has been given as to why the Commission should be concerned with the applicant's stated intent to serve a particular intra-MSA city for Section 307(b) purposes. Until this is answered, there is no harm in eliminating the issue, regardless of whether intent is stated honestly. Our misrepresentation jurisprudence exists to ensure compliance with our substantive rules; we do not and should not establish rules merely in order to test compliance with them.

Second, it is stated that my recognition of the need for waivers in MSAs of unusual size or configuration would be overused or abused. But it is not clear why waivers in this context would be different than in any other. We are legally required to provide for waivers. The cause of legal certainty can only be promoted by stating the parameters for grant at the outset.

Third, my proposal is thought to be internally inconsistent because it does not modify certain localism-based standards, such as city coverage, studio location, ascertainment and programming requirements, while limiting the impact of the Commission's gloss on Section 307(b) itself (within MSAs). However, to the extent there is an inconsistency, it is an argument for a close review of those remaining Commission-imposed requirements, not for the retention of an otherwise erroneous policy. If they have a policy basis different

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<sup>2</sup> The non-resolution of this problem here is compounded by immediately eliminating *Berwick*-type issues in pending cases, thus prejudicing the rights of competing applicants who have already applied for a license for a center city rather than a convenient suburb.

from that of the application selection preference, there may be a basis for keeping them. If not, they should be revisited.

Last, my suggestion to use the MSA designed by the Census Bureau and OMB is challenged as not being an "appropriate" delineation of a metropolitan area community for "our purposes". It is difficult to refute these arguments because they advance no standards of their own. Our reliance on city boundaries is indeed longstanding, but continuing past approaches for their own sake is not sound policy-making. Similarly, I recognize that MSAs are not a perfect device in this context; nonetheless, they are the best available geographic definition of the common socio-economic interests and patterns by which we define community. Whatever weaknesses do inhere in the use of MSAs, they are no different than those of municipal borders.

I am also concerned that no cogent arguments have been made to refute my approach to this issue. Neither the existence, nor the market-distorting impact, of the problem have been denied; no pro-suburban incentive legal requirement has been cited and my proposal is more consistent with the general policy of this Commission.

The present Commission has sought to rely on market forces rather than government regulation, whenever feasible. However, by encouraging applicants to seek suburban locations on the basis of the number of stations currently licensed to a particular municipality, the Commission not only ignores the basic fact that radio waves do not stop at political boundaries, but also inhibits the applicant's otherwise market-based decision to serve a perceived market need.

Congress has indicated that, in certain situations, other policies concerns are paramount; and with that decision I have no quarrel here. Nonetheless, the elimination of preferences within a metropolitan area is fully consistent with the language, legislative history and Commission and judicial interpretation of Section 307(b). Significantly, the statutory language itself does not define "community"; the Commission's distribution of broadcast facilities "among the several States and communities" must be "fair, efficient and equitable to each of the same." The complex legislative history of this provision indicates that Congress was concerned primarily with preserving the ability of less populated areas of the country, particularly in the west, but also rural areas in general, to obtain broadcast service. See *Pasadena Broadcasting Co. v. FCC*, 555 F.2d 1046, 1050 (D.C. Cir. 1977). To the extent there was any concern with intra-metropolitan area distribution of facilities, it was not clearly expressed.

Section 307(b), in its present form, was added to the Communications Act in 1936. It was designed to restore the provisions originally enacted in the Radio Act of 1927 which had been significantly revised in 1934. See 80 Cong. Rec. 6032 (1936) (remarks of Sen. Wheeler). The 1927 provision was animated by congressional con-

cerns that an excessive percentage of both the total and preferred radio frequencies were used by stations based in the nation's largest cities, particularly those in the east. As Rep. Davis noted, of the approximately 700 stations then licensed, "[a]bout 600 of those are held in 21 States, chiefly in a few large cities." 68 Cong. Rec. 2575 (1927). Similarly, he stated "in the entire South and Southwest . . . there were 79 broadcasting stations, and there was not one first-class license in the whole lot, and is not to-day, south of the Ohio River." *Id.* He had previously cited the fact that there were "within 50 miles of Chicago 40 stations, of New York 38, of Philadelphia 22, and of San Francisco 22" as the basis for enjoining the Secretary of Commerce "to effect an equitable distribution of stations over the entire country." 67 Cong. Rec. 5479 (1926) (emphasis added). There is no indication in the legislative history that, in enacting Section 307(b) or its 1927 predecessor, Congress intended that the Commission be concerned with the relative status of a center city versus a suburb, much less grant dispositive preferences on that basis.

As far back as the *Sixth Report and Order on Television Allocations*, 1 R.R. 601, 621 (1952), we have recognized that metropolitan centers and their central cities have "broad areas of common interest" which we must consider in allocating broadcast channels under Section 307(b). As a result, very few suburbs received allocations, even after the center city received several. Indeed, even prior to that point, not only we, but the Court of Appeals as well, have recognized that smaller municipalities in metropolitan areas are properly treated as identical to the center city for Section 307(b) purposes. *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951).

Similarly, in *St. Louis Telecast, Inc.*, 22 FCC 625 (1957), the Commission refused to find Section 307(b) applicable in selecting among mutually exclusive applicants for a television station in the St. Louis as its proposed city of license. We noted there that both St. Louis and East St. Louis were in the St. Louis Standard Metropolitan Area and that "there exists a single economically and culturally integrated community . . ." 22 FCC at 713. *See also Rossmoyne Corp.*, 7 R.R. 117 (1951). I would expand that finding, by rule, to all MSAs.

Finally, I would note that, while this issue may appear to be a minor one; it does, in fact, have long-term significance. We are currently considering a proposal to drop-in a substantial number of FM stations. Later this decade, an entire new segment of the spectrum may be made available for AM stations in the 1600 KHz band. Thus, the Commission's action is important and will affect many licensing decisions in the years ahead.

In conclusion, I acknowledge the Commission's willingness to consider a new proceeding, on an accelerated schedule, to provide a more copious record on this issue. While late is better than never,

given the many major policy issues in the mass media area which are to be resolved in the near future, I am not optimistic of an early resolution. Sound deregulation is not accomplished by utilizing two rulemaking proceedings when one will do.