

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

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

MEMORANDUM OPINION AND ORDER

Adopted: April 20, 2017

Released: April 20, 2017

By the Commission:

1. The Commission has before it an Application for Review (AFR) filed October 17, 2016, by Premier Broadcasters, Inc. (Premier), licensee of Station KITI(AM), Centralia-Chehalis, Washington.¹ Premier seeks review of the Media Bureau's (Bureau) September 13, 2016, letter decision² denying Premier's Petition for Reconsideration of the staff's grant of Threshold Communications' (Threshold) amended application for new station KVNW(FM), Napavine, Washington.³ For the reasons set forth below, we dismiss in part and otherwise deny the AFR.

2. Threshold was the winning bidder in Auction 91 for an FM allotment at Clatskanie, Oregon. Its long-form application ultimately proposed a community of license change to Napavine.⁴ Under the rules, applicants seeking to change the community of license of an FM station must demonstrate the proposed community change constitutes a preferential allotment under Section 307(b) of the Act.⁵ In the *2015 Letter Decision*, the Bureau denied Premier's informal objection, which contended that Clatskanie had a greater need for a new radio station than Napavine and determined that the allotment

¹ Threshold's opposition to the Application for Review (Opposition) was due November 1, 2016. On November 1, 2016, Threshold filed a Motion for Extension of Time to Respond to Application for Review and, on November 7, 2016, a Motion for Further Extension of Time to Respond to Application for Review. We grant Threshold's Motions for Extension of Time. Threshold submitted its Opposition on November 15, 2016. Premier subsequently filed a Motion for Extension of Time on November 18, 2016, and its Reply on December 2, 2016 (Reply), reiterating arguments set forth in the AFR. We grant Premier's Motion for Extension of Time.

² *Donald E. Martin, Esq. and Meredith S. Senter, Esq.*, Letter Order, Ref. 1800B3-AD (MB Sept. 13, 2016) (*2016 Letter Decision*).

³ *Donald E. Martin, Esq. and Meredith S. Senter, Esq.*, Letter Order, 30 FCC Rcd 7152 (MB July 7, 2015) (*2015 Letter Decision*); File No. BNPH-20110630AHJ (Amended Application).

⁴ Threshold originally proposed Fords Prairie as the community of license in its June 30, 2011, post-auction, long-form application for its new station. In October 17, 2011, Comments, Premier argued that Fords Prairie was "not a licensable community," but merely a neighborhood in Centralia, which Premier's KITI(AM) is licensed to serve. On May 23, 2012, Threshold amended the application to specify Napavine as the community of license. See Premier's Comments and Informal Objection (Aug. 27, 2012) at 4.

⁵ 47 CFR § 73.3573(g)(1); 47 U.S.C. § 307(b) ("In considering applications for licenses, and modifications and renewals thereof, . . . the Commission shall make such distribution of licenses . . . among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.") The Commission has adopted the following priorities: (1) First fulltime aural service, (2) Second fulltime aural service, (3) First local service, and (4) Other public interest matters. Co-equal weight is given to Priorities (2) and (3). *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 F.C.C.2d 88 (1982).

of Channel 225C3 at Napavine⁶ represented a preferential arrangement of allotments over the allotment of Channel 225C3 at Clatskanie.⁷ In making this determination, the Bureau held that, an auction winner requesting a community change in its post-auction long-form application pursuant to Section 73.3573(g) of the Commission's rules (Rules) must demonstrate that the proposed change would result in a preferential change under Section 307(b) of the Communications Act of 1934, as amended (Act), by comparing the requested new facilities at the "move-in" community with the winning bidder's allotted reference coordinates and maximum class facilities at the "move-out" community. In doing so, it rejected Premier's argument that instead of using the Clatskanie (move-out) allotment reference coordinates, the Bureau was required to calculate signal coverage from actual, existing tower sites in the Clatskanie area.⁸

3. On review, Premier reiterates the same arguments previously made in its Petition for Reconsideration. Specifically, Premier contends that (1) the Bureau exceeded its delegated authority⁹ and erred in holding that an auction winner requesting a community of license change need only consider the maximum class facilities of the specified reference coordinates at the move-out community, rather than those of existing area towers;¹⁰ (2) the Bureau improperly ignored Premier's attempt to rebut the staff's finding that the "urbanized area service presumption" (UASP) applies to the Clatskanie allotment, a finding that resulted in the treatment of that allotment under Priority (4); and (3) when the staff considered the Clatskanie allotment as first local (Priority (3)), it erred by only using population differentials to compare that community and Napavine.

⁶ Channel 225C3 at Napavine is a first local transmission service (Priority (3) of the FM Allotments Priorities).

⁷ Using the allotted reference coordinates for Channel 225C3 at Clatskanie, a station would provide a 70 dBu signal to 100 percent of Clatskanie and would cover more than 50 percent of the Longview, Washington, Urbanized Area. Therefore, the Clatskanie allotment is treated as an additional service to the Longview Urbanized Area under Priority (4).

⁸ Had the Bureau done so, Premier argued, it would not have found that a Clatskanie station would cover over 50 percent of the Longview Urbanized Area, would have therefore determined that the Clatskanie facility was a first local transmission service under Priority (3), and thus would have found that the proposed Napavine facilities were not a preferential arrangement of allotments. *2015 Letter Decision*, 30 FCC Rcd at 7154-55; Premier repeated this argument in its Petition for Reconsideration. *2016 Letter Decision* at 4-5.

⁹ AFR at 7; Reply at 2-4. Threshold and Premier dispute in their pleadings whether Section 73.3573(g) specifies whether the permissibility of an auction winner's proposed change in community of license for unbuilt facilities must be based on its current assignment, as considered by the Bureau, rather than existing area transmitter sites. Opposition at 3; Reply at 4. We need not resolve that issue because, for the reasons stated in the *2016 Letter Decision* and discussed in paragraph 4 and note 14, *infra*, the Bureau's consideration of Threshold's maximum class facilities for its Clatskanie allotment coordinates was consistent with *Rural Radio* and appropriate.

¹⁰ AFR at 7-10; Reply at 2-4. Premier argues, for the first time on review, that the Bureau's *White Salmon* decision is controlling here. AFR at 7 (citing *A. Wray Fitch III, Esq. and Carrie Ward, Esq.*, Letter Order, 31 FCC Rcd 7117, 7120 (Jun. 27, 2016) (*White Salmon*)). Because Premier cites this precedent for the first time on review, we dismiss this portion of the AFR pursuant to Section 1.115(c) of the Rules, 47 CFR § 1.115(c) ("No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass."). As Premier acknowledges in its AFR, *White Salmon* was released over two months before the *2016 Letter Decision*. AFR at 8. Premier's failure to have brought that Order to the Bureau's attention, as purported support for the arguments contained in its then-pending August 6, 2015, Request for Clarification and Petition for Reconsideration, prevented the Bureau from passing on Premier's reliance upon it. As an independent and separate ground for our action here, we disagree with Premier's claim that this precedent is controlling here. In *White Salmon*, the Bureau addressed and narrowly held that *Rural Radio*'s "absolute bar to any facility modification that would create white or gray area" does not apply to auction winners filing their long-form application and seeking a change in community pursuant to 47 CFR § 73.3573(g). *White Salmon*, 31 FCC Rcd at 7119, citing *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Report and Order, First Order On Reconsideration, and Second Further Notice of Proposed Rule Making, 26 FCC Rcd 2556, 2577, para. 39 (2011) (*Rural Radio*). Here, the creation of white or gray areas is not at issue.

4. Premier's primary argument hinges on its misapplication of the UASP introduced in the Commission's *Rural Radio* proceeding.¹¹ In *Rural Radio*, the Commission held that when an existing station proposes to move to a new community of license, claiming to become the first local transmission service at the new community under Priority (3) of the allotment priorities, it must first demonstrate, not only that it does not cover more than 50 percent of an Urbanized Area from its proposed new site, but also that the applicant could not subsequently make a rule-compliant minor modification to move to an existing tower in the area that would allow it to ultimately cover more than 50 percent of the Urbanized Area.¹² In creating the UASP, the Commission established a rebuttable presumption that a proposal that would cover, or could be modified to cover, over 50 percent of an Urbanized Area is a proposal to serve the entire Urbanized Area and, thus, one that does not qualify as a first local transmission service at the specified community under Priority (3).¹³ This "could be modified" standard was designed to prevent applicants from using a preferred Priority (3) community change to become an additional service to an already well-served Urbanized Area.¹⁴

5. Premier puts forth the novel proposition that this analysis should also apply to the FM assignment from which the winning bidder applicant is proposing to relocate. In the instant case, Premier claims that the Bureau erred by not allowing a party other than the applicant–Premier–to rebut the UASP in the case of the Clatskanie move-out allotment.¹⁵ Premier claims that its successful rebuttal of the UASP would show that the Clatskanie allotment should be considered a first local transmission service at Clatskanie, making the proper comparison of the move-out and move-in communities to be between two co-equal Priority (3) proposals, rather than a comparison between a Priority (4) proposal at Clatskanie and a higher Priority (3) proposal at Napavine, as the Bureau found. In other words, Premier asserts that it may employ a process designed to prevent stations from moving into an Urbanized Area to, in this case, prevent a station from moving out of an Urbanized Area. Nothing in *Rural Radio*, however, suggests that these procedures should be applied in reverse in this way. These presumption and rebuttal procedures only assess future service at the proposed move-in community and do not evaluate hypothetical service at existing sites in the area from which the applicant seeks to relocate an allotted but unbuilt new station.¹⁶

¹¹ *Id.* at 2572, para. 30.

¹² *Id.* at 2575, paras. 35, 38 & n.97.

¹³ *Id.* at 2572 para. 30.

¹⁴ *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Notice of Proposed Rule Making, 24 FCC Rcd 5239, 5247, para. 17 (2009). Thus, the policy is designed to prevent an applicant from obtaining approval of a station move by claiming that it intends to serve a smaller community entitled to a Section 307(b) preference, only to modify its authorization at a later date to serve a larger and economically more attractive one within the Urbanized Area that would not be entitled to such a preference. *Rural Radio*, 26 FCC Rcd at 5267-68, paras. 20-21 (2009).

¹⁵ The Bureau found that the full class facilities at the Clatskanie allotment site would cover more than 50 percent of the Longview, Washington, Urbanized Area. Premier does not take issue with that conclusion.

¹⁶ In the 2016 *Letter Decision*, the Bureau observed that even were it, *arguendo*, to accept Premier's position that both move-out Clatskanie and move-in Napavine should be compared under Priority (3), first local transmission service, Napavine as the more populous community represents the preferred arrangement of allotments, and thus would prevail in any event. 2016 *Letter Decision* at 5 (citing *Blanchard, Louisiana and Stephens, Arkansas*, Report and Order, 10 FCC Rcd 9828, 9829, para. 11 (1995) (*Blanchard*)). Premier responds that *Rural Radio* directs the staff to consider other proffered factors, not only raw population differentials, when comparing communities for a proposed community of license change. AFR at 14 (citing *Rural Radio*, 26 FCC Rcd at 2576, para. 35); Reply at 5. We disagree. Premier references *Rural Radio*'s discussion of Priority (4) showings in community of license change cases in order to bolster its argument regarding a Priority (3) comparison. *Rural Radio*, 26 FCC Rcd at 2577-78, para. 39. *Rural Radio* did not change the long-standing precedent regarding comparison of proposals under Priority (3), as set forth in cases such as *Blanchard*.

6. Upon review of the AFR and the entire record, we find that the Bureau fully and properly considered the arguments raised to it by Premier. We therefore uphold the Bureau's decision for the reasons stated in the *2016 Letter Decision*. Specifically, an auction winner, under Section 73.3573(g) of the Rules, requesting a community of license change in its post-auction long-form application must use the allotted reference coordinates and maximum class facilities at the move-out community for comparison to its proposed new facilities. Moreover, such auction winner may not use other potential transmission facilities at its existing tower site that could provide service to the move-out community for Section 307(b) comparative purposes.¹⁷

7. Accordingly, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(g) of the Commission's Rules, the Application for Review filed by Premier Broadcasters, Inc., IS DISMISSED IN PART for the reasons stated herein and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁷ Premier also requests *de novo* review of its showing purporting to rebut the UASP at Clatskanie, and again requests clarification as to which party bears the burden of proof to rebut the UASP at the move-out community for a new unbuilt station. AFR at 11-13 (citing *Rural Radio*, 26 FCC Rcd at 2572-73, para. 30); Reply at 1-2, 4. Because we reject Premier's attempted use of the *Rural Radio* procedures to bar Threshold's community of license change, we likewise find that Premier's rebuttal showing is not relevant and that there is no burden of proof to assign. Premier's request for *de novo* review is accordingly denied.