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

In re Applications of

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| FAYE & RICHARD TUCK, INC. KBEC, Waxahachie, Texas | **MM DOCKET NO. 83-212** File No. BP-810127AJ |
| BLUEBONNET RADIO BROADCASTERS, INC. Plano, Texas | **MM DOCKET NO. 83-215** File No. BP-810511AL |
| CENTURY BROADCASTING CORPORATION Garland, Texas | **MM DOCKET NO. 83-216** File No. BP-810511AM |
| DONTRON, INC. KPBC, Garland, Texas | **MM DOCKET NO. 83-218** File No. BP-810511AP |

For Construction Permit for a New AM Station

## MEMORANDUM OPINION AND ORDER

**Adopted: August 24, 1988; Released: September 8, 1988**

By the Commission:

## I. INTRODUCTION

1. This adjudicatory proceeding raises complex questions regarding the award of dispositive preferences under 47 U.S.C. § 307(b) to applicants in a comparative licensing proceeding who propose to provide the first local transmission service for a community that is located in, or near, a large metropolitan area. At issue in this case is the application of the so-called *Huntington* doctrine, which precludes the grant of such dispositive preferences in certain circumstances. In particular, this case raises questions as to whether the Census Bureau's concepts of "Urbanized Area" or "Standard Metropolitan Statistical Area" (SMSA) are relevant in determining whether a proposal for a community in a metropolitan area merits a dispositive preference under section 307(b), and what evidentiary showing is required to deprive an applicant of such a preference under the *Huntington* doctrine.

2. This case also raises the question of whether the Commission must ignore comparative factors affecting efficient use of the spectrum whenever an applicant proposes to bring first local transmission service to a community that previously had no broadcast stations licensed to it. As a matter of policy, such a result would cause some concern in light of the great proliferation of broadcast outlets since Congress last amended section 307(b) in 1936. In view of this growth in media coverage, the rationale for subordinating comparative differences among the applicants to the needs of the competing communities is not as compelling as it once was. Therefore, greater relevance attaches over time to the Court of Appeals' admonition that the implementation of section 307(b) should reflect that "[t]he ultimate touchstone for the FCC is . . . the distribution of service, rather than of licenses or of stations; the constituency to be served is people, not municipalities." *National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1198 (D.C. Cir. 1984).

3. As the proliferation of stations has blanketed the nation with broadcast *reception* service, the priority to provide local *transmission* service has assumed increasingly decisional significance in AM licensing proceedings. Large cities with lucrative advertising markets have had local transmission service for years. Therefore, an applicant for a new AM frequency who hopes to compete in one of those advertising markets by projecting an AM signal over the entire metropolitan area can increase the probability of being awarded a license if it proposes a nearby town or suburb as its community of license, rather than the central city. In this case, for example, none of the applicants proposes Dallas or Fort Worth as its community of license, even though each applicant proposes a service contour that, at least during the peak daytime listening hours, would extend over much of Dallas and Fort Worth and thus would make the station attractive to advertisers wishing to reach audiences in those cities.

4. We no longer have a presumption that applicants proposing suburbs of large cities as their communities of license do not intend to serve the needs and interests of those communities *Suburban Community Policy, the Berwick Doctrine, and the De Facto Reallocation Policy*, 93 FCC 2d 436, 450-51 ¶ 30 (1983). However, it would be naive for us to ignore that granting a dispositive preference to an applicant proposing first local transmission service near a metropolitan center, without regard to the efficiency of the applicant's proposed use of the spectrum, has the potential to produce anomalous results that would seem to contravene the original statutory mandate of section 307(b) "to provide a fair, efficient, and equitable distribution of radio service" to "the several States and communities." Nevertheless, despite the difficulties in this area, we will proceed with this case according to existing Commission precedent that a preference for local transmission service may be dispositive without regard to the comparative attributes of competing applicants.

5 With these concerns in mind, we turn to the case before us Four applicants -- Faye and Richard Tuck, Inc., Bluebonnet Radio Broadcasting, Inc , Century Broadcasting Corporation, and Dontron Broadcasting Corporation -- filed mutually exclusive applications for a new AM station on 770 kHz near Dallas, Texas. The applicants specified three different communities as their communities of license, and the Commission specified an issue to determine whether any of these communities is entitled to a dispositive preference under section 307(b). *Hearing Designation Order*, MM 3002 (Mar. 21, 1983).

6. Two of the communities -- Plano and Garland -- are within the Dallas-Fort Worth Urbanized Area. The third community -- Waxahachie -- lies outside the Urbanized Area but inside the Dallas-Fort Worth SMSA. The community of Plano already has a full-time AM station licensed to it. On the other hand, no radio station is licensed to serve Garland, but it has a UHF television permit. Finally, Tuck's daytime-only AM station KBEC is the only broadcast station currently licensed to serve Waxahachie.

7. In an initial decision, 103 FCC 2d 949 (1985), Administrative Law Judge Joseph P. Gonzalez determined that the applicants for Garland and Plano proposed such high-powered regional AM service to Dallas-Fort Worth that no meaningful section 307(b) distinctions could be made. Tuck proposed to operate at only 1 kw day and night and would serve significantly fewer people than the competing proposals for Garland and Plano. The ALJ found that Tuck's proposal to bring first local nighttime service to Waxahachie, which is approximately 30 miles south of Dallas-Fort Worth, warranted a dispositive section 307(b) preference. Under the contingent comparative issue, the ALJ found that Tuck, with 50 percent full-time integration and no media interests, would be the comparatively superior applicant.

8. The Review Board concluded that none of the competing applicants was entitled to a dispositive section 307(b) preference, that Tuck was the superior applicant under the contingent comparative issue, and that the grant of Tuck's application would best serve the public interest. 103 FCC 2d 936 (1986). Relying upon the Census Bureau's inclusion of Waxahachie, along with Garland and Plano, in the Dallas-Fort Worth SMSA, the Board determined that Waxahachie was an integral part of the larger metropolitan area for section 307(b) purposes. In doing so, the Board noted that the Census Bureau includes Garland and Plano but not Waxahachie in the Dallas-Fort Worth Urbanized Area.

9. Now before us are. (a) a Contingent Application for Review, filed June 9, 1986, by Tuck; (b) an Application for Review, filed June 9, 1986, by Bluebonnet; (c) an Application for Review, filed June 9, 1986, by Century; (d) an Application for Review, filed June 9, 1986, by Dontron; (e) an Opposition to Application for Review, filed July 15, 1986, by Tuck; (f) an Opposition to Applications for Review, filed July 15, 1986, by Bluebonnet; (g) an Opposition to Tuck's Contingent Application for Review, filed July 15, 1986, by Century; (h) an Opposition to Bluebonnet's Application for Review, filed July 15, 1986, by Century; and (i) an Opposition to Dontron's Application for Review, filed July 15, 1986, by Century.

10. In their Applications for Review, Dontron and Century challenge the Review Board's determination that, pursuant to *Huntington*, neither is entitled to a dispositive preference under section 307(b) for bringing first local radio transmission service to the community of Garland. Tuck claims in its Contingent Application for Review that *Huntington* does not apply to its Waxahachie proposal, and that it is entitled to a dispositive preference under section 307(b) for its proposal to bring first local transmission service to Waxahachie at night. Bluebonnet, which seeks to serve Plano, argues that *Huntington* applies to the proposals for Waxahachie and Garland, that none of the applicants deserves a dispositive preference for section 307(b), and that therefore the Commission should resolve this proceeding based on the standard comparative issue.

11. For the reasons set forth below, we find that a remand is necessary to resolve the questions raised in the pending applications for review. Changes in the Commission's rules raise a question of fact as to whether Tuck's proposal will bring first local transmission service to Waxahachie at night, a fact that is central to whether Tuck is entitled to a section 307(b) preference. In addition, recent Court of Appeals opinions affect the Review Board's approach to the *Huntington* issue in this case, and make it appropriate for us to take this opportunity to address concerns raised by the court.

## II. NEWLY AUTHORIZED NIGHTTIME SERVICE

12. The Commission recently made changes in its AM technical rules so as to permit certain daytime-only stations to operate both day and night. *Unlimited-time Operation by Existing AM Daytime-Only Radio Broadcast Stations ; Discontinuance of Authorization of Additional Daytime-Only Stations ; Minimum Power of Class III Stations*, 2 FCC Rcd 7113 (1987). There the Commission indicated that it would issue orders to daytime-only AM licensees qualifying under the revised rules for nighttime operation "to show cause why their licenses should not be modified to specify nighttime operation." *Id.* at 7118 ¶ 33.

13. Tuck is the licensee of daytime-only AM station KBEC in Waxahachie. It seeks to change frequencies and to operate station KBEC both day and night in Waxahachie on 770 kHz. However, station KBEC qualifies for nighttime operation under our revised rules, and we issued a show-cause order to the station specifying that the station must operate at night and that its nighttime operation may not exceed 65 watts. The station has not notified the Commission that nighttime operation at 65 watts is impossible, and the deadline for such notification has passed

14. In view of this change in circumstances, it appears that KBEC will now be able to provide nighttime service to Waxahachie even if Tuck's application to change frequencies is denied. As station KBEC already serves Waxahachie during the day, Tuck's claim to a dispositive section 307(b) preference depends entirely on nighttime service. Thus, the rule change raises a question as to whether Tuck is still eligible for a preference for local transmission service. However, as noted above, the Commission has issued a show-cause order specifying that KBEC may use only 65 watts of power at night, which is considerably less than the 1 kw that Tuck proposes to use at night if its application for an AM station on 770 kHz is granted.

15. Because the ALJ closed the record in this proceeding before the Commission amended its AM rules to permit limited nighttime operation by daytime-only stations, there is no record evidence as to what areas and population will now receive nighttime service from KBEC. Under these circumstances, we cannot determine from the record before us what effect KBEC's newly authorized nighttime operation has on the section 307(b) issue. Accordingly, without regard to whether *Huntington* applies to the Waxahachie proposal, we must remand this proceeding to the ALJ with instructions to adduce evidence and prepare a supplemental initial decision on this question.

## III. SECTION 307(b) PREFERENCE

16. Having concluded that a remand is necessary on the nighttime question, we believe that it is also appropriate for us to give guidance on the *Huntington* issue. After the Review Board's decision in this case, the Court of Appeals considered three cases raising the question at issue in this case -- that is, the applicability of the *Huntington* exception to proposals for communities located near a large metropolitan area. *Arizona Number One Radio, Inc*, 2

FCC Rcd 44 (1987), *aff'd mem. sub nom. Interstate Broadcasting System v. FCC*, 836 F 2d 1408 (D.C Cir. 1988); *Debra D. Carrigan*, 100 FCC 2d 721, 728-31 (Rev. Bd. 1985), *review denied*, 104 FCC 2d 826 (1986), *aff'd mem. sub nom. Bernstein / Rein Advertising v. FCC*, 830 F.2d 1188 (D.C. Cir. 1987); *New Radio Corp. v. FCC*, 804 F.2d 756, 760 (D.C. Cir. 1987). The Court of Appeals upheld the Commission in all three cases, but it observed that "the FCC's policy of assigning licenses to communities in metropolitan areas once again appears to be in a state of confusion." *New Radio*, 804 F.2d at 762.

17. In *New Radio*, the Court of Appeals specifically focused on "confusion concern[ing] the weight that the FCC places on the regional nature of the proposed service and on the Census Bureau's concepts of an 'Urbanized Area' and a 'Standard Metropolitan Statistical Area'" in *Huntington* cases. *Id.* Because the Review Board relied on those concepts in this case, we take this opportunity to address the court's concerns in the context of this case. For the reasons set forth below, we find that the Board's reliance on Waxahachie's location within the Dallas-Fort Worth SMSA was improper.

18. As a matter of fairness, we will permit the parties, on remand, to supplement their evidentiary showings on whether Waxahachie, Plano, and Garland are integral parts of the Dallas-Fort Worth metropolitan area for purposes of section 307(b). In *New Radio*, the Court of Appeals concluded that "the present state of the law surrounding the *Huntington* exception sometimes appear[s] to be a muddle," but that this "muddle" did not disadvantage the petitioner because it had not properly raised *Huntington*. 804 F 2d at 763. The parties in this case properly raised *Huntington* with respect to Waxahachie and Garland, and therefore we have no comparable assurance that the confusion on this question has not disadvantaged the applicants in this case. Thus, we will permit the parties to adduce further evidence as to whether *Huntington* applies to the proposals for Garland or Waxahachie. As Bluebonnet never claimed a section 307(b) preference for its proposal to serve Plano, the *Huntington* issue was not decisionally significant with respect to that applicant. However, in view of the new standards announced here, we will, as a matter of fairness, also permit the parties to adduce evidence on whether the *Huntington* exception applies to Plano.

**A. Local Transmission Service and the Section 307(b) Framework**

19. Section 307(b) requires the Commission to "make such distribution of licenses . . . among the several States and communities as to provide a fair, efficient and equitable distribution of radio service . . " 47 U.S.C. § 307(b). Thus, whenever applicants specify different communities of license for their proposed stations, the Commission first compares the needs of the respective communities for radio service. Applicants for AM channels, such as the frequency at issue in this case, may propose to serve any community where their operations will not cause objectionable interference to, or receive such interference from, existing stations. In contrast, FM and television frequencies are assigned to specific communities. Until 1983, applicants could generally propose FM or television operations from any communities within a specified distance from the community to which the channel had been assigned. That policy was changed in *Suburban Community Policy, the Berwick Doctrine, and the De Facto Reallocation Policy*, 93 FCC 2d 436 (1983), *recon. denied*, 56 RR 2d 835 (1984), *aff'd sub nom. Beaufort County Broadcasting Co. v. FCC*, 787 F.2d 645 (D.C. Cir. 1986).

20. The Commission has assessed the need for radio service primarily in light of the facilities presently available in the proposed communities and the relative population of the communities. *Radio Greenbrier, Inc.*, 80 FCC 2d 107, 109, *recon. denied*, 80 FCC 2d 140 (Rev. Bd. 1980); *Kent - Ravenna Broadcasting Co.*, 44 FCC 2603 (1961). The need for service concerns both the number of stations that can be received in a given area (reception service) and the availability of local outlets for self-expression in the community (transmission service). The Commission seeks to provide, in order of priority: (1) first full-time aural reception service; (2) second full-time aural reception service; (3) first local transmission service; and (4) additional services. The second and third priorities have equal weight. *See FM Channel Policies/Procedures*, 90 FCC 2d 88, 91-93 (1982).

21 In assessing the relative need for service, the Commission presumes that the unserved community with the largest population has the greatest need for a station. *See*, e.g., *Cornwall Broadcasting Corp*, 89 FCC 2d 704, 709 (Rev. Bd. 1982). If one community's need for service is sufficiently greater so as to give that community a decisive preference, only the applicant(s) specifying that community are given further consideration. *FCC v. Allentown Broadcasting Corp*, 349 U.S 358, 361-62 (1955). Thus, the Commission generally has preferred a community with no local transmission service over a community that already has a local station without regard to the comparative ability of each applicant to serve its respective community. In other words, where the Commission awards a dispositive section 307(b) preference based upon the communities' need for local transmission service, it does not reach the standard comparative issue. *Pasadena Broadcasting Co. v. FCC*, 555 F.2d 1046, 1050 (D.C. Cir. 1977).

**B. The Huntington Doctrine**

22. In those exceptional cases, however, where competing applications are filed for separate communities that are dependent upon, and contiguous to, a central city, and the applicants propose sufficient power to serve the entire metropolitan area, we treat that entire metropolitan area as one community for section 307(b) purposes. *Huntington Broadcasting Co. v. FCC*, 192 F 2d 33, 35 (D.C. Cir. 1951). Accord, *Debra D. Carrigan*, 100 FCC 2d at 728-31. Under these circumstances, we presume that the need for local self-expression in an ostensibly separate community will be adequately met by a broadcast facility licensed to serve any one of the competing communities. *Id.* at 728-31. Accordingly, we award none of the competing communities dispositive section 307(b) preference, and we base our selection among the mutually exclusive applicants on the standard comparative criteria rather than section 307(b) considerations. *See Allentown Broadcasting*, 349 U.S. at 361-62.

23. The *Huntington* doctrine is a limited exception to the usual section 307(b) presumption that every separate community needs at least one local transmission service. Accordingly, we are reluctant to extend it beyond its original application -- that of a central city and its contiguous suburbs. As the Court of Appeals indicated in *Beaufort County*, 787 F.2d at 649, " *Huntington's* premise is that where integrally related communities constitute a sin-

gle metropolitan transmission service area, individual communities' needs should be presumed satisfied by the aggregate of stations in that area."

24. Because *Huntington* is an exception to section 307(b), the party seeking to have us apply it against a competing applicant generally bears the burden of proof on this issue. As the Court of Appeals has explained, "[w]hile it may be assumed that the Commission may consider the *Huntington* exception on its own motion in an appropriate case, it is generally recognized that the burden of invoking an exception will fall on the party seeking to apply it." *New Radio*, 804 F.2d at 760. Thus, we recognize a community's presumptive need for local transmission service under section 307(b) unless there is substantial evidence that the communities at issue are interdependent.

25 By the same token, the Court of Appeals has emphasized that the Commission has the burden of justifying any extension of the *Huntington* exception. In *Miners Broadcasting Service, Inc v FCC*, 349 F 2d 199, 201 (D C. Cir. 1965), the court held that "[t]he use of the 'exceptional' rule of *Huntington* in this case is permissible only if the Commission clearly recognizes it as an extension and gives adequate reasons for it " Accord, *Beaufort County*, 787 F.2d at 654 (Commission not required to apply *Huntington* to two small contiguous communities not located in a metropolitan area)

### C. The Standard for Applying Huntington

26 In determining whether a party has satisfied its burden of establishing that *Huntington* should apply, the Commission has traditionally considered the following four criteria. (1) power and class of station; (2) interdependence or independence of the specified "community" to the central city of the "urbanized area", (3) size and proximity of the specified "community" to the central city, and (4) signal population coverage and relevant advertising market *Arizona Number One*, 2 FCC Rcd at 45 n.11; *Debra D. Carrigan*, 100 FCC 2d at 729 ¶ 10 *See* also *New Radio*, 804 F 2d at 761; *Miners*, 349 F 2d at 201-02 n.6.

27 The Court of Appeals has frequently criticized our *Huntington* doctrine. *See* , e.g , *Miners*, 349 F.2d at 201-02 n.6. As the court also noted in *New Radio*, there is some confusion as to what weight these criteria (particularly the "regional nature of the proposal) have in determining whether the *Huntington* exception will apply, and what weight the Census Bureau's concepts of Urbanized Area and SMSA have in delineating "community" in a major metropolitan area for section 307(b) purposes. 804 F 2d at 762.

28. We take this opportunity to address these concerns. Our intention is to clarify, rather than to expand or narrow, the scope of the *Huntington* exception. After careful consideration, we conclude, for the reasons set forth below, that proposed power and class of station is not pertinent in deciding whether *Huntington* should apply. We also find that relevant advertising market should be considered as an element of interdependence and not as a separate criterion under *Huntington* The ultimate focus of our analysis in these cases is the characteristics of the specified community rather than the technical aspects of the applicant's proposal Thus, the most important consideration under *Huntington* is the relationship between the specified and the central city of the Urbanized Area In comparison, evidence on the remaining criteria -- the size and proximity of the specified community to the central city, and signal population coverage -- is pertinent, but has less significance than evidence of interdependence.

29. *Power and Class of Station* . The technical nature of a proposal -- that is, the station's power and class -- has never been deemed sufficient, standing alone, to trigger the *Huntington* exception. Indeed, the Court of Appeals has overturned *Huntington* determinations that it found were based exclusively on such technical factors. *Miners*, 349 F.2d at 201-02 n.6; *Pasadena*, 555 F.2d at 1050-51. Its analysis in *Beaufort County*, where our refusal to apply *Huntington* to two rural communities was upheld, confirms that, in the absence of evidence that a specified community is a mere appendage of a metropolitan area, the *Huntington* exception does not apply. 787 F.2d at 654.

30. We believe that power and class of station are no longer relevant in determining whether to invoke *Huntington*. In recent years, we have experienced increased demand for electronic media of all types. Because of this increased demand, the market has become more competitive and the need for regulation less critical. In accordance with these changes in the marketplace, we have taken various steps to foster maximum utilization of the spectrum. For example, we now allow stations to upgrade service to the public by increasing power. *See Amendment of Part 73 of the Commission's Rules Concerning the Nighttime Power Limitations for Class IV AM Broadcast Stations*, 55 RR 2d 1015, 1016 ¶ 4 (1984).

31 In our view, focusing on the power and class of frequency under *Huntington* undercuts this public interest objective In this regard, considering this criterion could benefit an applicant proposing less than maximum utilization of the frequency. Power and class of station are matters that are largely within the discretion of the broadcast applicant, and we do not wish to give applicants an incentive for proposing deliberately limited service contours or otherwise encourage inefficient use of the spectrum.

32. In eliminating this criterion from the *Huntington* analysis, we emphasize that we are not abandoning our commitment to providing local transmission service to as many communities as possible We remain cognizant of a community's need for an outlet for local self-expression and of our statutory responsibility to allocate stations in a fair and equitable manner. As the court has indicated, we run afoul of our responsibilities under section 307(b) when we subordinate a community's need for local transmission service to efficiency considerations, and "allot [a] frequency 'so as to provide service to the greatest population and area possible.'" *See Pasadena*, 555 F.2d at 1048. Nevertheless, section 307(b) requires that we make an efficient, as well as a fair and equitable, distribution of licenses, and a policy that could favor inefficient proposals does not serve the public interest. Accordingly, we conclude that it is inappropriate for us to consider the power and class of station in determining whether to apply *Huntington* in radio cases[1] because such consideration actually gives broadcast applicants an incentive to specify deliberately small service contours. Cf. *National Association of Broadcasters*, 740 F 2d at 1198-99 (Not every communications service that the Commission authorizes must be tied to the local service concept).

33 *Interdependence with and Proximity to Central City* : In the typical *Huntington* case involving a central city and its contiguous suburbs, the second and third criteria -- the relationship between the specified community and the

central city, and their proximity and relative sizes -- are generally decisive in determining whether the *Huntington* doctrine should apply. However, the Court of Appeals has cautioned that we may not focus exclusively on the size and proximity of the communities involved without also considering evidence of the interdependency between the specified community and the central city. *New Radio*, 804 F.2d at 761. *See* also *Beaufort County*, 787 F.2d at 653-54 (Without evidence of the interrelationship between the communities, the Commission is not required to invoke *Huntington).*

34. In accordance with the court's admonitions in *New Radio* and in *Beaufort*, we hold that the relationship between the specified community and the central city is the critical consideration in deciding whether *Huntington* applies. In the absence of persuasive evidence that two communities share needs and interests we have no basis for inferring that one community's need for local transmission service will be satisfied by a station licensed to the other community. Although interdependence is the most important consideration under *Huntington*, the required showing of interdependence between the specified community and the central city will vary depending on the degree to which the second criterion -- relative size and proximity -- suggests that the community of license is simply an appendage of a large central city When the specified community is relatively large and far away from the central city, a strong showing of interdependence would be necessary to support a *Huntington* exception. On the other hand, less evidence that the communities are interdependent would be required when the community at issue is smaller and close to the central city.

35 In concluding that interdependence is the most important criterion under *Huntington*, we simply adjust our standards to reflect what has been our experience in this area. By reordering the *Huntington* criteria in this manner, we are not fundamentally changing our approach in these cases. However, we recognize that it is difficult to demonstrate the relationship between ostensibly separate communities, and that the evidence necessary to demonstrate such relationship will vary depending on the circumstances in a particular case. In this regard, we deem it useful to delineate those characteristics most likely to reflect such interdependence. In doing so, we emphasize that our list is not exhaustive, and that there is no set of indicia of interdependence that must be shown in order to invoke the *Huntington* exception

36 In assessing the interdependence of the specified community with the central city, we will consider the following characteristics: (1) the extent to which community residents work in the larger metropolitan area, rather than the specified community, (2) whether the smaller community has its own newspaper or other media that covers the community's local needs and interests; (3) whether community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area; (4) whether the specified community has its own local government and elected officials; (5) whether the smaller community has its own telephone book provided by the local telephone company or zip code; (6) whether the community has its own commercial establishments, health facilities, and transportation systems, (7) the extent to which the specified community and the central city are part of the same advertising market; and (8) the extent to which the specified community relies on the larger metropolitan area for various municipal services such as police, fire protection, schools, and libraries.

37. Two aspects of interdependence warrant further comment. First, we note that few cases have focused on relevant advertising market. This is because parties, in this and other cases, have adduced virtually no evidence analyzing relevant advertising market. Nevertheless, we believe that such evidence may be probative of whether a community is independent of a central city for purposes of the *Huntington* doctrine. In this regard, we are particularly interested in evidence showing a commonality of interest based on mutual economic reliance between the specified community and the larger metropolitan area. Thus, parties seeking to invoke *Huntington* may adduce evidence on the extent to which advertisers in the central city utilize advertising outlets in the smaller community, and the extent to which advertisers in the smaller community utilize advertising outlets in the central city [2] We will consider such evidence in determining whether the specified community is interdependent with, or independent of, the larger metropolitan area.

38 Second, we will carefully scrutinize evidence that the specified community depends on the larger metropolitan area for various public services. We recognize, however, that to the extent that a community's inclusion within a larger jurisdiction reflects economic realities, evidence that a community relies upon a larger jurisdiction to provide certain services may not be particularly probative of whether that community shares needs and interests with other communities within the larger metropolitan area. [3] Thus, we will consider rebuttal evidence showing that communities in metropolitan areas tend to cooperate in providing a particular service. In doing so, it is not our intent to ascertain why a community has or has not cooperated with neighboring communities in providing certain services to its residents. However, where the record reflects that nearby municipalities have cooperated in providing a certain service, the fact that the specified community does not participate with neighboring municipalities in the joint production of local public goods would be strong evidence of its independence from the larger metropolitan area.

39 *Signal Population Coverage* Although power and class of station are no longer relevant under *Huntington*, we will continue to consider signal population coverage under certain circumstances. Under our previous approach to this criterion, an applicant was able to avoid the *Huntington* analysis by choosing to cover fewer people by operating at less than maximum power and thereby receive a section 307(b) preference.[4] However, such an operation would be an inefficient use of the spectrum, contrary to the mandate of section 307(b). Hence, in order to avoid such situations in the future, we will now only consider the number of people covered by an applicant's proposed coverage if the applicant's proposal is at maximum power. If the proposal is not at maximum power, the number of people covered by the applicant's proposed contour will not factor into the *Huntington* analysis, and we will place greater reliance on the other factors discussed herein.

40 In sum, we have deleted one criterion of the test for invoking Huntington. power and class of station. We have also eliminated relevant advertising market as a separate criterion under *Huntington*, but we will consider such evidence as one element pertinent to the interdependence

criterion. In accordance with our past experience in this area, as well as various court opinions, we have held that interdependence is the most important criterion under *Huntington*. In order to clarify this difficult area, we have provided an illustrative list of indicia that we deem pertinent in assessing the relationship between the specified community and the central city. Finally, we have indicated that evidence on the remaining criteria -- size and proximity of the specified "community" to the central city; and signal population coverage -- is relevant to, but not necessarily dispositive of, the *Huntington* issue.

**D. Defining "Community" Under the Huntington Exception**

41. Having determined that interdependence is the most important criterion under *Huntington*, we turn now to the second concern raised by the court in *New Radio*. The weight given to the Census Bureau's SMSA and Urbanized Area concepts in delineating a metropolitan area community for section 307(b) purposes. As the Court of Appeals has suggested, the party seeking to invoke the *Huntington* exception may not resort to a "metropolitan area" presumption in order to meet its burden of proof *New Radio*. 804 F 2d at 760-61 The Commission does not presume, even in the typical case involving a central city and its contiguous suburbs, that the needs and interests of communities in a particular metropolitan area are indistinguishable, or that "all communities in metropolitan areas are merely undifferentiated components of larger metropolitan areas " *Id* at 761

42. In this regard, the Commission has explicitly refused to redefine a community in a metropolitan area to mean, for the purposes of section 307(b), "the community actually receiving service as a result of the power proposed . [rather than] the community specified on the application." *Suburban Community Policy*, 93 FCC 2d at 457

43 However, the Commission has issued a notice of proposed RuleMaking, proposing to adopt a metropolitan area concept in delineating the geographic boundaries of a "community" for the purposes of section 307(b) *Section 307 (b) Preferences Within Metropolitan Areas*, 48 Fed Reg. 19428 (proposed Apr 29, 1983), RR Current Service 53 305 (hereinafter cited as *Metropolitan Areas)* The Commission sought comments on whether the Census Bureau's concepts of Urbanized Area or SMSA, or some other physical delineation, would be an appropriate "community" for section 307(b) purposes. *Id.* at 19431 Pending action on the RuleMaking, the Commission has continued to use the traditional criteria for applying the *Huntington* doctrine on a case-by-case basis. *Debra D Carrigan*, 100 FCC 2d at 731 n.13.

44. The Census Bureau defines an Urbanized Area as a "separation of urban and rural population in the vicinity of the larger cities." *Metropolitan Areas*, 48 Fed. Reg at 19431. The criteria for Urbanized Area are (a) a central city of 50,000 inhabitants or more; or (b) twin cities, that is, cities with contiguous boundaries with a combined population of 50,000, with the smaller community having a population of at least 15,000; or (c) surrounding incorporated communities of 2500 or more or areas of an urban nature based upon population density and land utilization. *Id* On the other hand, the Census Bureau defines an SMSA as being made up of a county or a group of contiguous counties surrounding a city of 50,000 or more population. *Id.*

45. Thus, the Census Bureau's SMSA concept encompasses a larger area than its Urbanized Area definition, and it may include considerable amounts of rural territory that lie outside the Urbanized Area.

Adopting the broader SMSA concept as the standard for a metropolitan area community in section 307(b) cases would effectively mean that, regardless of its relationship to the central city, no community in a densely populated area, such as the California coast from Los Angeles County to the Mexican border, could ever receive a preference on section 307(b) grounds.

46. Under these circumstances, we conclude that a community's location within the SMSA is not an adequate substitute for record evidence that the specified community is interdependent with the central city. As the Court observed in *New Radio*, 804 F.2d at 762, the Board mentioned the SMSA concept in connection with the *Huntington* exception in *Debra D. Carrigan*, 100 FCC 2d at 736. In *Carrigan*, the Commission upheld the application of *Huntington* to all communities in that case. 104 FCC 2d at 828-29 ¶ 5 However, the Commission has never specifically endorsed the use of the SMSA concept in *Huntington* cases

47. Moreover, neither the Board nor the Commission relied upon the suburb's location within the Las Vegas SMSA in determining that *Huntington* should be invoked in *Carrigan* Rather, the determination to apply *Huntington* in that case turned upon the four standard *Huntington* criteria set forth in paragraph 26 above. There, the competing communities were all within five miles of each other, and all the applicants proposed to cover the same populations and areas from the same transmitter site. In addition, substantial evidence in the record reflected that the suburb in *Carrigan* -- Paradise, Nevada -- was culturally, politically, and economically dependent on Las Vegas.

48. Because the Census Bureau's Urbanized Area encompasses far less territory than the broader SMSA, we find that the Urbanized Area more accurately defines a metropolitan area "community" for section 307(b) purposes. As *Huntington* is a very limited exception to section 307(b), we are ever wary of extending it beyond the doctrine's original premises concerning the overlapping transmission needs of a central city and its contiguous suburbs. The record before us in this adjudicatory proceeding does not demonstrate that such an extension would serve the public interest. However, using the Urbanized Area concept in our *Huntington* analyses does not, in our view, impermissibly extend *Huntington*. Thus, in order to alleviate the confusion in this area, we believe that, pending action on the matters under consideration in the *Metropolitan Areas* RuleMaking, the public interest would be best served by using the Urbanized Area concept in connection with a *Huntington* analysis as the standard for defining a metropolitan area "community" in section 307(b) adjudicatory cases.

49. In concluding that Urbanized Area is relevant in *Huntington* determinations but that SMSA is not, we in no way prejudge the outcome of the application of the *Huntington* doctrine to this case. We hold only that Urbanized Area is an appropriate definition of "community" under *Huntington*, but that *Huntington* does not automatically encompass all communities within the SMSA. In other words, a party may not rely on a community's location within the SMSA to meet its burden of showing that the

community is an integral part of a homogenous metropolitan area. Rather, the party seeking to have us apply *Huntington* to a community outside the Urbanized Area must affirmatively show that there is sufficient dependence on the central city to support a public interest finding that the given community's local transmission needs can be adequately satisfied by stations licensed to other communities within the larger metropolitan area.

50. As set forth below, we are not persuaded that the record before us warrants invoking *Huntington* against any of the applicants in this case. On remand, the parties seeking to apply *Huntington* against Tuck or against the other applicants are free to present additional evidence on any of the criteria set forth in paragraph 40 above. The affected applicants are likewise free to present rebuttal evidence on any of the criteria.

51. By virtue of Waxahachie's location outside the Urbanized Area, the parties seeking to invoke *Huntington* against Tuck face a heavier burden of proof than those seeking to invoke *Huntington* against the applicants for Garland or Plano. Nevertheless, we do not foreclose the possibility that on remand the parties seeking to apply *Huntington* against Tuck will be able to affirmatively demonstrate that Waxahachie, despite its location outside the Urbanized Area, is interdependent with the larger Dallas-Fort Worth metropolitan area.

52 Where, as in this case, competing applicants specify different communities, the *Huntington* analysis will vary according to the attributes of each community. In this case, the evidence on remand may support applying *Huntington* to all three, to two, to only one, or to none, of these communities In the event that *Huntington* applies to only one or to two of these communities, its application would narrow, rather than expand, the choice of applicants In *Miners*, the Court of Appeals criticized us for applying *Huntington* in a case where the doctrine narrowed rather than expanded the Commission's choice of applicants. 349 F.2d at 201 & n 6 However, notwithstanding the Review Board's suggestion, the Court of Appeals' decision in *Miners* does not establish that *Huntington* can be invoked only where it eliminates all section 307(b) distinctions among the applicants. Nor does *Miners* preclude us from making *Huntington* distinctions among communities based on their location within (or outside) the Urbanized Area.

53 *Miners*, unlike the case before us, involved three communities in the Pittsburgh Urbanized Area. The Commission determined that *Huntington* applied to the proposal for Ambridge-Aliquippa, but that it did not apply to the competing proposal for nearby Monroeville. Accordingly, the Commission awarded the Monroeville applicant a dispositive preference under section 307(b) for first local transmission service. *Monroeville Broadcasting Co.*, 36 FCC 296, 297 (1964)

54. The Court of Appeals reversed the Commission. *Miners*, 349 F.2d at 200 It found that the Commission had focused almost exclusively upon the technical aspects of the two proposals, without explaining why other criteria apparently relevant under *Huntington* -- such as size, distance, and relationship to the central city -- were not considered *Id* at 201-02 & n.6. Although the Court of Appeals did note that the Commission's application of *Huntington* to only two of the specified communities had the effect of narrowing rather than expanding the choice of applicants, it explicitly invited the Commission to justify this "extension" of the *Huntington* doctrine *Id.* at 201.

55. As we observed in *Debra D. Carrigan*, 104 FCC 2d at 829, *Huntington* generally enlarges the choice of applicants. This is because a suburban proposal is not excluded from full consideration under the standard comparative issue, as would be the case if *Huntington* is not invoked to defeat an applicant's dispositive section 307(b) preference for first local transmission service. Nevertheless, *Huntington* was not intended to eliminate all section 307(b) distinctions among competing applicants, and there may be cases where section 307(b) considerations remain paramount. Consequently, the determination to apply *Huntington* must ultimately depend upon the characteristics of a particular proposal without regard to the nature of a competing proposal.

56. We perceive no rational basis for restricting *Huntington* to situations where all of the competing proposals can be characterized as proposals for the larger metropolitan area. Nor can we, consistent with our statutory responsibility under section 307(b), permit suburban proposals for communities within the Urbanized Area, such as those for Garland and Plano, to defeat the transmission needs of an outlying community, such as Waxahachie, without regard to evidence on the criteria set forth in paragraph 40 above

### E. The Competing Proposals in this Case

57 With these general precepts in mind, we turn briefly to the facts in this case. The competing communities are Waxahachie, Garland, and Plano. The only station licensed to serve Waxahachie is Tuck's daytime-only AM station, KBEC There is no broadcast station licensed to serve Garland, but the Commission awarded a construction permit for a new UHF television station to operate on UHF television channel 23 in Garland. Finally, Plano already has a full-time radio station.

#### 1. *The Plano Proposal*

58. As noted above, Bluebonnet proposes to serve the community of Plano It has not sought a preference under section 307(b) for local transmission service inasmuch as that community already has a full-time AM station for local self-expression. In fact, Bluebonnet has argued throughout this proceeding that none of the applicants is entitled to a section 307(b) preference, and that the Commission should resolve this proceeding based on the standard comparative issue.

59 We discern no reason why Bluebonnet would want to change its theory of the case at this time and request a dispositive section 307(b) preference for its proposal to serve Plano. Ordinarily, we would not permit an applicant to claim a dispositive section 307(b) preference for the first time at this late date. *See New Radio*, 804 F.2d at 760, where the Court of Appeals held that an applicant that chose to present its entire case based on a section 307(b) claim and did not raise *Huntington* before the ALJ or the Review Board waived the right to raise *Huntington* for the first time before the Commission.

60. Nevertheless, in view of the modified standards announced here, Bluebonnet may now wish to request a dispositive section 307(b) preference for bringing an additional local transmission service to Plano In that event, we would, as a matter of fairness, permit the other applicants to present evidence on whether *Huntington* also applies to Bluebonnet's proposal for Plano. Under these

circumstances, we see no reason to consider at this time whether the record supports the Board's application of *Huntington* against Bluebonnet.

**2. *The Garland Proposals***

61. The 770 kHz frequency at issue in this proceeding is available for either wide-area or localized service. *Clear Channel AM Broadcasting*, 78 FCC 2d 1345, 1371-72, *recon.*, 83 FCC 2d 216 (1980), *aff'd sub nom. Loyola University v FCC*, 670 F.2d 1222 (D.C Cir 1982). Based upon the power specified by the Garland applicants, the Review Board concluded that these applicants proposed essentially regional services. However, as noted above in paragraph 28, we have concluded that the power and class of the proposed station is not relevant in determining whether *Huntington* applies.

62. The size and proximity of Garland to the central city favors applying *Huntington* to the Garland proposals. In this regard, the community of Garland is located 15 miles from Dallas and within the Dallas-Fort Worth Urbanized area. Although Garland has a population of 138.857, it is only a fraction the size of Dallas. Its close proximity to Dallas further suggests that it may be a mere appendage of Dallas, and that *Huntington* should apply. The signal population coverage also favors applying *Huntington* to the proposal for Garland. In this regard, both proposals will project a 2 mV/m contour over Dallas both day and night. Moreover, because of Garland's location within the Dallas-Ft. Worth Urbanized Area, which is more densely populated than the SMSA, the applicants for Garland will reach significantly more people both day and night than Tuck could serve if it had specified the same daytime power as the Garland applicants propose

63 However, with regard to the most important consideration under *Huntington* -- the relationship between the specified community and the central city -- we find that the Review Board's determination to apply *Huntington* to the Garland proposals is not supported by substantial evidence In other words, Tuck and Bluebonnet have not met their burden of demonstrating that Garland is an integral part of a larger homogeneous metropolitan area that shares common needs and interests

64 Although Garland is located in the Dallas-Fort Worth Urbanized Area, the record reflects that it has its own fire and police departments, its own school district with 54 public schools, its own electric and water service, two libraries, three hospitals, and two community colleges. On the other hand, the record contains only a few references to the "North Dallas area" which suggest an interdependence between Garland and the larger metropolitan area. Tr. at 434, 436 In addition, a former mayor of Plano testified that Plano and Garland are considered part of the Dallas "Metroplex" -- an informal label that we must view even more cautiously than "SMSA" or "Urbanized Area" -- and that these two communities are served by a number of umbrella organizations that also serve Dallas. Tr. at 376-79; Bluebonnet Ex. 7, Attachment B at 11. However, as discussed in paragraph 38 above, the extent to which municipal services are provided by the local community, rather than jurisdictions in the larger metropolitan area, has limited relevance in determining whether *Huntington* should apply. Thus, we find that, on balance, the weight of the present evidence does not establish Garland's interdependence with the Dallas-Fort Worth metropolitan area.

**3. *The Waxahachie Proposal***

65. We also conclude that the record does not support the Board's determination to apply *Huntington* to Tuck's Waxahachie proposal. In fact, we find that Bluebonnet, Century, and Dontron have not met their burden of proof with respect to *any* of the three criteria set forth in paragraph 40 above.

66. As an initial matter, we do not share the Board's reluctance to characterize Tuck's proposal, which will serve only 50,691 persons in 672 square miles at night and will use 1 kw of power both day and night, as localized. Daytime-only station KBEC presently projects a 0.5 mV/m contour over Dallas, Fort Worth, and most of Dallas and Tarrant Counties during the day. Tuck proposes twice the daytime power presently used by its Waxahachie station, which will enable it to project a 2.0 mV/m contour over Dallas during the day Although this constitutes primary service under 47 C F.R. § 73.182(e), Tuck's proposal to use only 1 kw of power during the day is significantly more modest than the clearly regional proposals of the competing applicants, which will operate at 5 to 10 kw during the day Moreover, station KBEC, unlike the proposals for Garland and Plano, will not project a 10 mV/m signal over Dallas at night Joint Ex 1, fig 6. However, for the reasons set forth above, Tuck's specification of less than maximum power during the day is not relevant in determining whether *Huntington* applies

67 With regard to the relationship between the specified community and the central city, the record contains virtually no evidence that Waxahachie is an integral part of the Dallas-Fort Worth metropolitan area. Nor is there any record evidence that the Dallas stations have made any special effort to serve Waxahachie In fact, the record affirmatively reflects that Dallas stations do not cover local Waxahachie government and events Tuck Ex. 5 at 1, 22. Moreover, the record provides substantial evidence establishing that Waxahachie is independent from the larger Dallas-Fort Worth metropolitan area. In this regard, Waxahachie is a self-governing community with a full complement of civic, educational, medical, and commercial facilities It is the county seat for Ellis County, which is an important agricultural area Ellis County does not include Dallas or Fort Worth However, to the extent that such evidence relates to the jurisdictional scale with which local public goods are produced, it may have, for the reasons discussed in paragraph 38, only limited relevance under *Huntington*.

68 Turning to the size and proximity of the specified community to the central city, Waxahachie has a population of 14,624. It is approximately 30 miles south of Dallas, and outside the Dallas-Fort Worth Urbanized Area, but within the Dallas-Fort Worth SMSA. Although Waxahachie's location outside the Urbanized Area does not favor invoking *Huntington* against Tuck, we emphasize that we do not prejudge this third issue. The evidence on remand may show that Waxahachie is interdependent with Dallas-Fort Worth despite its location outside the Urbanized Area.

69. Finally, with respect to signal population coverage, Tuck's 2 mV/m contour will not reach Dallas at night, and its primarily local service will serve fewer people both day and night than the competing proposals. Under these circumstances, and in the absence of any other evidence that Waxahachie's presumptive need for a full-time local transmission service issue for self-expression is adequately met by the plethora of facilities licensed to surrounding com-

munities in the larger Dallas-Fort Worth metropolitan area, we conclude that Bluebonnet, Dontron, and Century have not met their burden of showing that *Huntington* should apply to the Waxahachie proposal. *New Radio*, 804 F.2d at 761. Accord, *Beaufort*, 787 F 2d at 652-53.

## V. ORDERS

70. ACCORDINGLY, IT IS ORDERED, That the record in this proceeding IS REOPENED AND REMANDED to the presiding Administrative Law Judge for further hearings in accordance with this Memorandum Opinion and Order, and for the preparation of a supplemental initial decision on the following hearing issues:

(1) To determine the areas and populations that will receive nighttime service from station KBEC when it begins operating at 65 watts, pursuant to the Commission's show-cause order;

(2) To determine what effect the findings made under Issue 1 have on the section 307(b) issue,

(3) To determine whether *Huntington* should apply to the proposals for Waxahachie, Plano, and Garland based on the criteria set forth in paragraph 40 above;

(4) To determine, in light of section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient, and equitable distribution of radio service, and

(5) To determine, in the event that it is concluded that only Dontron and Century are entitled to section 307(b) preferences, which of the proposals for Garland would, on a comparative basis, better serve the public interest

71. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence under Issue 1 SHALL BE on Tuck; and that the burdens of proceeding and of proof with respect to Issue 3 SHALL BE as set forth herein

72. IT IS FURTHER ORDERED, That the ALJ IS DIRECTED to expedite the further evidentiary hearings ordered herein.

73. IT IS FURTHER ORDERED, That the Contingent Application for Review, filed June 9, 1986, by Faye and Richard Tuck, Inc . and the Applications for Review, filed June 9, 1986, by Bluebonnet Broadcasters, Inc., Dontron, Inc., and Century Broadcasting Corporation ARE DISMISSED, and that the Review Board's Decision in this proceeding, 103 FCC 2d 936 (1986), IS MODIFIED as reflected herein.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

## FOOTNOTES

[1] This case does not raise a question concerning the resolution of section 307(b) issues in television cases, and we have not considered this question. Thus, in deleting power and class of station as a criterion under *Huntington* as applied to radio, we do not here change anything that we previously said regarding our treatment of section 307(b) issues in television cases. *See Cleveland Television Corp.*, 91 FCC 2d 1129, 1137 ¶ 14 (Rev. Bd. 1982), aff'd on other grounds, *Cleveland Television Corp. v. FCC*, 732 F.2d 962 (D.C. Cir. 1984), where we explained that television raises different section 307(b) considerations than radio because television stations typically serve much larger areas, involve greater capital investments, and require larger audiences to attract more advertising than radio stations.

[2] This is not the first time that the Commission has looked to advertising patterns in defining the parameters of a station's relevant market. For example, the Commission has looked to advertising patterns in establishing hyphenated markets for purposes of the must-carry cable television rules. Hyphenated markets are defined as markets characterized by more than one major population center supporting all stations in the market but with competing stations licensed to different communities within the market area *See Amendment of Section 76 51 (Orlando-Daytona Beach, Melbourne and Cocoa, Florida)*, 102 FCC 2d 1062, 1070-71 ¶ 15 (1985); *Amendment of Section 76.51 (Newark, New Jersey)*, 47 FCC 2d 753, 754 ¶ 5 (1974), *Cable Television Report and Order*, 36 FCC 2d 143, 176 ¶ 87 (1972)

[3] For example, we would not necessarily find that municipalities sharing a sewage treatment plant or an air pollution control program are interdependent and share the same needs and interests for section 307(b) purposes, in the face of evidence showing that communities in metropolitan areas generally cooperate in providing such services By the same token, the fact that a community provides its own fire protection would not be particularly probative of its independence from the larger metropolitan area if other evidence reflected that it is quite common for such communitiesto have separate fire departments

[4] The applicant has considerable discretion over the technical aspects of its proposal It can, subject to the Commission's power limitations and requirements for protection of other stations, dictate the area encompassed within its contours, and thus the number of people that its signal will reach