Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In re Application of	)	
	)	
THRESHOLD COMMUNICATIONS	)	File No. BNPH-20110630AHJ
	)	Facility ID #189494
For a New Commercial FM Station at	)	
Napavine, Washington	)	

TO: The Commission

OPPOSITION TO APPLICATION FOR REVIEW

Threshold Communications, by counsel and pursuant to §1.115 of the Commission's rules, hereby respectfully opposes the Application for Review filed on October 17, 2016 by Premier Broadcasters, Inc. in connection with Threshold's above-identified application for a new FM broadcast station at Napavine, Washington.[1] Premier seeks review of the Media Bureau's Letter Decision[2] affirming its earlier Letter Decision[3] in which Threshold's application was granted.

Premier presents three principal arguments to support its claim that the two Letter Decisions should be reversed:

(1) The Decisions improperly applied the UASP to the existing Clatskanie allotment.

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[1] Threshold has previously submitted an unopposed request to extend the time for filing this pleading until and including November 15, 2016.

[2] *Threshold Communications and Premier Broadcasting*, Letter Decision (MB September 13, 2016).

[3] *Donald E. Martin, Esq. and Meredith S. Senter, Jr., Esq.,* Letter Decision, DA15-790, 30 FCC Rcd 7152 (MB 2015).

(2) The Decisions ignored that the UASP is rebuttable and has been rebutted in this case.

(3) The Decisions improperly held that a 29-person difference in population is decisive and ignored all other evidence favoring Clatskanie.

As Threshold will show, none of these arguments is supported by the facts or the law. The Bureau's Decisions were correct and deserve to be affirmed.

1. **The UASP Was Properly Invoked and Applied.**

As an element of the process for evaluating competing radio allotment plans under §307(b) of the Communications Act as amended, the Commission developed the Urbanized Service Area Presumption ("UASP") in its *Rural Radio* proceeding.[4] Under the UASP, a proposal for a community located within an urbanized area that would place a principal community contour over 50% or more of the urbanized area, or that could be modified to provide such coverage, will be presumed to be a proposal for the entire urbanized area rather than the proposed community of license. Threshold demonstrated that the Clatskanie allotment covers more than 50% of the Longview, Washington, urbanized area. On the other hand, Napavine is not in any urbanized area. The Napavine proposal would not cover 50% of any urbanized area, and there is no existing tower from which the Napavine station could cover 50% of such an area. The Section 307(b) comparison therefore is between Napavine and the Longview urbanized area. Napavine has no existing transmission service. Longview has numerous existing stations. Napavine is preferred under Priority (3) of the allotment selection criteria.

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[4] *In the Matter of Policies to Promote Rule Radio Service and to Streamline Allotment and Assignment Procedures,* Second Report and Order, 22 FCC Rcd 2556, 2572-2578 (2011).

Premier disputes that this analysis should focus on the undeveloped allotment site for Clatskanie. Premier posits that construction of a tower at the allotment site is problematic and unlikely. On the other, Premier claims that there are existing towers in the Clatskanie area from which the station could not provide 70 dBu service to any portion of the Longview urbanized area.[5] Under such an analysis, Premier believes that the UASP would not be triggered and the 307(b) comparison would be merely between Clatskanie and Napavine.

Premier urges that an analysis focused on possible moves to existing towers in the area should be applied to the "move-out" community as well as the "move-in" community. However, such is not the Commission's policy. In *Rural Radio*, the Commission explicitly stated the existing tower analysis should be employed only with respect to the "the proposed facility,"[6] i.e., the "move-in" community. Furthermore, §73.3573(g) of the Commission's rules plainly specifies that a proponent beginning with an unbuilt assignment won in an auction must proceed with its current assignment as the basis from which to make comparisons for a move.[7] The Bureau correctly cited, explained and applied these principles in the Letter Decisions.

Nonetheless, Premier suggests that the Media Bureau has adopted a differentiated interpretation of the USAP for cases involving an unbuilt assignment in the "move-out" community, citing *A. Wray Fitch, III, Esq. and Carrie Ward, Esq.,* Letter Decision, 31 FCC Rcd 7117 (MB 2016) ("*White Salmon"*). This case also involved an analysis of an auction applicant

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[5] Opposition, at 10.

[6] *Rural Radio,* 26 FCC Rcd at 2577.

[7] Threshold was the winning auction bidder for the Clatskanie assignment and proposed the move away from Clatskanie in its construction permit application.

proposing to move away from the original community of license of an unbuilt assignment. Premier quotes a passage from that ruling concerning hypothetical service as holding that "the Section 307(b) analysis will be the same as that which we use when comparing proposals and counterproposals in an FM allotment rulemaking proceeding."[8] Premier has tagged the unbuilt Clatskanie assignment as a "hypothetical service." Joining the uses of the word "hypothetical" from two completely different contexts, Premier concludes that existing towers should be part of the analysis for both "move-in" and "move-out" communities.

However, Premier takes this passage badly out of context. In *White Salmon,* the Bureau is referring to the "loss of hypothetical service" in the sense of population losses and gains in situations where no prior service exists. This is a far cry from the analysis of the unbuilt Clatskanie assignment, which Premier confusingly and inappropriately also calls a "hypothetical service." In *White Salmon*, the Bureau is not discussing potential moves to existing towers or the impact of the existence of such towers on the Section 307(b) analysis.

Contrary to Premier's conclusion, the Bureau did not create "a new policy"[9] by refusing to consider existing towers in the Clatskanie environs. Rather, it is Premier that is espousing a departure from established policy and the Commission's existing rules. Premier's proposed interpretation would be more appropriately deliberated in a rulemaking proceeding rather than in adjudication of a specific application.

The wisdom of the current policy is self-evident. It prevents manipulation on both ends of the scenario. If an applicant were permitted to select any alternate tower site for the "move-

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[8] Opposition, at 7, *quoting White Salmon,* 31 RCC Rcd at 7120.

[9] Opposition, at 8.

out" community, it would be free to conger up the facts most favorable to its proposal rather than being constrained to use the assignment that had been previously found by the Commission to be the basis for adding an allotment to the community. On the other hand, the proponent for the "move-in" community is prevented from submitting an artificially meritorious proposal that it could later abandon in favor of its own business pursuits. The existing-towers test pushes the proponent to avoid hypothetical services that it would be tempted to abandon.

The UASP was properly triggered in this case. The Section 307(b) analysis must take into account the Clatkskanie assignment as it presently appears in the FCC's database. There is no rule, policy or holding to the contrary.

2. EVIDENCE ON THE RECORD DOES NOT REBUT THE UASP.

Premier argues that the UASP is a rebuttable presumption and that the Bureau erred in not addressing this issue. If the Bureau did err, it certainly was harmless error. Such evidence as there is on the record hardly moves the needle at all toward the rebuttable side of the dial.

The Commission firmly set out the criteria for rebutting the presumption in *Rural Radio:*

> The urbanized area service presumption may be rebutted by a compelling showing (1) that the proposed community is truly independent of the urbanized area, (2) of the community's specific need for an outlet for local expression separate from the urbanized area and (3) the ability of the proposed station to provide that outlet.[10]

The Commission emphasizes that this showing must be "compelling." It is to be based on the three prong-pronged *Tuck* test.[11] The three prongs of that test are (1) the degree to which the

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[10] Reconsideration Petition, at 6, *quoting Rural Radio,* 26 FCC Rcd at 2572.

[11] *See Faye & Richard Tuck, Inc.,* 3 FCC Rcd 5374 (1988).

proposed station will provide coverage to the urbanized area; (2) the size and proximity of the proposed community of license relative to the central city of the urbanized area; and (3) the interdependence of the proposed community of license and the urbanized area, utilizing the eight *Tuck* factors.[12] The Commission said that the eight-part test of *Tuck* factors would "be more rigorously scrutinized than has sometimes been the case in the past."[13] As an example, the Commission said that the showing should include "actual evidence of the number of local residents who work in the community, not merely extrapolations from commute times or observations that there are businesses where local residents *could* work if they so chose." [Emphasis in original.][14] The Commission continued that "the record should include actual evidence that the community's residents perceive themselves as separate and distinct from the urbanized area, rather than merely self-serving statements to that effect from town officials or business leaders."[15]

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[12] *Rural Radio,* 26 FCC Rcd at 2572-2573. The eight factors are: (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.

[13] *Ibid.*, at 2573.

[14] *Ibid.*

[15] *Ibid.*

Premier claims that the UASP is rebutted by some 17 letters submitted in this case from community officials and residents of Clatskanie, all of which urge the Commission to maintain the allotment at Clatskanie.[16] None of these statements is offered under the penalty of perjury pursuant to §1.16 of the Commission's rules. This substantially limits their evidentiary value.

Premier attempts to align these submissions with the eight *Tuck* factors. However, this effort was uneven and inconclusive. None of the statements offered evidence pertaining a key *Tuck* criterion – the incidence of commuting by Clatskanie residents to work in other parts of the urbanized area. Premier scurried to tardily present some statistics on this point in its August, 2015 Reply to Threshold's Opposition to Premier's Petition for Reconsideration of the Bureau's 2015 Letter Decision.[17] That material should be disregarded as inappropriate for a reply pleading.

Even more importantly, the Commission said in *Rural Radio* that it needs actual evidence that the community's residents perceive themselves as separate and distinct from the urbanized area. The "self-serving statement to that effect from town officials or business leaders" will not suffice. Of the 17 letters on the record, 10 are from governmental officials at various levels,[18]

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[16] Opposition, at 12-13.

[17] It is ironic that Premier appears quite willing to submit evidence in a pinch – even if untimely – while it continues to express exasperation that it cannot determine who bears the burden of proceeding.

[18] These include a United States Representative, an Oregon state Senator, an Oregon state Representative, the Mayor of Clatskanie, the Police Chief of Clatskanie, the Chief of the Clatskanie Rural Fire Protection District, the Superintendent of the Clatskanie School District, the Board of Directors of the Quincy Water Assoication, the Board Chair of the Clatskanie Library District, and the General Manager of the Clatskanie People's Utility District.

four are from representatives of civic/business groups,[19] and three are from private citizens apparently writing on their on behalf.[20] As noted above, the Commission indicated that it would find much more probative the direct evidence of the residents' actual perceptions than the self-serving pronouncements of community political and business leaders. Thus, the great majority of the letters received on this record – coming from community leaders – should be discounted. There then remain three personal statements from local residents. This is not a significant number out of a community with a population of 1,737. This is not a body of evidence with sufficient weight to rebut the UASP. The outcome would be the same even if the Bureau had addressed this meager record.

Premier's observation that there is no one to shoulder the burden of proceeding with evidence in this case is disingenuous. Premier has not hesitated over the course of more than four years to voluntarily insert itself uninvited into this proceeding. Facially at least, it would appear that Premier's expenditures on attorneys and engineering consultants have been substantial. Having of its own volition initiated a dust storm, Premier cannot now be allowed to

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[19] These include the Clatskanie Chamber of Commerce, the Clatskanie Garden Club, Clatskanie Senior Citizens, Inc., and Clatskanie Forward.

[20] The ultimate provenance of all 17 letters is suspect. They all present a more or less common format. Many of the writers exhibit an uncanny knowledge of hot button legal issues in this kind of a proceeding that would not be commonly known by people outside of broadcasting. Many of them also, surprisingly, say they know that the Napavine area already has adequate radio service. Perhaps most tellingly of all, many of them refer to the frequency in question as Channel 225C3. That is not the common nomenclature on the streets of Clatskanie or anywhere else among ordinary residents for referring to an FM frequency. Somewhere there is a common source for these letters that contributed to these similar contents. (Note that knowledge about the channel could not have come from Threshold's public notice of its application published in Clatskanie because that notice did not state the allotment channel number and only referred to the MHz frequency.)

complain that this proceeding is somehow incomplete because there was no one to the bear the burden of proceeding or the burden of proof. Whether or not it officially bore a burden, Premier was obviously positioned and capable of presenting any evidence it deemed necessary this proceeding. If it failed to do so, Premier has only itself to blame. Premier asks the Commission to remand this matter to the Bureau for a *de novo* proceeding. That would be unnecessary and unwarranted. Both Premier and the residents of Clatskanie have had their fair and open opportunity to be heard in this case. Giving them a second bite at the apple at Threshold's expense would be unfair.

3. THE DIFFERENCE IN SIZE OF THE COMMUNITIES IS DECISIVE

In the long-shot aspiration that Clatskanie could be deemed entitled to a Priority (3) preference on the grounds that it has no transmission service other than the allotment in question and that the presumption about being a part of the Longview urbanized area is rebutted, Premier concludes its pleading with the assertion that Napavine's greater population (by 29 persons) is not a decisive factor between two communities that are both entitled to a Priority (3) preference. In fact, before the UASP was deliberated in this case, the Bureau had ruled that Napavine's greater population did merit an award of the allotment to that community.[21] Premier has argued that *Rural Radio* has overruled the basis for the Bureau's decision. It is true that *Rural Radio* has altered the principles for comparing proposals on the basis of various coverage scenarios, i.e., reception services under Priority (4). However, *Rural Radio* has not changed the basic principle

[21] *Donald E. Martin, Esq. and Meredith S. Senter, Jr., Esq.*, Letter Decision (MB March 11, 2013), *citing Blanchard, Louisiana*, Memorandum Opinion and Order, 10 FCC Rcd 9828, 9829 (1995).

that population can serve as a tie-breaker when two proposals both qualify for a Priority (3) preference. This rule remains intact notwithstanding *Rural Radio.* It has been applied in decisions subsequent to *Rural Radio*. *Rural Radio* is concerned largely with reception service population. The population of a proposed community of license is transmission service population. See, *Law Offices of Evan D. Carb,* 28 FCC Rcd. 5667, Letter Decision (MB 2013).

The Priority (4) factors that Premier seeks to add to the discussion are irrelevant.[22] In a Priority (3) tie, the greater population prevails.

The Commission must reject Premier's Application for Review and affirm the Bureau's decision to grant Threshold's application. The UASP was properly triggered and applied to the facts of this case. Evidence on the record is insufficient to rebut the UASP.

Respectfully submitted,

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[22] Opposition, at 16-18.

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November 15, 2016

CERTIFICATE OF SERVICE

I, Donald E. Martin, hereby certify this 15th day of November, 2016, that I have caused a copy of the foregoing Opposition to Application for Review to be served by United States first class mail and electronic mail upon the following:

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