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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)	MM Docket No. 94-86
	)	
Amendment of Section 73,202(b)	)	RM-8497
Table of Allotments	)	
FM Broadcast Stations	)	
(Klamath Falls, Oregon)	)	
	)	
and	)	
	)	
Amendment of Section 73.202(b)	)	RM-8548
Table of Allotments	)	
FM Broadcast Stations	)	
(Butte Falls and Altamont Oregon)	)	

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Further Reply Comments of Terry A Cowan

Terry A. Cowan (Cowan) by and through undersigned counsel, files the following Further Reply Comments to the Petition for Rulemaking of Western States Broadcasting Inc., (RM-8548) which is being treated, by the Federal Communications Commission, as a Counterproposal in MM Docket No. 94-86 (See FCC Public Notice, Report No. 2041, released November 18, 1994).

Background

1. By Notice of Proposed Rule Making, DA 94-793, released July 27, 1994, the FCC, in response to a Petition for Rule Making, by Cowan, proposed to add Channel 284C-1 to the community of Klamath Falls, Oregon as its fourth FM allocation. MM Docket No. 94-86 was assigned. September 19, 1994 was set as the Comments date and October 4, 1994 as the Reply Comments date.

2. Timely supporting Comments were filed by Cowan. Western States Broadcasting, Inc., (WSB), on September 19, 1994 filed a pleading entitled "Opposition to Rulemaking and

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Counter-Proposal", wherein WSB proposed that Channel 249C-1, allotted to Altamont, Oregon be allotted to Butte Falls, Oregon on Channel 249 C-2, and reserved for use by WSB's Station KCHQ(FM), presently assigned to Altamont. As part of that request, WSB proposed, also, that Channel 284C-1 be allotted to Altamont rather than Klamath Falls. On October 4, 1994, Cowan filed timely Reply Comments, urging that WSB's counterproposal be rejected and that Channel 284 C-1 be allocated to Klamath Falls, Oregon as proposed in the FCC's Notice of Proposed Rule Making, supra. 1/

3. Since, on the one hand, that portion of WSB's "Opposition to Rulemaking and Counterproposal " requesting that Channel 249 C-1 be removed from Altamont and moved to Butte Falls as Channel 249 C-2, does not conflict in any way with Cowan's proposal to allocate Channel 284 C-1 to Klamath Falls, while, on the other hand, that portion of WSB's proposal to assign Channel 284 C-1 to Altamont rather than Klamath Falls does conflict with Cowan's proposal, the FCC, in its above-referenced November 18, 1994 Public Notice, determined to treat WSB's proposal as a separate Petition For Rule Making,

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1/ WSB filed an additional unauthorized pleading entitled "Response to Reply Comments of Terry A. Cowan". Since it was dated October 13, 1994, after the October 4, 1994 deadline date for the filing of Reply Comments, in MM Docket 94-86, Cowan filed a Motion to Strike that pleading on October 21, 1994.

and additionally as a counterproposal in MM Docket No. 94-86.

4. Cowan continues to rely on its original Reply Comments, in MM Docket 94-86, filed October 4, 1994. However, in response to the FCC's November 18, 1994 Public Notice, inviting additional Reply Comments, files these "Further Reply Comments of Terry A. Cowan" as a separate and independent argument in favor of allotting Channel 284-C1 to Klamath Falls rather than Altamont.

Further Reply Comments of Terry A. Cowan

5. In issuing its November 18, 1994 Public Notice, supra, and assigning WSB's proposal to amend the FCC Table of Allotments to assign Channel 249C2 to Butte Falls, in lieu of Channel 249 C-1 at Altamont, the FCC no doubt was treating WSB's request as a petition pursuant to Section 1.420(i) of the FCC's Rules which states:

> "In the course of the rule making proceeding to amend Section 73.202(b)... the Commission may modify the license or permit of an FM...station to specify a new community of license where the amended allotment would be mutually exclusive with the licensee's or permittee's present assignment"

Obviously operation on Channel 249C1 at Altamont and Channel 249C-2 at Butte Falls would be mutually exclusive since the communities are only about 45 miles distant one from the other, and therefore, WSB's request does comply with the provisions of Rule 1.420(i). But WSB went beyond that proposal and requested, also, that Channel 284-C1 be allocated to Altamont

rather than Klamath Falls. It did so: (1) to block assignment of Channel 284 C-1 at Klamath Falls; (2) to hasten FCC action to move Channel 249 Altamont to Butte Falls by creating a conflict with a pending Rule Making Proceeding in MM Docket 94-86; and/or (3) because WSB believed that such a substitution was required by Rule 1.420(i) or would give additional support to its requested removal of Channel 249 from Altamont to Butte Falls. For the purposes of this pleading reasons (1) and (2) supra need not be discussed. Cowan will demonstrate, infra, that reason (3) is neither required nor of decisional significance, and that the switch of Channel 249 from Altamont to Butte Falls can be made consistent with FCC Rules and policies, if Channel 284 C-1 is allocated to Klamath Falls, (rather than Altamont).

6. Rule 1.420(i) does not require that the shift of Channel 249 from Altamont to Butte Falls be conditioned upon a substitute Channel for Altamont. The Report and Order adding Section 1.420(i) to the FCC's Rules is found at FCC 89-128, released June 15, 1989, 66 Pike and Fischer RR 2d 877. It makes clear that Section 1.420(i) was adopted "... to provide a procedure whereby a licensee of permittee may petition the Commission for an amendment to the FM and television tables of allotments, and modification of its license, accordingly, without placing its existing authorization at risk" (Id. par. 22). The Commission goes on say that it will compare the

proposed allotment plan to the existing state of allotments in the communities involved and if the proposed plan would result in a preferential arrangement of allotments it will adopt the plan (Id. par. 25). While the Commission states that it will not allow a broadcaster to deprive a community of an existing service representing its only local transmission service (Id. par 28) the allotment of channel 284 C-1 to Klamath Falls (rather than Altamont) meets this objective for as established, hereinafter, the local transmission service involved here is Klamath Falls. 2/

7. In its "Opposition to Rulemaking and Counterproposal" WSB claims that the choice between assigning Channel 284 C-1 to Altamont or Klamath Falls must be made pursuant to Section 307(b) of the Communications Act of 1934, as amended. (Section 307(b)). That claim is false. Given the factual situation herein, FCC precedent establishes that Section 307(b) does not apply even if it were to be assumed arguendo, that Altamont is a separate and independent place (which it is not). Under the law established in Huntington Broadcasting Co. v. FCC, 192 F2d 33, D.C. Cir (1951), 7 Pike & Fischer RR 2030, 3/ Klamath Falls (and not Altamont)

2/ In addition to the legal reasons supporting a Klamath Falls designation for Channel 284C-1, there is a practical reason, also. In order for Channel 284 C-1 to effectively complete with the other Klamath Falls Stations, a Klamath Falls designation (rather than Altamont) is much more preferable if not essential. That might be why WSB's Station KCHQ(FM) has been forced to go and remain silent.

3/ Huntington, a 1951 decision, is still good law and continues to be cited in recent cases. See for example, Faye and Richard Tuck, 65 Pike and Fisher RR 2d 402 (1989) and RKO General Inc. (KFRC) 67 RR 2d 1428 (1991).

is the "community" involved in this proceeding.

In Huntington, there was involved mutually exclusive, high powered proposals for Huntington Park and Los Angeles, California. Huntington Park was a community of over 30,000 persons, with its own government, schools, service organizations etc., and it was claimed, by an applicant, that it deserved a Section 307(b) preference over Los Angeles. However, the Count affirmed the FCC's decision holding that Section 307(b) did not apply where "...(the facilities proposed) were so powerfully that the service would be regional in character and would substantially cover the entire metropolitan area in which both cities area located... (and that) both applicants were offering to render mutually exclusive service to one great community... (and, therefore, the FCC was correct when it)... saw the situation was not one in which two separate communities were competing so as to require the Commission to proceed under the admonition of section 307(b)...". The Channel involved, here, is even more powerful than the 5 kw involved in Huntington. It is Channel 284 C-1 (between 50 - 100 kw). It would serve substantially the same wide area whether designated as Altamont or Klamath Falls. Thus, here, consistent with the Huntington doctrine, the community involved is Klamath Falls, the center of the subject metropolitan area, and not the suburb of Altamont.

8. Accordingly, the allocation of Channel 285 C-1 to Klamath Falls would be retaining local transmission service to the real community involved here if and when Channel 249 is moved to Butte Falls. Additionally, it will not adversely effect WSB since WSB will be able to apply for Channel 284 C-1 if allocated to Klamath Falls, if it desires to do so.

9. In conclusion, Cowan respectfully submits that WSB's petition and counterproposal be rejected, in toto, for the reasons set forth in Cowan's October 4, 1994 Reply Comments. Alternatively, if the FCC determines not to reject WSB's proposal, in toto, it should, nevertheless, allocate Channel 284 C-1 to Klamath Falls, as proposed, and reject WSB's claim that Altamont is to be given a Section 307(b) preference over Klamath Falls, as contrary to FCC precedent.

Respectfully submitted,

Terry A. Cowan

BY /s/ Leonard S. Joyce
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December 5, 1994

CERTIFICATE OF SERVICE

I, Snowdeen Dove, a secretary in the Law Offices of Leonard S. Joyce, do hereby certify that the foregoing Further Reply Comments of Terry A. Cowan was served this 5th day of December, 1994, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

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