

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
CoxCom, LLC)	CSR - 8909 - A
)	
For Modification of the Market of)	MB Docket No. 15 - 120
WMDE, Dover, Delaware)	

To: The Secretary's Office
Attention: Chief, Media Bureau

MOTION FOR LEAVE TO FILE REPLY TO UNAUTHORIZED PLEADING

CoxCom, LLC (“Cox”), by its attorneys and pursuant to Section 76.7(c)(1) and 76.7(d) of the Commission’s rules, 47 C.F.R. § 76.7(c)(1) and 76.7(d), hereby moves for leave to file the attached Supplemental Reply to an unauthorized pleading, denominated as a “Submission for the Record” (the “**Submission**”), filed by Western Pacific Broadcast, LLC (the “**Station**” or “**WMDE**”) in the above-captioned matter. Cox is filing this Motion and the attached Supplemental Reply to correct factual and legal inaccuracies in WMDE’s unauthorized Submission.

Section 76.7(d) of the Commission’s rules explicitly prohibits “additional motions or pleadings” absent “extraordinary circumstances” or the Commission’s request.¹ Section 76.7(c)(1) similarly provides that replies, such as WMDE’s unauthorized Submission, “shall not contain new matters” unless expressly permitted by the Commission.² The Commission’s rules notwithstanding, WMDE’s unauthorized Submission contains additional repetitive and irrelevant claims regarding the mandatory carriage and potential carriage of the Dover, Delaware Station by Direct Broadcast Satellite (“**DBS**”) operators in the Washington, DC (Hagerstown) Designated Market Area (“**DMA**”), as well a new but demonstrably incorrect assertion regarding

¹ 47 C.F.R. § 76.7(d).

² 47 C.F.R. § 76.7(c)(1).

the effect of WMDE's failure to address the substantive facts and arguments presented in Cox's pending Petition for Special Relief to modify WMDE's must-carry rights consistent with market realities (the "**Petition**"). A grant of the instant Motion would allow Cox a fair opportunity to rebut new evidence and argument introduced for the first time in the Station's unauthorized Submission, and would provide the Bureau with an even more complete record to determine whether Virginia communities in the western suburbs of Washington, DC should be excluded from the must-carry market of a distant Dover, Delaware Station. The Bureau should therefore grant the instant Motion and accept the Supplemental Reply provided herein.

WHEREFORE, Cox respectfully requests leave to file the attached Supplemental Reply.

Respectfully submitted,

CoxCom, LLC

By:



Gary S. Lutzker

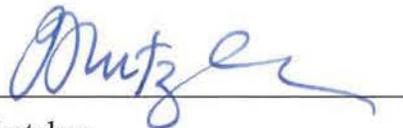
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Its Attorneys

September 22, 2015

Verification

To the best of my knowledge, information and belief formed after reasonable inquiry, this Motion For Leave To File Reply To Unauthorized Pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and it is not interposed for any improper purpose.



Gary S. Lutzker

September 22, 2015

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
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WMDE, Dover, Delaware)	

To: The Secretary's Office
Attention: Chief, Media Bureau

REPLY TO UNAUTHORIZED PLEADING

CoxCom, LLC (“**Cox**”), by its attorneys and pursuant to Section 76.7(c)(1) and 76.7(d) of the Commission’s rules, 47 C.F.R. § 76.7(c)(1) and 76.7(d), and the preceding Motion for Leave to File Reply to Unauthorized Pleading, hereby submits this Reply to Unauthorized Pleading (“**Supplemental Reply**”) to the unauthorized pleading, denominated as a “Submission for the Record” (the “**Submission**”), filed by Western Pacific Broadcast, LLC (the “**Station**” or “**WMDE**”) in the above-captioned matter.

The Bureau should reject the Station’s unauthorized Submission because it is prohibited by the Commission’s rules.¹ In addition, the Bureau should reject the unauthorized Submission because it contains nothing other than (i) repetitive and irrelevant claims regarding the mandatory carriage and potential mandatory carriage of a Dover, Delaware Station by Direct Broadcast Satellite (“**DBS**”) operators, and (ii) a new and demonstrably incorrect assertion regarding the effect of WMDE’s failure to rebut the substantive facts and arguments presented in Cox’s pending Petition for Special Relief to modify WMDE’s market consistent with market realities (the “**Petition**”).

¹ Absent a demonstration of appropriate circumstances and the approval of, or request by, the Commission, Section 76.7(d) of the rules, 47 C.F.R. § 76.7(d), prohibits filing of WMDE’s unauthorized Submission. The Station, of course, made no attempt to demonstrate such circumstances, and neither sought nor obtained the Commission’s approval to file the unauthorized Submission.

The unauthorized Submission attempts to make much of Dish Network's apparent acquiescence to distribute the Station in the Washington, DC DMA and DirecTV's claimed agreement to do so in the future, both pursuant the "must-carry" rules applicable to DBS operators.² Other than obfuscation, however, WMDE's unauthorized Submission adds nothing material to the existing record because WMDE made precisely the same claims in its Opposition to Cox's Petition³ and because Cox demonstrated in both its Petition and its Reply to Opposition that carriage pursuant to a governmental mandate fails to establish historic carriage or provide a market nexus between a broadcast station and a cable community for market modification purposes.⁴ Moreover, the Station conveniently fails to acknowledge that under the Commission's current rules, neither Dish Network nor DirecTV had any alternative to carrying WMDE because they do not yet have the ability to seek a modification of WMDE's must-carry market.⁵ Therefore, the Station's claims regarding DBS carriage are redundant and inapposite, and in any case cannot be used to invent a non-existent market nexus between the Station and the Cox Communities.

The Bureau also should reject WMDE's misleading and demonstrably incorrect assertion that Section 76.7(b)(2)(v) of the Commission's rules — which stands for the universally

² See 47 C.F.R. § 76.66. Under the currently effective rule, DBS operators are required to carry all broadcasters assigned by Nielsen to a DMA if they carry any such broadcasters (known as "carry one, carry all") and, unlike cable operators, have no ability to modify a broadcaster's must-carry market. *But see* Amendment of the Commission's Rules Concerning Market Modification, *Report and Order*, __ FCC Rcd __, FCC 15-111 (rel. Sept. 2, 2015) (adopting *inter alia* market modification rules for DBS operators pursuant to Section 102 of the Satellite Television Extension and Localism Act Reauthorization Act of 2014 ("STELAR"), and effective upon approval by OMB and announcement of such approval in the Federal Register) (the "**DBS Market Order**"). The new rules adopted in the DBS Market Order have yet to become effective, however.

³ See WMDE *Opposition of Petition for Special Relief*, CSR-8909-A, MB Docket No. 15-120, at 5-6 (filed June 25, 2015) ("both DirecTV and Dish provide service in and around the CoxCom Cable Communities and both have agreed to carry WMDE throughout the Washington DC DMA").

⁴ See Cox Petition at 7 and n. 23 (citing *Bitmore Broadcasting, L.L.C.*, 17 FCC Rcd 7984, 7989-90 at para. 10 (Med. Bur. 2002); *Comcast Cablevision of Santa Maria, Inc.*, 13 FCC Rcd 24192, 24197, at para. 13 (Cab. Serv. Bur. 1998); *Dynamic Cablevision of Florida, Ltd.*, 11 FCC Rcd 9880, 9889, at para. 20 (Cab. Serv. Bur. 1996)); *see also* Cox Reply at 7 and n.32.

⁵ See 47 C.F.R. § 76.66 and the DBS Market Order, *supra* n.2.

accepted legal principle that a failure to deny is deemed an admission⁶ — is inapplicable to anything other than complaint proceedings.⁷ Contrary to WMDE’s unsupported claim, the Commission has applied the rule in non-complaint proceedings.⁸ The Commission also intentionally amended Section 76.7 “to provide a uniform filing format, deadlines, and other procedural requirements,”⁹ so the Station’s assertion that Section 76.7(b)(2)(v) applies only to complaints is implausible at best.¹⁰ In addition, although WMDE may have deluded itself into believing that the statutory market modification factors and facts in record below are merely “numerous irrelevant and extraneous allegations,”¹¹ the Bureau should not be misled by such self-serving fantasies. In reality, and as Cox’s Reply demonstrated, the Station has neither disputed nor submitted evidence to rebut the determinative market facts established in the Petition, including among other things that:

- the Station’s city of license and the Cox Communities are located in separate markets an average of 98 miles apart and are separated by a minimum two hour drive;
- the Station and the Cox Communities are divided by substantial market-separating political, geographic, and economic barriers;

⁶ See FED. R. CIV. P. 8(d) (“Averments in a pleading to which a responsive pleading is required . . . are admitted when not denied in the responsive pleading.”). The Commission’s procedural rules are modelled on the Federal Rules of Civil Procedure. “[W]e look to the Federal Rules of Civil Procedure for procedural guidance to Commission adjudicatory proceedings.” See, e.g., *APCC Services, Inc. v. Intelco*, 28 FCC Rcd 1911, at n. 395 (Enf. Bur. 2013) (citing *APCC Services, Inc. v. TS Interactive*, 19 FCC Rcd 10456, 10460, para. 10 (Enf. Bur. 2004)).

⁷ See unauthorized Submission at n.3; see also 47 C.F.R. § 76.7(b)(2)(v) (“Averments in a complaint are deemed to be admitted when not denied in the answer.”).

⁸ See, e.g., Corey and Juanita Walker, *Petition for Declaratory Ruling*, 26 FCC Rcd 10531 at para. 5 (Med. Bur. 2011) (“The record in this proceeding includes the following facts, which are deemed admitted by the Association as it failed to file an Opposition or Reply to the Petition.”).

⁹ 1998 Biennial Regulatory Review, Part 76 Cable Television Service Pleading and Complaint Rules, *Report and Order*, 14 FCC Rcd 418, 420 at para. 8 (1998) (“**Cable Pleading Rules Order**”).

¹⁰ Moreover, pursuant to the Cable Pleading Rules Order, the Bureau routinely treats mandatory carriage, network non-duplication, and other “complaints” as petitions under 47 C.F.R. § 76.7(b)(1) and just as routinely applies the “deemed admitted” rule under 47 C.F.R. § 76.7(b)(2)(v) to those petitions. See Cox Reply at 16 and cases cited therein at n.70; see also, e.g., *Raul & Consuelo Palazuelos v. Echostar*, 19 FCC Rcd 12027 at n.3 (2004) (“Although styled a ‘complaint’, a carriage complaint . . . is treated by the Commission as a petition for special relief for purposes of the Commission’s pleading requirements.”).

¹¹ Unauthorized Submission at n.3.

- no Fairfax County, Virginia Multichannel Video Programming Distributors (“MVPDs”) carry any other stations licensed to Dover or anywhere else in Delaware or nearby eastern Maryland;
- WMDE fails to provide any actual signal coverage or any local programming directed specifically to the Cox Communities;
- unlike WMDE, numerous other truly local broadcast stations that Cox already carries offer extensive news coverage regarding issues of concern in the Cox Communities and provide carriage and coverage of sporting and other events of interest to viewers in the Cox Communities; and
- WMDE has no measurable broadcast or MVPD viewership in the Cox Communities or the Washington, DC (Hagerstown) DMA.

Regardless of how one characterizes the Station’s failure to address Cox’s factual demonstrations and legal arguments in the Petition and the Reply (as admissions or otherwise), the fact remains that all the record evidence and statutory market modification factors confirm the separate economic markets in which WMDE and the Cox Communities operate. Its excessive rhetoric notwithstanding, the Station actually has not claimed otherwise. The Media Bureau, therefore, should reject WMDE’s unauthorized Submission, grant Cox’s Petition forthwith, and exclude the Cox Communities from WMDE’s must-carry market.

Respectfully submitted,

CoxCom, LLC

By:



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Its Attorneys

September 22, 2015

Verification

To the best of my knowledge, information and belief formed after reasonable inquiry, this Reply to Unauthorized Pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and it is not interposed for any improper purpose.



Gary S. Lutzker

September 22, 2015

CERTIFICATE OF SERVICE

I, Sandra Jeter, a secretary at the law firm of BakerHostetler, LLP, certify that on this twenty-second day of September 2015, I caused the foregoing Motion for Leave to File Reply to Unauthorized Pleading and Reply to Unauthorized Pleading to be served by first-class mail, except where electronic delivery is indicated, on the following:

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