

Before the
Federal Communications Commission
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b))
Table of Allotments) MB Docket No. 02-136
FM Broadcast Stations) RM-10458
(Arlington, The Dalles, and Moro, Oregon,)
and Covington and Trout Lake, Washington))

To: Assistant Chief, Audio Division
Media Bureau

REPLY COMMENTS

Mid-Columbia Broadcasting, Inc. ("Mid-Columbia"), licensee of Station KMCQ(FM), The Dalles, Oregon, First Broadcasting Company, L.P. ("FBC"), and Saga Broadcasting Corp. ("Saga"), licensee of Station KAFE, Bellingham, Washington (Mid-Columbia, FBC and Saga, together, "Joint Parties") hereby reply to the comments filed in the above-captioned proceeding. Two parties filed comments in opposition to the Joint Parties' proposal to allot Channel 283C3 to Covington, Washington: Mercer Island School District and Peninsula School District No. 401 ("School Districts") and the City of Gig Harbor ("Gig Harbor"). In addition, three parties filed counterproposals: New Northwest Broadcasters LLC ("New Northwest"); Two Hearts Communications, LLC ("Two Hearts"); and Triple Bogey, LLC, MCC Radio, LLC and KDUX Acquisition, LLC ("KDUX"). The Joint Parties address the issues raised in each of these pleadings below.¹

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¹ In addition, four parties filed comments after the comment deadline in this proceeding, and all four are defective because they failed to serve the Joint Parties. These late-filed comments (filed by Chris Goelz, Robert Casserd, Merle E. Dowd, and Rod Smith) raise only issues that were raised by other commenters and are addressed herein. Accordingly, they should be dismissed. See *Franklin and White Castle, Louisiana*, 11 FCC Rcd 8662 (1996).

I. The Objections of the School Districts and Gig Harbor are Without Merit Because Loss of Secondary Service Is Not Considered in Allotment Proceedings.

1. The School Districts are licensees of FM Translator K283AH, Gig Harbor, Washington, and Class D FM station KMIH, Mercer Island, Washington, both operating on Channel 283. Both the Joint Petitioners' originally proposed operation of Channel 283C3 at Covington and their amended proposal for Channel 283C2 at Kent, Washington would interfere with these facilities. The School Districts state that the Commission should consider, as a public interest factor, the loss of service that would result from the loss of K283AH and KMIH(FM).² However, both of these facilities are secondary services, and neither is protected against interference from primary services.³

2. With respect to FM Translator K283AH, translators simply are not considered in allotment proceedings. *Willows and Dunnigan, California*, 15 FCC Rcd 23852, 23856-57 (2000). Consistent with this policy, the Commission's translator rules are based on *actual* interference, not potential interference. Thus, the Commission's rules do not permit an FM translator to operate if it "causes any actual interference to [t]he direct reception by the public of the off-the-air signals of any authorized broadcast station."⁴ Accordingly, any issue with respect to the operation of K283AH will not be ripe unless and until actual interference is caused. *See Kingston, New York*, 17 FCC Rcd ____ (DA 02-1776, rel. Jul. 29, 2002) (interference to secondary services is not a proper consideration at allotment stage). If actual interference is

² The School Districts also argue that Covington is not deserving of a first local service. However, in view of the Joint Parties' amended proposal, which would provide first local service to Kent, there is no need to address any issues with respect to Covington.

³ *Amendment of the Commission's Rules Concerning FM Translator Stations*, 5 FCC Rcd 7212, 7219 (1990); *Creation of a Low Power Radio Service*, 14 FCC Rcd 2471, 2481 n.37 (1999).

⁴ 47 C.F.R. § 74.1203.

caused, the rules make clear that it is the translator that must give way. *See* Section 74.1203 of the Commission's Rules.

3. With respect to KMIH, Class D noncommercial educational (NCE) stations are not entitled to protection from full service FM stations. *See Brighton, New York*, 8 FCC Rcd 793, 794 (1993); *Sanford, North Carolina*, 10 FCC Rcd 9266 (1995) (Notice of Proposed Rule Making). Accordingly, proposals for full service allotments need not consider spacing distances to Class D stations. As with the translator rules, the rules applicable to Class D stations are based on actual interference, not potential interference, and make clear that the Class D station must give way when actual interference is caused.⁵

4. Gig Harbor and the School Districts argue that K283AH and KMIH provide valuable and irreplaceable services. In the case of K283AH, these services include "music, news, local sports, public election candidate forums, Crimestoppers, and public service announcements." In the case of KMIH, the services include radio vocational training. Both stations offer public safety and Emergency Alert System (EAS) services. However, these programming considerations cannot be considered in an allotment context. For many years it has been FCC policy not to intervene in licensees' choices of programming formats. *See Changes in the Entertainment Formats of Broadcast Stations*, 60 F.C.C.2d 858 (1976). Instead, the Commission has determined that the public interest is best served when market forces and competition between broadcasters are allowed to drive programming diversity, and this determination has been upheld by the Supreme Court. *FCC v. WNCN Listener's Guild*, 450 U.S. 582, 585 (1981). Recently, the Commission declined to revisit this policy even when unique foreign language and ethnic informational programming were threatened. *Multicultural Radio Broadcasting, Inc.*, 15

⁵ See 47 C.F.R. § 73.512(d).

FCC Rcd 20630 (2000). Therefore, the programming presented by K283AH and KMIH cannot receive protection under the Commission's longstanding rules and policies.

5. Nor will residents of the areas served by these stations be deprived of public safety and emergency information. As the attached Technical Narrative shows, the current service areas of K283AH and KMIH are served by at least 23 FM, 14 TV and 5 AM stations, all of which are capable of rapidly disseminating public safety information and participating in the EAS. Moreover, it is not clear that either station will be forced off the air, since the Technical Narrative also demonstrates the potential availability of 17 alternate channels for KMIH and 12 alternate channels for K283AH.⁶

6. In summary, neither Gig Harbor nor the School Districts have cited any case in which the Commission has afforded protection to secondary services such as FM translators or Class D NCE stations, or even considered their potential loss as a public interest factor. Indeed, as shown above, the Commission has refused to consider the impact on secondary services in making full-service allotments. Thus, to give consideration to these arguments here would reverse existing precedent and erode the public interest in the preservation and expansion of primary broadcast service to the public.

II. The KDUX Counterproposal is Defective and Should Be Dismissed, and the Joint Parties Reserve the Right to Comment on Any Counterproposals Accepted in this Proceeding at the Appropriate Time.

7. Two Hearts, New Northwest, and KDUX each submitted counterproposals. Should the Commission accept any of these counterproposals and release a Public Notice indicating such

⁶ The use of these channels would likely cause contour overlap with respect to second- or third-adjacent channels used by full-service stations, and would therefore require waiver of the applicable rules. However, the Commission has a policy to grant such waiver requests where appropriate. *See Educational Information Corporation*, 6 FCC Rcd 2207 (1991); *see also* Technical Narrative at 4 n.2 In addition, since the translator is used to fill in signal coverage to terrain-shaded areas, it may be possible to replace it with one or more on-channel boosters to achieve the same purpose.

acceptance, the Joint Parties will comment on the counterproposal within the time set forth by the Commission for such comments. The Joint Parties note, however, that Two Hearts proffers an alternate channel at Arlington, Washington which it states would remove the conflict between its counterproposal and the Joint Parties' counterproposal; similarly, New Northwest proffers an alternate channel at Trout Lake, Washington, which it states would remove the conflict between its counterproposal and the Joint Parties' counterproposal. Accordingly, it may be possible to grant all three of these proposals together.

8. The Joint Parties assert that the KDUX counterproposal is defective and should not be accepted. As discussed therein, KDUX proposes to substitute Channel 281C for Channel 282C for use by Station KAFE, Bellingham, Washington, *with a power limitation* towards certain Canadian allotments.⁷ This is not a substitution that can be ordered by the Commission over the licensee's objection. *See Wasilla, Anchorage and Sterling, Alaska*, 14 FCC Rcd 6263, 6265 (1998) (rejecting proposed substitution at Anchorage because it would have required the use of a directional antenna to protect an allotment at Homer, Alaska). KDUX has no agreement with Saga regarding such a change to KAFE. While Saga's agreement with FBC and Mid-Columbia provides for the adoption of a directional antenna for KAFE under the specific circumstances, procedures, and conditions set forth therein, the existence of that agreement cannot be taken to mean that Saga consents to the use of a directional antenna in connection with the KDUX proposal, or any other proposal for that matter.

9. The Commission can only order the substitution of an alternate channel for an existing channel over the licensee's objection based on a finding that the two channels are "equivalent." *See Okmulgee, Oklahoma, et al.*, 10 FCC Rcd 12014, 12016 (1995). However, in

⁷ *See* KDUX Counterproposal at 18 and accompanying Engineering Statement at 15.

this case Channel 281C, which would require KAFE to reduce power, clearly is not equivalent to its current Channel 282C, from which it can operate with maximum facilities. *See* Technical Narrative at 2-3. The Commission has indicated that the inability to operate at a station's current maximum power would prevent a finding of channel equivalence. *Angola, Indiana, et al.*, 6 FCC Rcd 1230, 1232 (1990). Since KDUX failed to obtain Saga's clear consent to the changes to KAFE prior to the counterproposal deadline, and the changes cannot be ordered absent such consent, its counterproposal is unacceptable for consideration. *See Parker, Arizona*, 17 FCC Rcd ____ (DA 02-1249, rel. May 24, 2002).

III. Conclusion

10. For the reasons set forth herein, the Commission should deny the objections of Gig Harbor and the School Districts to the Joint Parties' amended proposal. The Commission should dismiss the KDUX counterproposal as defective. The Joint Parties reserve the right to comment on the merits of any counterproposal accepted by the Commission in the comment period provided therefor.

Respectfully submitted,

MID-COLUMBIA BROADCASTING,
INC.

By: J. Dominic Monahan
J. Dominic Monahan (by MNL)
Luvaas Cobb Richards & Fraser, PC
777 High Street
Suite 300
Eugene, OR 97401
(541) 484-9292

Its Counsel

FIRST BROADCASTING COMPANY,
L.P.

By: Mark N. Lipp
Mark N. Lipp
Shook, Hardy & Bacon LLP
600 14th Street, NW
Suite 800
Washington, DC 20005
(202) 783-8400

Its Counsel

SAGA BROADCASTING CORP.

By: Gary S. Smithwick
Gary S. Smithwick (by MNL)
Smithwick & Belendiuk, PC
5028 Wisconsin Avenue, NW
Suite 301
Washington, DC 20016
(202) 363-4050

Its Counsel

August 13, 2002

TECHNICAL EXHIBIT
IN SUPPORT OF REPLY COMMENTS
IN THE NOTICE OF PROPOSED RULE MAKING IN
MB DOCKET NO. 02-136
AMENDMENT OF SECTION 73.202(b), TABLE OF FM ALLOTMENTS
THE DALLES, OREGON AND KENT, WASHINGTON

Technical Narrative

This technical narrative and associated exhibits have been prepared on behalf of FM stations KMCQ, channel 283C, The Dalles, Oregon and KAFE, channel 282C, Bellingham, Washington and First Broadcasting Company, L.P. (Joint Parties") in support of reply comments (herein "Reply Comments") in the Notice of Proposed Rule Making in MB Docket No. 02-136 (herein "NPRM").

The NPRM proposed the reallocation of channel 283C from The Dalles, Oregon to Covington, Washington, reclassification from Class C to C3 and the modification of the license of KMCQ on channel 283C at The Dalles, Oregon accordingly (BLH-19990512KA). The NPRM also requests the allotments of channel 283C1 to Moro, Oregon, channel 261C2 to Arlington, Oregon and channel 226A to Trout Lake, Washington as first local aural service transmissions. The NPRM was issued in response to the petition for rule making (herein "Petition") filed jointly by KMCQ and First Broadcasting, Company, L.P.

The Joint Parties filed comments amending their initial proposal by changing the city of license from Covington, Washington to Kent, Washington and the allotment channel from 283C3 to 283C2. In addition, it was proposed to substitute channel 281C for channel 282C at Bellingham, Washington and to modify the license of KAFE on channel 282C at Bellingham accordingly. Furthermore, it was proposed to substitute channel 288A for channel 280A at Forks, Washington and modify the license of KLLM on channel 280A at Forks accordingly.

Two parties filed comments opposing the Joint Parties' proposal to allot channel 283C3 to Covington, Washington: Mercer Island School District and Peninsula School District No. 401 (herein "School Districts") and the City of Gig Harbor (herein "Gig Harbor"). In addition, three parties filed counterproposals to the Joint Parties' proposal to allot channel 283C3 to Covington: Triple Bogey, LLC, MCC Radio, LLC and KDUX Acquisition, LLC (herein "KDUX"); New Northwest Broadcasters, LLC (herein "New Northwest"); and Two Hearts Communications, LLC ("herein "Two Hearts").

The Joint Parties acknowledge the KDUX, New Northwest and Two Hearts counterproposals and reserve the right to address the comparative merits of each at a later date, except as noted below. These Reply Comments specifically address the Gig Harbor and School Districts oppositions.

The KDUX counterproposal proposes the substitution of channel 281C for channel 282C at Bellingham, Washington and the modification of the license of KAFE accordingly. The KDUX counterproposal alleges that the proposed KAFE operation on channel 281C is equivalent to the current channel 282C allotment and, thus, the channel change is permissible under the guidelines established in Circleville, Ohio (8 FCC 2d 159 (1967)). In order to provide contour protection to Canadian allotments on channel 280A at Powell River, BC and channel 281A at Bralorne, BC, the KDUX counterproposal proposes that an ERP limitation be imposed on the Bellingham channel 281C allotment.¹ Although not readily apparent from the KDUX counterproposal, the ERP reductions towards Bralorne and Powell River would be implemented by KAFE using a directional antenna without the consent of KAFE. According to the US-Canadian FM Agreement (Ottawa February 1991, amended 1997), KAFE currently operates on channel 282C as an "unlimited" Class C allotment with a nondirectional ERP of 60 kW and an HAAT of 704 meters. The KDUX counterproposal proposes operation of KAFE on channel

¹An ERP limitation of 27 kW at an HAAT of 600 meters is proposed towards Powell River channel 280A and an ERP limitation of 30 kW at an HAAT of 600 meters is proposed towards Bralorne channel 281A.

281C as a "limited" allotment with respect to the Bralorne channel 281A and Powell River channel 280A allotments. Section 3.5.2 of the US-Canadian FM Agreement states that a limited allotment operates "with less than maximum parameters". Obviously an "unlimited" allotment and a "limited" allotment are not equivalent and, therefore, use of the guidelines established in Circleville, Ohio to modify the KAFE allotment is not appropriate.

The School Districts oppose the Joint Parties proposal based on the adverse impact to Class D station KMIH on channel 283 at Mercer Island, Washington and FM translator station K283AH on channel 283 at Gig Harbor, Washington. In addition, Gig Harbor opposes the Joint Parties proposal based on the adverse impact to FM translator station K283AH on channel 283 at Gig Harbor. However, both Class D station KMIH and FM translator station K283AH are considered to be "secondary" stations and not required to be protected by changes made to primary commercial FM stations. Specifically, Section 73.512(d) states that "Class D noncommercial educational (secondary) stations (see Section 73.506(a)(2)) will be permitted to continue to operate only so long as no interference (as defined in Section 73.509) is caused to any TV or commercial FM broadcast stations." In addition, Section 74.1203(a)(1) states that an authorized FM translator station will not be permitted to continue to operate if it causes any actual interference to "the transmission of any authorized broadcast station".

Studies indicate that several alternate channels are potentially available to KMIH and K283AH. Specifically, channels 205, 221, 225, 229, 233, 237, 245, 249, 253, 266, 270, 271, 275, 285, 289, 293 and 297 are potentially available for KMIH, and channels 221, 225, 229, 237, 245, 253, 266, 270, 271, 289, 293 and 297 are potentially available for K283AH. The availability of these channels is premised on the FCC waiving the contour overlap rules normally applicable to Class D stations (Section 73.509) and FM translator stations (Section 74.1204) with respect to second and third adjacent channel

full-service FM stations. Similar waivers have previously been granted by the FCC for both Class D stations as well as FM translator stations.²

The School Districts and Gig Harbor allege that the potential loss of service of KMIH and K283AH will adversely effect the availability of the Emergency Alert System (EAS) in each station's service area. However, studies indicate that numerous FM, TV and AM stations provide primary service to both the KMIH and K283AH service areas. Figure 1 tabulates the FM, TV and AM stations which provide primary service to the K283AH service area. As indicated on Figure 1, there are at least 23 FM, 14 TV and 5 AM stations which provide primary service to the K283AH service area. Figure 2 tabulates the FM, TV and AM stations which provide primary service to the KMIH service area. As indicated on Figure 2, there are at least 23 FM, 14 TV and 5 AM stations which provide primary service to the KMIH service area. It is presumed that all FM, TV and AM stations participate in the EAS.



W. Jeffrey Reynolds

du Treil, Lundin & Rackley, Inc.
201 Fletcher Avenue
Sarasota, Florida 34237
(941)329-6000
JJEFF@DLR.COM

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² For instance, see FCC letter dated November 29, 2000 to Mexican Fine Arts Center Museum from James D. Bradshaw, Assistant Chief, Audio Services Division, Mass Media Bureau concerning Class D station WRTE(FM), Chicago, IL (BPED-20000609ABC). See also FCC letter dated April 10, 1995 to Sacred Heart University from Alan I. Schneider, Chief, Auxiliary Services Branch, Audio Services Division, Mass Media Bureau concerning a New FM translator at Northford, CT (BPFT-930615TA).

Tabulation of other AM, FM, and TV Stations Providing
Primary Service to the K283AH service area

<u>Call Sign</u>	<u>Community of License</u>	<u>State</u>	<u>Channel/Freq.</u>
KIRO (AM)	SEATTLE	WA	710
KNWX (AM)	SEATTLE	WA	770
KGW (AM)	BURIEN/SEATTLE	WA	820
KJR (AM)	SEATTLE	WA	950
KOMO (AM)	SEATTLE	WA	1000
KPLU-FM	TACOMA	WA	203
KVTI (FM)	TACOMA	WA	215
KBTC-FM	TACOMA	WA	219
KLSY-FM	BELLEVUE	WA	223
KUBE (FM)	SEATTLE	WA	227
KMPS-FM	SEATTLE	WA	231
KUOW (FM)	SEATTLE	WA	235
KJR-FM	SEATTLE	WA	239
KXXO (FM)	OLYMPIA	WA	241
KYPT (FM)	SEATTLE	WA	243
KBSG-FM	TACOMA	WA	247
KING-FM	SEATTLE	WA	251
KWJZ (FM)	SEATTLE	WA	255
KAYO-FM	ELMA	WA	257
KISW (FM)	SEATTLE	WA	260
KQBZ (FM)	SEATTLE	WA	264
KPLZ-FM	SEATTLE	WA	268
KZOK-FM	SEATTLE	WA	273
KMTT (FM)	TACOMA	WA	279
KCMS (FM)	EDMONDS	WA	287
KBKS (FM)	TACOMA	WA	291
KRWM (FM)	BREMERTON	WA	295
KNDD (FM)	SEATTLE	WA	299
KOMO-TV	SEATTLE	WA	4
KING-TV	SEATTLE	WA	5
KIRO-TV	SEATTLE	WA	7
KCTS-TV	SEATTLE	WA	9
KSTW (TV)	TACOMA	WA	11
KCPQ (TV)	TACOMA	WA	13
KONG-TV	EVERETT	WA	16
KTBW-TV	TACOMA	WA	20
KTWB-TV	SEATTLE	WA	22
KBTC-TV	TACOMA	WA	28
KWPX (TV)	BELLEVUE	WA	33
KHCV (TV)	SEATTLE	WA	45
KBEH (TV)	BELLEVUE	WA	51
KWDK (TV)	TACOMA	WA	56

Tabulation of other AM, FM, and TV Stations Providing
Primary Service to the KMIH service area

<u>Call Sign</u>	<u>Community of License</u>	<u>State</u>	<u>Channel/Freq.</u>
KIRO (AM)	SEATTLE	WA	710
KGNW (AM)	BURIEN/SEATTLE	WA	820
KIXI (AM)	MERCER ISL.-SEATTLE	WA	880
KJR (AM)	SEATTLE	WA	950
KOMO (AM)	SEATTLE	WA	1000
KKOL (AM)	SEATTLE	WA	1300
KPLU-FM	TACOMA	WA	203
KNHC (FM)	SEATTLE	WA	208
KEXP-FM	SEATTLE	WA	212
KBCS (FM)	BELLEVUE	WA	217
KBTC-FM	TACOMA	WA	219
KLSY-FM	BELLEVUE	WA	223
KUBE (FM)	SEATTLE	WA	227
KMPS-FM	SEATTLE	WA	231
KUOW (FM)	SEATTLE	WA	235
KJR-FM	SEATTLE	WA	239
KYPT (FM)	SEATTLE	WA	243
KBSG-FM	TACOMA	WA	247
KING-FM	SEATTLE	WA	251
KWJZ (FM)	SEATTLE	WA	255
KISW (FM)	SEATTLE	WA	260
KQBZ (FM)	SEATTLE	WA	264
KPLZ-FM	SEATTLE	WA	268
KZOK-FM	SEATTLE	WA	273
KMTT (FM)	TACOMA	WA	279
KCMS (FM)	EDMONDS	WA	287
KBKS (FM)	TACOMA	WA	291
KRWM (FM)	BREMERTON	WA	295
KNDD (FM)	SEATTLE	WA	299
KOMO-TV	SEATTLE	WA	4
KING-TV	SEATTLE	WA	5
KIRO-TV	SEATTLE	WA	7
KCTS-TV	SEATTLE	WA	9
KSTW (TV)	TACOMA	WA	11
KCPQ (TV)	TACOMA	WA	13
KONG-TV	EVERETT	WA	16
KTBW-TV	TACOMA	WA	20
KTWB-TV	SEATTLE	WA	22
KBTC-TV	TACOMA	WA	28
KWPX (TV)	BELLEVUE	WA	33
KHCV (TV)	SEATTLE	WA	45
KBEH (TV)	BELLEVUE	WA	51
KWDK (TV)	TACOMA	WA	56

CERTIFICATE OF SERVICE

I, Lisa M. Balzer, a secretary in the law firm of Shook, Hardy and Bacon, do hereby certify that I have on this 13th day of August, 2002 caused to be mailed by first class mail, postage prepaid, copies of the foregoing **"REPLY COMMENTS"** to the following:

R. Barthen Gorman
Federal Communications Commission
236 Massachusetts Avenue, NE
Suite 110
Washington, DC 20002

Al Monroe
Alco Services, Inc.
P.O. Box 450
Forks, WA 98331
(Licensee of Station KLLM, Forks, WA)

Rod Smith
13502 NE 78th Circle
Vancouver, WA 98682-3309

Merle E. Dowd
9105 Fortuna Drive
8415
Mercer Island, WA 98040

Robert Casserd
4735 N.E. 4th Street
Renton, WA 98059

Chris Goelz
8836 SE 60th Street
Mercer Island, WA 98040

Matthew H. McCormick, Esq.
Reddy, Begley & McCormick
2175 K Street, NW
Suite 350
Washington, DC 20037
(Counsel to Triple Bogey, LLC et al.)

M. Anne Swanson, Esq.
Nam E. Kim, Esq.
Dow Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, NW
Suite 800
Washington, DC 20036
(Counsel to New Northwest Broadcasters LLC)

Howard J. Barr, Esq.
Womble Carlyle Sandridge & Rice, PLLC
1401 Eye Street, NW
7th Floor
Washington, DC 20005
(Counsel to Mercer Island School District et al.)

City of Gig Harbor
3105 Judson Street
Gig Harbor, WA 98335

Dennis J. Kelly, Esq.
Law Office of Dennis J. Kelly
P.O. Box 41177
Washington, DC 20018
(Counsel to Two Hearts Communications LLC)



Lisa M. Balzer