

BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

ORIGINAL

In the Matter of)
)
 Amendment of Section 73.202(b),)
 Table of Allotments,)
 FM Broadcast Stations)
 (Arlington, The Dalles, Moro, Fossil, Astoria)
 Gladstone, Tillamook, Springfield-Eugene,)
 Coos Bay, Manzanita and Hermiston, Oregon)
 and Covington, Trout Lake, Shoreline, Bellingham,)
 Forks, Hoquiam, Aberdeen, Walla Walla,)
 College Place, Long Beach and Ilwaco, Washington))

MB Docket No. 02-136

RECEIVED

AUG 13 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: Assistant Chief, Audio Division, Media Bureau

MOTION TO SEVER COUNTERPROPOSAL

Triple Bogey, LLC, MCC Radio, LLC and KDUX Acquisition, LLC (jointly "Counterpetitioners") herein request that the Commission sever from consideration in the above-captioned proceeding the counterproposal filed July 29, 2002, by Mid-Columbia Broadcasting ("Mid-Columbia"), First Broadcasting Company, L.P. ("First Broadcasting") and Saga Broadcasting Corp. ("Saga") (collectively the "Joint Parties"). In support of this motion, the following is stated:

Background and Introduction

On October 29, 2001, First Broadcasting and Mid-Columbia filed a Petition for Rule Making proposing, *inter alia*, to change the community of license of Station KMCQ(FM) from The Dalles, Oregon, to Covington, Washington. The petition contemplated downgrading KMCQ from Class C status to Class C3 status in the process. Mid-Columbia and First Broadcasting also proposed

allotment of Channel 283C1 at Moro, Oregon, Channel 261C2 at Arlington, Oregon, and Channel 226A at Trout Lake, Washington. In response to the petition, the Commission staff issued a *Notice of Proposed Rule Making*, DA 02-1339 (released June 7, 2002) (“*NPRM*”). The *NPRM* set July 29, 2002, as the deadline for comments and counterproposals.

On that day, the Joint Parties filed their “Comments and Amended Proposal” (“Amended Proposal”) in which they propose, for the first time, that Station KMCQ(FM) change its community of license to Kent, Washington, instead of Covington. To facilitate that change, they also propose, again for the first time, to change the channel of Station KAFE, Bellingham, Washington (of which Saga is the licensee) from Channel 282C to Channel 281C and to change the frequency of Station KLLM, Forks, Washington, from Channel 280A to Channel 288A.

The Amended Proposal further recites that, in order to allow KAFE to operate on Channel 281C without the need to make other facilities changes, the FCC should coordinate with Industry Canada to resolve short spacings between KAFE and two Canadian allotments. Specifically, the Joint Parties submit a report asserting their belief that Canadian authorities would accept proposed changes (or consent to waivers with respect to) allotments in Campbell River, Powell River and Bralorne, British Columbia, so that KAFE could operate on Channel 281C without reducing power in the direction of the reference points for those allotments. Alternatively, the Joint Parties state that “should the Commission decide not to send this plan to Canada for any reason, the Joint Parties propose to protect the Canadian allotments through the use of a directional antenna for KAFE.” Amended Proposal at pp. 11-12.

According to the Joint Parties, the Amended Proposal was not submitted as the initial rule making proposal because Saga’s cooperation was “conditioned on the resolution of spacing issues with respect to certain Canadian allotments....” Amended Proposal at 2. These issues have now

purportedly been resolved as the result of “significant changes” that have occurred “to the regulatory landscape.” *Id.* The only actual change in circumstance between the filing of the initial Petition for Rule Making and the Amended Proposal, however, appears to have been the preparation by the Joint Parties of a report analyzing the potential for modifying Canadian allotments. The preparation of that report, however, appears to have been a purely voluntary undertaking by the Joint Parties, the timing and need of which was entirely foreseeable and under their control, which, in any event, has not resulted in any post-filing change to the “regulatory landscape.” The Joint Parties have not demonstrated that Saga could not have participated from the outset, nor offered any other satisfactory explanation for their failure to advance the current proposal in the original Petition for Rule Making that triggered this proceeding.

**The Joint Parties’ Amended Proposal Should Have Been Advanced in the Initial
Petition for Rule Making and, Accordingly, Should Be Severed from this
Proceeding Pursuant to Commission Policy**

In *Taccoa, Sugar Hill, and Lawrenceville, Georgia*, 16 FCC Rcd 21191 (Chief, Allocations Branch, released November 30, 2001), the Commission expressed concern about the potential for administrative inefficiency and unfairness to parties that could result from allowing the original proponent of a rule making to file a competing counterproposal against itself. *Id.* at 21192 (¶5). The Commission observed that the filing of a counterproposal by the original proponent makes it necessary for the staff to process two inconsistent proposals from the same party in a single rule making proceeding. “This appears to be an unnecessary expenditure of staff resources without any offsetting public interest benefit and is not conducive to the efficient transaction of Commission business.” *Id.* The Commission also noted that counterproposing one’s own petition for rule making

could be unfairly prejudicial to other parties. *Id.*¹ Thus, the Commission warned that any counterproposal advanced by the original petitioner must contain a satisfactory “explanation, such as *unforeseen circumstances*, as to why the new proposal could not have been advanced in the initial petition for rulemaking....” *Id.* (emphasis added). In the absence of such an explanation, the new proposal would be held for consideration in a separate proceeding.

In this case, as noted above, the Joint Parties do not point to any unforeseen circumstances. They offer only a cursory and internally inconsistent explanation as to why their Amended Proposal was not advanced in the initial Petition for Rule Making, which does not withstand examination. First, the time for filing the allotment proposal, as originally conceived or as specified in the Amended Proposal, was exclusively within the control of Joint Parties. Since there was no regulatory deadline for the submission of their proposal, there is no reason why they could not have waited until Saga’s concerns regarding the alleged Canadian allotment issue were addressed before filing a petition for rule making.

Second, the Joint Parties’ provide no concrete support for their claim that there have been “*changes with regard to the Canadian channel allotments involved*” since the filing of the Petition for Rule Making. In fact, the only “change” is the preparation of the Joint Parties’ report, which was apparently sent to Canadian authorities on the due date for counterproposals, asserting that Canada’s allotment plan could be modified to accommodate omnidirectional operation of KAFE on Channel 281C. Again, the Joint Parties certainly could have commissioned their report on Canadian spacing issues prior to filing the initial proposal, but chose for reasons of their own not to do so.

¹ The Commission further noted that there is “an issue as to whether the second proposal filed by the rule making proponent is within the scope of the notice or meets a ‘logical outgrowth’ test” as mandated by law to be subject to consideration in the same proceeding. *Id.*

Of course, the Canadian government has taken no action upon the Joint Parties' report, and has not even been asked officially to do anything at all. The Joint Parties simply requested, for the first time in the July 29, 2002 Amended Proposal, that the Commission engage in coordination discussions with Canada to pursue the allotment changes advanced in the consultant's report. *See* Amended Proposal at Exhibit 3. Thus, Canadian government *action* obviously cannot be one of the "significant changes to the regulatory landscape" the Joint Parties purport to have relied upon to justify filing a counterproposal to their own Petition for Rule Making.

Third, the Joint Parties' proposal is not contingent on the suggested changes to Canadian allotments. Recognizing that there is no certainty that Canada will adopt the channel substitutions presented, the Joint Parties have proposed, as an alternative, to protect the Canadian allotments through use of a directional antenna by KAFE. But as demonstrated in the Counterpetitioners "Comments and Counterproposal," filed July 29, 2002, the use of a directional antenna to protect short-spaced Canadian allotments is a common practice of long-standing and is specifically contemplated in the treaty between the United States and Canada.² Thus, Mid-Columbia and First Broadcasting must be assumed to have been aware of what they needed to do with respect to KAFE in order to propose Kent as KMCQ's new community of license prior to filing the initial Petition for

² *Working Arrangement for the Allotment and Assignment of FM Broadcasting Channels under the Agreement Between the Government of Canada and the Government of the United States of America Relating to the FM Broadcasting Service* at Section 3.6; *accord, e.g., Raymond, Washington*, 17 FCC Rcd 997, ¶ 11, n.9 (Chief, Allocation Branch 2002); *Wellsville, New York*, 14 FCC Rcd 15964, ¶ 6 (Chief, Allocation Branch 1999); *Hilton, New York*, 11 FCC Rcd 6674 (Chief, Allocations Branch 1996) (Notice of Proposed Rule Making; allotment subsequently adopted); *Brighton, New York*, 8 FCC Rcd 793, ¶ 6 (Chief, Allocation Branch 1993); *Waterbury, Vermont*, 6 FCC Rcd 5163, ¶ 11 (Chief, Policy & Rules Div. 1991); *Saranac Lake, New York*, 6 FCC Rcd 5121, ¶ 6 (Asst. Chief, Allocation Branch 1991).

Rule Making. The Joint Parties offer no real explanation for their failure to propose directionalization and advance their Amended Proposal from the outset.

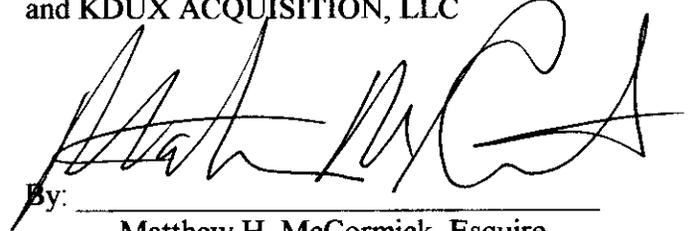
In short, under the *Taccoa* policy, the Commission should reject the Joint Parties' revised allotment plan and should process the Amended Proposal as a new proposal in a separate proceeding.

Because the Amended Proposal conflicts with the initial proposal for relocation of KMCQ and with the Counterpetitioners' proposal, consideration of the Amended Proposal will have to wait until final resolution of this proceeding. If the Counterpetitioners' proposal for relocation of Station KDUX from Aberdeen to Shoreline, Washington is adopted, the Amended Proposal will not be capable of effectuation and should be dismissed.

The Commission's concern with the efficient transaction of its business and with fairness to all parties, both underscored in *Taccoa*, support severance of the Amended Proposal from this proceeding. The Commission processed an initial petition for rule making for relocation of KMCQ, resulting in the issuance of the *NPRM*. Now, the Commission is asked to process a conflicting proposal for relocation of KMCQ advanced by the same parties, joined by Saga, but without any demonstration that the amendments were unforeseeable or made possible only by post-Petition changes outside the parties' control. Consideration of the Joint Parties' belated Kent proposal would unnecessarily increase the Commission's workload and deprive other interested parties of a fair opportunity to assess and respond to the proposal on which the Joint Parties now seek to rely. Thus, the policy objectives advanced in *Taccoa* clearly would be furthered by severing the Amended Proposal and withholding its consideration until a subsequent proceeding.

In light of all circumstances, the Counterpetitioners respectfully request that the Joint Parties' Amended Proposal be SEVERED from the above-captioned proceeding and HELD IN ABEYANCE pending final resolution of this proceeding.³

TRIPLE BOGEY, LLC, MCC RADIO, LLC
and KDUX ACQUISITION, LLC



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August 13, 2002

³ With respect to other aspects of this proceeding, the Counterpetitioners shall file reply comments following the release of the Commission's Public Notice formally announcing the acceptance of counterproposals. This procedure is permitted under established Commission practice. *E.g. Wellsville, New York*, 14 FCC Rcd 1564, ¶ 1 & n.3 (Chief, Allocations Branch 1999); *Corinth, New York*, 2 FCC Rcd 3316, ¶ 1 & n.3 (Chief, Policy and Rules Div. 1987). In those reply comments, the Counterpetitioners will demonstrate that, even if the Amended Proposal is considered in this proceeding, it would not result in a preferential allotment of frequencies and, accordingly, should be rejected on the merits.

CERTIFICATE OF SERVICE

I, Janice M. Rosnick, do hereby certify that I have on this 13TH day of August, 2002, caused to be hand delivered or mailed by First Class Mail, postage prepaid, copies of the foregoing MOTION TO SEVER COUNTERPROPOSAL to the following:

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