

BEFORE THE

**Federal Communications Commission**

WASHINGTON, D. C. 20554

**RECEIVED**

**MAR 25 2003**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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, Kent, )  
 College Place, Long Beach and Ilwaco, Washington) )

MB Docket No. 02-136

**ORIGINAL**

To: Assistant Chief, Audio Division, Media Bureau

**REPLY COMMENTS**

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

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## SUMMARY

Triple Bogey, LLC; MCC Radio, LLC and KDUX Acquisition, LLC (collectively, “Triple Bogey”) urge through these Reply Comments that Triple Bogey’s allotment proposal be adopted.

Backround. Triple Bogey **seeks** to change the frequency of KDUX-FM, Aberdeen, Washington, from Channel 284C2 to Channel 283C2 and reallocate the station to Shoreline, Washington. Additionally, Triple Bogey proposes allotment of Channel 237C3 at Aberdeen, Washington, Channel 226A at Trout Lake, Washington, Channel 261C2 at Arlington, Oregon, Channel 300A at Moro, Oregon and Channel 285A at Fossil, Oregon as new vacant allotments. Finally, Triple Bogey proposes that Channel 284C2 be substituted for Channel 237C3 at Hoquiam, Washington and that the license of MCC’s KXXX be modified to specify operation on that channel.

Triple Bogey’s allotment plan conflicts with the “Amended Proposal” of First Broadcasting Company, LP and Mid-Columbia Broadcasting, Inc. (collectively “First Broadcasting”), which proposes, *inter alia*, that KMCQ(FM), Channel 283C, The Dalles, Oregon, be downgraded to Channel 283C2 and reallocated to Kent, Washington.

Both KDUX-FM’s proposed relocation to Shoreline and KMCQ’s proposed relocation to Kent requires Station KAFE, Bellingham, Washington, to change frequency from Channel 282C to Channel 281C and Station KLLM, Forks, Washington, to change from Channel 280A to another frequency.

Because KAFE, operating on Channel 281C, would be short-spaced to two vacant Canadian allotments, it will be necessary for the Commission either to negotiate the allotment as a special short-spacing pursuant to the treaty with Canada or, alternatively, to request the Canadian government to change the frequency of one of the two allotments in question **and** waive the short-

spacing with respect to the other. If the Canadian allotments are not changed, it would be necessary for KAFE to use a directional antenna.

Triple Bogey demonstrated that the pattern produced by such an antenna would not reduce the land area or population within the United States covered by KAFE's 60 dBu or 70 dBu contours.

Saga Broadcasting *Corp.*, the KAFE licensee, has agreed to install a directional antenna, if necessary, if First Broadcasting's proposal is adopted but resists installing such an antenna if Triple Bogey's proposal is adopted. Saga has disclosed that it has entered into an "exclusive" agreement with First Broadcasting under which First Broadcasting will pay an unstated sum in excess of Saga's *Circleville* expenses for changing its frequency and, possibly, its antenna.

#### Arguments.

1. Under the Commission's *Taccoa Policy*, First Broadcasting's counterproposal to its own proposal should be dismissed. No valid excuse exists for First Broadcasting waiting until the counterproposal deadline to present its Amended Proposal. The fact First Broadcasting was not able to effectuate its "exclusive" arrangement with Saga until after an NPRM had been issued in this proceeding does not justify First Broadcasting's filing of a counterproposal to its own proposal.

2. Triple Bogey's proposal should be preferred over First Broadcasting's:

(a) First Broadcasting's relocation of KMCQ will result in **1,799** persons losing the only radio service they currently have, service that will not be restored until some point in the indefinite future.

(b) Triple Bogey's proposal will result in a larger number of persons ultimately receiving a first aural service, the Commission's highest allotment priority.

3. The attacks on Triple Bogey's proposal are without merit:

(a) Mercer Island School District, Peninsula School District No. 401 and their supporters assert that Shoreline is not an independent community deserving of a first local broadcast service. To the contrary, Triple Bogey's Counterproposal demonstrates, and this pleading underscores, that Shoreline is a vibrant independent community. The majority, if not all, of the *Tuck* factors favor Shoreline.

(b) First Broadcasting and Saga claim that Triple Bogey's proposal is defective because it did not secure Saga's consent to installation, if necessary, of a directional antenna to protect the Canadian allotments in question (even though Saga has consented to installation of just such an antenna, if necessary, to effectuate First Broadcasting's proposal). The cases First Broadcasting and Saga cite do not involve the use of a directional antenna to protect a Canadian allotment. The use of contour protection methods vis-a-vis short-spaced Canadian allotments is a common practice and contemplated by the U.S.-Canada treaty. In light of the fact KAFE will not lose any coverage in the United States, the proposed channel is functionally equivalent to KAFE's current channel. The reliance First Broadcasting and Saga place on the Commission's policy not to force a transmitter site change is unavailing. No site change is contemplated here and the rationale behind the "no forced site change" policy is not violated here. That policy was based on the fact that numerous unanswered questions would exist if a station was forced to change its site. Here, the only question is whether a directional antenna could be manufactured to provide the requisite protection. Saga itself has confirmed that such an antenna could be employed. The fact that Saga and First Broadcasting have entered into an "exclusive" agreement does not limit the Commission's power to adopt the proposal that best serves the public interest. That public interest is best served by Triple Bogey's proposal.

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 College Place, Long Beach and Ilwaco, Washington) )

MB Docket No. 02-136

To: Assistant Chief, Audio Division, Media Bureau

**REPLY COMMENTS**

Triple Bogey, LLC; MCC Radio, LLC (“MCC”) and KDUX Acquisition, LLC (collectively “Triple Bogey”) offer these Reply Comments in response to the Commission’s Public Notice, Report No. 2599 (released March 10, 2003), reporting the filing of three sets of counterproposals in the above-captioned docket.

The record in this proceeding leads to three clear conclusions: First, the filing by First Broadcasting Company, L.P. and Mid-Columbia Broadcasting, Inc. (collectively “First Broadcasting”) of a counterproposal to their own initial proposal constitutes a misuse of the Commission’s processes and, under the policy enunciated in *Tuccou, Georgia*, 16FCC Rcd 21 191 (Chief, Allocations Branch 2001), must result in the dismissal of that counterproposal. Second, if First Broadcasting’s counterproposal is not dismissed at the outset, it must be denied because it would result in nearly 1800 people losing their *only* radio service for an indefinite period of time.

Third, even if First Broadcasting's proposal is given comparative consideration, Triple Bogey's allotment proposal must be preferred because it better serves the Commission's highest allotment priority – the provision of a first aural service.

### **I. Background.**

On October 29, 2001, First Broadcasting filed a Petition for Rule Making (hereinafter "Original Proposal") proposing that Station KMCQ, Channel 283C, The Dalles, Oregon, be downgraded to Channel 283C3 and reallocated to Covington, Washington. In order to "provide service to unserved and underserved areas resulting from" the relocation of KMCQ, First Broadcasting also proposed the allotment of Channel 283C1 at Moro, Oregon; Channel 261C2 at Arlington, Oregon and Channel 226A at Trout Lake, Washington.

On June 7, 2002, the Commission released a *Notice of Proposed Rule Making* in this proceeding (DA 02-1339), which set July 29, 2002, as the deadline for comments and counterproposals. On that date: (a) Triple Bogey, New Northwest Broadcasters, LLC ("New Northwest") and Two Hearts Communications, LLC ("Two Hearts") filed timely counterproposals, which are described below; (b) Mercer Island School District ("MISD") and Peninsula School District No. 401 ("Peninsula") (collectively "School Districts")<sup>1</sup> jointly filed comments opposing First Broadcasting's Original Proposal and (c) First Broadcasting abandoned its Original Proposal and presented a new allotment plan through its "Comments and Amended Proposal" (hereinafter "Amended Proposal").

First Broadcasting. First Broadcasting's Amended Plan turns its back on Covington, Washington, and asks that KMCQ be downgraded to Channel 283C2 (instead of Channel 283C3)

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<sup>1</sup> Other comments against the Original Proposal and in support of MISD and/or Peninsula were filed by City of Gig Harbor, Robert Casserd, Chris Goelz, Merle E. Dowd and Rod Smith.

and reallocated to Kent, Washington instead. To accommodate allotment of Channel 283C2 at Kent, Station KAFE (FM), Bellingham, Washington, would change frequency from Channel 282C to Channel 281C and Station KLLM (FM), Forks, Washington, would be changed from Channel 280A to Channel 288A.<sup>2</sup>

Operating on Channel 281C from its current transmitter site, KAFE would be short-spaced to two vacant Canadian allotments.<sup>3</sup> To address that situation, First Broadcasting requests that the Commission, in accordance with standard treaty procedures, ask Canada to change the channel of one of the vacant allotments and to waive the short-spacing with respect to the other.<sup>4</sup> First Broadcasting also took the step of retaining a Canadian consulting engineer to develop a plan for the Canadian allotments. That engineer presented First Broadcasting's proposal to the Canadian administrative agency that regulates broadcasting, Industry Canada, through a letter dated July 29, 2002, the same day the Amended Proposal was filed. *See* Amended Proposal, Exhibit 3.

If Canada were to grant First Broadcasting's waiver and allotment modification requests, KAFE could operate on Channel 281C without reducing power in the direction of those allotments. But First Broadcasting, joined by Saga Broadcasting Corp. ("Saga"), the KAFE licensee, states that

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<sup>2</sup> The Amended Proposal reiterates support for the loss-area fill-in allotments of Channel 283C1 at Moro, Oregon; Channel 261C2 at Arlington, Oregon, and Channel 226A at Trout Lake, Washington.

<sup>3</sup> Specifically, KAFE would be short-spaced to Channel 280A at Powell River, British Columbia, and Channel 281A at Bralorne, British Columbia.

<sup>4</sup> First Broadcasting's proposal is that Channel 291B be substituted for Channel 280A at Powell River. With respect to the Bralorne allotment, First Broadcasting points to an engineering study demonstrating that, due to significant terrain blockage, no actual interference will occur to a facility operating on Channel 281A at Bralorne. On the basis of that study, First Broadcasting asks the Commission to formally coordinate with Canada a waiver of the treaty with respect to the Bralorne allotment.

if the proposed rearrangement of Canadian allotments is not effectuated, KAFE can and will operate with a directional antenna to afford those allotments the protection required. Amended Proposal at pp. 11-12.

Triple Bogey. Triple Bogey's allotment plan (hereinafter "Counterproposal") requests that the frequency of Station KDUX-FM be changed from Channel 284C2 to Channel 283C2 and reallocated from Aberdeen, Washington to Shoreline, Washington, an incorporated city with a population of 53,025.<sup>5</sup> Triple Bogey's Counterproposal demonstrates, using the *Tuck* criteria,<sup>6</sup> that Shoreline is an independent community deserving of a first local broadcast service.<sup>7</sup> To accommodate that change, Triple Bogey, as did First Broadcasting, requests that the frequency of Station KAFE be changed from Channel 282C to Channel 281C. It also requests that the frequency of KLLM be changed from Channel 280A to Channel 240A. Neither KAFE nor KLLM would be required to relocate its transmitter site. As does First Broadcasting, Triple Bogey notes that KAFE may need to reduce power slightly in the direction of two vacant Canadian allotments. But studies prepared by the Seattle consulting engineering firm Hatfield & Dawson, which Triple Bogey submitted with its Counterproposal, demonstrate that KAFE, operating with such a directional

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<sup>5</sup> Shoreline is located in the northern portion of the Seattle, Washington Urbanized Area. Operating from the reference point proposed, KDUX-FM as a Shoreline station would encompass within its 70dBu contour 23.48% of the Seattle Urbanized Area and essentially all of the Bremerton, Washington Urbanized Area. Bremerton's population (37,259), however, is smaller than that of Shoreline.

<sup>6</sup> *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988).

<sup>7</sup> Triple Bogey, LLC and MCC herein reiterate their commitment to apply for the allotments requested in the Counterproposal and promptly construct the facilities for which they receive construction permits. See Counterproposal at pp. 3-4.

antenna, would suffer no reduction in United States area or population within its 60 dBu or 70 dBu contours.

Triple Bogey's Counterproposal also urges that Channel 284C2 be substituted for Channel 237C3 at Hoquiam, Washington and that the license of MCC's Station KXXK be modified to specify operation on that channel. Additionally, Triple Bogey proposes five new vacant allotments: Channel 237C3 at Aberdeen, Washington; Channel 226A at Trout Lake, Washington; Channel 261C2 at Arlington, Oregon; Channel 300A at Moro, Oregon and Channel 285A at Fossil, Oregon.

New Northwest. Through an extensive counterproposal involving modification of several existing stations and several new allotments, New Northwest **seeks** to relocate Station KAST-FM, Astoria, Oregon, to Gladstone, Oregon. The change would require substitution of Channel 226C3 at Gladstone for Channel 225C1 at Astoria. The only point of conflict between New Northwest's proposal and that presented in the *NPRM* is the proposed allotment of Channel 226A at Trout Lake. To resolve that conflict, New Northwest proposes allotment of Channel 236A instead of Channel 226A. Triple Bogey has no objection to that substitution because it does not conflict with any other aspect of Triple Bogey's Counterproposal. Accordingly, New Northwest's proposal does not need to be addressed further in these Reply Comments.

Two Hearts. Similarly, it is unnecessary to address extensively in this pleading the counterproposal of Two Hearts, licensee of Station KHSS, Channel 264C3, Walla Walla, Washington. Two Hearts **seeks** modification of **KHSS** to operate on Channel 264C2 at College Place, Washington.<sup>8</sup> The only point of intersection between Two Hearts' proposal and Triple

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<sup>8</sup> Two Hearts' counterproposal is not listed in the FCC's March 10, 2003 Public Notice.

Bogey's is that Two Hearts proposes allotment of Channel 263C2 at Arlington, Oregon, instead of Channel 261C2. As was the case with New Northwest, Triple Bogey has no objection to this substitution because it does not conflict with any other aspect of Triple Bogey's Counterproposal?

School Districts. The objections of the School Districts require only brief comment. MISD is the licensee of Class D Station KMIH(FM), Channel 283, Mercer Island, Washington and Peninsula is the licensee of, *inter alia*, FM Translator K283AH, Gig Harbor, Washington. Both **KMM** and K283AH are secondary facilities. As such, each must find a replacement frequency (or cease operations) when a full-power station begins operation on Channel 283 in their vicinity. The adoption of Triple Bogey's Counterproposal (or of First Broadcasting's Amended Proposal) would require such displacement. While Triple Bogey respects the service **KMM** and K283AH provide, the fact remains that long ago the Commission concluded that operation of a full-power station better serves the public interest than operation of a secondary facility such as a Class D station or a translator. *See, e.g., Ruggiero v. FCC*, 317F.3rd 239,239 (D.C. Cir. 2003). Accordingly, KMIH and K283AH must give way when a full power operation begins on Channel 283. *See* First Broadcasting's Reply Comments filed August 13, 2001, at pp. 2-4. MISD's proposal (*i.e.*, that **KMM** be given a "special allocation") is not listed as a counterproposal in the FCC's March 10 Public Notice and correctly so. The FCC's rules do not authorize such a "special allocation."

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<sup>9</sup> Regardless of what specific frequency is allotted at each community, Triple Bogey remains committed to apply for the Trout Lake and the Arlington facilities and to promptly build each station for which it is awarded a construction permit.

<sup>10</sup> Triple Bogey will respond in Section IV herein to the School Districts' assertions in their Reply Comments, filed August 13, 2002, that Shoreline is not an independent community.

### 11. First Broadcasting's Counterproposal to its Own Proposal Should be Dismissed.

As detailed above, First Broadcasting's Original Proposal, filed October 29, 2001, led to the issuance of the *NPRM* in this proceeding. That proposal contemplated the reallocation of KMCQ from The Dalles, Oregon to Covington, Washington and presented detailed information on Covington's alleged need for a local transmission service. On the *NPRM*'s deadline for counterproposals, First Broadcasting abandoned its Original Proposal and, for the first time, asked that KMCQ be permitted to change its community of license to Kent, Washington instead of Covington.

In *Taccoa, supra*, the Commission gave notice it intends to "carefully review future counterproposals filed by the original rulemaking proponent." 16 FCC Rcd 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 rulemaking 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. We are also concerned with fairness to other parties." *Id.* The Commission continued, "In the absence of an explanation, such as unforeseen circumstances, as to why the new proposal could not have been advanced in the initial petition for rulemaking, we reserve the right, as a procedural matter, to process the new proposal in a new proceeding." *Id.*

Only recently the Commission applied the *Taccoa* ruling. In *Bridgeton, New Jersey*, DA 02-3455 (Assistant Chief, Audio Division, released December 16, 2002), Cohanzick Broadcasting Corp. ("Cohanzick"), licensee of Station WSNJ-FM, Channel 299B, Bridgeton, New Jersey, initially filed

a proposal to reallocate Channel 299B from Bridgeton to Elmer, New Jersey. That filing led to the issuance of a notice of proposed rule making. During the comment period, Cohanzick and New Jersey Radio Partners (“NJRF”) jointly filed comments abandoning the original plan and proposing instead to substitute Channel 300A at Pennsauken, New Jersey, for Channel 299B at Bridgeton.

Cohanzick and NJRF argued, as First Broadcasting does here, that changed circumstances justified consideration of Cohanzick’s counterproposal to its own proposal. The Commission found no such justification. The Commission noted that, after the filing of its petition for rule making, Cohanzick entered into an agreement with NJRF for the sale of WSNJ-FM and that reallocation of the station to Pennsauken was a precondition to closing the sale. The Commission held the revised allotment proposal “is based on the voluntary business decisions of Cohanzick and NJRF.” *Id.* at ¶2. The Commission responded by dismissing Cohanzick’s original petition, terminating the proceeding and initiating a new docket seeking comment on the Pennsauken proposal. Significantly, in the Bridgeton/Elmer docket, no other counterproposals had been filed. Here, Triple Bogey has presented a timely counterproposal that should not be subjected to further counterproposals. Accordingly, the appropriate action in this proceeding is to dismiss First Broadcasting’s Amended Proposal.

In this case, First Broadcasting’s claim of “unforeseen circumstances” is equally unavailing as Cohanzick’s in *Bridgeton*. First Broadcasting claims that it could not have filed its Amended Proposal as its initial petition for rule making because it had not been able to reach a favorable resolution with Saga, the KAFE licensee, regarding the Canadian spacing issues discussed above. First Broadcasting claims that subsequent to the filing of its Original Proposal, “significant changes to the regulatory landscape” made it appear that changes in the Canadian allotments could be obtained. Amended Proposal at p.2.

But the only actual changes in circumstances were that (a) on the day the Amended Proposal was filed, First Broadcasting, through its Canadian consulting engineer, presented its Powell River/Bralorne plan to Industry Canada and (b) Saga and First Broadcasting entered into an “exclusive” agreement under which Saga agreed to cooperate with First Broadcasting, even if it means operating KAFE with a directional antenna, in exchange for First Broadcasting paying Saga an unstated sum in excess of the costs incurred in modifying KAFE’s facilities. Saga Reply Comments, filed August 13, 2002, at pp. 4-5

The Amended Proposal recognizes that Canada may opt not to adopt First Broadcasting’s channel allotment plan. Accordingly, the Amended Proposal presents, as an alternative, that KAFE use a directional antenna to protect the Canadian allotments. But that alternative always was available. The use of a directional antenna to protect short-spaced Canadian allotments is specifically contemplated in the treaty between the United States and Canada and a common practice.”

Thus, the conclusion must be that nothing, except the fact that First Broadcasting and Saga apparently had not yet finalized their “exclusive” agreement, prevented First Broadcasting from submitting its Amended Proposal at the time its Original Proposal was submitted. The subsequent business decision on the part of First Broadcasting and Saga to effectuate their exclusive agreement does not justify First Broadcasting’s filing of a counterproposal to its own proposal.

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<sup>11</sup> *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 (“Working Arrangement” )* at Section 3.6; *accord, e.g., Wellsville, New York*, 14 FCC Rcd 15964, ¶ 6 (Chief Allocations Branch 1999); *Oakville, Washington*, 17 FCC Rcd 997, ¶ 10, n.9 (Chief, Allocation Branch 2002); *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).

The Commission's concerns with the efficient transaction of its business and with fairness, both underscored in *Tuccoa* and *Bridgeton*, support dismissal of the Amended Proposal from this proceeding. Furthermore, First Broadcasting's Original Proposal similarly should be dismissed since First Broadcasting obviously has abandoned it.<sup>12</sup>

### **111. Comparison of Triple Bogey and First Broadcasting Proposals.**

In the event the Commission does not dismiss First Broadcasting's Amended Proposal, for **two** distinct reasons, Triple Bogey's Counterproposal must be preferred over the Amended Proposal: (a) First Broadcasting's proposed relocation of KMCQ will leave nearly 1800 people without *any* radio service for an indefinite period of time in violation of Commission policy and (b) Triple Bogey's plan will provide a first aural service to a larger number of people than would First Broadcasting's in furtherance of the highest allotment priority, and will deliver other public interest benefits.

#### **A. Relocation of KMCQ Will Create a Large "White" Area.**

First Broadcasting's Amended Proposal contemplates moving KMCQ some 135 miles north of its present transmitter site. No portion of KMCQ's current 60 dBu contour would overlap the **60** dBu contour of the Kent station proposed. Exhibit A hereto at 14. First Broadcasting proposes to restore service to this 100% loss area through back-fill allotments. The Amended Proposal would theoretically provide, if the proposed loss-area fill-in allotments are considered, **(a)** a first aural

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<sup>12</sup> Triple Bogey herein incorporates by reference its Motion to Sever Counterproposal, filed August 13, 2002, which similarly argues that the *Tuccoa* policy bars consideration of First Broadcasting's Amended Proposal in this proceeding.

service to 58 persons,” (b) a second aural service to 1,362 persons,<sup>14</sup> and (c) a first local service to four communities with an aggregate population of 80,879 – Kent, Washington (pop. 79,524); Moro, Oregon (pop. 337); Arlington, Oregon (pop. 524); and Trout Lake, Washington (pop. 494).

Significantly, removal of Channel 283C from The Dalles will result in the creation of significant “white” and “gray” areas<sup>15</sup> that will receive replacement service only at some unknown point in the future. If KMCQ is relocated to Kent, 1,799 persons – including the entire populations of Arlington and Condon, Oregon – will lose their only aural service. *See* Exhibit A hereto. **An** additional 1,836 persons – including the entire population of Maupin, Oregon – will lose their second aural service. *Id.* Service to these people would be fully restored only when and if stations begin operation on the three loss-area fill-in allotments First Broadcasting proposes (Channel 283C1 at Moro, Channel 261C2 at Arlington and Channel 226A to Trout Lake) and on two existing vacant channels (Channel 228A at Condon, Oregon and Channel \*268C3 at The Dalles, Oregon).<sup>16</sup>

Even if the vacant allotments at The Dalles and Condon were deemed, for the purposes of this proceeding, to be “existing services,” the relocation of KMCQ still would result in 791 persons losing their only aural service (including the entire population of Arlington, Oregon) and 2,583 persons losing their second aural service (including the entire populations of Condon and Maupin, Oregon) until stations were operating on the Moro, Arlington and Trout Lake channels proposed.

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<sup>13</sup> *See* First Broadcasting’s Petition for Rule Making, October 29, 2001, Technical Exhibit at p. 2.

<sup>14</sup> *Id.*

<sup>15</sup> A “white” area is an area that receives no full-time aural service. A “gray” area is an area that receives only one full-time aural service.

<sup>16</sup> An application for review with respect to allotment of Channel \*268C3 of The Dalles is pending in MM Docket No. 96-12.

It has long been established that the public “has a legitimate expectation that existing service will continue.” *Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd 7094,7097 (¶ 19) (1990) (hereinafter “*Community of License II*”). The principle that “curtailment of service is not in the public interest is axiomatic.” *Hall v. FCC*, 237 F.2d 567 (D.C. Cir. 1956); accord, e.g., *TV Corp of Michigan v. FCC*, 294 F.2d 730 (D.C. Cir. 1961); *West Michigan Television v. FCC*, 460 F. 2d 883 (D.C. Cir. 1971).

The Commission has made clear, in considering whether to permit an existing station to change its community of license, the expectation that existing service will continue is a factor that must be weighed “independently against the service benefits that may result from reallocating a channel from one community to another, regardless of whether the service removed constitutes a transmission service, a reception service, or both.” *Community of License II*, 5 FCC Rcd at 7097 (¶ 19). Removal of service is warranted only if there are sufficient public interest factors to offset the loss of continued service. *Id.*, citing *KTVO, Znc.*, 57 RR 2d 648 (1984). The Commission has further stated:

We specifically wish to clarify that replacement of an operating station with a vacant allotment or unconstructed permit, although a factor to be considered in favor of the proposal, does not adequately cure the disruption to “existing service” occasioned by removal of an operating station. From the public’s perspective, the potential for service at some unspecified future date is a poor substitute for the signal of an operating station that can be accessed today simply by turning on a TV or radio set. Therefore, in analyzing proposals pursuant to Section 1.420(i), we intend to examine the effect of the proposal on existing service to the public particularly closely.

*Community of License II*, 5 FCC Rcd at 7097 (¶ 19).

The Commission, in establishing its FM allotment priorities, assigned the highest priority to the provision of a full-time aural service. *Revision of FM Assignment Policies and Procedures*, 90

FCC 2d (1982) (“*FM Priorities*”).” Here, examination of the effect which First Broadcasting’s Amended Proposal will have on existing service leads to the conclusion it must be rejected.<sup>18</sup> The withdrawal of the only aural service available to 1,799 people is *prima facie* contrary to the public interest.

For example, in *Pecos, Texas*, 14 FCC Rcd 2840 (Chief, Allocations Branch 1999), the Commission rejected a proposal to change the community of license of Station KKLY from Pecos, Texas to Wink, Texas because, even though KKLY had not yet been constructed, from its authorized Pecos site, the station would provide a first service to 673 people and a second service to 20 people. In light of the fact that retaining the channel in Pecos would serve the highest allotment priority, the proposed relocation to Wink was denied.

Similarly, in *Cheyenne, Wyoming*, 15 FCC Rcd 7528 (Chief, Allocations Branch 2000), the Commission rejected an allotment plan that would have resulted in 211 people losing a potential first aural service from an authorized but unbuilt station. The Commission found that creation of this white area triggered Priority 1 of *FM Priorities*. For that reason alone, notwithstanding the fact it would result in a gray area population net gain of 532 people, the proposal had to be denied. *Id. at* ¶¶ 5&7; *accord, Littlefield, Texas*, 12 FCC Rcd 3215, 3220 (¶9) (Chief, Allocations Branch 2000) (retention of a first aural service to 411 persons buttresses the decision to retain the current allotment arrangement rather than adopt the proposal presented).

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<sup>17</sup> The other priorities are: (2) second full-time aural service; (3) first local service and (4) other public interest factors. Co-equal weight is given to Priorities 2 and 3.

<sup>18</sup> In case at some point First Broadcasting’s Original Proposal is deemed relevant to the analysis, Triple Bogey notes the first and second aural service figures are the same for First Broadcasting’s Original Proposal as for its Amended Proposal, both with respect to the KMCQ loss area and the coverage to be provided by First Broadcasting’s proposed loss-area fill-in allotments. *See Exhibit A* hereto.

In light of the fact that the loss of *potential* first aural service to less than 700 people led to denial of reallocation proposals in *Pecos* and *Cheyenne*, the loss of *actual* first aural service to more than twice that number here warrants the denial of First Broadcasting's proposal for KMCQ. Preserving the only radio service available to 1,799 persons serves Priority 1 of the *FM Priorities*. Withdrawing that service in order to permit KMCQ to move to Kent, Washington would disserve Priority 1. As the Commission stated in *Community of License II*, the potential that service might be restored "at some unspecified future date is a poor substitute for the signal of an operating station," *i.e.*, KMCQ. 5 FCC Rcd at 7097 (¶19).

As noted previously, First Broadcasting has proposed three fill-in allotments to cover the loss in area that relocation of KMCQ creates. But the Commission rightly has expressed deep concern regarding the use of new vacant allotments to repair the damage caused by relocation of an existing station. *Id.*; accord *Pacific Broadcasting of Missouri, LLC*, FCC 03-18 (released February 11, 2003).

In *Pacific Broadcasting*, the full Commission found not tenable the staff practice of relying on vacant so-called "back-fill" allotments to preserve local service when the community's only existing station **seeks** to change its city of license. The Commission held that the back-fill practice permitted the filing of inherently contingent proposals and created the potential for the type of problems and resource burdens that led to the codification of the general prohibition on filing contingent applications. The Commission stated, "[T]he ultimate licensing of a back-fill through our auction procedures is both an uncertain and time-consuming process, especially during the current hiatus in broadcast auctions." *Id.* at ¶ 14. Accordingly, the Commission ordered the Bureau to immediately cease this practice. "Henceforth, a community of license modification proponent may

not rely on a new “back-fill” FM allotment to “preserve” a community’s sole local transmission service.” *Id.*

While *Pacific Broadcasting* specifically dealt with the preservation of a community’s sole local service, *Community of License II* makes clear that the same principle is applicable to situations in which a first full-time aural service – an even higher allotment priority than first local service – is to be “preserved” by fill-in vacant allotments.

Here, given the size of the white area population that relocation of KMCQ would create, the public interest dictates that First Broadcasting’s plan to move that station to the Seattle Urbanized Area be rejected.

### **B. Triple Bogey’s Plan Would Provide More People a First Full-Time Aural Service**

Even if First Broadcasting’s proposed relocation of KMCQ is not denied because of the substantial white area it would create, First Broadcasting still trails far behind Triple Bogey under Priority 1.

Adoption of Triple Bogey’s Counterproposal will provide (a) a first aural service to 558 persons in an aggregate area of 1,171 square kilometers, (b) a second aural service to 1,971 persons in an aggregate area of 2,324 square kilometers, and (c) a first local transmission service to five communities with an aggregate population of 54,849 – Shoreline, Washington (pop. 53,025); Trout Lake, Washington (pop. 494); Arlington, Oregon (pop. 524); Fossil, Oregon (pop. 469); and Moro,

Oregon (pop. 337).<sup>19</sup> Triple Bogey's plan would not create, even temporarily, any white or gray areas. *See* Exhibit A hereto (Engineering Statement of Hatfield & Dawson).

Significantly, as noted above, First Broadcasting calculates that its Amended Plan would provide a first aural service to only 58 persons. ( Triple Bogey's engineers, however, have calculated the white area population under First Broadcasting's proposal to be 408 persons. *See* Triple Bogey Counterproposal, Exhibit A at p. 32.) Assuming First Broadcasting's calculations are disregarded, and Triple Bogey's white area advantage is deemed to be 150 persons, that number remains significant. *See, e.g., Channel 32 Broadcasting Co.*, 6 FCC Rcd 5188,5189 (1991) (white area service to 177); *Christian Broadcasting of the Midlands*, 99 FCC Rcd 578,583 (Rev. Bd. 1984) (white area service to 180 persons), *rev. denied* 103 FCC 2d 375 (1986); *recon. denied*, 2 FCC Rcd 6404 (1987).

Triple Bogey's white area advantage under Priority 1 is decisional. First Broadcasting's supposed advantage under Priority 3 cannot overcome Triple Bogey's clear superiority under the Commission's highest allotment priority. The conclusion that Triple Bogey's plan is to be preferred becomes even clearer when consideration is given to the fact First Broadcasting's plan would withdraw for an indefinite period of time the only existing service available to 1799 persons and one of only two existing services available to another 1,836 persons (*see* Exhibit A hereto).

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<sup>19</sup> Furthermore, Triple Bogey's Counterproposal would upgrade Station KXXX(FM), Hoquiam, Washington, from Class C3 to Class C2 status, and add Channel 237C3 at Aberdeen, Washington.

#### IV. Attacks on Triple Bogey's Allotment Proposal are Without Merit.

The School Districts, in their Reply Comments filed August 13, 2002, claim that Shoreline is not an independent community. On a different tack, First Broadcast and Saga, in separate Reply Comments, assert that Triple Bogey's proposal must be dismissed because it entails KAFE limiting its power toward certain Canadian allotments – the exact same limitation for KAFE that Saga endorses as part of First Broadcasting's Amended Proposal. None of these attacks have merit.

##### A. Shoreline is Clearly an Independent Community, Well-Deserving of a First Local Service.

Shoreline is the State of Washington's 13<sup>th</sup> largest city. More than 1,100 businesses are located in Shoreline. The community, which was incorporated in 1995, covers 12 square miles. A June 2002 newsletter published by the City of Shoreline summarized some of the responses of Shoreline residents to a survey taken earlier in the year: "Excellent schools.' 'Small-town feeling.' 'Friendly.'" *See* Triple Bogey Counterproposal at pp. 10-11 & Exhibits F, I J. The *Tuck* showing presented makes unmistakable the conclusion that Shoreline is an independent community, well-deserving of a first local service.

Undeterred by the wealth of data Triple Bogey presented, the School Districts claim that Shoreline does not meet the *Tuck* test. That claim is undercut by the record.

The School Districts point to the fact that KDUX-FM, as a Shoreline station, will place a 70 dBu contour over **23.4%** of the Seattle Urbanized area and essentially all of the Bremerton Urbanized Area. As Triple Bogey pointed out in its Counterproposal, the Commission on numerous occasions has approved reallocation proposals involving substantially greater 70 dBu coverage of a nearby urbanized area. *E.g., Pleasanton, Texas*, 15 FCC Rcd **3068** (Chief, Allocations Branch 2000)

(99% of the urbanized area); *Oraibi, Arizona*, 14 FCC Rcd 13547 (Chief, Allocations Branch 1999) (90% of urbanized area).

With respect to the Bremerton Urbanized Area, Shoreline's population is larger than Bremerton's (53,025 versus 37,259). Moreover, as demonstrated in Triple Bogey's Counterproposal, the reference point for Shoreline is 30.3 kilometers from Bremerton's reference point and the communities are separated by the Puget Sound. In order to get from Shoreline to Bremerton one would have to (a) travel approximately 10 miles to the Washington State Femes Terminal in Seattle and then take a one-hour ride on a toll ferry or (b) drive 76 miles around the Puget Sound. *See* Triple Bogey Counterproposal, Exhibits E and DD.

With respect to the size/proximity factor, Shoreline's substantial population (53,025) is 8.9% of the population of the central city, Seattle. This percentage is substantially larger than that approved in other cases. *E.g., Detroit Lakes, Minnesota*, DA 02-3364 (Assistant Chief, Audio Division, released December 16, 2002) (2.8% of one central city and 6.4% of another in a dual-city urbanized area.); *Ada, Oklahoma*, 11 FCC Rcd 16896, Chief, Allocations Branch 1996 (0.9%).

With respect to the third factor, the independence of Shoreline from Seattle, the eight *Tuck* sub-factors clearly demonstrate Shoreline's independence.

1. The Extent to Which Residents Work in Shoreline. With respect to Factor 1, Triple Bogey presented a report prepared by the City of Shoreline stating that 9,800 private sector employees work in Shoreline at a total of 1,134 businesses. Clearly, the residents of Shoreline are not obligated to turn to Seattle for employment. The School Districts point only to the Census Bureau statistic that the mean travel time to work is 26.9 minutes. That statistic is not material. All it tells us is that for half of Shoreline's 26,276 workers, the travel time to work is between 0 and 26.9

minutes.<sup>20</sup> The School Districts cite *Pleasanton, Texas, supra*. But in that case, the Commission approved a reallocation even though the proponent did not identify employment opportunities in the community. Here, Triple Bogey clearly has demonstrated abundant employment opportunities.

2. Newspapers and Other Media. The School Districts ask the Commission to discount the fact that Shoreline has its own newspaper, *The Shoreline Enterprise*, because it is a weekly rather than a daily. But the Commission has held that the fact a community has a weekly newspaper warrants a favorable ruling on this factor. *E.g. Detroit Lakes, supra; Ada, Oklahoma, supra*.

3. Community Perception. The School Districts assert that Triple Bogey has merely provided “a few feel good statements” about Shoreline and has not demonstrated that the community perceives itself to be independent of Seattle. The School Districts’ argument is belied by the substantial materials Triple Bogey submitted and, most importantly, by the fact Shoreline residents took the step in 1995 of officially incorporating their city. The existence of elected government officials, local civic organizations, a chamber of commerce and Shoreline civic activities confirms that Shoreline is a community distinct from its neighbor, Seattle. *See Detroit Lakes, supra*, ¶ 11.

4. Shoreline City Government and Elected Officials. The School Districts concede, as they must, that Shoreline does have its own local government and elected officials.

5. Shoreline’s Zip Codes. While Shoreline may share zip codes with other municipalities, it is clear that the U.S. Post Office recognizes “Shoreline” as a city name. *See* Triple Bogey Counterproposal, Exhibit J.

6. Shoreline has Numerous Commercial Establishments and Other Facilities. Notwithstanding the School Districts sniping, it is beyond doubt Shoreline has a vibrant business

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<sup>20</sup> The Census Bureau printout upon which the School Districts rely also indicates that 1,086 Shoreline residents work at home. Another 450 walk to work.

community. More than 1,000 businesses are located in Shoreline. The Shoreline Chamber of Commerce membership and business directory is more than 50 pages long. **An** Internet search for those businesses which included “Shoreline” in the name and have an address in Shoreline, Washington produced 270 listings. Triple Bogey Counterproposal at p. 12 & Exhibits F, T and U. The School Districts cannot deny that a large number of health care providers are located in Shoreline. *Id.* at Exhibit F. Instead they recite that Shoreline does not have its own “central medical facility.” Given the wealth of business activity in Shoreline, the fact that Shoreline residents may need to travel to a nearby community to go to the hospital does not obviate a favorable finding for Shoreline with respect to Factor 6. *E.g., Pleasanton, supra*, ¶ 9; *Detroit Lakes, supra*, ¶ 12.

7. The Extent to Which Shoreline and Seattle Are Part of the Same Advertising Market. The School Districts recite that Shoreline is located in the Seattle Arbitron Metro, the Seattle DMA and the Seattle Basic Trading Area. Nonetheless, as Triple Bogey pointed out, businesses can advertise directly to Shoreline residents through the *Shoreline Enterprise*, the weekly community newspaper.

8. Shoreline’s Municipal Services. Triple Bogey demonstrated that Shoreline has its own school district, fire department, parks and recreation department and many other governmental offices, which are entirely separate from those of any other community. The School Districts point to the fact that police services are provided pursuant to a contract with King County’s Sheriff’s Department but failed to note that the officers work specifically in Shoreline, wear Shoreline uniforms and drive Shoreline patrol cars.

In sum, it is beyond doubt that far more than a majority, if not all, of the **Tuck** subfactors demonstrate that Shoreline is distinct from Seattle. When such a majority is found, the Commission considers the community independent. *E.g., Lebanon, Indiana*, DA 02-3418 (Assistant Chief, Audio

Division, released December 16, 2002); *Cumberland, Kentucky*, 17 FCC Red 5024 (Chief, Allocations Branch 2002).

**B. Proposing that KAFE Use a Directional Antenna Does  
Not Render Triple Bogey's Plan Defective.**

Triple Bogey's proposal, as does First Broadcasting's Amended Proposal, contemplates changing the frequency of Station KAFE, Bellingham. No change in KAFE's transmitter site is contemplated. As discussed fully in Triple Bogey's Counterproposal, operating on Channel 281C, KAFE's transmitter site is closer to one existing Canadian station and two vacant Canadian allotments than normally contemplated under the *Working Arrangement* with Canada. The existing Canadian station in question, CHQM-FM, Vancouver, British Columbia, operates on Channel 278C, the third adjacent channel to the proposed Bellingham substitute allotment. Significantly, the KAFE interfering contour (even if the station were to operate with maximum Class C facilities), will not overlap any Canadian land areas. Likewise, the CHQM-FM interfering contour will not overlap any United States land areas. Under the treaty with Canada, a station located in the proximity of the US.-Canadian border is entitled to protection only with respect to the land areas of its own country. See Section 5.2.2.4 of the *Working Arrangement*. Therefore the proposed allotment of Channel 281C at Bellingham complies with the *Working Arrangement* with respect to CHQM-FM.

With respect to the two vacant allotments, operation of KAFE on Channel 281C at Bellingham can be accommodated either by (a) using the "special negotiated short-spacing" process contemplated under the *Working Arrangement*, under which KAFE would make a slight reduction in radiation toward the two allotments or (b) as First Broadcasting discusses in its Amended Proposal, by having the Canadian government change the channels of the allotments in question.

Significantly, Saga and First Broadcasting have explicitly confirmed that, if necessary, KAFE will protect Canadian allotments through use of a directional antenna and that a “directional antenna pattern can be designed that complies with the requirements set forth in the U.S. – Canadian treaty, and affords protection to the Canadian allotments as permitted therein.” Amended Proposal at p. 12. Such a directional antenna not only will protect the vacant Canadian allotments, but will not change the area and population within the United States covered by the KAFE 60 dBu or 70 dBu contours. Triple Bogey Counterproposal at Exhibit A, pp. 16-17.

In their separate Reply Comments, both filed August 13, 2002, First Broadcasting and Saga argue that the proposed KAFE channel substitution cannot be ordered by the Commission over Saga’s objection, citing *Wasilla, Alaska*, 14 FCC Rcd 6263, 6265 (Chief, Allocations Branch 1998). But in that case, the Commission’s staff rejected a proposed substitution at Anchorage, Alaska, because it would have required the use of a directional antenna to protect an allotment at Homer, Alaska. Significantly, neither that case nor any other case First Broadcasting and Saga cite involves a Canadian allotment.

In *Wasilla*, the Commission followed its standard practice of disallowing the use of a contour protection method at the allotment stage to cure a short-spacing to an existing domestic allotment. *Wasilla, supra*, ¶ 9. But the Commission frequently has used contour protection methods at the allotment stage with respect to short-spacings to Canadian stations and allotments. *E.g.*, *Oakville, Washington, supra*, ¶ 10, n.9; *Wellsville, New York, supra*, 14 FCC Rcd 15964 at ¶ 6; *Brighton, New York, supra*, 8 FCC Rcd 793 at ¶ 6; *Waterbury, Vermont, supra*, 6 FCC Rcd 5163 at ¶ 11; *Saranac Lake, New York, supra*, 6 FCC Rcd 5121 at ¶ 6.

First Broadcasting and Saga also cite cases that reiterate the Commission's policy not to force an existing station to change its transmitter site to accommodate a proposal elsewhere in the absence of a strong and compelling public interest showing to justify such action. *E.g., Wasilla, supra* at ¶9, *citing Claremore, Oklahoma*, 3 FCC Rcd 4037 (1988), *rev. denied*, 66 RR 2d 225 (1989); *Parker, Arizona*, 17 FCC Rcd 9578 (Assistant Chief, Audio Division 2002). Here, a change in KAFE's transmitter site is not even suggested. All that is proposed is the installation, if necessary, of a directional antenna to protect the Canadian allotments.

The Commission's policy against involuntary transmitter site moves is founded on the fact that significant administrative difficulties would ensue from a forced relocation. *E.g., Asheville, North Carolina*. 36 RR 2d 810 (1976); *Toms River, New Jersey*, 43 FCC 2d 414 (1973). In *Toms River*, the Commission noted that such a site change would involve numerous unresolved contingencies.

Among the unknowns are: Is a site available for use? Is it priced within reason? Is the land suitable for FM tower construction? Do aeronautical considerations restrict antenna height and hence coverage? Are there intervening hills that could cause shadowing? The mere fact that there is an area in which the station theoretically could relocate provides no answer. While it could be argued that we always face the problem in rule making of not knowing about the site to be used, there is a difference. In the ordinary case it is the prospective operator who faces the problem. If he fails in the quest for a satisfactory site no public loss is occasioned. At worst, the public will not be able to receive the hoped-for gain.

*Toms River, supra*, ¶ 13 (footnote omitted). Here, there are no such uncertainties. The only change that may be required is a one-channel shift in the station's frequency and the installation of a directional antenna. Through the Amended Proposal, Saga itself has confirmed that such an antenna can be designed and has agreed to install one if necessary.

Saga, to its credit, candidly acknowledges in its August 13 Reply Comments that the reason it is willing to install a directional antenna to accommodate First Broadcasting's proposal (but not Triple Bogey's) is that it has entered into an "exclusive agreement" with First Broadcasting under which First Broadcasting "has agreed to compensate Saga in excess of the *Circleville* amounts." Saga Reply Comments at pp. 4-5.<sup>21</sup>

Saga and First Broadcasting cannot buy and sell the public interest to the highest bidder. The issue presented is what allotment proposal will best further that public interest. The possible need to use a directional antenna to protect Canadian allotments (a) does not present any of the uncertainties inherent in a forced transmitter site move and (b) is consistent with other allotment rulings involving protection of Canadian stations and allotments. The fact Saga has entered into a financial agreement with First Broadcasting should not and does not limit the Commission's powers to advance the public interest. Parties, such as First Broadcasting and Saga, who voluntarily invoke the Commission's allotment processes in order to obtain modified facilities by adjusting a station's antenna should not be permitted to refuse to make the exact same adjustment in order to accommodate another allotment proposal, such as Triple Bogey's, that better serves the public interest. *See Rockford, Texas*, 4 FCC Rcd 8075 (Chief, Allocations Branch 1989) (rule making proponent agreeing to change the site of its existing station to point A will not be permitted to invoke the policy against involuntary transmitter site moves to block the Commission's specification of point B as the station's location in order to accommodate otherwise mutually exclusive upgrade requests).

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<sup>21</sup> Triple Bogey, in accordance with the guidelines set forth in *Circleville, Ohio*, 8 FCC 2d 159 (1967) has pledged to pay the costs the licensees of Stations KAFE and KLLM incur to change the frequencies of their respective stations, which costs will include the acquisition and installation of a new antenna at each station

To reiterate the key points: (a) under the *Working Arrangement*, a station located in the proximity of the U.S. – Canada border is entitled to protection only with respect to land areas of its home country and (b) if Canada does not honor the request to modify the channels of the **two** vacant allotments in question and use of a directional antenna by KAFE becomes necessary, the slight reduction in power in the direction of those two allotments in question will not result in any change in the area and population within the United States covered by the KAFE 60 dBu or **70 dBu** contours. Stated simply, KAFE would not lose any coverage to which it is entitled. Thus, the proposed substitute is the equivalent of KAFE's existing allotment.

#### **V. Conclusion,**

WHEREFORE, IN LIGHT OF ALL CIRCUMSTANCES PRESENT, It is respectfully requested that the Commission:

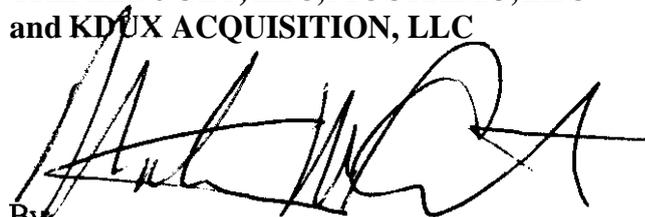
1. Issue an order to Saga Broadcasting Corp., licensee of Stations KAFE(FM), Channel 282C, Bellingham, Washington, to show cause why the license of Station KAFE should not be modified to specify operation on Channel 281C.
2. Issue an order to Alco Services, Inc., license of Station KLLM(FM), Channel 280A, Forks, Washington, to show cause why the license of KLLM should not be modified to specify operation on Channel 240A.

3. Amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

Community	Present Channel Number	Proposed Channel Number
Shoreline, WA	—	283C2
Aberdeen, WA	284C2	237C3
Bellingham, WA	225C, 282C	225C, 281C
Forks, WA	280A	240A
Hoquiam, WA	237C3	284C2
Trout Lake, WA	—	226A
Arlington, OR	—	261C2
Moro, OR	—	300A
Fossil, OR	—	285A

Furthermore, the license of KDUX-FM should be modified to specify operation on Channel 283C2 at Shoreline, Washington, and the license of KXXK should be modified to specify operation on Channel 284C2 at Hoquiam, Washington.

**TRIPLEBOGEY, LLC, MCCRADIO, LLC  
and KDUX ACQUISITION, LLC**



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