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May 12, 2003

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Marlene Dortch
Office of the Secretary
Federal Communications Commission
445 Twelfth Street
TW A325
Washington, D.C. 20554

**Re: Amendment of Section 73.202(b)
Table of Allotments
FM Broadcast Stations
MB Docket No. 02-136; RM-10458,
RM-10663, RM-10667, RM-10668**

Dear Ms. Dortch:

Transmitted herewith on behalf of Mercer Island School District is an original and four copies of its Opposition to the recent Supplement submitted in the above-referenced matter by Mid-Columbia Broadcasting, Inc., First Broadcasting Company, L.P. and Saga Broadcasting Corp. (collectively the "Joint Parties").

Should any questions arise concerning this matter, please contact this office directly

Respectfully submitted,


Howard J. Barr

Enclosure

cc: Service List

WASHINGTON 84899v1
HJB/de
2506.X.Further.Reply.Comments [47355.0015.1]



Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 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, Moro, Fossil,) RM-10663
Astoria, Gladstone, Tillamook, Springfield-) RM-10667
Eugene, Coos Bay, Manzanita and Hermiston,) RM-10668
Oregon and Covington, Trout Lake, Shoreline,)
Bellingham, Forks, Hoquiam, Aberdeen, Walla)
Walla, Kent, College Place, Long Beach, Ilwaco)
and Trout Lake, Washington)

To: Chief, Allocations Branch

OPPOSITION TO SUPPLEMENT

Mercer Island School District ("Mercer Island"), by counsel, hereby submits its Opposition to the Supplement submitted in this matter by Mid-Columbia Broadcasting, Inc., First Broadcasting Company, L.P. and Saga Broadcasting Corp. (collectively the "Joint Parties").¹

The following is shown in support thereof:

Joint Parties contention that the remedy of dismissal is not available under the Commission's *Taccoa Policy*² should be rejected. First, Joint Parties are incorrect in the assertion that the argument supporting dismissal of its amended proposal was first raised in the Triple Bogey Reply Comments.

¹ Mercer Island respectfully requests acceptance of this submission.

² *Taccoa, Sugar Hill, and Lawrenceville, Georgia*, 16 FCC Red 21191 (2001) (a party may not submit a counterproposal to its own proposal absent an explanation, such as unforeseen circumstances, as to why the new proposal could not have been advanced in the initial petition for rule making).

Calling the Kent counterproposal what it was -- a “blatant attempt to manipulate [the Commission’s] rulemaking procedures and to circumvent the notice and comment requirements of the Administrative Procedure Act” -- Mercer Island made just that argument in its initial Reply Comments in this proceeding.³ Accordingly, Joint Parties contention that the remedy was first raised in response to the Commission’s release of its Public Notice, Report No. 2599, released March 10, 2003, should be rejected and cannot form the basis for acceptance of the Supplement.

Joint Parties seek to rebut Triple Bogey’s assertion that the amended Kent proposal should be dismissed, arguing that dismissal is not permitted because that proposal is in conflict with the Triple Bogey counterproposal filed on the same day and entitled to comparative consideration under *Ashbacker*.⁴ But *Ashbacker* does not require consideration of third party claims in all instances. See *Intra-band Channel Exchanges*, 59 RR 2d 1455, 1463 (1986) (finding that opening swapped channels to third parties was not required under *Ashbacker*). *Ashbacker* merely holds “that the Commission must use the same set of procedures to process the applications of all similarly situated persons who come before it seeking the same license.” *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1555 (D.C. Cir. 1987), citing *Multi-State Communications, Inc. v. FCC*, 728 F.2d 1519, 1525-26 (D.C. Cir.), cert. denied, 469 U.S. 1017 (1984).

But Joint Parties are not similarly situated with the commenters and counterproponents such as Mercer Island.

³ That is, its Reply Comments following Joint Parties submission of its amended proposal herein.

⁴ *Ashbacker Radio Corporation v. FCC*, 326 U.S. 327 (1945).

Ashbacker allows the Commission to promulgate regulations limiting the filing rights of competing applicants⁵ while leaving it with the discretion to determine the circumstances under which applications are considered mutually exclusive.⁶ It did just that when it adopted the *Taccoa Policy* prohibiting parties from counter-proposing their own proposals absent a sufficient justification as to why the counterproposal could not have been made in the first place and gave explicit notice of its “reserv[ation] of the right, as a procedural matter, to process the new proposal in a new proceeding.”⁷

The Commission’s clear and explicit rulemaking policy has been that rulemaking proponents must not only comment on the merits of their proposal, but restate their present intention to apply for the channel if allotted and, if authorized, to promptly construct the station.

By submitting their amended proposal, Joint Parties failed to satisfy that most basic of requirements and forfeited their right to any future consideration of their proposal in this docket and nothing in *Ashbacker* requires the preservation of that right.⁸ Not only should the Commission find that Joint Petitioners failed to make the requisite statement of continuing interest, but it should find their counterproposal to constitute a specific withdrawal of interest. Given Joint Petitioners withdrawal the Commission should decline to make any allotment proposed by Joint Petitioners in this proceeding.

⁵ *Amendment of Sections 73.3572 and 73.3573 Relating to Processing of FM and TV Broadcast Applications*, 58 RR 2d 776, para. 16 (1985), citing *Ashbacker*, 326 U.S. at 333 n.9.

⁶ *Id.*, citing *MCI Airsignal International, Inc.*, FCC 84-397 (released Aug. 17, 1984).

⁷ *Taccoa, Sugar Hill and Lawrenceville, Georgia*, 16 FCC Rcd at ____.

⁸ The submission of comments by a rulemaking petitioner and the present intention restatement serve as a predicate to any action the Commission might take in the course of this proceeding. See *Murray, Kentucky*, 3 FCC Rcd 3016 (MMB 1988) and *Pine, Arizona*, 3 FCC Rcd 1010 (Allocations Branch 1988) (the Commission’s longstanding policy is to refrain from making an allotment to a community absent an expression of interest.).

The *NPRM*⁹ itself made no allowance for the submission of a counterproposal by Joint Parties in lieu of the present intention restatement. Joint Parties chose to gamble that the *Taccoa Policy* loophole could be mined to their advantage. By taking that gamble, they necessarily assumed the risk that it would not pay off.

Joint Parties, apparently concerned that their gamble will not pay off, now contend that the Commission “cannot dismiss an otherwise acceptable proposal while allowing a mutually exclusive proposal to go forward consistent with *Ashbacker* and its progeny.”¹⁰ The argument presumes too much, i.e., the acceptability of their amended proposal.¹¹

With the ground rules established, the Joint Parties cannot be heard to complain that *Ashbacker* requires consideration of their amended proposal regardless of their failure to satisfy the present intention restatement or their ability to satisfy *Taccoa*.

As Mercer Island has previously asserted, having failed in both regards, the original Covington proposal and amended Kent proposal should be dismissed. That both proposals are now cut-off by timely and properly submitted counterproposals is solely a function of Joint Parties’ assumption of the risk.

Joint Parties are in essence asking to be saved from themselves but it is too late for that.

Joint Parties further argument is a continuation on that theme. Their position, essentially, is that the *Taccoa Policy* has placed the Commission in a quandary and opened the door to

⁹ *Arlington, The Dalles, and Moro, Oregon, and Kent and Trout Lake, Washington*, DA 02-1339 (2002).

¹⁰ Supplement at p.4.

¹¹ Parties to this proceeding have well briefed the failure of Joint Parties amended proposal to satisfy the *Taccoa Policy*’s requirements.

gamesmanship. They further assert that the only way out is for it to reject *Taccoa* and simply process the proposals before it.

Joint Parties conveniently neglect to mention that, to the extent the Commission is in a quandary,¹² that quandary is of Joint Parties making and not the Commission's. In point of fact, the only party here that appears to be in a quandary is the Joint Parties and that is a quandary of Joint Parties' own making. Likewise, Joint Parties conveniently neglect to mention that they are the one's engaging in the gamesmanship here.

Neither the so-called quandary nor the incentive to engage in gamesmanship will exist if the Commission simply processes the proceeding pursuant to its *Taccoa Policy*, i.e., reject the amended Kent proposal for the failure to justify why it could not have been made in the first place; reject the inceptive Covington proposal for failure to file the present intention restatement as required by longstanding Commission policy and as specifically required in the *NPRM*; and then consider the remaining proposals. This will close the door on the supposed opportunity for gamesmanship that Joint Parties contend the Commission has created.

Again, the fact that Joint Parties are now cut-off from reasserting the Covington or Kent proposals is not a function of the Commission's failure to adhere to policies and rules of

¹² Mercer Island does not concede that the Commission is in a quandary, whether of its own making or not.

administrative procedure, but Joint Parties own inability to satisfy those rules and policies.

Respectfully submitted,

MERCER ISLAND SCHOOL DISTRICT

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May 12, 2003

CERTIFICATE OF SERVICE

I, Dina Etemadi, do hereby certify that I have on this 12th day of May, 2003, caused to be hand delivered or mailed via First Class Mail, postage prepaid, copies of the foregoing Opposition to Supplement to the following:

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