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Before the
Federal Communications Commission
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	MB Docket No. 02-136
Amendment of Section 73.202(b)	)	RM-10458
Table of Allotments	)	RM-10663
FM Broadcast Stations	)	RM-10667
(Arlington, The Dalles, and Moro, Oregon,	)	RM-10668
and Covington and Trout Lake, Washington)	)	

To: Marlene Dortch, Office of the Secretary
Attn: Assistant Chief, Audio Division
Media Bureau

OPPOSITION TO MOTION FOR LEAVE TO FILE SUPPLEMENT,

AND REQUEST FOR EXPEDITED ACTION

Mid-Columbia Broadcasting, Inc. ("Mid-Columbia"), licensee of Station KMCQ(FM), The Dalles, Oregon, First Broadcasting Company, L.P. ("FBC"), and Saga Broadcasting, LLC. ("Saga"), licensee of Station KAFE, Bellingham, Washington (Mid-Columbia, FBC and Saga, together, "Joint Parties") hereby oppose the "Motion for Leave to File Supplement to Petition to Deny" of Mercer Island School District ("Mercer Island"), filed in the above-captioned docket on February 12, 2004. In addition, the Joint Parties request that the Commission take expedited action on the proposals that are before it in this proceeding.

1. Although unaccompanied by a supplement, the Motion appears to refer to a "Supplement" filed by Mercer Island ten days earlier, on February 2, 2004.[1] The Commission should not accept the Supplement. The period for comments and reply comments has long since passed in this proceeding.[2] The Commission's Rules clearly state that "No additional comments

[1] In addition, the Motion appears to have been incorrectly titled, since Mercer Island has not filed a petition to deny in this proceeding.

[2] *See Notice of Proposed Rule Making*, 17 FCC Rcd 10678 (2002).

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may be filed unless specifically requested or authorized by the Commission." 47 C.F.R. § 1.415(d). Mercer Island has not shown good cause for acceptance of the Supplement. As will be discussed below, the Supplement raises no issue that could not have been raised in a timely manner in this proceeding. Moreover, in substance the Supplement is a counterproposal, and the Commission's Rules are even clearer that any counterproposal must be submitted before the comment date in the proceeding. Accordingly, the Commission must deny Mercer Island's motion and reject the Supplement without consideration.

I. Mercer Island's Request for an Allotment on Channel 283A at Mercer Island, Washington is Untimely and Defective.

2. Mercer Island raises the new argument that the Commission should establish a new Class A allotment at Mercer Island, Washington for KMIH. This argument is untimely and defective. It is untimely because it could have been raised at an earlier stage in this proceeding. Mercer Island identifies no new development with respect to the radio spectrum, or any other reason, why it could not have requested a Class A allotment in comments in this proceeding.[3]

3. Moreover, any argument for a Class A allotment at Mercer Island is untimely because it is a counterproposal, which cannot be considered unless filed in comments. "[A] counterproposal is a proposal for an alternative and mutually exclusive allotment or set of allotments in the context of the proceeding in which the proposal is made." *Drummond and Victor, Montana*, 15 FCC Rcd 19721 (2000), *citing Implementation of BC Docket 80-90 to Increase the Availability of FM Broadcast Assignments*, 5 FCC Rcd 931 (1990). In this case, an allotment at Mercer Island on Channel 283A is mutually exclusive with the proposed allotment of Channel 283C2 at Kent, Washington as well as with the allotment of Channel 283C2 at

[3] To the extent that Mercer Island argues that KMIH deserves protection because of unique format or educational service, these arguments have already been raised and addressed. *See* Reply Comments of the Joint Parties (filed Aug. 13, 2002).

Shoreline, Washington, proposed by Triple Bogey, LLC *et al.* in their counterproposal, and so it is a counterproposal. A counterproposal must be filed in comments. 47 C.F.R. § 1.420(d). *See also Pinewood, South Carolina*, 5 FCC Rcd 7609 (1990). An untimely counterproposal, filed after the comment deadline, cannot be considered. *Bainbridge, Georgia*, 13 FCC Rcd 6424 (1998); *Pinewood, South Carolina, supra.*

4. Finally, Mercer Island's Class A proposal is grossly defective. In the first place, Mercer Island failed to include a channel spacing study demonstrating that the allotment of Channel 283A can be made at Mercer Island in compliance with the Commission's Rules, and thus fails to meet the minimum requirements for acceptability. *See Liberty, New York*, 8 FCC Rcd 4085 (1993). Second, while admitting that the allotment would not meet the required separation distance to KAFE(FM), Bellingham, Washington at that station's current site, Mercer Island attempts to demonstrate that there would be no contour overlap with KAFE through the use of a study based on the Longley-Rice terrain-sensitive prediction methodology. While the Commission does accept Longley-Rice studies in some circumstances, it does not do so in FM allotment proceedings to demonstrate that no overlap exists. Furthermore, the allotment of a channel is not based on overlap but spacing. *See* Section 73.207(a). *See Amendments of Parts 73 and 74 of the Commission's Rules To Permit Certain Minor Changes in Broadcast Facilities Without a Construction Permit*, 12 FCC Rcd 12371, 12402 (1999) ("supplemental showings have not been accepted, nor will be accepted, for the purpose of determining interference or prohibited contour overlap between FM broadcast stations"). Therefore, there is no basis to consider Mercer Island's Class A proposal.

II. The Commission Should Take Expedited Action on the Proposals Before it With No Further Public Notice.

5. The untimely counterproposal of Mercer Island illustrates why the Commission should not issue a further public notice regarding the Joint Parties' amended proposal in this proceeding. A further notice will invite parties already in this proceeding to amend their proposals, and at least one party – Mercer Island – has already demonstrated its readiness to do so. The submission of further amended proposals will raise procedural difficulties that have no solution.

6. But there is no need to consider a further public notice. The Joint Parties have already presented evidence that the Commission's policy regarding amended proposals is satisfied here. The Notice of Proposed Rule Making in this proceeding was released on June 7, 2002. The Joint Parties learned only in July, 2002, that Industry Canada might consider an innovative engineering solution that could permit non-directional operation of KAFE on Channel 281C. Indeed, the Joint Parties could *not* have known of this increased flexibility on the part of Industry Canada before that time, because expert consultants had only recently formed an opinion on this subject. *See* Letter from Stephen Acker, attached hereto as Exhibit A. Therefore, the situation in this case is different from *Bridgeton and Elmer, New Jersey*, 17 FCC Rcd 25136 (2002). There, the Commission found in that case that the petition could have been amended before the issuance of a notice of proposed rule making, which, in its view, required the initiation of a new proceeding. Here, by contrast, the potential engineering solution that enabled Saga (the licensee of KAFE) to join in the amended proposal was not available to the Joint Parties before the Notice was issued.

7. The correctness of the Joint Parties' assessment in this regard was demonstrated when Industry Canada indicated its willingness to consider terrain shielding in connection with a

non-directional allotment for KAFE. *See* Letter from Paul Vaccani, attached hereto as Exhibit B. This clearly marks a change of course for Industry Canada, which had not considered such an engineering solution in the past. That letter also represents Canada's favorable response to the FCC's request for concurrence in all of the pending proposals in this proceeding, including a restricted allotment for KAFE.

8. Although the Joint Parties expressed a preference for a non-restricted allotment for KAFE, they expect that the international negotiations over concurrence in a non-restricted allotment may require several years. Given the passage of nearly two years already since the Joint Parties filed their proposal, the Joint Parties are prepared to accept the Canadian concurrence in a restricted allotment for KAFE. Accordingly, the Commission may immediately issue a decision in this proceeding based on the proposals before it. Expedited action is appropriate because of the length of time these proposals have remained before the Commission.

III. Conclusion

For the foregoing reasons, the Commission should deny Mercer Island's motion and reject without consideration its Supplement. Canada has responded to the Commission's request for coordination. The Joint Parties urge the Commission to expedite its action on the proposals before it and issue a decision with all deliberate speed.

Respectfully submitted,

MID-COLUMBIA BROADCASTING, INC.

By: J. Dominic Monahan (by MNL)
J. Dominic Monahan
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
Vinson & Elkins LLP
1455 Pennsylvania Ave., NW
Suite 600
Washington, DC 20004
(202) 639-6500

Its Counsel

SAGA BROADCASTING, LLC.

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

Its Counsel

March 3, 2004

JOHNSTON & BUCHAN LLP
Communications, Trade & Business Law

275 Slater Street, Suite 1700
Ottawa, Ontario
K1P 5H9
Tel.: 613.236.3882
Fax: 613.230.6423

Stephen B. Acker
acker@johnstonbuchan.com

www.johnstonbuchan.com

February 26, 2004

John Karousos
Assistant Chief, Audio Division
Media Bureau
445 12th Street
Washington, DC 20554
USA

Re: Canadian Treatment of International Coordination Issues Under the 1991 Canada/U.S. Agreement related to the FM Broadcasting Service MB Docket NO. 02-136, RM-10458

Dear Sir:

I am a partner in the Canadian law firm Johnston & Buchan LLP and practice primarily in the area of communications law with a particular emphasis on licensing and spectrum management issues.

In the summer of 2002, I was contacted by Gordon Elder of Elder Engineering Inc., a Canadian broadcasting engineering firm, to assess the possibility that Industry Canada would be willing to accept an innovative engineering solution in order to permit mutually beneficial changes to the FM radio allotments in the U.S. and Canada near the Canada-U.S. border. Specifically, Mr. Elder had been working with First Broadcasting Company, L.P., and Mid Columbia Broadcasting, Inc. on a proposal to permit unlimited Class C operation of Station KAFE, Bellingham, Washington, on Channel 281C in order to secure the cooperation of Saga Broadcasting Corp., the licensee of KAFE, with First Broadcasting's reallotment plans.

As I previously reported to the FCC, it was my opinion that due to changes in the regulatory climate in Industry Canada, the requested changes were far more likely to be approved at that time than at any previous time within my experience. In all likelihood, I would not have been able to render the same opinion if I had been asked earlier.

As demonstrated by the letter of December 19, 2003, from Mr. Paul Vaccani of the Broadcast Regulatory Branch of Industry Canada to Ms. Kathryn O'Brien of the Strategic Analysis and Negotiations Division of the FCC, subsequent events have proved my assessment

to be correct. In that letter, Industry Canada, for the first time (to my knowledge), offered to consider terrain shielding to protect certain Canadian allotments in connection with a Channel 281C allotment for KAFE. This clearly marks a change of course for Industry Canada with respect to certain cross-border allotment issues.

Yours sincerely,

Stephen B. Acker

300 Slater Street
Ottawa, Ontario
K1A 0C8

6116-2-1 (DBC-E)

January 5, 2004

REGISTERED

Ms. Kathryn O'Brien
Chief, Strategic Analysis and
Negotiations Division
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554 U.S.A.

Dear Ms. O'Brien:

This is in reply to your letter dated April 11, 2003 requesting comments on the following proposed amendments to Table B of the Working Arrangement pursuant to the Canada-U.S.A. FM Broadcasting Agreement of 1997:

	Channel Number	
Location	Delete	Add
Kent, WA 47-32-39 NL/122-06-32 WL	---	283B
Bellingham, WA 48-40-48 NL/122-50-24 WL	-----	281C*(L1)
Forks, WA 47-57-16 NL/124-23-20 WL	---	288A
Gladstone, OR 45-32-27 NL/122-33-51 WL	---	226B1
Portland, OR 45-30-58 NL/122-43-59 WL	---	230B1
Tillamook, OR 45-27-59 NL/123-55-11 WL	---	232B1
Long Beach, WA 45-18-51 NL/124-03-07 WL	---	224A

.../2

Manzanita, OR 45-41-05 NL/123-54-38 WL	—	228B1
Trout Lake, WA 46-03-10 NL/121-33-47 WL	—	236A
Shoreline, WA 47-45-15 NL/122-35-27 WL	—	283B1
Ilwaco, WA 46-18-33 NL/124-02-31 WL	—	259A
Forks, WA 47-57-16 NL/124-23-20 WL	—	240A
Hoquiam, WA 46-56-33 NL/123-49-26 WL	—	284B
Aberdeen, WA 46-59-55 NL/123-58-31 WL	—	237B1

* Specially negotiated, short-spaced allotment.

*(L1) Specially negotiated, short-spaced allotment limited to 49.2kW ERP and 600m HAAT or the equivalent along the 314.6° azimuth towards channel 280A in Powell, River, BC and limited to 58.2kW ERP and 600m HAAT or the equivalent along the 0.4° azimuth towards channel 281A in Bralorne, BC.

This Administration has no objection to the above proposals as notified and will amend Table B accordingly should we hear further to this regard.

In regards to the Bellingham proposal, the Department would like to note that we have been approached by representatives of KAFE(FM) in regards to assigning unlimited class C status to the proposed channel 281. Although terrain is not usually considered for protection purposes internationally, we would in this instance be prepared to consider such protection and other issues in this case only, should the Commission wish to pursue this further. However, please be advised that the Department will in the very near future be submitting a notification for a new allotment on channel 292 in Vancouver, BC and would expect some reciprocity in regards to considering similar terrain protection to channel 293C in Lynden, WA.

.../3

Sincerely,

ORIGINAL SIGNED BY
ORIGINAL SIGNÉ PAR
JOHN DEXTER

Paul Vaccani
Director
Broadcast Applications Engineering
Broadcasting Regulatory Branch

CERTIFICATE OF SERVICE

I, Lisa M. Balzer, a secretary in the law firm of Vinson & Elkins, do hereby certify that I have on this 3rd day of March, 2004 caused to be mailed by first class mail, postage prepaid, copies of the foregoing "**Opposition to Motion for Leave to File Supplement, and Request for Expedited Action**" to the following:

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

First Broadcasting Investment Partners, LLC.
750 N. St. Paul
10th Floor
Dallas, TX 75201
(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
1156 15th Street, NW
Suite 610
Washington, DC 20005-1770
(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)

Cary S. Tepper, Esq.
Booth Freret Imlay & Tepper P.C.
5101 Wisconsin Avenue, N.W.
Suite 307
Washington, D.C. 20016-4120
(Counsel to Bay Cities Building Company, Inc.)

Lisa M. Balzer