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March 25, 2004

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

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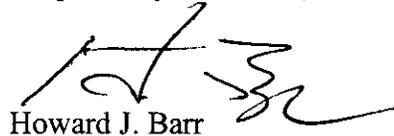
**Re: Amendment of Section 73.202(b)
Table of Allotments
FM Broadcast Stations
MB Docket No. 02-136; RM-10458,
RM-10663, RM-10667, RM-10668**

Dear Ms. Dortch:

Transmitted herewith on behalf of Mercer Island School District is an original and four copies of its Reply to Opposition for submission in the above-referenced matter.

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

Respectfully submitted,



Howard J. Barr

Enclosure

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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MAR 25 2004

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

REPLY TO OPPOSITION

Mercer Island School District ("Mercer Island"), by counsel, submits its Reply to the Opposition to Motion for Leave to File Supplement and Request for Expedited Action of Mid-Columbia Broadcasting, Inc., First Broadcasting Company, L.P. and Saga Broadcasting, LLC ("Joint Petitioners). The following is shown in support thereof:

I. Mercer Island's Request for an Allotment on Channel 283A at Mercer Island Washington was timely and must be Considered

Joint Petitioner's allegation that "Mercer Island raises the new argument that the Commission should establish a new Class A allotment at Mercer Island, Washington for KMIH" that is "untimely" and that "could have been raised at an earlier stage in this proceeding" should be rejected. Mercer Island made this very argument in its original comments in this proceeding.

Accordingly, the counterproposal was timely submitted and is ripe for consideration in the context of this rule making.

A channel spacing study is unnecessary in this situation since the proposed allotment is not a “new” allotment. Adoption of the proposal will merely codify in the rules the current state of affairs. As discussed in the Supplement:

The station now operates on 104.5 MHz with 30 watts of power and a 60 dBu (signal strength) contour that stretches over 6 Km from the transmitter site.¹ Because the station operates with greater than “maximum” facilities for its class, it is considered to be a “Superpowered” Class D station. The Commission has stated that it is aware of five Superpowered Class D stations.² **With its current facilities, KMIH(FM) is the functional equivalent of a fully protected, i.e. primary, Class A FM facility** (emphasis added).

The case of KMIH(FM) is a special one. Any deviations from the general rules applicable to Commission allotment necessary to accommodate the Mercer Island proposal should be granted in this case.³

As discussed previously, KMIH(FM) is one of only a handful of Superpowered Class D FM stations. Not only is KMIH(FM) a superpowered Class D, but with a 60 dBu contour that exceeds 6 six kilometers the station meets the Class A FM minimum requirements and is the

¹ Exhibit A, Engineering Statement of Doug Vernier.

² 1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission’s Rules, 13 FCC Rcd 14849, para 64 (1998) The Commission “propose[d] to grandfather such superpowered Class D facilities, permitting them to continue to operate as Class D stations at their present power and antenna height and to modify their facilities provided they do not extend their predicted 60 dBu contour distances” *Id.* The Commission has yet to act on this proposal. See 1998 Biennial Review – Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission’s Rules, 22 CR 612, para 45 (2000)

³ See *Northeast Cellular Telephone Co v FCC*, 897 F.2d 1164, 1166 (D.C. Cir 1990). See also *WAIT Radio v FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969) (“a waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest”).

functional equivalent of a Class A FM station.⁴ Nevertheless, KMIH(FM) is still considered by the Commission to be a Class D secondary service with no interference protection rights.

Given the current KMIH(FM) technical facilities and the level of service it provides to the Mercer Island community, the Commission should adopt Mercer Island's proposal in lieu of the competing proposals to relocate stations serving rural markets into the Seattle Urbanized Area. This proposed allocation will not only result in a preferential arrangement of allotments, but one far superior to any other proposed in this docket by providing/maintaining a longstanding -- truly local -- first local service at Mercer Island.

Adoption of this counterproposal will result in a preferential arrangement of allotments by preserving the longstanding service KMIH(FM) has provided to the citizens of Mercer Island. By adopting this counterproposal, the Commission will not only fulfill the paramount responsibility in its implementation of Section 307(B) of the Communications Act by achieving a "fair, efficient and equitable distribution of radio service," but it will do so consistent with the mandate that it focus on "the distribution of service, rather than of licenses or stations; the constituency to be served is people, not municipalities." *National Association of Broadcasters v. FCC*, 740 F.2d 1190 (D.C. Cir. 1984).

II. Expedited Action is Unwarranted

This is an extremely complex proceeding, including several different proposals -- seeking to shift service from underserved rural areas to the well served Seattle area without any countervailing public interest benefits -- and a number of proposed new allocations, including, but not limited to, Mercer Island's requested Class A allocation for KMIH(FM) at Mercer Island.

⁴ 47 C.F.R. §73.211(a)(3), §73.211 (a)(3) of the Commission's rules.

Already in this docket, the Commission has released a Notice of Proposed Rulemaking⁵, a public notice seeking further comment,⁶ and four Orders to Show Cause.⁷ Expedited action is the last thing that is called for and is the antithesis to the reasoned decision making that is required in this matter.

III. Commission Policy Requires Dismissal of the Kent Amendment

Joint Petitioners are only slightly hypocritical in their complaints about Mercer Island's supplemental filing given the opportunity they themselves took to re-argue a previously briefed issue, i.e., whether its counterproposal to its initial proposal ought to be dismissed

By way of background, Joint Petitioners initiated this proceeding through the filing of a petition for rule making proposing the reallocation of KMCQ(FM), Channel 283C, The Dalles, Oregon, to Covington, Washington on Channel 283C3 (the "Covington Proposal"). *See Notice of Proposed Rulemaking ("NPRM")*, DA 02-1339, released June 7, 2002. The *NPRM* set July 29, 2002 as the deadline for comments and counterproposals.⁸

Rather than support the Covington Proposal, Joint Petitioners abandoned that proposal, proposing instead that KMCQ(FM) be downgraded to Channel 283C2 and be reallocated to Kent, Washington (the "Kent Amendment"). To accommodate this proposal, Joint Petitioners proposed a channel change for KAFE(FM), Bellingham, Washington from Channel 282C to

⁵ *Notice of Proposed Rulemaking, Amendment of Section 73 202(b) Table of Allotments, Arlington, The Dalles, and Moro Oregon and Covington and Trout Lake, Washington*, DA 02-1339, released June 7, 2002

⁶ Public Notice, Report No. 2599, released March 10, 2003.

⁷ *Order to Show Cause*, DA 04-582, released March 5, 2004; *Order to Show Cause*, DA 04-547, released March 5, 2004, *Order to Show Cause*, DA 04-607, released March 12, 2004, *Order to Show Cause*, DA 04-606, released March 12, 2004

⁸ On that date, Mercer Island counterproposed the allotment of a Class A allocation for KMIH(FM) at Mercer Island, Washington.

Channel 281C. The Channel 281C allotment is short-spaced to two vacant Canadian allotments, causing Joint Petitioners to request the Commission to propose to the Canadian government a channel change for one of the allotments and that it waive the short-spacing with respect to the other. In the alternative, Joint Petitioners and KAFE(FM)'s licensee, Saga Broadcasting, pledged to operate directionally so as to protect the Canadian allotments.

The Commission subsequently released its March 10, 2003 Public Notice seeking comment on the Kent Amendment. Mercer Island asserted that the Commission's *Taccoa*⁹ policy required dismissal of the Kent Amendment.¹⁰ Simply put, nothing prevented Joint Petitioners from submitting the Kent Amendment in the first instance. Joint Petitioners failed to establish any changed or unforeseen circumstances that might permit consideration of the Kent Amendment in lieu of the Covington Proposal.¹¹ Failure to demonstrate such unforeseen circumstances requires dismissal of the Kent Proposal. Joint Petitioners thereafter submitted a "Supplement" to which Mercer Island replied.

Joint Petitioners now, in their Opposition to Mercer Island's requested Supplement, reference a self serving February 26, 2004 letter from Canadian attorney Stephen B. Acker addressing the merits of Joint Petitioners contention that the Commission's *Taccoa* policy does not require dismissal of the Kent Amendment¹² as well as a January 5, 2004 letter from Paul

⁹ *Taccoa, Sugarhill and Lawrenceville, Georgia*, 16 FCC Rcd 21191 (Chief, Allocations Branch 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)

¹⁰ Joint Petitioners submitted comments in support of the Kent Proposal.

¹¹ *Id* at 21192.

¹² Mr Acker's letter was submitted in this docket, but apparently not served on the other parties in apparent violation of the Commission's ex parte rules. Additionally, this letter references a "December 19, 2003 letter from Paul Vaccam of the Broadcast Regulatory Branch of Industry Canada to Ms. Kathryn O'Brien of the Strategic Analysis and Negotiations Division of the FCC" however this letter is not attached.

Vaccani¹³ of Industry Canada to his FCC counterpart, Kathryn O'Brien¹⁴ in further justification of the Kent Amendment.

Neither submission, however, is reflective of the unforeseen circumstances necessary to satisfy *Taccoa*. Moreover, these recent letters cannot justify submission of the 17 month old Kent Amendment; particularly when the fact that Joint Parties did not advance their proposal to Industry Canada until the very day they submitted the Kent Amendment.

Joint Petitioners' various proposals in this docket have been submitted solely to foster their business goals interests as they appeared at the time. Simply put, nothing required the Joint Parties to advance the Covington proposal in the first instance and nothing required the subsequent amendment of that proposal. Accordingly, the Commission's *Taccoa* Policy requires dismissal of the Kent Amendment.

Respectfully submitted,

MERCER ISLAND SCHOOL DISTRICT

By: 
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Its Counsel

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March 25, 2004

¹³ Director, Broadcast Applications Engineering, Broadcasting Regulatory Branch

¹⁴ Chief, Strategic Analysis and Negotiations Division.

CERTIFICATE OF SERVICE

I, Howard J. Barr, do hereby certify that I have on this 25th day of March, 2004, caused to be hand delivered or mailed via First Class Mail, postage prepaid, copies of the foregoing REEPLY TO OPPOSITION” to the following:

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