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July 6, 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
OFFICE OF THE SECRETARY

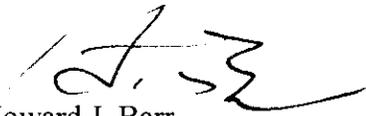
**Re: Amendment of Section 73.202(b)
Table of Allotments
FM Broadcast Stations
MB Docket No. 02-136; RM-10458,
RM-10663, RM-10667, RM-10668**

Dear Ms. Dortch:

Transmitted herewith on behalf of Mercer Island School District is an original and four copies of its "Statement in Support of Motion to Dismiss" 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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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

STATEMENT IN SUPPORT OF MOTION TO DISMISS

Mercer Island School District ("Mercer Island"), by counsel, submits its Statement in Support of Motion to Dismiss in response to Mid-Columbia Broadcasting, Inc.'s and First Broadcasting Investment Partners, LLC's (collectively, "Joint Parties") "Opposition" to the "Motion to Dismiss" ("Motion") filed by Triple Bogey, LLC, MCC Radio, LLC and KDUX Acquisition, LLC (collectively, "Triple Bogey").

By its Motion, Triple Bogey seeks dismissal of Joint Parties inceptive proposal to relocate KMCQ-FM from The Dalles, Oregon to Covington, Washington. In its "Statement Regarding Withdrawal of Counterproposal," ("Statement") Mercer Island supported Joint Parties withdrawal of its amended proposal to relocate KMCQ to Kent, Washington in lieu of the Covington relocation proposal, but opposed reinstatement of the original Covington proposal.

Accordingly, Mercer Island supports Triple Bogey's Motion. The following is shown in support thereof:

I. PARTIES HAVE BEEN PREJUDICED

1. Joint Parties allegation that no party has been prejudiced by its procedural machinations should be rejected. Joint Parties forced Mercer Island and other parties to waste valuable time and resources in first opposing the abandoned Covington proposal and then, on a short reply deadline, on a reply to the since abandoned amended Kent proposal.¹ Of course, as discussed in Mercer Island's Statement, Joint parties never timely commented on the Covington proposal and thus Mercer Island and other parties have been denied the opportunity to examine those comments or to reply. Clearly, Mercer Island and the other parties to this proceeding have been prejudiced in more ways than one.

2. None of the cases cited by Joint Parties in opposition to the Motion support their position. The facts in both *Wickenburg and Salome, Arizona*, 17 FCC Rcd 7222 (2002) and *Springfield, Tennessee, Oak Grove and Trenton, Kentucky*, 18 FCC Rcd 25628 (2003) differ wildly from the facts of this proceeding. No party stood to be prejudiced by the reinstatement in either the *Wickenburg and Salome* proceeding or in the *Springfield, Tennessee, Oak Grove and Trenton, Kentucky* proceeding. Here, multiple parties were prejudiced by the filing of the Kent counterproposal and multiple parties stand to be prejudiced by the reinstatement of the Kent proposal. The Commission has repeatedly declined to accept attempts to cure procedural defects

¹ *Stallworth v. E-Z Service Convenience Stores*, 199 F.R.D. 366, 368 (M.D. Ala. 2001) (failure to produce evidence was not "harmless" within the meaning of Federal Rule 37(c)(1) even though plaintiff had the opportunity to respond to the new evidence on sur-reply; "plaintiff was prejudiced by having to spend additional time . . . at the eleventh hour, analyzing and responding to the material").

in allotment proceedings where other parties stand to be prejudiced by such action.² The Commission should apply that policy here and deny Joint Parties' reinstatement request should be denied given the extreme prejudice that will be worked on the parties in this proceeding.

3. In this case, Joint Parties sought to withdraw their counterproposal nearly two years subsequent to its submission. In that time, the Commission released a public notice regarding the amended proposal,³ eliciting numerous comments and reply comments, and four Orders to Show Cause⁴ which also elicited numerous filings. The petitioner in *Springfield, Tennessee, Oak Grove and Trenton, Kentucky* withdrew the counterproposal less than two months after its submission. In *Wickenburg and Salome*, the petitioners withdrew their counterproposal **less than a month** after its submission. Moreover, in both of those cases no other party filed an opposition or counterproposal to the initial proposal nor did any party oppose the withdrawal of the counterproposal. In this case, the counterproposals and oppositions are both numerous and significant.

4. Additionally, unlike in this case, the petitioner in *Springfield, Tennessee, Oak Grove and Trenton, Kentucky*, posed a conceivably legitimate reason for its counterproposal. Here, Joint Parties, voluntarily, without any unforeseen circumstances and for its own business purposes amended its original proposal. Likewise, it voluntarily and for its own business purposes withdrew the amended proposal in favor of the original proposal. In *Springfield, Tennessee, Oak Grove and Trenton, Kentucky*, the proponent originally sought to amend its original Oak Grove proposal only because the modification of the station license to Oak Grove

² See *Lincoln, Osage Beach, Steelville, and Warsaw, Missouri*, FCC 02-35 (2002) and cases cited therein.

³ Public Notice, Report No. 2599, released March 10, 2003.

⁴ DA 04-547, released March 5, 2004, DA 04-582, released March 5, 2004, DA 04-606, released March 12, 2004 and DA 04-607, released March 12, 2004.

would violate the Commission's revised multiple ownership rules. The Commission accepted the amended proposal "in view of this unforeseen circumstance."⁵ The petitioner subsequently withdrew the Trenton counterproposal when the Third Circuit stayed the effectiveness of those rules.⁶ In seeking the withdrawal, the petitioner there recognized that its request was a "most extraordinary one."⁷

II. JOINT PARTIES "REITERATION" OF THE COMMITMENT TO COVINGTON IS DEFECTIVE

5. As Mercer Island pointed out in its original Reply Comments in this proceeding, the *NPRM* required Joint Parties not only to comment on the merits of their Covington proposal, but to restate their present intention to apply for Channel 283C3 if allotted and, if authorized, to promptly construct the station. Joint Parties failed to comment on the merits of their proposal and failed to submit a showing of continuing interest in the proposed Covington allotment. Joint Parties do not deny this.

6. Joint Parties instead counterproposed their own proposal seeking KMCQ's reallocation to Kent rather than Covington. The *NPRM*, however, made no allowance for the submission of a counterproposal by the proponent in lieu of an expression of interest.⁸ This too, Joint Parties do not deny.

⁵ *Springfield, Tennessee, Oak Grove and Trenton, Kentucky*, 18 FCC Rcd 25628 at n.3.

⁶ *Id.*

⁷ "Request to Withdraw Uncontested Counterproposal and Reinstate Original Proposal," MM Docket No. 03-132, submitted September 25, 2003.

⁸ Joint Parties' counterproposal was not within the scope of the *NPRM* and fails to meet the "logical outgrowth" test "normally ... applied to consider whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule." *Arizona Public Service Co. v. EPA*, 211 F.3d 1280, 1299 (2000); see also *Association of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1059 (DC Cir 2000); *First Am. Discount Corp. v. Commodity Futures Trading Comm'n*, 222 F.3d 1008, 1014 (DC Cir 2000).

7. Joint Parties now claim that the failure to “explicitly pledge to apply for the channel at Covington and construct the station if the facilities were authorized” “elevates form over function.” In making this contention, Joint Parties, of course, concede the failure to make a timely expression of interest. But more to the point, the contention stands as further evidence of Joint Parties disdain for the Commission’s processes and procedures.⁹

8. Joint Parties failure is not a “form over substance” issue. To the extent that the Commission has permitted late expressions of interest, that policy is “limited to situations where there is no opposition to the channel proposals and where there would be no adverse impact on another pending proposal.”¹⁰ Here though, the opposition to Joint Parties channel proposal have been numerous and significant. Likewise, acceptance of Joint Parties late expression of interest will adversely impact not only Mercer Island’s counterproposal for a Class A allotment at Mercer Island, Washington for KMIH(FM), but Triple Bogey’s counterproposal as well.

9. Mercer Island reiterates here that, not only should the Commission find that Joint Parties failed to make the requisite statement of continuing interest, but it should find the Kent counterproposal to constitute a specific withdrawal of interest in the Covington proposal such that, with the withdrawal of the Kent proposal, there is no proposal to reinstate. Given Joint Parties (i) failure to satisfy the *NPRM’s* requirements by commenting on their proposal and making the requisite expression of interest and (ii) the withdrawal of the Covington proposal at

⁹ Opposition at ¶ 5.

¹⁰ *Amor Family Broadcasting Group v. Federal Communications Commission*, 918 F2d 960 (1990), quoting, *Memorandum Opinion and Order*, 64 Rad. Reg. 2d 1408, 1409 (1988).

the time they counterproposed Kent in lieu thereof, the Commission should decline to make any allotment proposed by Joint Parties in this proceeding.¹¹

III. JOINT PARTIES FAILED TO SUBMIT AN APPROPRIATE EXPLANATION TO WARRANT REINSTATEMENT OF THE ORIGINAL PROPOSAL

10. As described in Mercer Island's initial reply comments in this proceeding, Joint Parties failed to adequately justify acceptance of their counterproposal. Joint Parties likewise fail to provide any justification for the withdrawal of that proposal and reinstatement of the original proposal. Unlike the parties in *Springfield, Tennessee, Oak Grove and Trenton, Kentucky* who were essentially forced to abandon their proposed move to Oak Grove, Kentucky because of the Commission's adoption of new multiple ownership rules and who then sought reinstatement of that proposal when those rules were stayed, nothing compelled the Joint Parties to seek out an alternative community by way of a counterproposal other than its own business dealings and nothing has changed so as to require reinstatement of the original proposal.

11. Joint Parties never provided any reason, much less a compelling one, supporting reinstatement of the original proposal. To the contrary, the Joint Parties "Withdrawal of Counterproposal" establishes that nothing compelled the withdrawal of the counterproposal other than a **voluntary decision** to abandon the counterproposal. Therein, Joint Parties specifically state that: "The Joint Parties have decided that they will not pursue the Counterproposal

¹¹ 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).

submitted in response to the *Notice of Proposed Rule Making*, 17 FCC Rcd 10678 (2002), in this proceeding.”¹²

12. While the Joint Parties also state that “Saga no longer consents to the substitution of Channel 281C for 282C at Bellingham,” that too appears to be a voluntary decision un compelled by anything other than a desire to avoid having to reveal the nature, terms and conditions of the agreements underlying Saga’s earlier consent to the aforementioned substitution. Furthermore, Joint Parties, neither collectively nor individually, have represented to the Commission that the underlying agreements have been terminated. To the contrary, Saga’s “Response to Order to Show Cause” refers to these agreements in the present tense, stating they are “in effect,” suggesting that the Joint Parties withdrawal request is merely a tactical one.

13. Just as a private business decision will not warrant a grant of a rule waiver,¹³ the Joint Parties business decision to withdraw the counterproposal does not justify reinstatement of the original proposal. The Motion should be granted.

IV. NO PUBLIC INTEREST FINDING HAS BEEN RENDERED

14. Contrary to Joint Parties allegation, the Commission has yet to render a determination on the public interest benefits of the Covington proposal. While the Commission did initially grant the proposal,¹⁴ that action was subsequently set aside.¹⁵ Accordingly, no finding exists that grant of the Covington proposal is in the public interest.

¹² Withdrawal at para. 1.

¹³ See *Styles Interactive, Inc. Application for Review of Denial of Petition for Reconsideration Seeking Waiver of IVDS Final Down Payment Deadline*, FCC 97-390 at para. 8 (1997).

¹⁴ *Report and Order*, DA-04-1540, released May 28, 2004.

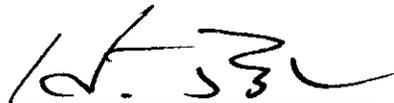
¹⁵ *Order*, DA-04-1647, released June 8, 2004.

CONCLUSION

Wherefore, the premises considered, Mercer Island School District respectfully requests that the Commission grant the Motion to Dismiss. .

Respectfully submitted,

MERCER ISLAND SCHOOL DISTRICT

By: 

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Its Counsel

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July 6, 2004

CERTIFICATE OF SERVICE

I, Howard J. Barr, do hereby certify that I have on this 6th day of July, 2004, caused to be hand delivered or mailed via First Class Mail, postage prepaid, copies of the foregoing "Statement in Support of Motion to Dismiss" to the following:

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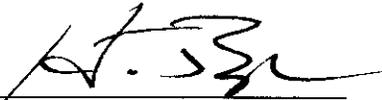
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