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Before the
Federal Communications Commission
Washington, DC 20554

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In the Matter of)
)
Amendment of Section 73.202(b))
Table of Allotments)
FM Broadcast Stations)
(Arlington, The Dalles, Moro, Fossil, Astoria,)
Gladstone, Portland, 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))

Federal Communications Commission
Office of Secretary

MB Docket No. 02-136
RM-10458
RM-10663
RM-10667
RM-10668

To: Office of the Secretary
Attn: The Commission

OPPOSITION TO MOTION FOR STAY

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SUMMARY

Mid-Columbia Broadcasting, Inc. and First Broadcasting Investment Partners, LLC (“Joint Parties”), oppose the stay sought by Mercer Island School District in this proceeding. Mercer Island has not demonstrated that any of the factors warranting a stay of a rule making decision are present here. First, it is not likely to succeed on the merits of its petition for reconsideration. The Commission’s action in processing and granting the Joint Parties’ initial proposal for Covington, Washington after their amended proposal for Kent, Washington was rendered defective by subsequent events was in accord with precedent and reasonable under the circumstances. The Commission’s decision that Covington, a self-governed community of more than 13,000 people, is deserving of a first local service was well-supported by evidence in the record, including evidence introduced by Mercer Island itself. Moreover, Mercer Island’s request that its secondary Class D station be converted to a Class A allotment would require the complete revision of the principles upon which secondary service is founded even if it were properly before the Commission, which it is not. This argument has no chance of success whatsoever.

Second, Mercer Island is not irreparably harmed by the rule making decision. As the licensee of a secondary service, Mercer Island has no legal right to continue broadcasting on its frequency in the presence of a competing demand for the spectrum by a full-service station. Therefore, it suffers no legally cognizable harm. Moreover, the effectiveness of the rules *per se* has no effect at all on Mercer Island’s operations, since it is actual interference, not potential interference, that determines whether a secondary service must discontinue operations. Therefore, it suffers no concrete or certain harm, either.

Finally, a stay of this allotment decision would not be in the public interest. The Commission held long ago that its former policy of staying allotment decisions pending reconsideration harmed the public interest as well as broadcasters and the Commission itself. Those harms would all be present here should the Commission grant a stay.

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To: Office of the Secretary
Attn: The Commission

OPPOSITION TO MOTION FOR STAY

Mid-Columbia Broadcasting, Inc. ("Mid-Columbia"), licensee of Station KMCQ(FM), The Dalles, Oregon and First Broadcasting Investment Partners, LLC ("First Broadcasting") ("Joint Parties"), by their respective counsel, hereby oppose the Motion for Stay filed in the above-captioned proceeding on September 8, 2004, by Mercer Island School District ("MISD").

1. On July 9, 2003, the Commission allotted Channel 283C3 to Covington, Washington in this proceeding. *Report and Order*, DA 04-2054. MISD has filed a Petition for Reconsideration of that action.¹ The effective date of the changes to the FM Table of Allotments set forth in the *Report and Order* is August 24, 2004. MISD seeks a stay of that effective date, which would prevent the Joint Parties from implementing the *Report and Order* until the various

¹ The Joint Parties intend to address MISD's Petition for Reconsideration in a separate filing.

appeals are acted upon.² For the reasons that follow, the Commission should not stay the effectiveness of the rules adopted in the *Report and Order*.

2. In order to obtain a stay of the effective date, MISD must show (i) it would likely succeed on the merits of its petition for reconsideration; (ii) it would be irreparably harmed if the effective date is not stayed; (iii) a stay would harm others only insubstantially; and (iv) the public interest favors a stay. See *Virginia Petroleum Jobber's Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958); *Washington Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). MISD has not succeeded in demonstrating *any* of these factors. Accordingly, a stay is not warranted.

3. Before proceeding with a discussion of the four factors, it is worth taking a step back to review the posture of this case. The *Report and Order* was decided on long-standing allotment principles backed by decades of case law. Competing proposals were carefully examined by the Commission for acceptability, and the remaining mutually exclusive proposals were compared according to FM allotment priorities. MISD argues that the Commission should disregard these longstanding allotment principles in order to protect the secondary operation of its Class D station at Mercer Island. In support, it advances theories that are contrary to the Commission's Rules, without any basis in case law, and contrary to the public interest. To accept MISD's arguments would require the Commission to take the unprecedented step of completely rejecting its rules concerning secondary services. It is with this background that we discuss the four factors for a stay of the rules.

² An Application for Review was also filed in this case, by Triple Bogey, LLC, MCC Radio, LLC, and KDUX Acquisition, LLC (collectively "Triple Bogey"). The Joint Parties have submitted an Opposition to the Application for Review.

I. MISD is Unlikely to Succeed on the Merits of its Petition for Reconsideration.

4. As recited in its Motion for Stay, MISD's Petition for Reconsideration raises three arguments. First, MISD argues that the Commission should not have accepted the Joint Parties' amended petition for Kent, Washington, and having accepted it, should not have allowed the Joint Parties to withdraw it. This argument is inherently contradictory, and in any event, the Commission's action was in accord with precedent. Second, MISD argues that the Commission should not have found Covington to be deserving of a first local service. Again, the Commission was acting well within established case law in doing so. Third, MISD argues that the Commission should have granted it a Class A allotment at Mercer Island. This argument is procedurally and substantively defective without cited precedent and cannot possibly succeed on the merits.

A. The Commission Properly Considered and Processed the Covington Proposal.

5. MISD argues that the Commission should not have accepted the Joint Parties' amended proposal for Kent, Washington, citing *Taccoa, Sugar Hill, and Lawrenceville, Georgia*, 16 FCC Rcd 21191 (2001). Motion for Stay at 3-5. This argument is misdirected, because the Commission did *not* accept the Kent proposal. Rather, the Commission said that in view of the circumstances it *could* have accepted the Kent proposal, but it did not have to do so because of subsequent developments. *Report and Order* at ¶ 3. Having set up a straw man, MISD then attempts to shoot it down. It argues that once the Commission accepted the Kent proposal, it should not have allowed the Joint Parties to withdraw it. Motion for Stay at 5-6. But as discussed above, the Commission did not accept the Kent proposal, so this argument is deceptive and misleading. The truth is that the Commission processed the only proposal properly before it, which was the Covington proposal.

6. The Commission's action in processing the Covington proposal was reasonable from a policy standpoint and in keeping with prior case law. No policy goal would be advanced by dismissing the Covington proposal. The only other conflicting proposal, filed by Triple Bogey, LLC, MCC Radio, LLC, and KDUX Acquisition, LLC (collectively "Triple Bogey"), was defective for failure to include the necessary consent of Saga Broadcasting, LLC, the licensee of KAFE, Bellingham, Washington. This is the same reason that the Joint Parties' Kent proposal became defective once Saga withdrew its consent. But the Covington proposal was acceptable, and was not in conflict with any acceptable proposal in the proceeding. It had already been set forth in a notice of proposed rule making, and the interested public had already had the opportunity to comment on it. Therefore, its processing was in harmony with principles of administrative law. On the other hand, if the staff had dismissed the Covington proposal, the Joint Parties could have immediately re-filed it. That would just result in needless duplication of processing effort and delays in the introduction of service.

7. Moreover, the decision to process and grant the Covington proposal was in accord with precedent. MISD argues that the Commission could not grant the Covington proposal in the absence of an explicit expression of continuing interest, but this argument elevates form over function. In *Taccoa, supra*, the original petitioner proposed to reallocate a channel from Toccoa to Sugar Hill, Georgia. At the comment deadline, the petitioner counterproposed to allocate the channel to Lawrenceville, Georgia instead of Sugar Hill as originally proposed, expressing an interest in the Lawrenceville allotment. The Commission nevertheless granted the Sugar Hill allotment without requiring a continuing expression of interest. *Taccoa, Georgia, et. al*, 16 FCC Rcd 14069 (2001), *recon.*, 16 FCC Rcd 21191 (2001). Only when, on reconsideration, the petitioner expressly *withdrew* its expression of interest in Sugar Hill, did the Commission set

aside its action granting an allotment to Sugar Hill. *Taccoa*, 16 FCC Rcd at 21191. The staff action in this case was consistent with *Taccoa*. Just as in that case, no expression of interest was required in order to reinstate the original proposal when the counterproposal could not be granted. See also *Gunnison, Colorado, et al.*, DA 04-2908 (rel. Sept. 20, 2004) at note 3, where the Commission considered a counterproposal after a request for withdrawal and subsequent reinstatement.

B. The Commission Properly Found Covington to be Deserving of a First Local Service Preference.

8. The Commission easily found that Covington is deserving of a first local service preference. As to the threshold criteria, Covington's "substantial" population of 13,081 supports consideration as a first local service. As to the independence factors, the Commission found that factors 4 (local government and elected officials), 5 (ZIP code), 6 (commercial establishments, health care facilities, civic organizations) and 8 (police and fire protection, water and sanitation services) clearly weigh in favor of Covington's independence. In addition, the Commission noted, for services such as schools and libraries that Covington does not supply itself, it is not dependent upon Seattle. Instead, these services are provided independently of Seattle by the Kent School District and King County.

9. In addition to these four factors, MISD's own evidence that 35 percent of Covington's civilian labor force and 18 percent of its total population works in Covington (figures that were not available at the time of the Joint Parties' filing) demonstrates that *Tuck* factor 1 is satisfied. Contrary to MISD's assertion, there is no requirement that "a majority of residents live and work in the community." See Motion for Stay at 7. The employment figures for Covington are far greater than those of other communities adjudged to be independent. In *Anniston, Alabama*, 16 FCC Rcd 3411, 3413 (2001), the Commission held that the fact that 16

percent of the residents of College Park worked in College Park was sufficient for a favorable finding on this factor. *See also Albemarle and Indian Trail, North Carolina*, 16 FCC Rcd 13876, 13880 (2001) (11.3 percent of working-age residents worked in the community); *Coolidge and Gilbert, Arizona*, 11 FCC Rcd 3610 (1996) (13 percent of Gilbert's working population worked in Gilbert). Therefore, at least five of the eight Tuck factors clearly support Covington's independence. MISD offers only conclusory statements to the contrary. Motion for Stay at 7-8.

10. As to the other factors, MISD errs when it argues that Covington's dependence on the larger urbanized area (as opposed to Seattle itself) weighs against its independence from Seattle. *See* Motion for Stay at 8. In fact, it weighs in favor of independence. The *Tuck* inquiry, and the *Huntington* doctrine upon which it is based, focus upon the independence of the suburban community *from the central city*, not from the urbanized area. In *Tuck*, the Commission definitively characterized the criterion as the "interdependence or independence of the specified 'community' to the central city of the 'urbanized area.'" *See also Debra D. Carrigan*, 100 FCC 2d 721, 729 (1985); *Miners Broadcasting Service v. FCC*, 349 F.2d 199, 202 n.6 (D.C. Cir. 1965). Therefore, the fact that some of Covington's municipal services are provided by King County and the City of Kent weighs strongly in favor of Covington's independence, not against it.

C. MISD's Argument for a Class A Allotment at Mercer Island is Both Procedurally and Substantively Defective.

11. MISD argues that the Commission failed to give consideration to its request for a Class A allotment at Mercer Island. However, as the Joint Parties pointed out in opposing that request, this would require the Commission to ignore bedrock requirements of administrative procedure as well as its own substantive rules. MISD's request for a Class A allotment was untimely and grossly defective. It was untimely because it was a counterproposal that was filed

after the deadline for comments in this proceeding.³ An allotment at Mercer Island on Channel 283A would likely have been mutually exclusive with the proposed allotment of Channel 283C3 at Covington, Washington as well as with the allotment of Channel 283C2 at Shoreline, Washington, proposed by Triple Bogey. But 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*. Moreover, MISD's counterproposal would have introduced a new community into the proceeding after the comment deadline. Motion for Stay at 1 note 1. This is impermissible under principles of administrative law. *Corpus Christi and Three Rivers, Texas*, 11 FCC Rcd 517 (1996). For these reasons, the Commission is barred from considering MISD's Class A proposal.

12. While these procedural violations alone are enough to dismiss MISD's Class A request, it also cannot be granted because it was grossly defective. First, MISD 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 failed to meet the minimum requirements for acceptability, even had its counterproposal been timely filed. *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, MISD 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

³ MISD first advanced the Class A proposal in a "supplement" filed on February 2, 2004. The comment deadline was July 29, 2002. *Notice of Proposed Rule Making*, 17 FCC Rcd 10678 (2002).

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”). Finally, MISD is proposing to have its license for the Class D facility modified to the Class A channel. There is no precedent cited nor any that exists to authorize the modification of a secondary service license (Class D) to a primary service facility (Class A). For these reasons as well, MISD cannot possibly prevail on the merits of this argument.

II. MISD Suffers No Legally Cognizable Harm Resulting from the Rule Change.

13. MISD states it will be irreparably harmed by the loss of its KMIH service on Channel 283D at Mercer Island. Motion for Stay at 9. However, MISD has no legal right or entitlement to broadcast on Channel 283D when a full-service station has a competing use for the spectrum. This is the fundamental nature of a secondary service. As a result, MISD suffers no legally cognizable harm upon which a stay may be based.

14. Not every loss or inconvenience constitutes irreparable harm. *United States v. Michigan*, 505 F. Supp 467, 474 (W. D. Mich. 1980). In order to support a stay, the loss must be legally cognizable. *Id.*; *Access Charge Reform*, 15 FCC Rcd 13191, 13196 (2000). MISD's claim of irreparable harm fails because any loss of service it may incur is not legally cognizable. KMIH, as a Class D noncommercial educational (NCE) station, is not entitled to protection from a full service FM station. *See Brighton, New York*, 8 FCC Rcd 793, 794 (1993); *Sanford, North Carolina*, 10 FCC Rcd 9266 (1995) (Notice of Proposed Rule Making). Since it is not entitled to protection, it has no legal right to continue to operate on its frequency when a full-service station commences operation in the same area.

15. Moreover, the harm to MISD is not “concrete and certain.” *See Access Charge Reform, supra*. The rules applicable to Class D stations are based on actual interference, not potential interference. Actual interference cannot be determined or measured until a Covington station is constructed and commences operation on Channel 283C3. Therefore, until any actual interference is present, KMIH can continue to operate, and there is no harm at all.⁴

III. Others Would Be Harmed By a Stay.

16. A stay would frustrate the first service planned for the residents of Covington. The Joint Parties have already filed an application to implement the *Report and Order*, as they are permitted to do. They look forward to the prompt grant of that application and the initiation of service for KMCQ at Covington. Because this proceeding has taken nearly three years to resolve, and the expenditures to date by the Joint Parties in connection with the proposed Covington station have been substantial, the Joint Parties wish to complete their business arrangements as soon as possible, and it is in their interest to do so. Obviously, any delay in the grant of the application, or the completion of their business arrangements substantially harms the Joint Parties and the public interest due to the delay in the prompt initiation of service.

IV. A Stay Would Not Be In the Public Interest.

17. The public interest does not favor a stay. This principle was the central reasoning behind the Commission’s decision to abandon the automatic stay that had formerly been in effect upon the filing of a petition for reconsideration of an allotment decision. *See Amendment of Section 1.420(f) of the Commission’s Rules Concerning Automatic Stays of Certain Allotment Orders*, 11 FCC Rcd 9501 (1996). The Commission held that the practice of staying such decisions imposes substantial costs on the public, broadcasters, and the Commission itself:

⁴ However, the rules make clear that when actual interference is caused, the Class D station must give way. See 47 C.F.R. § 73.512(d).

First, significant populations are denied the advantages of improved service for long periods of time. Second, the inability to effect the authorized change can cause stations to go dark or not be constructed at all, harming both broadcasters and the public. Third, as both video and audio technologies evolve, television and radio broadcasters must be able to adapt as quickly as possible to changes in their competitive environments. Finally, by facilitating meritless petitions for reconsideration, the rule needlessly diverts resources that would otherwise be available to the Commission for the performance of other necessary functions.⁵

18. These harms are all present or implicated here. The Commission, after careful consideration, found the grant of the Covington proposal to be in the public interest. The stay MISD has requested would certainly delay the realization of these public interest benefits, including first local service to a deserving community and expanded service to a substantial population. This delay would also frustrate the Joint Parties' plans for Station KMCQ, as discussed above. Finally, granting a stay in this case would encourage other parties to seek stays in similar proceedings, creating the perverse incentives that the repeal of the automatic stay provision was designed to eliminate.

CONCLUSION

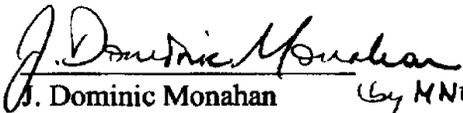
The *Report and Order* granting the Joint Parties' Covington proposal was decided in accordance with well-established and longstanding principles. MISD has failed to demonstrate *any* of the four requirements to obtain a stay of the effective date. MISD's arguments on reconsideration are not in accordance with Commission rules and policies, and stand virtually no chance of success. MISD cannot be irreparably harmed, because it has no legally cognizable right to what would be lost. Finally, the Commission found long ago that staying the effectiveness of allotment decisions upon the filing of a petition for reconsideration is detrimental to the public interest.

⁵ *Id.* at ¶ 9.

WHEREFORE, for the foregoing reasons, the Commission should deny MISD's motion for a stay of the effective date of the allotment changes in this proceeding.

Respectfully submitted,

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I, Lisa M. Holland, a secretary in the law firm of Vinson & Elkins, do hereby certify that I have on this 22nd day of September, 2004 caused to be mailed by first class mail, postage prepaid, copies of the foregoing "Opposition to Motion for Stay" to the following:

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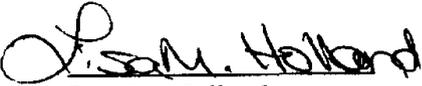
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