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Federal Communications Commission
Office of Secretary

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
)
Amendment of Section 73.202(b),)
Table of Allotments,)
FM Broadcast Stations)
(Americus and Emporia, Kansas))

MB Docket No. 05-139
RM-11218

Filed With: **Office of the Secretary**

Directed To: **Assistant Division Chief, Audio Division**
Mass Media Bureau

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COMMENTS AND OPPOSITION TO ORDER TO SHOW CAUSE

C & C Consulting, Inc. ("C&C"), by its attorney, hereby submits its Comments and Opposition to the "Notice of Proposed Rule Making and Order to Show Cause," DA 05-756 (Ass't Chief, Audio Division, March 23, 2005) ("NPRM"), issued in this proceeding. With respect thereto, the following is stated:

C&C is licensee of Station KANS(FM).¹ KANS(FM) operates on Channel 241A. Dana J. Puopolo ("Puopolo"), the rulemaking proponent in this proceeding, proposes the substitution of Channel 244A for Channel 241A for Station KANS(FM).

This proposed channel change is not in the public interest. Station KANS(FM) formerly operated on Channel 258A at Emporia, Kansas. By "Notice of Proposed Rule Making and Order to Show Cause," 13 FCC Rcd 2463 (Chief, Allocations Branch 1998), the Commission proposed modification of the KANS(FM)'s license to Channel 241A in order to allow the substitution of Channel 257C3 for Channel 257A at Topeka, Kansas. The proposal was adopted by *Report and*

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¹ The call sign of Station KANS(FM) was formerly KRWV(FM).

Order, 16 FCC Rcd 14085 (Chief, Allocations Branch 2001), and after considerable effort to acquire the necessary equipment and to publicize its new channel of operation (at a cost of well over one hundred thousand dollars), the modification was implemented just last year, in May 2004, and the license for the facility was granted on October 20, 2004. File No. BMLH-20040506ACD. Costs incurred in the channel change included not only the costs and time involved in retuning the station's antenna and transmitter, but also the enormous burden of replacing all items containing the former frequency of the Station, such as is contained on advertising for the station (such as billboards, television commercials, stations vans, etc.), as well as the information contained on station stationary, all audio promotional carts, business cards, and giveaway items from the Station (such as key chains, coffee mugs, balloons, bumper stickers, etc.).

Now, just one year after the disruption caused by the channel public has subsided and public acceptance of the channel change has occurred, Puopolo proposes to subject Station KANS(FM) to yet *another* channel change for Station KANS(FM), requesting that the Station's channel move now from Channel 241A to Channel 244A.

Although ordinarily (since this channel change would not require a transmitter site change), this channel substitution would be approved by the Commission on largely a pro forma basis without the need for a hearing,² in this instance, where the Station just recently already was forced to change channels involuntarily, a hearing should be held to determine whether this channel change would be in the public interest. Clearly, this channel change would cause serious

² *Modification of FM or Television Licenses Pursuant to Section 316 of the Communications Act*, 2 FCC Rcd 3327 (1987).

additional disruption to the operation of the Emporia Station and to the local listenership if this latest channel change were to be ordered. As indicated above, an enormous amount of effort is involved in effectuating channel changes. For last year's channel implementation, C&C was forced to go through the time and expense of replacing pre-printed office products (at a cost of over \$4,000), existing promotional items (including 4000 bumper stickers, 600 coffee mugs, contest entry boxes, t-shirts, and key chains, all procured to promote the station's 5th anniversary) (at a cost of over \$15,000), existing taped television commercials (\$11,000), and jingles (over \$4,000), all bearing the former frequency of operation – all just to benefit not at all itself, but an *unrelated third party*. The channel change also necessitated the installation of a new antenna, at a cost of over \$30,000, which resulted in two days of station down-time, which also was detrimental to station operations and the station's ability to serve its local community. Also, C&C determined that in order to avoid losing market share, it was necessary to implement a public awareness campaign 1½ months prior to the frequency change to publicize the new frequency, and to continue the awareness campaign for 1½ months following the channel change. This campaign included utilization of both in-town and out-of-town billboards, newspaper advertisements, and television advertisements to advertise the frequency change. All of these expenditures, while largely reimbursed monetarily, took away large amounts of staff time from C&C primary endeavor -- namely, running broadcast station KANS(FM)!

And now, if the Petition is adopted, all of the success achieved by the previous efforts will be destroyed by the additional channel change, and all the efforts will have to now be duplicated.

It is one thing requiring a station such as Station KANS(FM) to participate in a channel

swap to improve overall service to the public *once*. To require it a *second* time in such a short period of time is likely unprecedented,³ and is an undue imposition upon C&C as an existing licensee. C&C values the market share it has built up locally and the level of service it provides to the local community and the surrounding environs. Both stand to be jeopardized or at the very least harmed, merely to provide speculative new service at some undetermined future date to the small community of Americus.

Moreover, if the Commission does as it has in the past, the channel change would be ordered without even the requirement of an interested party, namely the ultimate owner of the Americus construction, to commit to the reimbursement of expenses to C&C for the channel change. To allow this practice to continue goes against the fundamental requirement that the Commission has established that there be a valid expression of interest tendered in support of a rulemaking request. While certainly Puopolo has standing to request addition of a new channel, Puopolo has no ability to validly "agree to compensate [KANS] for reasonable expenses necessary to move channel 244A from 241" (Petition for Rulemaking at ¶ 5), since Puopolo cannot know if he will ever ultimately be the owner of the Americus permit. Since Puopolo is not currently the owner of the permit, he consequently should not be deemed to have standing to commit the actual future owner to financial expenditures. The approach being requested would be no different to that imposed by the Commission in channel upgrades. While mere applicants

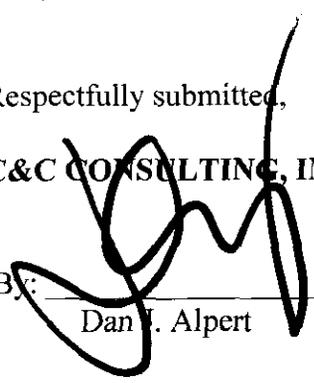
³ The closest case where such a fact situation was presented was *Rock Valley and Sibley, IA, et al.*, 6 FCC Rcd 5867 (Allocations Branch 1991), where two successive channel changes had been ordered. To "avoid the possibility of multiple channel changes within a short period of time," the Commission was able to modify the previously ordered channel change, so only one single channel change needed to occur. *Id.* at ¶ 7. Such action cannot successfully occur in this case.

have, on occasion, proposed to upgrade a channel in the course of rulemaking proceedings, the Commission has determined that until it is the *owner* of a permit for the channel, it has no standing to manipulate the Class of a channel. *Santa Margarita and Guadalupe*, 2 FCC Rcd 6930, ¶ 9 (MMB 1987), *aff'd*, 4 FCC Rcd 7887 n.2 (1989); *Lafayette LA*, 4 FCC Rcd 5073 (1989); *Arlington, McKinney, Celina, Terrell, Daingerfield, College Station, Caldwell, Howe TX and Durant, OK*, 8 FCC Rcd 4281 (1993); *Mt. Pleasant, IA*, 10 FCC Rcd 12069, n.1 (MMB 1995). Similarly, here, until Puopolo is the *owner* of a given channel, Puopolo should have no standing to manipulate the frequencies of other stations such as KANS(FM), especially where, as here, such manipulation will require financial reimbursement by a future owner.

Accordingly, C&C Consulting, Inc. respectfully requests that these Comments be accepted and that the Commission deny the request for substitution of Channel 244A for Channel 241A at Emporia, Kansas or alternatively, designate this proceeding for hearing.

Respectfully submitted,

C&C CONSULTING, INC.

By: 

Dan J. Alpert

Its Attorney

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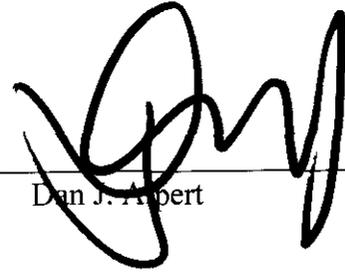
703-243-8690

May 9, 2004

CERTIFICATE OF SERVICE

I, Dan J. Alpert, hereby certify that the foregoing Comments and Opposition to Order to Show Cause has been served on the following:

Dana J. Puopolo
1434 24th St.
Santa Monica, CA 90404



A handwritten signature in black ink, appearing to be 'Dan J. Alpert', is written over a horizontal line.

Dan J. Alpert