

ORIGINAL

DOCKET FILE COPY ~~Before~~ the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Amendment of Section 73.202(b))
Table of Allotments,) MB Docket No. 05-10
FM Broadcast Stations) RM-11140
(The Dalles, Tualatin, Eugene, Albany,) RM-11241
Lebanon, Paisley, Diamond Lake, Oregon) RM-11279
and Goldendale, Washington)

RECEIVED

To: Marlene H. Dortch, Secretary

MAY - 2 2006

Attn: Chief, Audio Division
Media Bureau

Federal Communications Commission
Office of Secretary

COMMENTS OF CUMULUS LICENSING LLC TO
ORDER TO SHOW CAUSE

Cumulus Licensing LLC ("Cumulus"), licensee of Station KNRQ-FM, Eugene, Oregon ("KNRQ"), submits its Comments to the Order to Show Cause issued by the Commission in the above-captioned proceeding on March 31, 2006 (DA 06-731). The Order established May 2, 2006 as the date for filing Comments.¹

Procedural Background

1. On March 21, 2005, Portland Broadcasting, LLC ("PBL"), Columbia Gorge Broadcasters, Inc. ("Columbia"), M.S.W. Communications, LLC ("MSW") and Extra Mile Media, Inc. ("Extra" and together with PBL, Columbia and MSW, the "Joint Parties") filed a pleading styled as a Petition for Rule Making (the "Joint Petition") that would, among a myriad of FM channel and community changes, force KNRQ to move from Channel 250C to Channel

¹ Although undersigned special counsel for Cumulus in this proceeding has filed multiple documents, the Show Cause Order incorrectly identifies counsel for Cumulus. It is requested that the staff correct its records accordingly.

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300C. Cumulus filed detailed Reply Comments in this proceeding on October 19, 2005 (the "Reply Comments") and a "Response Of Cumulus Licensing LLC To Request To Order To Show Cause" on February 23, 2006 (the "Response").²

2. As described in detail by Cumulus' (Reply Comments, Pars. 1-3; Response Par. 9), the Joint Petition was converted through a levered process into a Counterproposal to another Counterproposal filed by SSR Communications Incorporated ("SSR") that was also conveniently submitted to the Commission on March 21, 2005. The SSR Counterproposal was styled as a counterproposal to an original filing by Klickitat Broadcasting ("Klickitat") to add Channel 266A to Monument, Oregon and docketed as MB Docket No. 05-10 (hereafter referred to as "Docket 05-10"). However, through a contrived interdependence created by the same-day filings of the Joint Petition and the SSR Counterproposal and conveniently pointed out to the Commission by the Joint Parties in their Reply Comments filed on June 2, 2005 in Docket 05-10, the Commission elected to treat the Joint Petition in the manner requested by the Joint Parties, that is, as a counterproposal in Docket No. 05-10.³ In a Public Notice issued

² We request that the Commission incorporate herein the Cumulus Reply Comments and Response. Although Cumulus provided the staff with ample evidence in the Reply Comments and Response that raised substantial and material questions of fact regarding the public interest benefits of the Joint Petition, the staff apparently ignored this evidence as it is not addressed in the Show Cause Order.

³ Cumulus is aware of the Commission FM rule making procedures and the fact that counterproposals can effectively cut-off later-filed rule making petitions. *See, e.g., Charles Crawford v. FCC*, 417 F.3d 1289 (D.C. Cir. 2005). However, the situation presented herein is one step removed from the normal fact pattern and for that reason Cumulus asked the Commission to examine the bona fides of the connection between the SSR Counterproposal and the Joint Petition. Nothing in the Joint Petition conflicts with the addition of Channel 266A at Monument, Oregon. Yet, on the deadline for filing Comments and Counterproposals in the Monument proceeding, the Joint Parties filed a hastily prepared Petition for Rule Making that includes a most-tenuous connection to one aspect of the SSR Counterproposal - the upgrade of the Monument channel to 280C, which in turn creates the conflict with the equally bizarre move

October 4, 2005 (Report No. 2727), the Commission established October 19, 2005 as the deadline by which interested parties could file Reply Comments to the Joint Petition.

3. In effect, the Joint Parties have reached this stage in the processing of their Joint Petition through procedural alchemy⁴ that effectively deprives the public and the Commission of a fair and full assessment of the merits of their complex proposal. Indeed, no parties remain who could be adversely affected by processing the Joint Petition for what it really represents, a new petition for rule making, not a overly complex counterproposal to a counterproposal to an original rule making filed by a party, Klickitat, that has since withdrawn any interest in a new FM channel at Monument, Oregon, and SSR has downgraded its proposed assignment to Monument to Channel 280C1. In sum, the SSR Counterproposal is no longer mutually exclusive with the relief requested in the Joint Petition.

**The Issuance of the Show Cause Order
Was Premature and Not Supported by the Record**

4. Rule 1.87 authorizes the Commission to issue an order to show cause when it "appears" that a station's license should be modified. However, such a conclusion must at the very least be based on the evidence filed in a proceeding. In this case, the Commission has ignored the detailed filings made by Cumulus, in particular its Reply Comments, which were submitted in direct response to the Commission's October 4, 2005 Public Notice. Cumulus is

of KXPC-FM to Paisley, Oregon. Cumulus documented this history in its filings and urged the Commission to examine the *bona fides* of these occurrences and determine if the parties are trying to game the system.

⁴ Among other changes, the SSR Counterproposal proposed upgrading Klickitat's modest request for Channel 266A at Monument, Oregon, to the allotment of Channel 280C at Monument. Among other changes in the Joint Petition, Station KXPC-FM, Lebanon, Oregon would migrate Channel 279C to the shrinking community of Paisley, Oregon (population 250) where it would conveniently be mutually exclusive with SSR's bizarre request to upgrade the Monument allocation to Channel 280C.

directly and adversely affected by the relief requested in the Joint Petition and has expended considerable time, effort and resources to provide the Commission with relevant and detailed evidence upon which it reasonably anticipated that even an initial determination to proceed would be based.⁵ Rule 1.87 and administrative fairness demanded that the Commission consider all the relevant material that is filed before it can move to the next step of issuing a formal Order to Show Cause why KNRQ's license should be modified. This is not an insignificant event for a well-established and successful Class C station like KNRQ that serves the Eugene, Oregon metropolitan area.

**Channel 300 Cannot Be Used
for Station KNRQ**

5. A key issue raised by Cumulus in its Reply Comments, an issue that is of utmost importance to the Joint Parties, is the feasibility of using Channel 300 as a replacement channel for KNRQ. Cumulus noted the proximity of Mahlon Sweet Field to the KNRQ transmitter site, and the concern that operation on Channel 300 would cause electromagnetic interference to navigation aids used in connection with this main Eugene airport. Cumulus also focused on the interdependence of the Joint Parties' rule making package; if a critical element like the substitution of Channel 300 crumbles, their entire proposal craters.

6. As anticipated by Cumulus and its experts, the FAA has concluded that the use of Channel 300 at the KNRQ transmitter site will create a hazard to air navigation as a result of the potential for electromagnetic interference. In its Reply Comments (Par. 7) and Response (Par.

⁵ Cumulus' detailed response to the Joint Petition which directly counters many of the claims made by the Joint Parties has been on file with the Media Bureau for almost seven months. Yet, the Joint Parties have avoided responding because they have no good answers to the issues raised by Cumulus, and the Commission has seemingly accepted unsupported claims made by the Joint Parties, claims which Cumulus has documented are false.

2), Cumulus explained its concern regarding this issue and noted that the FAA's initial determination was still under review.⁶ Attachment 1 hereto is a letter dated April 27, 2006 signed by Gary M. Allen, President of Aviation Systems, Inc., to which is attached the Notice of Presumed Hazard issued by the FAA on April 15, 2006. The Joint Petition is premised upon forcing KNRQ to move from Channel 250C to Channel 300C. In light of the FAA's determination that Channel 300C cannot be used without causing a hazard to air navigation, the Joint Petition must be dismissed, and this proceeding must then be terminated.

**Answers Are Required from the Joint Parties
on the Following Substantive Issues**

7. In addition to the fatal unavailability of Channel 300C for use by KNRQ, Cumulus raised additional substantive issues in its Reply Comments and Response that torpedo the Joint Parties' plans.⁷ These issues are fully documented and argued in the Reply Comments and Response, but will be briefly mentioned herein for convenience.

8. KACI-FM Loss Areas. One aspect of the Joint Petition would move Station KACI-FM from Channel 249C2 at The Dalles to Channel 250C2 at Tualatin, Oregon. Contrary to the Joint Parties bare assertion that this will create no white or gray areas,⁸

⁶ Cumulus is extremely sensitive to the issue of potential EMI created to air navigation aids by broadcast stations as a result of its experience in being forced to take Station KQHN(FM), Channel 300C2, Oil City, Louisiana, off the air for almost one year as a result of an after-the-fact FAA determination that the station caused interference to navigation aids in the Shreveport area. The station has only recently resumed broadcasting on Channel 247C2.

⁷ Unfortunately, the staff elected to issue its Show Cause Order to Cumulus, rather than demand that the Joint Parties address these issues and place the burden of proceeding on the Joint Parties where it properly belongs. The burden should be on the Joint Parties to demonstrate that its proposal is viable; it should not be prematurely shifted to Cumulus.

⁸ The Show Cause Order (Par. 3) cites to the channel and city of license changes requested for KACI-FM apparently as part of its public interest "findings" totally ignoring the record evidence filed by Cumulus documenting the white, gray and reduced-service areas that would be thereby

Cumulus documented the creation of white and gray areas, as well as even larger populations and areas that will lose their third, fourth and fifth off-the-air audio services. *See*, Reply Comments, Pars. 8 - 10 and Engineering Statement of Jefferson Brock of Graham Brock, Inc., Exhibit 5 (the "Brock Statement").

9. *The KMSW Upgrade.* In an effort to slip by an unrelated upgrade, the Joint Petition incorporates the proposed upgrade of the licensed facilities of KMSW(FM), The Dalles, Oregon, from Channel 224C3 to Channel 272C2. As reflected in the Reply Comments (Par. 12), this request is not essential or related to any of the Joint Parties' other proposals. Rather, it simply appears to be an attempt to upgrade KMSW without the possibility of drawing competing proposals or applicants.⁹ Therefore, this requested upgrade must be severed from the Joint Petition and survive or fail on its own merits. However, if the Commission retains the proposed KMSW upgrade in the mix, Cumulus has noted its intention of applying for Channel 272C2 at The Dalles, participating in any auction for the channel and constructing the facility if it is the winning bidder.¹⁰ *See*, Reply Comments (Par. 11) and Declaration of Lewis W. Dickey, Jr., attached thereto.

10. *The Move of KXPC-FM to Paisley, Oregon.* One unusual aspect of the Joint Petition is the transfer of Station KXPC-FM, which currently operates on Channel 279C at Lebanon, Oregon to the shrinking community of Paisley, Oregon, which had a population of

created.

⁹ If, however, the aim of the KMSW upgrade is to fill-in for the KACI-FM service area losses, the Commission has made it clear that vacant and proposed channels cannot be used to "back-fill" such lost service areas. *See, e.g., Report and Order, MB Docket No. 02-167, DA 06-796* (Pars. 5-6; April 7, 2006).

¹⁰ Again, the Show Cause Order (Par. 3) accepts without question the KMSW upgrade ignoring Cumulus' intention to apply for the channel if it is assigned and Cumulus' arguments concerning the unrelated and unconnected nature of this issue as part of the Joint Petition.

under 250 in 2000, a 30% loss from its 1990 Census count. Cumulus challenged Paisley's qualification as a "community" for Section 307(b) purposes, arguments which also appear to have been improperly ignored by the Commission in the Order. See Reply Comments, Pars. 13-16. Regardless of Paisley's qualifications as a community under Section 307(b), it bears repeating for future review that the only reason the Joint Parties were interested in moving KXPC-FM to Paisley was to create the contrived mutual exclusivity between the Joint Petition and the SSR Counterproposal to allot Channel 280C to Monument, Oregon.¹¹ This critical element of the Joint Petition is suspect for the several reasons advanced by Cumulus in its Reply Comments and Response, and above (pages 1-3, *supra*), and runs counter to the loss of an established service to over 1,000,000 persons in the Lebanon, Oregon area occasioned by the removal of KXPC-FM from that community. See, Reply Comments, Pars. 13 - 16.

11. *The Allocation of Channels to Prairie City and Prineville as Proposed in the SSR Counterproposal Are Defective.* Among SSR's various proposed changes to the FM Table of Allotments are the assignment of Channel 265C to Prairie City, Oregon and Channel 267C1 to Prineville, Oregon. The Show Cause Order cites to these proposed additions to the radio spectrum as support for its finding of "sufficient public interest benefits to justify the issuance of a show cause order." *Order*, Pars. 2, 4. However, in its Reply Comments, Cumulus offered evidence prepared by its technical expert that the sites proposed for these channels are not viable

¹¹ The contrived nature of the SSR Counterproposal-Joint Petition conflict was also evident to Horizon Broadcasting Group LLC ("Horizon") and its technical consultants - Hatfield and Dawson. Among other things, SSR proposed to move KWPK-FM, Sisters, Oregon, from Channel 281C2 to Channel 282C2 in order to upgrade the Monument, Oregon allocation from the Class A channel requested by Klickitat to the infamous and now unwanted Channel 280C. As noted in the Reply Comments (Note 8), this prompted the Horizon consultants to observe that: "Indeed, SSR appears to have gone out of its way to select an allotment site for Channel 280C which conflicts with the present operation of KWPK-FM."

because they are located in the Nalheur National Forest and the Ochoco National Forest, respectively. *See*, Brock Statement, p. 5. Again, this evidence is apparently ignored by the staff. It is impossible for a reviewing authority or interested parties for that matter to determine what weight was attached to the factors supposedly relied on by the staff to make its tentative findings and conclusions in the Show Cause Order, if the staff makes no mention of the evidence presented by Cumulus in its Reply Comments and Response.

The SSR Counterproposal Was Filed Late

12. Finally, of special note is the fact that the SSR Counterproposal, a critical element to the process in getting the Joint Petition this far, was itself filed late - a defect that has warranted dismissal of late filed counterproposals in other proceedings. As noted, the deadline for filing counterproposals in Docket 05-10 was March 21, 2005. While the SSR Counterproposal was stamped as received in the Media Bureau's Office (the Commission office to which it was addressed) on March 21, 2005, it was not received in the Office of the Secretary until April 1, 2005. The Commission has very recently observed that in such circumstances, the counterproposal must be dismissed. *See, Report and Order in MB Docket No. 05-142*, DA 06-262 (Par. 2; Feb. 10, 2006). In this decision, the Commission dismissed a counterproposal that was not received in the Office of the Secretary until two days after the deadline, even though it was stamped as received in the Media Bureau on the actual deadline. Given the dubious nature of the same-day filing and contrived connection of the SSR Counterproposal and the Joint Petition, dismissal of the late-filed SSR Counterproposal is even more warranted and appropriate in this case.

Conclusion

The Commission's decision to order Cumulus to show cause why Station KNRQ-FM, Eugene, Oregon, should not be forced to move from Channel 250C to Channel 300C was premised on a selective review of the record in this proceeding. The staff appears to have ignored in all respects the substantial and contrary evidence submitted by Cumulus. As a result of the determination by the FAA, Channel 300C cannot be used at the KNRQ transmitter site, and no other channel can be used at that site and meet the Commission's FM mileage separation requirements. For this and the other uncontested reasons documented by Cumulus, this proceeding should be summarily terminated and the Joint Petition should be dismissed with prejudice.

Respectfully submitted,
CUMULUS LICENSING LLC

By: 
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Its Attorneys

May 2, 2006



April 27, 2006

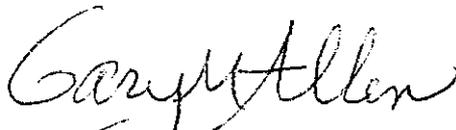
Mr. Gary Kline
Cumulus Media
P.O. Box 4555
Lafayette, IN 47903

Re: FAA Aeronautical Study 2005-ANM-2379-OE

Dear Mr. Kline:

The FAA issued a Determination of No Hazard to Air Navigation under the study number referenced above on December 29, 2005, for the proposed addition of an antenna transmitting on 107.9 MHz at 100 KW at 44° 0' 7" latitude, 123° 6' 54" longitude near Eugene, Oregon. It was subsequently discovered by the FAA Frequency Management Officer that a significant EMI potential at the ILS for the Mahlon Sweet Field in Eugene, Oregon had been overlooked. Consequently, the FAA issued a Notice of Presumed Hazard under the same study number citing the negative EMI impact on the ILS. There are no mitigating actions available at the study location so the Presumed Hazard will stand as a permanent decision.

Sincerely,



Gary M. Allen, Ph.D., Esq.
President and General Counsel



Federal Aviation Administration
Air Traffic Airspace Branch, ASW-520
2601 Meacham Blvd.
Fort Worth, TX 76137-0520

Aeronautical Study No.
2005-ANM-2379-OE
Prior Study No.
1990-ANM-246-OE

Issued Date: 04/15/2006

Gary Kline
Cumulus Media
PO Box 4555
Lafayette, IN 47903

**** NOTICE OF PRESUMED HAZARD ****

The Federal Aviation Administration has conducted an aeronautical study under the provisions of 49 U.S.C., Section 44718 and if applicable Title 14 of the Code of Federal Regulations, part 77, concerning:

Structure Type: Antenna Tower
Location: Eugene, OR
Latitude: 44-0-7.0 N NAD 83
Longitude: 123-6-54.0 W
Heights: 373 feet above ground level (AGL)
1668 feet above mean sea level (AMSL)

Initial findings of this study indicated that the structure as described exceeds obstruction standards and/or would have an adverse physical or electromagnetic interference effect upon navigable airspace or air navigation facilities. Pending resolution of the issues described below, the structure is presumed to be a hazard to air navigation.

See attachment for additional information.

The study revealed that the potential for electromagnetic interference exists. See attached page(s) for further information.

NOTE: PENDING RESOLUTION OF THE ISSUE(S) DESCRIBED ABOVE, THE STRUCTURE IS PRESUMED TO BE A HAZARD TO AIR NAVIGATION. THIS LETTER DOES NOT AUTHORIZE CONSTRUCTION OF THE STRUCTURE EVEN AT A REDUCED HEIGHT. ANY RESOLUTION OF THE ISSUE(S) DESCRIBED ABOVE MUST BE COMMUNICATED TO THE FAA SO THAT A FAVORABLE DETERMINATION CAN SUBSEQUENTLY BE ISSUED.

IF MORE THAN 60 DAYS FROM THE DATE OF THIS LETTER HAS ELAPSED WITHOUT ATTEMPTED RESOLUTION, IT WILL BE NECESSARY FOR YOU TO REACTIVATE THE STUDY BY FILING A NEW FAA FORM 7460-1, NOTICE OF PROPOSED CONSTRUCTION OR ALTERATION.

If we can be of further assistance, please contact our office at (907)271-5863. On any future correspondence concerning this matter, please refer to Aeronautical Study Number 2005-ANM-2379-OE.

Signature Control No: 439975-454239

(NPH)

Robert van Haastert
Specialist

Attachment(s)
Additional Information

Additional Information for ASN 2005-ANM-2379-OE

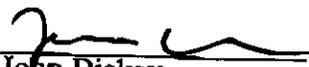
This site will have a negative impact on air/ground communications for the FAA Instrument Landing System (ILS) facilities located near your proposed location.

The present study indicates the site will cause unacceptable interference to the Eugene, OR ILS on its planned operating frequency of 107.9 MHz at 100 kilowatts of power.

Any questions regarding this issue should be directed to Fred Neudecker, Frequency Management Officer, ANM-473, (425)227-2637.

DECLARATION

I have reviewed the information in the preceding Comments of Cumulus Licensing, LLC to Order to Show Cause and declare that it is true and correct to the best of my knowledge, information and belief.


John Dickey
EVP
Cumulus Licensing, LLC

May 2, 2006

Certificate of Service

I, Tracy Lynn Trynock, hereby certify that on this 2nd day of May, 2006, true and correct copies of the foregoing **Comments of Cumulus Licensing LLC to Order to Show Cause** have been served via U.S mail, postage prepaid, or by hand delivery upon the following persons:


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