

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

In the Matter of)	
)	
Amendment of Section 73.202(b))	MB Docket No. 06-77
Table of Allotments)	RM-11324
FM Broadcast Stations)	RM-11334
(Edinburgh, Hope, Versailles, and)	
Tell City, Indiana, Burkesville, Greensburg,)	
Hodgenville, Horse Cave, Lebanon,)	
Lebanon Junction, Lewisport, Louisville,)	
Lyndon, New Haven, Springfield,)	
and St. Matthews, Kentucky,)	
and Belle Meade, Goodlettsville,)	
Hendersonville, Manchester,)	
and Millersville, Tennessee))	

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Federal Communications Commission
Office of Secretary

To: Office of the Secretary
Attn: Assistant Chief, Audio Division
Media Bureau

**JOINT OPPOSITION TO MOTION TO ACCEPT LATE FILED
COMMENTS AND MOTION TO STRIKE**

CXR Holdings, L.L.C. ("CXR"); Newberry Broadcasting, Inc.; Elizabethtown CBC, Inc.;
Washington County CBC, Inc.; CBC of Marion County, Inc.; Cumulus Licensing LLC, and
Edinburgh Radio (together the "Joint Parties"), by their respective counsel, hereby move to strike
the "Petition for Rule Making Status Request and Reply Comments" and oppose the "Motion to
Accept Late Filed Comments" filed by Indiana Community Radio Corporation ("ICRC") on
August 7, 2006 (the "ICRC Pleadings"). Neither pleading is authorized and both are untimely.
In support hereof, the Joint Parties state as follows:

1. It appears that the majority of the ICRC Pleadings relate to a proposal it filed in MB Docket No. 05-17.¹ ICRC believes that its proposals should be acted on by the FCC before CXR's proposal in this proceeding because it was filed first. However, ICRC fails to acknowledge that its first proposal was indeed acted on by the FCC in MB Docket No. 05-17. In fact, the FCC dismissed ICRC's proposal in that docket due to numerous technical and legal defects.² If ICRC was dissatisfied with the Commission's decision to dismiss its proposal, the proper forum to protest that decision would have been in MB Docket No. 05-17.³ If ICRC believes that its amended proposal (filed in December 2005/January 2006) should be acted on before CSR's proposal in this proceeding, it is also wrong.⁴ Because ICRC's amended proposal included a new community, it should be considered a new petition for rule making and subject to the freeze.⁵

2. Nevertheless, to the extent that ICRC is resubmitting its proposal in this proceeding, it is untimely, in violation of the current freeze on rule making petitions, and not shown to be in conflict with any proposal in this proceeding. Thus, the Commission has no choice but to strike the ICRC proposal and comments for these reasons. First, the *Notice of Proposed Rule Making* expressly stated that "[c]ounterproposals advanced in this proceeding

¹ ICRC filed a number of proposals in MB Docket No. 05-17. The first was filed before the Report and Order was issued in that docket and was addressed by the FCC in the Report and Order. See *Connersville, Indiana, et al., Report and Order*, 20 FCC Rcd 18871, ¶¶ 13-14, 26 (2005). ICRC's other proposals were filed in December 2005 and January 2006 after the Report and Order that dismissed ICRC's first proposal was issued.

² *Id.* at ¶¶ 13-14, 26.

³ MB Docket No. 05-17 is final because the time period for reconsideration or Commission review has expired. See 47 C.F.R. §§ 1.115, 1.117, 1.429.

⁴ ICRC's proposals were actually contingent on the outcome of MB Docket No. 05-17, which by itself makes them defective. See *Okmulgee, Oklahoma et al.*, 10 FCC Rcd 12014 (1995) (Contingent proposals are unacceptable for filing, and must be dismissed). Furthermore, it is the policy of the Commission not to accept any rule making proposal that is contingent on the outcome of another rule making proceeding. *Saint Joseph, Clayton, Ruston, and Wisner, Louisiana*, 18 FCC Rcd 22 (2004). These are additional reasons why ICRC's proposals were dismissed by the Commission in MB Docket No. 05-17.

⁵ See *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services, Notice of Proposed Rule Making*, 20 FCC Rcd 11169, ¶ 47 (2005).

itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments.”⁶ The comment date in this proceeding was May 30, 2006. ICRC filed its Pleadings on August 7, 2006; over two months late. Second, even if it were a timely counterproposal, there is no evidence that it conflicts with any of the proposals in this proceeding. “A counterproposal is a proposal for an alternative and mutually exclusive allotment or set of allotments in the context of the proceeding in which the proposal is made.”⁷ The channel study that ICRC provides fails to show a conflict with any proposal in this proceeding. Finally, to the extent that ICRC’s proposal is a new proposal, it is defective because of the freeze on the filing of new petitions for rule making to amend the FM Table of Allotments.⁸ For all of these reasons, the Commission must strike the ICRC proposal from this proceeding.⁹

3. In regard to the substantive comments made by ICRC, the Commission’s Rules provide a time for the submission of comments and reply comments to a notice of proposed rule making. 47 C.F.R. § 1.415(b)-(c). Again, in this proceeding, the comment date was May 30, 2006, and the reply comment date was June 13, 2006.¹⁰ The Commission’s Rules further provide that “no additional comments may be filed unless specifically requested or authorized by the Commission.” 47 C.F.R. § 1.415(h). The ICRC Pleadings both contain material addressed to the merits of the proceeding. The Commission did not request or authorize either pleading.

⁶ See *Hodgenville, Kentucky, et al., Notice of Proposed Rule Making*, 21 FCC Rcd 3560, Appendix (2006) (“*Hodgenville NPRM*”).

⁷ *Milton, West Virginia and Flemingsburg, Kentucky*, 11 FCC Rcd 6374 (1996).

⁸ See *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services, Notice of Proposed Rule Making*, 20 FCC Rcd 11169, ¶ 47 (2005).

⁹ ICRC also failed to serve CXR or any other party in this proceeding as required by Section 1.420 of the Commission’s Rules and therefore made an *ex parte* presentation.

¹⁰ See *Hodgenville NPRM*.

Both were filed after the deadline for filing comments and reply comments in this proceeding. Accordingly, both pleadings should be stricken as untimely.¹¹

4. To the extent that the ICRC Pleadings can be considered reply comments on the CXR proposal - reply comments that were due at the Commission by August 1 - the only allegation made by ICRC that has any relevance whatsoever to this proceeding is that CXR's proposal to move Station WXCH(FM) from Versailles to Hope, Indiana, requires a *Tuck* showing. CXR agrees that a *Tuck* showing is required for Hope, Indiana, and thus it provided such a showing in its Counterproposal which demonstrated that Hope is independent of the Columbus, Indiana Urbanized Area.¹²

WHEREFORE, for the foregoing reasons, the Commission must strike the "Petition for Rule Making Status Request and Reply Comments" and reject the "Motion to Accept Late Filed Comments" filed by Indiana Community Radio Corporation ("ICRC") on August 7, 2006. They are untimely, contain numerous technical and legal defects, and do not raise any issues that are relevant to the outcome of this proceeding.

Respectfully Submitted,

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¹¹ See, e.g., *Rockport, Texas, et al.*, 4 FCC Rcd 8075 (1989); *Caliente, Nevada et al.*, 20 FCC Rcd 893 (2004).

¹² The remainder of the ICRC Pleadings are unsubstantiated allegations aimed at the Joint Parties and at parties not even involved in this proceeding. As such, they must be stricken.

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CERTIFICATE OF SERVICE

I, Diana Gonzales, in the law firm of Vinson & Elkins, do hereby certify that I have on this 22nd day of August, 2006, unless otherwise noted, caused to be mailed by first class mail, postage prepaid, copies of the foregoing "**Joint Opposition and Motion to Strike**" to the following:

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