

ORIGINAL

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

FILED/ACCEPTED

OCT - 9 2008

Federal Communications Commission
Office of the Secretary

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

TO: The Secretary
Attention: Chief, Policy Division
Media Bureau

**MOTION FOR LEAVE TO SUPPLEMENT OPPOSITION
TO PETITION FOR RECONSIDERATION**

Cumulus Licensing LLC ("Cumulus"), by its attorneys, hereby moves for leave to file this supplement (the "Supplement") to its Opposition to Petition for Reconsideration filed on November 9, 2006, which will also constitute a response to the "Further Supplement to Petition for Reconsideration" (the "Further Supplement") filed on October 1, 2008, by Portland Broadcasting, LLC and its partners (collectively, "Portland Broadcasting") in the above-captioned proceeding. The Supplement should be accepted because it contains recent information which will complete the record and respond to a supplement filed by Portland Broadcasting. *See e.g. Rose Hill, Trenton, Aurora, and Ocracoke, North Carolina*, 15 FCC Rcd 10739 n. 2 (2000) (consideration of supplement in order to complete the record).

Introduction

As the Commission is well aware, MB Docket No. 05-10 involves a long-standing effort by Portland Broadcasting to force Cumulus, which is the licensee of Station KNRQ(FM),

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Eugene, Oregon (“KNRQ”), to modify its operation from Channel 250C to Channel 300C. The proceeding has been unnecessarily complicated from the beginning by Portland Broadcasting’s election to put the proverbial cart before the horse. When it initially proposed that the Commission modify KNRQ’s licensed channel from 250C to 300C, Portland Broadcasting had not requested a determination from the Federal Aviation Administration (the “FAA”) whether relocation of KNRQ on Channel 300 – which abuts frequencies used by the FAA for navigational aids – would create a hazard to air navigation. That was a critical oversight because relocation of radio stations on Channel 300 has been the source of FAA interference issues in other FCC proceedings.

Cumulus was the first party to ask the FAA to determine whether KNRQ’s use of Channel 300C would create a hazard to air navigation. That request resulted in the FAA’s issuance of a Notice of Presumed Hazard (“NPH”) on April 15, 2006 in Aeronautical Study No. 2005 - ANM - 2379 - O.E.¹ The NPH was filed with the Commission, which cited that FAA decision as the sole basis for its dismissal of Portland Broadcasting’s rulemaking petition in September 2006.² *Report & Order*, 21 FCC Rcd 10017 (MB 2006). Portland Broadcasting subsequently filed a petition for reconsideration of that action.

In its Further Supplement, Portland Broadcasting reported that the FAA had issued a Determination of No Hazard (the “DNH”) on September 10, 2008 with respect to the proposed allocation of Channel 300C for use by KNRQ at its existing transmitter site at Eugene, Oregon (and attached a copy of the DNH to the Further Supplement). As a result of this determination,

¹ It is noteworthy that the NPH states that any questions should be directed to Fred Neudecker, who was then the FAA’s Frequency Management Officer with responsibility for the matter.

² In light of its sole reliance on the FAA’s NPH, the Commission did not address the other issues raised by Cumulus in opposition to Portland Broadcasting’s proposal.

Portland Broadcasting claimed that the Commission could now "proceed to review and approve the Joint Petitioners' proposal under the Commission's allotment priorities." Further Supplement, p. 5.

Portland Broadcasting's Further Supplement fails to advise the Commission that Cumulus is challenging the FAA's issuance of the DNH and that there is thus a prospect that the DNH will be rescinded. Accordingly, the Commission should defer further proceedings in this docket until there is a final disposition of Cumulus' challenge.

FAA Proceedings

The FAA's NPH was issued in 2006 because of the FAA's conclusion that KNRQ's operation on Channel 300C would cause interference to navigational aids used by the FAA at the Mahlon Sweet Field Airport (the "Airport") in Eugene, Oregon. Portland Broadcasting later entered into a Reimbursable Agreement with the FAA to fund the FAA's change of the frequencies used for those navigational aids on the assumption that the change would eliminate the interference and thus enable the Commission to grant its proposal with respect to KNRQ. The DNH attached to Portland Broadcasting's Further Supplement is expressly premised upon the implementation of that Reimbursable Agreement between the FAA and Portland Broadcasting. See Further Supplement, Attachment p. 3 (DNH is conditioned on Portland Broadcasting's commitment "to fund the EUG ILS and Localizer (ADE) frequency changes"). It should thus be emphasized that the FAA has not yet changed the frequencies used at the Airport and apparently does not intend to do so unless and until this Commission issues a decision granting Portland Broadcasting's request.

In the meantime, Cumulus has challenged the legal basis of the FAA's decision to enter into the Reimbursable Agreement with Portland Broadcasting and, by necessity, the FAA's

issuance of the DNH on which Portland Broadcasting now relies. Attachment 1 annexed hereto is a copy of the "Request for Termination of Reimbursable Agreement" filed by Cumulus with the FAA on September 2, 2008; Attachment 2 annexed hereto is a copy of the "Supplement to Request for Termination of Reimbursable Agreement and Request for Hearing" filed by Cumulus with the FAA on October 1, 2008.

In its filings with the FAA, Cumulus has asserted three basic arguments that preclude the FAA from proceeding with the Reimbursable Agreement and the issuance of the DNH: (1) the FAA improperly precluded Cumulus from participating in agency proceedings resulting in the execution of the Reimbursable Agreement even though the FAA knew that the Reimbursable Agreement was designed to facilitate a decision by this Commission that would be adverse to Cumulus; (2) there is no legal basis for the FAA to expend public resources to benefit the interests of one private party (Portland Broadcasting) to the detriment of another private party (Cumulus); and (3) the FAA's decisions to enter into the Reimbursable Agreement and to issue the DNH may have been tainted by the improper involvement of Fred Neudecker, a former FAA employee who participated in the initial decisions at the FAA on this matter and was then retained by Portland Broadcasting almost immediately after he left the agency to provide consulting services on the very same matter, all of which may have violated the post-employment restrictions in Section 207(a) of Title 18 of the United States Code. Cumulus therefore requested that the FAA terminate the Reimbursable Agreement with Portland Broadcasting (which can be terminated by either party without any liability) or, if that request is

not granted, that the FAA initiate a hearing to determinate whether Mr. Neudecker's involvement *in the matter violated applicable law.*³

The FAA has not yet issued any decision in response to Cumulus' filings. Consequently, it would be premature for the Commission to issue any kind of decision on the assumption that the FAA will in fact change the frequencies at the Airport and thus validate the issuance of the DNH. The Commission should therefore defer any further consideration of Portland Broadcasting's reconsideration petition until there is a final disposition of Cumulus' challenge to the FAA decisions.

Conclusion

WHEREFORE, in view of the foregoing and the entire record herein, it is respectfully requested that the Commission accept and consider this Supplement and defer further action in MB Docket 05-10 until there is a final disposition of Cumulus' challenge to the FAA decisions.

Respectfully submitted,

CUMULUS LICENSING LLC



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October 9, 2008

³ As previously explained herein, Mr. Neudecker's involvement in the FAA proceeding is one of the issues presented in the FAA filings.

ATTACHMENT 1

"REQUEST FOR TERMINATION OF REIMBURSABLE AGREEMENT"

FILED BY CUMULUS WITH THE FAA

ON SEPTEMBER 2, 2008

**(DUE TO SIZE CONSTRAINTS, EXHIBITS TO THE FAA
FILING ARE AVAILABLE UPON REQUEST)**

**Before the
FEDERAL AVIATION ADMINISTRATION
Washington, DC 20591**

In re)
)
Reimbursable Agreement)
)
between) Agreement No. AJW-FN-WSA-08-0260
)
Department of Transportation)
Federal Aviation Administration)
)
and)
)
Portland Broadcasting LLC)
)

To: Office of Chief Counsel
Attention: Enforcement Docket
(AGC-10)

REQUEST FOR TERMINATION OF REIMBURSABLE AGREEMENT

Cumulus Broadcasting LLC ("Cumulus"), acting pursuant to Section 106 of Title 49 of the United States Code and, to the extent applicable, Section 13.5(a) of the rules of the Federal Aviation Administration (the "Agency" or "FAA"), hereby requests (1) that the FAA immediately terminate the Reimbursable Agreement (the "Agreement"), dated as of June 17, 2008, between the Department of Transportation and the FAA, on the one hand, and Portland Broadcasting LLC ("PB"), on the other hand, with respect to the changing of localizer frequencies used at the Mahlon Sweet Field Airport in Eugene, Oregon (the "Airport"), or (2) at a minimum, that the FAA defer implementation of the Agreement until Cumulus has had a meaningful opportunity to provide comments on the Agreement.

Introduction & Summary

The instant request revolves around the FAA's intention to take actions at the Airport which the FAA knows could adversely affect Cumulus without allowing Cumulus any right to participate in the proceeding. The FAA's knowing disregard of Cumulus' interest is particularly egregious because the FAA exclusion has no basis in any law or regulation and may involve conduct by one of its former employees in violation of 18 U.S.C. §207.

PB has been pressing the Federal Communications Commission ("FCC") for years for the issuance of an order that would require radio station KNRQ-FM in Eugene, Oregon ("KNRQ") – which is owned by Cumulus – to change its frequency from Channel 250C (97.9 MHz) to Channel 300C (107.9 MHz). Cumulus has strenuously opposed that proposal, primarily because of prior experience which demonstrated that operation on Channel 300 would create interference issues that would have a material adverse effect on KNRQ's operations and ultimately redound to Cumulus' financial detriment.

PB was unsuccessful at the FCC because the FAA determined in April 2006 that relocation of KNRQ to Channel 300C would create interference with the frequencies used at the Airport and, accordingly, issued a Notice of Presumed Hazard ("NPH"). Both before and after issuance of the NPH, PB urged the FAA to consider changing the localizer frequencies used at the Airport and thus reverse the NPH. The FAA resisted those overtures by PB. Fred Neudecker, the FAA Frequency Management Officer, explained to Cumulus' consultant shortly after issuance of the NPH in April 2006 that the FAA had investigated the matter, that the Agency could not find a solution to make the

changes requested by PB, and that FAA headquarters in Washington, DC was averse to making any such changes in any event.

On February 1, 2007, the FAA issued another NPH in response to a request for review by PB. Mr. Neudecker was identified as the Frequency Management Officer on that NPH.

By letter dated that same day (and apparently coordinated with the FAA's issuance of the NPH), PB reminded the FAA of its willingness (first expressed more than a year earlier) to enter into a reimbursable agreement to change the localizer frequencies at the Airport – which, in light of Mr. Neudecker's comments to Cumulus' consultant, should have been viewed by the FAA as of no utility. However, shortly after the FAA issued the NPH on February 1, 2007, Mr. Neudecker left the employ of the FAA and opened a consulting practice in Newcastle, Washington. On or about April 25, 2007, Mr. Neudecker – having been apparently retained as a consultant to PB – provided another PB consultant with a 34-page report (the "Neudecker Report") which identified changes that could be made to the localizer frequencies at the Airport to accommodate PB's original request. In a cover letter, Mr. Neudecker advised the PB consultant that his recommendations "will significantly enhance aviation safety by reducing the potential for interference to these critical Navigation Aides." Letter from Fred Neudecker to Clyde Pittman, undated, annexed hereto (along with the accompanying report) as Exhibit 8.

Mr. Neudecker's letter, along with the Neudecker Report, found their way to the FAA and were ultimately produced to Cumulus in response to a request under the Freedom of Information Act ("FOIA"). Within a month after the date of the Neudecker

Report, the FAA confirmed the inauguration of a new aeronautical study to investigate once again the same issues that had already been covered by the two prior NPHs.

At some point along the way, the Regional Administrator for the Northwest Mountain Region determined that the FAA could not move forward with the study and a possible reimbursable agreement with PB without an investigation by the Office of the Inspector General ("OIG") in the Department of Transportation. The Regional Administrator received the OIG report (the "OIG Report") in February 2008. Immediately thereafter, the FAA began to move expeditiously to accommodate PB's request.

As soon as it learned of the FAA decision to proceed with a possible reimbursable agreement with PB, Cumulus made known to the FAA its interest in participating in any proceeding for consideration of such agreement. FAA representatives advised Cumulus that the reimbursable agreement was a private matter that did not permit participation by third parties – even though the FAA knew that implementation of the reimbursable agreement would have a detrimental impact on Cumulus.

In the meantime, an FAA representative advised PB by email in March 2008 (1) that the FAA was planning to proceed with a reimbursable agreement to change the localizer frequencies at the Airport and (2) that PB could forward the FAA email to the FCC to advise that latter agency of the FAA's contemplated action. When Cumulus learned of the FAA emails (through a filing which PB made at the FCC), its counsel contacted the FAA representative to inquire about the meaning of the emails. The FAA representative advised Cumulus' counsel that she would not discuss the meaning of the emails with the Cumulus counsel. No basis was given for that refusal.

The Agreement was executed on June 17, 2008, and, as far as Cumulus knows, the FAA is planning to initiate action on September 8, 2008 to change the localizer frequencies at the Airport. In the meantime, Cumulus has been unable to obtain the OIG Report under the FOIA or otherwise comment on the Agreement. However, on June 24, 2008, PB advised the FCC that it had entered into the Agreement with the FAA and that, if the localizer frequencies are changed at the Airport as planned, PB will seek reversal of the FCC decision that precluded KNRQ from relocating to Channel 300C.

The Agreement is thus being used primarily if not exclusively to accommodate the interests of one private party (PB) to the substantial detriment of another private party (Cumulus). Reimbursable agreements are not to be used in such a manner. The FAA is a public agency which should be indifferent to the welfare and disputes of private parties. In the absence of a compelling public interest, the FAA should refrain from aligning itself with the interests of one private party against the interests of another private party – especially when, as here, it appears that the FAA may have been motivated to act, in part at least, by the recommendations of a former employee who was substantially involved in the project when he was employed at the FAA.

I. Facts

On or about March 21, 2005, PB (along with two other parties) filed a proposal with the FCC to require KNRQ to relocate from Channel 250C (97.9 MHz) to Channel 300C (107.9 MHz) to accommodate, *inter alia*, a change in facilities of a radio station owned by PB. On March 31 2006, the FCC issued an Order to Show Cause directed to

Cumulus under applicable FCC regulation to show why it should not be required to relocate as requested by PB. *Monument, Oregon*, 21 FCC Rcd 3332 (AD 2006).

In response to the Order to Show Cause, Cumulus filed a request with the FAA to determine (as it suspected) whether KNRQ's operation on Channel 300 would cause a hazard to air navigation. On April 15, 2006, the FAA issued an NPH with respect to the proposed use of Channel 300C for KNRQ (Aeronautical Study No. 2005-ANM -2379-OE). See Exhibit 1 annexed hereto. Mr. Neudecker was identified in the NPH as the Frequency Management Officer

Cumulus filed its response to the FCC's Order to Show Cause on May 2, 2006 and attached a copy of the FAA NPH. Cumulus also explained that its objection to the use of Channel 300C for KNRQ was based in part on prior experience with another of its owned stations. Cumulus had secured FAA approval for use of Channel 300 for KQHN(FM) in Oil City, Louisiana. However, after the station inaugurated operation on that channel, the FAA determined that use of Channel 300 (at the top of the permissible spectrum for FM usage) was causing interference to navigation aids in the Shreveport, Louisiana area. As a result, KQHN was forced to go off the air for almost one year before a resolution could be found. Comments of Cumulus, FCC MB Dkt. No. 05-10 (May 2, 2006) at 5 n.6.

On June 30, 2006, the FAA issued a Feasibility Report, a copy of which is annexed hereto as Exhibit 2, in response to PB's request for a feasibility study to determine whether the frequencies could be changed at the Airport to accommodate KNRQ's use of Channel 300C. Aeronautical Study No. 2006-ANM-1254-OE. The report stated that the "request for the FAA to change the LS frequencies is more involved

than just changing the crystals: it involves cutting tuned cables, adjusting antenna heights, changing aeronautical charts and published instrument approach procedures, and conducting flight tests. This assumes that there are frequencies available, which has not been verified." Mr. Neudecker was again identified as the Frequency Management Officer.

On July 5, 2006, Jack Chevalier, a PB consultant, advised Peter Markus, an FAA employee in the Northwest Mountain Region, that PB had estimated the cost of making the frequency changes at \$200,000 and that PB was prepared to enter into a reimbursable agreement to cover the FAA's costs. See Exhibit 3 annexed hereto.

At or about this time, Gary Allen, an aviation consultant for Cumulus, had a telephone conversation with Mr. Neudecker concerning the feasibility study requested by PB. In that conversation, Mr. Neudecker advised Mr. Allen that the FAA had reviewed the matter, that they could not find a solution that would eliminate the interference to allow KNRQ's operation on Channel 300C, and that it did not matter in any event because FAA superiors in Washington, DC were averse to the notion of changing frequencies at the Airport. See Exhibit 4 annexed hereto.

On September 5, 2006, the FCC released a Report and Order which referenced the FAA's NPH and the FAA's conclusion that use of KNRQ's current transmitter site for Channel 300C "would exceed obstruction standards and/or have an adverse physical or electromagnetic interference effect upon navigable airspace or air navigation facilities in connection with the Mahlon Sweet Field Airport." *Ione, Oregon*, 21 FCC Rcd 10017, 10022 (2006) ("*Report and Order*"). On that basis, the FCC dismissed the PB proposal.

On or about October 27, 2006, PB filed a Petition for Reconsideration with the FCC seeking reversal of the *Report and Order*. PB told the FCC that it had identified alternative frequencies that could be used at the Airport and that it had advised the FAA of PB's willingness to reimburse the FAA for any costs incurred in making the necessary changes.

On February 1, 2007, the FAA issued another NPH in response to a request from PB and again concluded that KNRQ's use of Channel 300C would "have an adverse physical or electromagnetic interference effect upon navigable airspace or air navigation facilities." See Exhibit 5 annexed hereto (Aeronautical Study No. 2007-ANM-102-OE). Mr. Neudecker was again identified as the Frequency Management Officer.

PB was apparently alerted to the FAA's issuance of the NPH. By letter dated February 1, 2007, Clyde Pittman, a PB aviation consultant, reminded Robert van Haastert, the FAA representative who had signed the February 1, 2007 NPH, that PB was prepared "to enter a reimbursable agreement with the FAA" with "a maximum limit of \$200,000. . . ." Exhibit 6 annexed hereto.

By letter dated February 7, 2007 to Dennis E. Roberts, the FAA Regional Administrator for the Northwest Mountain Region, Mr. Haastert, and Mr. Neudecker, John W. Dickey, Cumulus' Executive Vice President, explained that Cumulus' objection to KNRQ's use of Channel 300C was based in part on prior experience:

. . . Cumulus has had a very unfavorable experience trying to operate an FM radio station on Channel 300. Aside from being the outside limit of the FM radio spectrum, channel 300's proximity to the spectrum utilized for air navigation aids creates unique potential problems for broadcasters. Indeed, Cumulus was required to take Station KQHN(FM), Oil City, Louisiana off-the-air for almost one year when the FAA determined after the fact that the station's operation on Channel 300C2 created potential electromagnetic interference to air navigation aids. Cumulus is determined never to go through such an experience again.

Exhibit 7 annexed hereto.

Sometime shortly after receipt of Mr. Dickey's letter, Mr. Neudecker left the employ of the FAA and opened a consulting business in Newcastle, Washington. He was apparently retained by PB almost immediately after opening his consulting business and, on or about April 25, 2007, Mr. Neudecker prepared the Neudecker Report. *See* Exhibit 8 annexed hereto. Contrary to his prior statements to Cumulus' aviation consultant, Mr. Neudecker now found that there was a practical solution for the FAA to accommodate PB's request.

Cumulus does not have any information to show how or why the Neudecker Report found its way to the FAA, but it was included among the records produced in response to a Cumulus FOIA request filed on January 14, 2008.

On May 21, 2007 – less than one month after the apparent date of the Neudecker Report – the FAA issued a notice of its termination of the aeronautical study initially requested by Cumulus in 2005 (to determine whether KNRQ's operation at Channel 300C would create a hazard to air navigation) and stated that it had been replaced by a new aeronautical study to determine whether KNRQ could use Channel 300C. Aeronautical Study No. 2007-ANM-102-OE. Stated another way, the FAA confirmed its intention to embark on a new study less than a month after the apparent date of the Neudecker Report to review matters which it had already determined on two separate occasions to be a hazard to air navigation.¹

¹ It may be that the notice was merely a housekeeping measure. However, Cumulus cannot make an informed-judgment on that issue without access to internal FAA emails. Cumulus did file a FOIA request for all records, including emails, concerning PB's request for a reimbursable agreement. However, none of the records produced included any FAA emails between July 10, 2006 and March 3, 2008.

No action was taken for nine (9) months on PB's request for a reimbursable agreement.² At some point during that period, Mr. Roberts, the FAA Regional Administrator for the Northwest Mountain Region, apparently requested the OIG Report. Mr. Roberts received the report in February 2008.³

Almost immediately thereafter, Anne Krusaka, a member of the FAA Planning Team in the Western Service Area, advised PB's consultants (including Mr. Pittman, the person to whom the Neudecker Report was addressed), that the FAA "deliberation is complete and we are ready to move ahead with changing the frequencies of the EUG and ADE localizers at the Eugene Airport." Exhibit 9 annexed hereto.

On March 6, 2008, in an apparent response to an inquiry from Kevin Terry, one of PB's consultants, Ms. Krusaka advised Mr. Terry that the FAA would not be sending him "a separate letter regarding the status of FAA's action" but further advised him that he should "feel free to forward my previous email to the FCC."⁴ Exhibit 10 annexed hereto.

On March 28, 2008, PB filed a Supplement to Petition for Reconsideration (the "Supplement") with the FCC to report the FAA's plan to move forward with the reimbursable agreement. The Supplement included copies of the two aforementioned emails from Ms. Krusaka. A copy of the Supplement was served on Cumulus.

²As explained above, Cumulus filed a FOIA request for all records, including emails, concerning PB's request for a reimbursable agreement. None of the records produced included any FAA emails between July 10, 2006 and March 3, 2008. There is no explanation for that gap in communications even though it appears, as indicated *infra*, that there were internal communications during that period with respect to PB's reimbursable agreement request.

³ Cumulus requested a copy of the OIG Report in a FOIA request filed on April 17, 2008. The response was statutorily required by May 16, 2008. As of this date, there has been no response to Cumulus' request for the OIG Report. Cumulus has been advised by the OIG that a response will be forthcoming on or about September 16, 2008.

⁴ Ms. Krusaka's email of March 3, 2008 was included in the records produced in response to Cumulus' FOIA request, but Mr. Krusaka's email (and any prior email from Mr. Terry) was not included in the records produced to Cumulus.

On April 7, 2008, Cumulus' counsel telephoned Ms. Krusaka and made an inquiry about the meaning of her emails. Ms. Krusaka responded that she would not discuss the emails with Cumulus' counsel. *See Exhibit 11* annexed hereto. Cumulus' counsel confirmed that telephone conversation in an email which reiterated the request to speak with Ms. Krusaka about her emails. Ms. Krusaka never responded to that email inquiry. *Id.*

In the meantime, Cumulus' counsel made an inquiry with the FAA's Northwest Mountain Region about the possibility of participating in the process to provide PB with a reimbursable agreement. He was advised by FAA representatives that the process was an "internal" one which did not permit participation by third parties. *See Exhibit 12* annexed hereto. However, when Cumulus' counsel inquired about the basis for that conclusion, the FAA's regional counsel was forced to make an inquiry with Ms. Krusaka about the appropriate regulation because the counsel's conclusion was apparently based on an assumption. *See Exhibit 13* annexed hereto. The FAA regional counsel's office ultimately advised Cumulus' counsel that the basis for excluding Cumulus from the deliberations was Section 17.11(e) of the FAA regulations, which states that protests of contracts cannot be filed before the Office of Dispute Resolution for Acquisition with respect to contracts "which do not fall into the category of procurement contracts subject to the AMS." *See Exhibit 11* annexed hereto.

The PB Agreement contemplates that work on changing the localizer frequencies at the Airport will commence on September 8, 2008. Agreement, Article II, G.

II. Argument

A. Cumulus Has Standing to Participate

The right to participate in proceedings before federal agencies is covered by “prudential standing” principles. As one court explained, “To establish prudential standing, a party’s ‘grievance must arguably fall within the zone of interests protected or regulated by the statutory provision . . . invoked in the suit.’” *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1266 (D.C. Cir. 2004) (internal citations omitted). That approach requires an answer to the following question: “who may and who may not invoke the power of the courts to enforce the terms of a statute[?]” *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 921-22 (D.C. Cir. 1989). In cases involving the FAA, “a person disclosing a substantial interest in an order issued by the . . . Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator . . . may apply for review of the order.” *Int’l Bhd. of Teamsters v. Transp. Sec. Admin.*, 429 F.3d 1130, 1134 n.3 (D.C. Cir. 2005).

There is no question that Cumulus has a “substantial interest” in PB’s Agreement. PB requested that Agreement *solely* because of PB’s interest in securing an FCC order that would reverse an earlier FCC decision and force Cumulus to relocate KNRQ on a channel that Cumulus believes would be substantially detrimental to its financial interest.

It matters not that Cumulus is not directly regulated by the FAA. The FAA action will have a direct and immediate impact on Cumulus. Indeed, that is the very reason why PB requested the Agreement with the FAA.

Cumulus is thus in the same position as a lighting manufacturer who was accorded standing to challenge an FAA order that indirectly affected its business of

manufacturing lighting fixtures for airports. *Safe Extensions, Inc. v. FAA*, 509 F.3d 593 (D.C. Cir. 2007). The FAA contended that the manufacturer did not have standing to challenge an FAA order establishing new standards for such lighting fixtures because, according to the agency, the FAA is authorized “to regulate airports, not manufacturers.” 509 F.3d at 600. The court disagreed. The FAA, said the court, “effectively regulates [the manufacturer] because it prevents the company from selling its product to airports.” 509 F.3d at 600-601 (quoting *PDK Labs., Inc. v. DEA*, 362 F.3d 786, 791 (D.C. Cir. 2004)).

In Cumulus’ situation, the FAA effectively regulates which tower sites can be used for radio stations, and, if PB’s Agreement is implemented, the FAA will, in effect, permit the use of a tower site that is now foreclosed to Cumulus. In light of that substantial interest, Cumulus has standing, and the FAA should have allowed Cumulus to participate in proceedings and deliberations concerning the decision on whether to proceed with a reimbursable agreement for PB.

In concluding otherwise, the FAA appears to have relied initially on assumptions rather than any legal analysis. See Exhibit 13. In later invoking Section 17.11(e) of the FAA’s rules, the agency appears to have been making nothing more than an incorrect guess.

Part 17 of the FAA rules concerns protests by parties who are unsatisfied with a procurement contract issued by the FAA. Protests would be from actual or potential bidders who believe, *inter alia*, that the contract should have been awarded to a different party. See 14 C.F.R. 17.3(k) (“interested party” defined “in the context of a bid protest”). In contrast, Cumulus is not an actual or potential bidder and was not protesting a contract

that had been executed by the Agency. Cumulus wants to participate in the proceeding to determine whether the public interest justifies the FAA's execution of a contract merely to accommodate the interests of one private party (PB) at the expense of another private party (Cumulus).

Nothing in Part 17 precludes such participation. To conclude otherwise would be to say, in effect, that the FAA can issue an order to the substantial detriment of Cumulus (who is not a bidder) without any scrutiny by Cumulus or a reviewing court. That conclusion flies in the face of the "strong presumption of reviewability" in the Administrative Procedure Act. *Steinholdt v. FAA*, 314 F.3d 633, 638 (D.C.Cir. 2003). As the United States Supreme Court explained, "[A]n aggrieved person will not be cut off unless there is a persuasive reason to believe that such was the purpose of Congress."⁵ *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967).

Despite that admonition – and the forceful language in *Safe Extensions, Inc.*, *supra* – the Agency has cut Cumulus off from participating in the deliberations concerning the reimbursable agreement. That exclusion cannot be squared with applicable law or precedent and should not be sanctioned – especially because the Agency's action (unlike the order in *Safe Extensions, Inc.*) was designed primarily, if not exclusively, to benefit one private party (at another private party's expense) rather than the public interest.⁶

⁵ If it were prevented from participating in deliberations concerning the Agreement, Cumulus would, for all practicable purposes, be denied the opportunity to file any complaint about any subsequently-issued NPH that relied on changes made through the Agreement.

⁶ To the extent Section 17.11(e) is nonetheless deemed applicable, Cumulus hereby requests a waiver to allow its participation in proceedings concerning the PB Agreement.

B. Questionable Circumstances Surround Reimbursable Agreement

Cumulus' right to participate in proceedings related to the Agreement is all the more critical because of the questionable circumstances surrounding its development. For almost two years, the FAA steadfastly adhered to its position that it would not be possible to change the frequencies at the Airport and that KNRQ's operation on Channel 300C would cause a hazard to air navigation. Mr. Neudecker was the Frequency Management Officer who supervised those aeronautical studies, and he expressly told Cumulus' consultant in mid-2006 that the FAA had studied the matter, that they had not found a solution, and that superiors in FAA headquarters in Washington, DC were opposed to any accommodation of PB's persistent requests for a reimbursable agreement and a change in the frequencies utilized at the Airport. Mr. Neudecker's comments were reflected in the two separate NPHs issued by the FAA (the most recent one in February 1, 2007).

Matters took a sudden change after Mr. Neudecker left the employ of the FAA, opened a private consulting practice, and prepared a 34-page report for PB which took a position which contradicted the NPHs and his prior comments to Cumulus' consultant. Within one month after the apparent date of that report, the FAA embarked on a course of action to enter into a reimbursable agreement to accommodate PB's requests and change the frequencies at the Airport.

Critical facts concerning Mr. Neudecker's involvement and any reliance which the FAA placed on the Neudecker Report are unknown at this time to Cumulus.

However, submission of the Neudecker Report to the FAA suggests a possible violation of 18 U.S.C. §207.

1. Statutory Post-employment restrictions

Section 207(a)(1) of Title 18, United States Code permanently bars a former government officer employee from contacting his former agency with respect to the same particular matter involving specific parties “in which the person participated personally and substantially as such officer or employee.” And Section 207(a)(2) bars former government officers and employees from lobbying their former agency with respect to any matter “which such person knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her service or employment” Collectively, these “switching sides” provisions are designed to avoid both the appearance and reality of conflicts of interest that might arise if and when former government employees seek to influence the conduct of the agencies where they were employed concerning particular matters and involving specific parties in which they participated personally and substantially or were under their supervision.

2. Mr. Neudecker’s potential violation

There would be a violation of Section 207(a)(1) and/or Section 207(a)(2) if Mr. Neudecker (1) “knowingly [made], with the intent to influence, any communication to or appearance before any officer or employee” of the FAA, in connection with (2) “a particular matter,” (3) in which the FAA “is a party or has a direct and substantial interest,” (4) which he either “participated personally and substantially” (§207(a)(1)) or “knows or reasonably should know” was pending “under his . . . official responsibility”

(§207(a)(2)), and (5) “which involved a specific party or specific parties at the time it was so pending.” The record known to date indicates fulfillment of each of those elements:

Knowingly made, with intent to influence, any communication to or appearance before the FAA. Mr. Neudecker unquestionably made a “communication to” the FAA in the form of his report, which is included in the FAA’s files. The report was not simply an assessment of the facts but was instead a blueprint that could be used to influence the FAA’s conduct. *See* Office of Legal Counsel, Department of Justice, “Communications under 18 U.S.C. § 207,” 2001 WL 34054424 (2001) (“DOJ Memorandum”) (a report or other communication from a former employee would be considered made with “intent to influence”).⁷

A particular matter. The Neudecker Report was certainly made in connection with a particular matter – namely, the change of the localizer frequencies at the Airport.

FAA is a party or has a direct interest. It is equally clear that the FAA has a direct interest in the matter at issue because it affects air traffic and safety, which the FAA has a statutory mandate to oversee.

Personal and substantial participation. Mr. Neudecker served as the Frequency Management Officer with respect to the particular matter, and is the author of the study of that same particular matter.

Under his official responsibility. “Official responsibility” is defined as “the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government actions.” 18 U.S.C. § 202. The NPHs and other Agency records annexed hereto confirm that the analyses of the localizer frequencies used at the Airport were under Mr. Neudecker’s responsibility.

Which involved a specific party or parties. The FAA’s deliberations obviously related to two specific parties: PB and Cumulus.

⁷ It is not known how or when the Neudecker Report was submitted to the FAA (in part because, as explained above, there is a gap in the FAA internal emails produced in response to Cumulus’ FOIA request). However, it would not matter if the Neudecker Report were submitted to the FAA with or without Mr. Neudecker’s knowledge. *See* DOJ Memorandum (an “intent to influence,” and thus a violation of Section 207 can occur through the attribution of a report by a former agency employee because the signature by a former agency official “implicates the core concerns underlying the statute because it enables the former official to use influence acquired during government service for improper and unfair advantage, and creates the appearance that the agency’s decision might be affected by the use of the former official’s prior government position”). Access to internal FAA emails between July 2006 and March 2008 could amplify and perhaps affect the analysis. *See supra* at 9 n.1.

The possible violation of Section 207 compounds the Agency's decision to exclude Cumulus from the process. Cumulus could have provided or secured information to indicate whether (1) the Neudecker Report (and any related communications) created or constituted a violation of Section 207, which would have warranted the Agency's refusal to execute the Agreement with PB and (2) whether execution of the Agreement with PB would have been in the public interest regardless of whether the Neudecker Report constituted or created a violation of Section 207.

C. Reimbursable Agreement Should Be Cancelled

The FAA is obligated to exercise its power in a manner designed to serve the public interest. However, the known record in the instant matter demonstrates that the Agency entered into the Agreement with PB primarily, if not solely, to accommodate PB at the expense of Cumulus – not to serve the public interest. The Neudecker Report – coupled with the Agency's failure to allow participation by Cumulus or even to respond to inquiries from its counsel on the meaning of communications filed with the FCC – raise the specter that Agency deliberations may have been influenced by other forces. In the absence of any compelling public interest, the FAA should terminate the Agreement and remove itself from any involvement in PB's dispute with Cumulus at the FCC.⁸ See Agreement, Article X (agreement can be terminated by either party "prior to its expiration date, with or without cause, and without incurring any liability or obligation to the terminated party").

⁸ At a minimum, the FAA should at least defer implementation of the Agreement until Cumulus is given a right to participate in the proceeding and help the Agency develop a full record on which an informed decision can be based.

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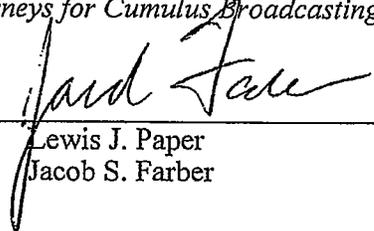
WHEREFORE, in view of the foregoing, it is respectfully requested that the Agreement be cancelled.

Respectfully submitted,

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Attorneys for Cumulus Broadcasting LLC

By:



Lewis J. Paper
Jacob S. Farber

CERTIFICATE OF SERVICE

I, Nancy Washington, hereby certify that a copy of the foregoing "Request for Cancellation of Reimbursable Agreement" was sent by first-class U.S. mail, postage prepaid, this ____ day of August 2008 to the following:

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Counsel for Portland Broadcasting

Nancy Washington

ATTACHMENT 2

"SUPPLEMENT TO REQUEST FOR TERMINATION OF REIMBURSABLE
AGREEMENT AND REQUEST FOR HEARING"

FILED BY CUMULUS WITH THE FAA

ON OCTOBER 1, 2008

(DUE TO SIZE CONSTRAINTS, EXHIBITS TO THE FAA
FILING ARE AVAILABLE UPON REQUEST)

Before the
FEDERAL AVIATION ADMINISTRATION
Washington, DC 20591

In re)
)
Reimbursable Agreement)
)
between) Agreement No. AJW-FN-WSA-08-0260
)
Department of Transportation)
Federal Aviation Administration)
)
and)
)
Portland Broadcasting LLC)
)

To: Office of Chief Counsel
Attention: Enforcement Docket
(AGC-10)

**SUPPLEMENT TO REQUEST FOR TERMINATION OF
REIMBURSABLE AGREEMENT AND REQUEST FOR HEARING**

Cumulus Broadcasting LLC ("Cumulus") hereby (1) supplements its Request For Termination of Reimbursable Agreement (the "Request") to provide information which Cumulus acquired after the Request was filed on September 2, 2008, and (2) if Cumulus' Request is not immediately granted, requests the initiation of a hearing to determine the extent to which Fred Neudecker, a former Frequency Management Officer at the Federal Aviation Administration ("FAA" or "Agency"), influenced the decision of the FAA to enter into the above-referenced agreement (the "Agreement") with Portland Broadcasting, LLC ("PB"). Consideration of the additional information in this Supplement confirms the public interest need for the FAA to terminate the Agreement with PB, or, at a minimum, to initiate a hearing (with appropriate discovery) to determine

whether the FAA's conduct is tainted by a violation of Section 207(a) of Title 18 of the United States Code. In support of those conclusions, the following is stated:

Background

1. Cumulus requested termination of the Agreement because, *inter alia*, (a) Cumulus was precluded from participating in proceedings relating to the negotiation and execution of the Agreement even though the Agreement is expressly designed to facilitate a decision by the Federal Communications Commission (the "FCC") that is sought by PB and opposed by Cumulus, (b) there is no public interest basis for the FAA to use its resources to benefit one private party (PB) at the expense of another private party (Cumulus), and (3) the FAA's involvement in a private transaction is all the more inappropriate because one of the Agency's former employees provided assistance to PB which may constitute a violation of the post-employment restrictions embodied in Section 207(a) of Title 18 of the United States Code.

2. Subsequent to the filing of the Request, Cumulus received (a) a redacted copy of the report (the "OIG Report") prepared by the Inspector General's Office of the Department of Transportation ("OIG") and referenced in the Request (at page 4) and (b) additional Agency records produced in response to a supplemental request by Cumulus under the Freedom of Information Act ("FOIA"). Those documents reinforce the public interest bases underlying Cumulus' Request.

OIG Report

3. Although it concludes that Mr. Neudecker did not try to influence the Agency's action on these matters, the record developed by the OIG plainly shows

otherwise.¹ According to the OIG Report, PB contacted Mr. Neudecker almost immediately after he left the employ of the FAA in February 2007 to inquire whether he would prepare a study for PB to support PB's request to change the localizer frequencies at the Mahlon Sweet Field Airport in Eugene, Oregon (the "Airport"). Mr. Neudecker had not established a private consulting firm at that point, but he accepted PB's offer to prepare the study for \$5,000.

4. The OIG Report does not explain why PB chose Mr. Neudecker to prepare that study. However, a reasonable inference can be made that Mr. Neudecker's selection was based on his prior involvement in the matter while he was at the FAA. Mr. Neudecker not only knew the issues but also the FAA personnel who remained at the Agency. Stated another way, there is a reasonable inference that Mr. Neudecker's retention by PB was based primarily on his ability to influence the outcome of FAA deliberations rather than his professional knowledge and skills.

5. Logic supports that inference. If PB were solely interested in securing a report from an aviation consultant with expertise in airspace analysis and obstruction evaluation services, there were any number of established consultants who could have been selected. Indeed, Kevin Terry, PB's engineer, had submitted numerous Engineering Statements to the FCC to explain why PB's proposal to relocate KNRQ (the affected Cumulus radio station) on Channel 300C would not create a hazard to air navigation. *See Exhibit 2* annexed hereto. Mr. Terry's analysis was augmented by the report of another engineering firm, Hatfield & Dawson, which PB submitted to the FCC to explain why PB's proposal would not create any hazard to air navigation. *See Exhibit 3* annexed hereto. Given its ready access to other qualified engineers, it is reasonable to infer that

¹ The redacted OIG Report is annexed hereto as Exhibit 1 and is incorporated herein by reference.

PB selected Mr. Neudecker — who had not even opened a consulting service — to do a report because of an assumption that his analysis would carry greater weight with his former colleagues at the Agency than Mr. Terry or Hatfield & Dawson.

6. To the extent those reasonable inferences are in fact true, Mr. Neudecker fulfilled PB's expectations. According to the OIG Report, he directly communicated with his former colleagues at the FAA to explain the study he was preparing and even asked to use the FAA's resources to conduct that study. Mr. Neudecker's former colleagues explained that he was no longer entitled to utilize FAA resources but advised him that he could use information in the public domain that was readily available to him (and to Mr. Terry and Hatfield & Dawson as well).

7. Mr. Neudecker apparently completed his study in April 2007, and, while the redacted OIG Report does not expressly say so, it appears that Mr. Neudecker was the one to submit his study (the "Neudecker Report") to the FAA in April 2007. See Request at 9. The OIG Report further confirms what the Request could only infer from the record then available: namely, that the FAA did not initiate any further study of the changes requested by PB until *after* it had received the Neudecker Report.²

8. In this context, it is difficult to accept the conclusion of the OIG Report that Mr. Neudecker did not attempt to influence and did not have any influence on the FAA decision to proceed with the reimbursable agreement with PB. The known facts show otherwise. Mr. Neudecker was able to accomplish what PB's other engineers could

² It appears from the OIG Report that Mr. Neudecker had further communications with his former colleagues at the FAA about "the need to change the frequencies at [the] Eugene airport because there were currently interference issues." OIG Report at 5. However, Mr. Neudecker had explained in his report that the interference was only "potential" rather than actual, Request at Exhibit 8, and documents later produced to Cumulus under the FOIA confirmed that there had been "no reported incidences of interference" and that there was thus "no requirement for change" unless the FAA could secure such changes through a reimbursable agreement with PB. See Exhibit 4 annexed hereto.

not: namely, a prompt decision by the FAA to conduct an independent study to verify the results of Mr. Neudecker's conclusions. It may be true, as the OIG Report states, that the FAA's conclusions were based on "physics" that "cannot be altered;" but that is all a question of the definition of "success," and, in the instant matter, success could consist of simply getting the FAA to act. Beyond that, a violation of Section 207(a) is not premised on the former employee's success but merely whether the former employee had any communications or took any actions with his former agency on the same matter that was previously under the former employee's responsibility. *See NFK Engineering, Inc. v. United States*, 805 F.2d 372, 376 (Fed. Cir. 1986) ("appearance of impropriety" is enough to disqualify bidder); Office of Legal Counsel, Department of Justice, "Communications under 18 U.S.C. §207," 2001 WL 34054424 (2001) (a report or other communication from a former employee would be considered made with "intent to influence").

9. The foregoing analysis precludes any acceptance of the OIG Report at face value without further inquiry into the nature and extent of Mr. Neudecker's communications with his former colleagues at the Agency and their impact on the FAA's decision. Accordingly, if the Agreement is not immediately terminated, it is requested that a hearing be initiated, that Cumulus be allowed to participate in the hearing, and that such hearing include the right to obtain documents through subpoena and to conduct depositions. *See* 14 C.F.R. § 13.5(i).

Concerns of Airport Manager

10. FOIA records produced to Cumulus after the filing of the Request include an email from Timothy M. Doll, the Airport Director, expressing his "concern about a 'forced change' in channel for KNRQ-FM to 107.9 megahertz" and a "possible

interference with [the Airport's] 16R ILS at 107.9 megahertz." See Exhibit 5 annexed hereto. Mr. Doll requested assurance from the FAA that the change in frequencies for PB "will not have any interference with [the Airport's] Cat III runway approach."

11. The FOIA records produced to Cumulus do not include any record which addresses Mr. Doll's concerns about a possible hazard to air navigation. The question therefore arises whether the FAA has guaranteed or can guarantee that the change of frequencies requested by PB will not create the interference of concern to Mr. Doll and, more specifically, whether there is any risk – however remote – that Mr. Doll's concerns are justified.

Cumulus Upgrade of KNRQ

12. The record needs to be amplified to explain the adverse impact on Cumulus if PB's Agreement is not terminated and Cumulus is forced by the FCC to relocate on Channel 300C. On January 19, 2007, Cumulus filed a Form 301 application with the FCC to relocate KNRQ's transmission facilities in Tualatin, Oregon. The 60 dBu service contour of the proposed facility would enable KNRQ to reach expand its population coverage by more than one million persons. The FCC granted the application and issued a new construction permit for Cumulus on March 28, 2008. See Exhibit 6 annexed hereto. However, Cumulus' right to construct those new facilities – and expand KNRQ's service to the public – is dependent on the FCC *not* requiring KNRQ to be relocated to Channel 300C. The construction permit expressly states that the authorization is conditioned on the outcome of MB Docket 05-10, the proceeding in which PB is trying to force Cumulus to relocate KNRQ on Channel 300C.

13. To be sure, the condition on the KNRQ construction permit reflects a decision by the FCC. However, the FCC will not be in a position to invoke that condition if the FAA terminates the PB Agreement and does not change the localizer frequencies at the Airport. Conversely, if those frequencies are changed (in light of the FAA's issuance of a no hazard determination with respect to KNRQ's operation on Channel 300C), the FCC will need to address the matter – and create a risk for Cumulus that it will be unable to implement the new facilities for KNRQ at Tualatin.

14. There is no reason for the FAA to interject itself into a private dispute between PB and Cumulus to facilitate PB's ability to make arguments to the FCC. As explained in Cumulus' Request, a public agency's resources should not be used for the benefit of one private party to the disadvantage of another private party in the absence of a justifiable public interest basis (especially when a change in frequencies at the Airport will result in the added cost of educating airmen about the change).³

[Remainder of page intentionally left blank]

³ To assist PB now would only subject the FAA to a comparable request from Cumulus for a reimbursable agreement to restore the ILS frequencies at the Airport to what they were prior to implementation of PB's Agreement.

Conclusion

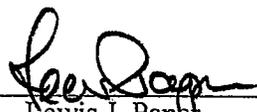
WHEREFORE, in view of the foregoing and the entire record herein, it is respectfully requested that Agreement be terminated, or, if not, that the FAA initiate a hearing to determine whether its actions on PB's Agreement have been tainted by Mr. Neudecker's involvement.

Respectfully submitted,

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Jacob S. Farber

CERTIFICATE OF SERVICE

I, Nancy Washington, hereby certify that a copy of the foregoing "Supplement to Request for Cancellation of Reimbursable Agreement" was sent by first-class U.S. mail, postage prepaid, this 1st day of October 2008 to the following:

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Certificate of Service

I, Joan P. George, a secretary in the law firm of Fletcher, Heald & Hildreth, PLC, do hereby certify that a true copy of the Supplement to Opposition to Petition for Reconsideration was sent this 9th day of October, 2008, via email where indicated and via United States First Class Mail, postage prepaid, to the following:

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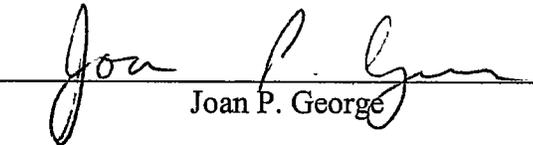
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