

ORIGINAL

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

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, Tualatin, Eugene, Albany,)
Lebanon, Paisley, and Diamond Lake,)
Oregon and Goldendale, Washington))

FILED/ACCEPTED

DEC - 4 2008

Federal Communications Commission
Office of the Secretary

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

REPLY TO OPPOSITION TO MOTION FOR STAY

Cumulus Broadcasting LLC ("Cumulus"), acting pursuant to Section 1.45(c) of the Commission's rules, hereby replies to the Opposition to Motion for Stay (the "Opposition") filed by Portland Broadcasting, LLC ("PB"), Bicoastal Medial Licenses IV, LLC and Extra Mile Media, Inc. (collectively, with PB, the "Joint Petitioners"). The Opposition confirms the merits of Cumulus' Motion for Stay (the "Motion") to hold the proceedings in the above-referenced docket in abeyance until there is a final resolution of the complaint which Cumulus filed with the Federal Aviation Administration ("FAA") with respect to the FAA's No Hazard Determination ("NHD") to permit operation of Cumulus radio station KNRQ-FM ("KNRQ") on Channel 300C in Eugene, Oregon. In support of that conclusion the following is stated:

Introduction

1. In their Opposition, the Joint Petitioners claim that Cumulus had failed to satisfy any of the four criteria applied in evaluating a motion for stay. However, the Joint Petitioners do not and cannot challenge the facts on which Cumulus' Motion is premised. Nor do the Joint

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Petitioners cite any case in which the Commission has denied a motion for stay under similar circumstances. Accordingly, the Motion should be granted. In support of that conclusion, the following is stated:

Irreparable Harm

2. The Opposition states that “Cumulus has failed to demonstrate that it will suffer irreparable injury absent a stay.” Opposition at 7. According to the Opposition, the Motion only “offers speculation as to what could *theoretically* happen, but does not substantiate its claims that it will suffer actual injury.” *Id.* (emphasis added).

3. The Joint Petitioners’ argument is belied by the very thrust of the countless pleadings which the Joint Petitioners have filed in the instant docket: namely, an effort to require the relocation of KNRQ to Channel 300C in Eugene, Oregon so that KACI-FM, which is licensed to Bicoastal Media Licenses IV, LLC, can be relocated from The Dalles, Oregon, to Tualatin, Oregon. Indeed, the Joint Petitioners urge the Commission to adopt their proposal “as soon possible.” Opposition at 8 (footnote omitted).

4. Grant of the Joint Petitioners’ proposal “as soon as possible” – and the relocation of KNRQ to Channel 300C – would require the cancellation of the construction permit which Cumulus currently holds to relocate KNRQ to Channel 250A in Tualatin, Oregon.¹ File No. BPH-20070119AFH. All of that could be for naught if the FAA were to rescind the NHD and, as a result, preclude KNRQ from operating on Channel 300C. In that latter event, there would be no vehicle to compensate Cumulus for the loss of the construction permit to relocate KNRQ in

¹ The construction permit states that “[t]he grant of this permit is conditioned on the final outcome of MB Docket 05-10. A final outcome of that proceeding may require KNRQ-FM to change frequency, class, or site location. Accordingly, any construction undertaken pursuant to this permit is at the permittee’s sole risk.”

Tualatin. The harm to Cumulus would therefore be irreparable and hardly theoretical. *See* Motion at 4.

5. Nowhere does the Joint Petitioners' Opposition confront the irreparable impact that would befall Cumulus if the Commission were to grant the Joint Petitioners' proposal and the FAA's NHD were to be later rescinded.

Harm to Joint Petitioners

6. One of the four stay factors is whether "the issuance of a stay [would] *substantially* harm other parties interested in the proceeding?" *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (emphasis added). *Accord Washington Metropolitan Area Transit Commission v. Holiday Tourist, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (harm to non-moving party must be "substantial"). The Joint Petitioners contend that grant of Cumulus' Motion may delay final resolution of the instant proceeding. But the Joint Petitioners do not advance any facts to demonstrate that any delay will adversely affect their interests in any "substantial" manner (even assuming *arguendo* that a resolution of proceedings would result in a grant of the Joint Petitioners' proposal). Nor do the Joint Petitioners cite any Commission decision which states that a possible delay in the resolution of a legal proceeding constitutes "substantial harm." *Compare Liberty Productions*, 16 FCC Rcd 18966, 18972 (2001) (non-moving party "stands to incur substantial interest charges"); *Cumulus Licensing Corp.*, 16 FCC Rcd 1052, 1055 (2001) (non-moving party would be forced to "'unravel' . . . a complex multi-million dollar business transaction"). Consequently, this factor cannot be a basis for denying Cumulus' Motion.

Likelihood of Success on the Merits

7. The Joint Petitioners assert that “Cumulus has totally failed to substantiate its claim that it will prevail on the merits in this case [at the FAA].” Opposition at 7. The Joint Petitioners premise that conclusion on their further assertion that “it certainly appears from its actions that the FAA is unlikely to grant Cumulus the relief which it seeks. . . .” Opposition at 6.

8. It may of course be true that the FAA will not grant Cumulus the relief it seeks (which originally consisted of a termination of the Reimbursable Agreement between the FAA and PB and has since been supplemented by Cumulus’ request for its own reimbursable agreement with the FAA to restore the ILS frequencies at the Mahlon Sweet Field Airport in Eugene, Oregon (the “Airport”) to the frequencies in use prior to implementation of the PB Reimbursable Agreement). However, it is not sufficient to state – as the Joint Petitioners do – that this factor should be assessed without regard to possible action by a reviewing court. It would not represent the first time in which a governmental agency failed to recognize its own mistake. Nor would it represent the first time in which a court of appeals required a governmental agency to modify, reverse, or rescind an earlier decision. In short, Cumulus’ likelihood of success on the merits should not be confined to an assessment of whether the FAA will grant Cumulus the relief it seeks but should also include an assessment of whether any adverse FAA decision would be reversed by reviewing court.

9. The record before the FAA (which has been also filed with the Commission) provides a compelling basis for the FAA to change course – either on its own volition or through judicial review of its actions.

A. Cumulus Participation

10. As it explained in its Motion, Cumulus was foreclosed from participating in the proceedings at the FAA with respect to the negotiation and execution of the PB Reimbursable Agreement even though the FAA knew that the Reimbursable Agreement was being pursued by PB for the benefit of PB and to the detriment of Cumulus in the instant proceeding. For its part, the Joint Petitioners claim (1) that the PB Reimbursable Agreement did not constitute “a vehicle for one private party to gain advantage over another” but instead reflected “a determination that aviation safety would be improved with the significant reduction or elimination of existing interference at the Eugene Airport by changing ILS frequencies,” Opposition at 5, and (2) that Cumulus has no right to complain about being excluded from the proceedings with respect to the PB Reimbursable Agreement “because it has never been permitted, and until now, no party prior to Cumulus has claimed the right to participate in private contractual negotiations between the FAA and a third-party.” Opposition at 6. Neither of those comments can withstand scrutiny.

11. First, no credence can be given to the Joint Petitioners’ contention that the PB Reimbursable Agreement did not give an advantage to one private party (PB) to the disadvantage to another private party (Cumulus). As the Joint Petitioners’ Opposition recounts, PB has relentlessly pursued the Reimbursable Agreement with the FAA in order to overcome Cumulus’ objection (based in part on the FAA’s initial issuance of a Notice of Presumed Hazard) to require KNRQ to be relocated on Channel 300C in Eugene, Oregon. Nor is there any valid basis to say, as the Joint Petitioners do, that the Reimbursable Agreement reflected “a determination that aviation safety would be improved. . .” Opposition at 5. There were no complaints of interference at the Airport previously, and, if aviation safety had been a real consideration, the FAA presumably would not have waited to execute a Reimbursable Agreement with PB that

would be implemented more than two (2) years after PB initially made the request in June 2006 – rather, the FAA (one would like to believe) would have moved far more expeditiously to eliminate any safety risks present at the Airport.

12. Second, it cannot be said that Cumulus' protest about being excluded is frivolous merely because, as the Joint Petitioners claim (without any citations), "it has never been permitted and, until now, no party prior to Cumulus has claimed the right to participate in private contractual negotiations between the FAA and a third-party." Opposition at 6. The FAA knew – as did PB – that execution and implementation of the Reimbursable Agreement could have an adverse impact on Cumulus.² As explained in the pleadings filed with the FAA (that are a part of the record in the instant proceeding), there can be no doubt that Cumulus would have standing in these circumstances to participate in the FAA proceedings and to seek judicial review of any adverse FAA decision. 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." *Abbott Labs v. Gardner*, 387 U.S. 136, 140 (1967). *Accord Steinholtz v. FAA*, 314 F.3d 633, 638 (D.C. Cir. 2003) (there is a "strong presumption of reviewability" in the Administrative Procedure Act).

² When the FAA learned in 2006 of Cumulus' opposition to PB's effort to change the ILS frequencies at the Airport, FAA representatives explained to PB's engineer that they "did not want to become involved in a dispute between Cumulus and the Joint Parties. . ." PB Reply to Opposition to Petition for Reconsideration (January 17, 2007), Attachment A at 5 (unnumbered page). And after the frequencies were changed in October 2008, one of the involved FAA personnel emailed another with the comment, "Should be interesting to see what the FCC decides." See Exhibit 1 annexed hereto. (Cumulus received the email on November 18, 2008 in response to a request for documents filed under the Freedom of Information Act.)

B. Violation of Ethics Laws

13. In its Motion, Cumulus explained that the FAA decision to execute and implement the Reimbursable Agreement with PB was tainted by the involvement of Fred Neudecker, a former FAA Frequency Management Officer who was asked to prepare an engineering report on behalf of PB immediately after he left the FAA's employ. Motion at 6. The Joint Petitioners' Opposition does not expressly address Mr. Neudecker's apparent violation of Section 207 of Title 18 in submitting a report to the FAA on behalf of a private party with respect to the same matter that had been under his responsibility while he had been employed at the FAA. However, the Opposition does make other statements which indirectly impugn Cumulus' contention with respect to Mr. Neudecker's involvement.

14. The Joint Petitioners' Opposition tries to create the impression that securing the Reimbursable Agreement and changing the ILS frequencies at the Airport was a simple procedure that did not require any assistance from Mr. Neudecker. Thus, the Opposition claims that the Joint Petitioners had "consistently contended" that the concern with KNRQ's possible use of Channel 300C – which was rejected by the FAA's issuance of the Notice of Presumed Hazard in April 2006 – "could easily be resolved. . ." Opposition at 2.

15. That simply is not so. PB had made its request for a reimbursable agreement to the FAA in June 2006. By February 2007, nothing had happened. At that juncture, Mr. Neudecker left the FAA's employ and – although he had not opened a private consulting practice – PB immediately retained his services to prepare an engineering report to support the PB request for a reimbursable agreement.

16. PB's retention of Mr. Neudecker is all the more remarkable because PB already had three (3) engineers under engagement, including one (Jack Chevalier) who was touted as an
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aviation consultant. See Joint Petitioners Reply to Opposition to Petition for Reconsideration (January 17, 2007), Attachment A at 7 (unnumbered page) & Attachment B (comments of Hatfield & Dawson Consulting Engineers, LLC in Docket No. FAA-2006-25002). With three (3) engineers already in tow – all of whom had been in contact with the FAA – there was no ostensible reason for PB to hire yet another engineer – unless, as in the case of Mr. Neudecker, it was someone whose mere presence would have more impact on the FAA than the other three (3) engineers.

17. Subsequent events appear to have confirmed the benefit of Mr. Neudecker's engagement. As detailed in the Cumulus pleadings filed with the FAA and submitted in this docket, the FAA appeared to become far more active in responding to PB's request for a reimbursable agreement after Mr. Neudecker submitted his report to the FAA in April 2007. And, as explained in the Joint Petitioners' Opposition, the FAA eventually issued a Determination of No Hazard to Air Navigation on September 10, 2008 – only eight (8) days after Cumulus filed its first pleading with the FAA and weeks *before* any frequencies had been changed at the Airport. In other words, the FAA took the unusual step of stating that KNRQ's operation of Channel 300C would not cause any hazard to air navigation even though the Airport frequencies had not been changed or tested to ensure the validity of that conclusion.

18. As explained in the pleadings filed by Cumulus with the FAA, the foregoing facts require a full evidentiary hearing in which Cumulus would be allowed to participate. In this setting, it can hardly be said that Cumulus has failed to provide a substantial showing of the merits of its claim before the FAA.

Public Interest

19. Defects in the FAA decision-making process confirm that the public interest would be better served by a grant of Cumulus' Motion. The Joint Petitioners argue otherwise because approval of their proposal "would result in first local service to two communities and a first local aural broadcast service to over 2,200 individuals. . ." Opposition at 8. However, those benefits are premised on the continued validity of the NHD issued by the FAA. There is no public interest in the Commission expending its limited resources to rush to a decision that may later have to be reversed.

20. The precedent cited in the Motion confirms the Commission's adherence to that approach in similar situations. See Motion at 5. Although their Opposition tries to distinguish the cases cited in the Motion, the Joint Petitioners fail to cite any decision to the contrary.

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Conclusion

WHEREFORE, in view of the foregoing and the entire record herein, it is respectfully requested that the Commission stay, or at least hold in abeyance, any further proceedings in the instant docket until there is a final resolution of the issues raised by Cumulus with the FAA.

Respectfully submitted,

CUMULUS LICENSING LLC



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December 4, 2008

Exhibit 1

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Subject 2007-ANM-102-OE Determination

The FAA Determination for 2007-ANM-102-OE is attached. Should be interesting to see what the FCC decides.

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Certificate of Service

I, Barbara Lyle, a secretary in the law firm of Fletcher, Heald & Hildreth, PLC, do hereby certify that a true copy of the "Reply to Opposition to Motion for Stay" was sent this 4th day of December, 2008, via United States First Class Mail, postage prepaid, to the following:

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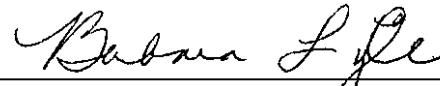
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