

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

In the Matter of )  
)  
Amendment of Section 73.202(b) )  
Table of Allotments )  
FM Broadcast Stations )  
(The Dalles, Tualatin, Eugene, Albany, )  
Lebanon, Paisley, and Diamond Lake, )  
Oregon and Goldendale, Washington) )

MB Docket No. 05-10  
RM-11279

FILED/ACCEPTED

DEC - 8 2008  
Federal Communications Commission  
Office of the Secretary

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

RESPONSE TO COMMENTS OBJECTING  
TO THE ISSUANCE OF PUBLIC NOTICE

Of Counsel:

Alan C. Campbell  
Michelle A. McClure  
Ronald P. Whitworth  
FLETCHER, HEALD & HILDRETH, PLC  
1300 N. 17<sup>th</sup> Street, 11<sup>th</sup> Floor  
Arlington, VA 22209  
703-812-0400

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## Summary

MB Docket No. 05-10 commenced on March 21, 2005, with the filing of a Petition for Rule Making by Portland Broadcasting, LLC ("PB") and several partners, all of whom are licensees of radio stations in northern Oregon, and who are referred to collectively herein as the "Joint Parties." The key element of the Joint Parties' plan has been, and is, the relocation of Station KACI-FM, which is now licensed to one of the Joint Parties, Bicoastal Media Licenses, IV, LLC ("Bicoastal"), from The Dalles, Oregon, where the station operates on Channel 249C2, to Tualatin, Oregon, where KACI-FM would operate on Channel 250 as a Class C2 facility.

Cumulus Licensing LLC ("Cumulus") is the licensee of Station KNRQ-FM, Eugene, Oregon, which operates on Channel 250C. In order for the Joint Parties to implement their overall scheme, KNRQ-FM must be moved from Channel 250C to Channel 300C at Eugene. Cumulus has vigorously opposed the forced move of KNRQ-FM to Channel 300C due in part to the fact that the use of Channel 300C at the KNRQ-FM transmitter site involves interference concerns with the frequencies the FAA uses for air navigation aids at the Eugene Airport.

Indeed, as a result of these FAA issues, the Commission dismissed the Joint Parties' Rule Making Petition on September 5, 2006 without considering other issues presented. The Joint Petitioners filed a timely Petition for Reconsideration of the Commission's action and shifted their attention to the FAA in order to address, for the first time, the airport frequency interference concerns. The FAA issued a Determination of No Hazard with respect to the use of Channel 300C at the KNRQ-FM transmitter site earlier this year and entered into a Reimbursable Agreement with PB to cover the costs of the change in FAA frequencies used at the Eugene Airport.

As a result of the FAA's actions, and although Cumulus continues to contest the appropriateness and basis of the FAA's actions, the Media Bureau reopened the Docket 05-10 proceedings and on November 7, 2008 issued a Public Notice (DA No. 08-2459) inviting interested parties to file competing expressions of interest pursuant to Section 1.420(g) of the Commission's Rules for Channel 272C2 at The Dalles, Oregon.

On November 24, 2008, Cumulus filed its competing expression of interest, and the Joint Parties filed what they styled as "Comments Objecting to the Issuance of Public Notice," arguing that the Media Bureau could not solicit competing expressions of interest because only Bicoastal, which is the licensee of KMSW-FM, The Dalles, could file for Channel 272C2, which would be used as a non-adjacent channel upgrade for KMSW-FM in order to cover for the loss of substantial white and gray areas of service created by the move of KACI-FM to Tualatin.

Unfortunately for the Joint Parties plans, there is absolutely no support, nor do they cite any, for the reservation of Channel 272C2 at The Dalles for use only by Bicoastal. As noted in detail herein, the goals of the Joint Parties to relocate KACI-FM to Tualatin, including the change in KNRQ-FM's frequency to Channel 300C, could be accomplished in four steps, each of which is mutually contingent on the other three and each of which is an essential, incompatible and required step. However, the gratuitous substitution of Channel 300C2 for Channel 272C2 at Goldendale, Washington, where it is used by Station KYYT-FM, so that Channel 272C2 can be allotted to The Dalles, Oregon to be used by KMSW-FM is in no way a required step in their rule making proposal. This channel grab is not authorized or sanctioned by any Commission rule or precedent, nor do the Joint Parties cite any such support in their opposing Comments. And, contrary to the Joint Parties' position, the filing of competing expressions of interest by interested parties is expressly authorized by Rule 1.420(g).

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(The Dalles, Tualatin, Eugene, Albany,	)	
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Oregon and Goldendale, Washington)	)	

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

**RESPONSE TO COMMENTS OBJECTING  
TO THE ISSUANCE OF PUBLIC NOTICE**

Cumulus Licensing LLC (“Cumulus”), by its attorneys, submits its Response to the “Comments Objecting To The Issuance of Public Notice” (the “Comments”) filed in this proceeding by Portland Broadcasting, LLC (“PB”), Bicoastal Media Licenses, IV, LLC (“Bicoastal”) and Extra Mile Media, Inc. (“Extra”) (collectively, the “Joint Parties”) on November 24, 2008.<sup>1</sup>

**Introduction**

1. On November 7, 2008, the Media Bureau issued a Public Notice (DA No. 08-2459) inviting interested parties to file “competing expressions of interest” pursuant to Section 1.420(g) of the Commission’s Rules with respect to the substitution of Channel 272C2 for

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<sup>1</sup> *In re* Amendment of 73.202(b), FM Table of Allotments, FM Broadcast Stations (The Dalles, Tualatin, Eugene, Albany, Lebanon, Paisley, and Diamond Lake, Oregon and Goldendale, Washington), *Comments Objecting to the Issuance of Public Notice*, MB Docket 05-10 (November 24, 2008) [hereinafter *Joint Parties Comments*].

Channel 224C3 at The Dalles, Oregon. Cumulus filed Comments on the deadline, November 24, 2008, indicating that it was interested in Channel 272C2, that it would file an application for the channel if it was allotted to The Dalles and that it would participate in an auction for the channel. The Joint Parties were the only other party which filed comments, although of a decidedly different nature.<sup>2</sup> In their Comments, the Joint Parties argue without the benefit of any case or rule citation, that (i) no party other than Bicoastal, the licensee of KMSW-FM, The Dalles, Oregon, can file for Channel 272C2; (ii) the staff may have taken this action “due to a misunderstanding” of what it was doing; and (iii) the Public Notice should be withdrawn.<sup>3</sup>

2. It is clear from the record of this proceeding that the Media Bureau was well aware of the issues and knowingly invited the filing of competing expressions of interest for Channel 272C2 at The Dalles, Oregon. Cumulus has supported this action, and the Joint Parties have opposed it, throughout the proceedings in MB Docket No. 05-10 (“Docket 05-10”). Given the importance of the Media Bureau's decision to the outcome of these proceedings, it is useful to detail briefly the history of Docket 05-10.

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<sup>2</sup> Despite the caption used by the Joint Parties on their “Comments” in actuality they are asking for reconsideration of the issuance of the Public Notice without citation to any rules or cases providing for such reconsideration.

<sup>3</sup> *Joint Parties Comments* at 2.

3. On March 21, 2005, the Joint Parties<sup>4</sup> filed an allegedly independent Petition for Rule Making (the "Petition")<sup>5</sup> that morphed into a Counterproposal to Docket 05-10.<sup>6</sup> The Petition proposed a series of channel and community changes, the most critical of which was the relocation of KACI-FM from The Dalles, Oregon, where it operated on Channel 249C2, to Tualatin, Oregon, where it would operate on Channel 250C2. The critical link necessary to accomplish the relocation of KACI-FM is the forced modification of Station KNRQ(FM), Eugene, Oregon, which is licensed to Cumulus, from Channel 250C to Channel 300C. As detailed below, Cumulus has vigorously opposed the Joint Parties' efforts to force KNRQ to operate on Channel 300C and in filings in Docket 05-10 has documented several fatal flaws in their overall scheme, including the inevitable result that the use of Channel 272C2 at The Dalles must be subject to the filing of competing expressions of interest.

#### Argument

4. **The Joint Parties Proposal.** The cornerstone of the Petition is the move of KACI-FM to Tualatin, Oregon, as a first local transmission service licensed to that community<sup>7</sup> by deleting Channel 249C2 from The Dalles and allotting Channel 250C2 to Tualatin. As Step 1

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<sup>4</sup> When the Docket 05-10 proceedings commenced, Columbia Gorge Broadcasters, Inc. was the licensee of Station KACI-FM, The Dalles, Oregon and M.S.W. Communications, LLC was the licensee of Station KMSW-FM, The Dalles. In the interim, Bicoastal acquired KACI-FM and KMSW-FM and is now the licensee of those stations.

<sup>5</sup> *In re* Amendment of 73.202(b), FM Table of Allotments, FM Broadcast Stations (The Dalles, Tualatin, Eugene, Albany, Lebanon, Paisley, and Diamond Lake, Oregon and Goldendale, Washington), *Petition for Rule Making*, MB Docket 05-10 (November 24, 2008) [hereinafter the "*Petition*"].

<sup>6</sup> See Report No. 2727, Public Notice (rel. October 4, 2005).

<sup>7</sup> It is ironic that Cumulus, as the licensee of KNRQ, has been able to accomplish this result via the more direct approach of filing an application and receiving a construction permit to change KNRQ's city of license to Tualatin. See BPH-20070119AFH; BMPH-20080331ACU.

to accomplish KACI-FM's journey to Tualatin, the Joint Parties ask the Commission to issue a show cause order to Cumulus to change KNRQ-FM's license from Channel 250C to Channel 300C. In order to accomplish Step 1, the Joint Parties ask the Commission to sanction Step 2, changing the operating frequency of Station KHPE-FM, Albany, Oregon, from Channel 300C to Channel 279C.<sup>8</sup> But, in order to accomplish Step 2, the Joint Parties ask the Commission to approve Step 3, changing the city of license of Station KXPC-FM, which operates on Channel 279C, at Lebanon, Oregon to Paisley, Oregon.<sup>9</sup> These community of license and channel changes are all that is technically required in order for the Joint Parties to relocate KACI-FM to Tualatin, Oregon and KXPC-FM to Paisley, Oregon, and to force KNRQ to shift to Channel 300C.

5. However, because the relocation of KACI-FM would remove the only radio service to a sizeable area and population – a fatal flaw - the Joint Parties become inventive and attempt to add two channel changes that are unrelated to and not required in order to complete Steps 1 - 4. First, the Joint Parties ask the Commission to issue an order to show cause for

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<sup>8</sup> In order for KNRQ to operate on Channel 300C, the Joint Parties also propose as Step 4 that the vacant allocation of Channel 299A at Silver Lake, Oregon be changed to 251A so that Channel 300C can be used by KNRQ.

<sup>9</sup> Cumulus also demonstrated that two other Class C channels (246C and 287C) could be allocated to Paisley, Oregon and operate at the Joint Parties' preferred transmitter site. *See In re Amendment of 73.202(b), FM Table of Allotments, FM Broadcast Stations (The Dalles, Tualatin, Eugene, Albany, Lebanon, Paisley, and Diamond Lake, Oregon and Goldendale, Washington), Reply Comments of Cumulus Licensing LLC*, MB Docket 05-10 (October 19, 2005) [hereinafter the "*Cumulus Reply Comments*"], at Technical Exhibit at 4-5 and Exhibit 6.

Station KYYT-FM, Goldendale, Washington, to move from Channel 272C2 to Channel 300C2.<sup>10</sup>

Second, the Joint Parties would like to move Channel 272C2 from Goldendale, Washington to The Dalles, Oregon, where it could be used by KMSW-FM to cover the KACI-FM loss areas.

However, these two bonus reallocations are not essential and incompatible elements for Steps 1 - 4 to be accomplished.

6. **The Joint Parties Rely on a Non-Existent Commission Rule.** In their Comments, the Joint Parties rely on Section 1.420(g) of the Commission's Rules to support their contention that the invitation of competing expressions of interest was improper.<sup>11</sup> This is the same rule that the Joint Parties relied upon previously, with one glaring exception. Noticeably absent from the Joint Parties' Comments was the specific rule section (1.420(g)(3)) it had relied upon previously.

7. In their *Comments on Order to Show Cause*, filed on May 2, 2006, the Joint Parties argued that the KMSW-FM upgrade qualified as an "incompatible channel swap"<sup>12</sup> under Section 1.420(g)(3) of the Commission's rules. However, in their Comments objecting to the issuance of the Public Notice, the Joint Parties deleted subsection (3) of Rule 1.420(g) from their

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<sup>10</sup> When the Petition was filed, the licensee of KYYT-FM was not a voluntary partner in the Joint Parties' plans. During the course of the Docket 05-10 proceedings, an agreement was reached between the Joint Parties and KYYT-FM for KYYT-FM to move to Channel 300C2. Also, it should be noted that in their Comments, this substitution was listed as Channel 279C rather than 272C2 in what was likely a typographical error. *See Joint Parties Comments, supra* note 1, at 2.

<sup>11</sup> *Id.* at 4.

<sup>12</sup> Under Rule 1.420(g)(3), an "incompatible channel swap" was a channel substitution for an upgrade and an accommodating substitution that were mutually exclusive and were mutually available, i.e., there was no alternate channel of its class that was fully spaced from the station's site. *See, e.g., In re* Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Jackson and Salyersville, Kentucky), *Report and Order*, 17 FCC Rcd 4662, n.2. (March 15, 2002).

citation, presumably out of a recognition that this rule no longer exists. In the Commission's *Report and Order* introducing new community of license change procedures in November 2006, that subsection was deleted from the rules,<sup>13</sup> mooted the concept of an "incompatible channel swap."

8. **Even if the Rule Existed, the KMSW-FM Upgrade Would be Inappropriate.**

Assuming, *arguendo*, that the former Section 1.420(g)(3) was still in existence, the Joint Parties' attempt to incorporate the non-adjacent channel substitution in The Dalles into the rule making would have been inappropriate nonetheless. Despite the Joint Parties' contention that the KMSW-FM channel change is an "inextricably intertwined component of the overall rulemaking proposal," this is simply factually inaccurate. For the reasons described above, the proposed upgrade is in fact a separate and distinct proposal that has no technical relation to the remainder of the rule making proposal.

9. Under the former 1.420(g)(3), the Commission held that an "incompatible channel swap" existed where each proposed change was entirely essential and mutually exclusive to one another. Every element of the proposal had to be mutually contingent, such that the entire proposal would be impossible to effectuate if one of the elements was missing.<sup>14</sup> Even where an incompatible channel swap existed, the Commission then determined whether to grant such

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<sup>13</sup> *In re* Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services, *Report and Order*, MB Docket No. 05-210, Appendix A (November 29, 2006).

<sup>14</sup> *See, e.g.*, Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Carlisle, Irvine, and Morehead, Kentucky), *Report and Order*, 12 FCC Rcd 13181 (August 25, 1997).

proposals on a case-by-case basis.<sup>15</sup> Here, not only is the rule relied upon by the Joint Parties no longer in effect, but the KMSW-FM upgrade would not have qualified for consideration as an incompatible channel swap even if the rule remained in existence.

10. The Joint Parties would like the Commission to give them a free pass to upgrade KMSW-FM to a non-adjacent channel and higher class on Channel 272C2. This simply cannot be done without inviting, as the Media Bureau has done, the filing of competing expressions of interest. The Joint Parties' game plan runs afoul of impediments like *Ashbacker*<sup>16</sup> and the fact that no Commission Rule or case precedent supports their desire to bootstrap the non-adjacent channel allocation of 272C2 to Bicoastal for use by KMSW-FM. The Joint Parties recognize the fact that the gift of Channel 272C2 to KMSW-FM is not an essential, incompatible element of their overall proposal, a knowledge that is evident in the wording of the Petition. For example, all of the channel and community changes other than the use of Channel 272C2 by KMSW-FM, are characterized in the Petition as changes that "will be necessary" or that "must" occur.<sup>17</sup> In

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<sup>15</sup> See Modification of FM Broadcast Licenses to Higher Class Co-Channel or Adjacent Channels, *Report and Order*, 60 RR 2d 114 (April 29, 1986).

<sup>16</sup> See *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 66 S. Ct. 148, 90 L. Ed. 108 (1945). The Court held in *Ashbacker*, "that where two *bona fide* applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him." *Ashbacker*, 326 U.S. at 333. Congress subsequently gave to applicants the right to participate in an auction for mutually exclusive applications. 47 U.S.C. § 309. In *Bachow Communs., Inc. v. FCC*, 345 U.S. App. D.C. 45, 237 F. 3d 6836 (2001), the Circuit Court noted that while not everybody interested in a telecommunications license has a right to a comparative hearing that right inheres to those who actually file timely, mutually exclusive applications. However, the Court went on to say that *Ashbacker* rights do inhere in potential applicants whose right to file a timely competing application is frustrated by a Commission freeze order. *Bachow* at note 7. The present case is analogous to the *Bachow*. case in that Cumulus would be a potential applicant for the proposed channel and withdrawal or rescission of the Public Notice and opportunity to file "competing expressions of interest" would result in an interested potential applicant - - *i.e.*, Cumulus - - being unable to pursue the channel, a violation of its *Ashbacker* rights.

<sup>17</sup> See *Petition*, *supra* note 4, at paras. 1, 7-10, and 18.

contrast, the voluntary upgrade of KMSW-FM is described as something that Bicoastal “wishes” to do and as something that “can” be done.<sup>18</sup>

11. *The Inclusion of the KMSW-FM Upgrade is an Impermissible Attempt to Circumvent the Commission’s Policies Regarding the Backfill of Loss Areas.* The obvious reason the KMSW-FM upgrade was categorized by the Joint Parties as an essential element of the rule making is because the relocation of KACI-FM to Tualatin creates a substantial area of lost service, including, as Cumulus has documented, white and gray loss areas. The Joint Parties pretend there is no KACI-FM loss area. Indeed, the Petition asserts that: “No white or gray area will be created.”<sup>19</sup> Interestingly, the Joint Parties’ support for this incorrect assertion is Figure 4 of Engineering Statement in support of the Petition, which depicts the coverage of KMSW-FM if it were operating on Channel 272C2.<sup>20</sup> The fact is that when KACI-FM, which is a Class C2 facility in Tualatin, departs, its former 60 dBu contour area is not encompassed by the KMSW-FM 60 dBu contour, because KMSW-FM is only a Class C3 facility on Channel 224C3. As detailed in the Cumulus Reply Comments, the Joint Parties proposal would result in the creation of a white area of 646 persons in 414.7 square kilometers, and a gray area of 1,502 persons in 464.9 square kilometers.<sup>21</sup>

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<sup>18</sup> *Id.* at para.17.

<sup>19</sup> *Id.* at 3.

<sup>20</sup> *Id.*, *Engineering Statement in Support of Petition for Rule Making* [hereinafter *Petition Engineering Statement*] at 2 and Figure 4.

<sup>21</sup> The proposal would also result in 7,442 citizens in 1701.7 square kilometers losing their third station, 2,528 citizens in 1,261.8 square kilometers losing their fourth station, and 2,374 residents in 609.9 square kilometers losing their fifth station. *Cumulus Reply Comments*, *supra note 5*, at 6.

12. The Commission has held that creation of a “white area” resulting in the loss of a potential first aural service falls under Priority 1, the pinnacle of the Commission’s priority system when examining FM allotments.<sup>22</sup> As a corollary, the Commission has held loss of first aural service to even a small group of citizens is a fatal flaw in an allotment proposal.<sup>23</sup> Furthermore, even if it were the case that the KMSW-FM upgrade is an essential and incompatible element to the Joint Parties proposal, the substitution of non-adjacent Channel 272C2 for Channel 224C3 at The Dalles would be impermissible as a “backfill”<sup>24</sup> solution to fill in the loss areas. Under *Sells, Arizona*,<sup>25</sup> the Commission has made it explicitly clear that a backfill allotment or an existing vacant allotment cannot negate the creation of white or gray areas.

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<sup>22</sup> The other priorities are: (2) second full-time aural service; (3) first local service and (4) other public interest factors. Co-equal weight is given to Priorities 2 and 3. *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d (1982).

<sup>23</sup> See, e.g., Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Cheyenne, Wyoming and Gering, Nebraska), Report and Order, 15 FCC Rcd 7528 (April 14, 2000) (The Commission rejected an allotment plan that would have resulted in the loss of potential first aural service to just 211 people from an authorized but unbuilt station); accord, Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Pecos and Wink, Texas), Report and Order, 14 FCC Rcd 2840 (February 12, 1999) (The Commission rejected a community of license change proposal for Station KPLY from Pecos, Texas to Wink, Texas because even though KPLY was unbuilt, it would provide a first service to 673 people and a second service to 20 people); accord Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Littlefield, Wolfforth, and Tahoka, Texas), Report and Order, 12 FCC Rcd 3215, 3220 (March 21, 1997) (retention of first aural service to 411 persons buttresses decision to deny a proposed alternate allotment arrangement).

<sup>24</sup> A “backfill” allotment is one made to replace an allotment that is being modified or relocated in connection with the change of community of license of an authorized station. See, e.g., *Cheyboygan, et. al., Michigan*, Request for Supplemental Information, 17 FCC Rcd 20491 (October 18, 2002).

<sup>25</sup> *In re* Amendment of 73.202(b), FM Table of Allotments, FM Broadcast Stations (Sells, Willcox, and Davis-Monthan Air Force Base, Arizona), *Memorandum Opinion and Order*, 23 FCC Rcd 1242 (February 1, 2008).

“[W]e will no longer consider the potential service from a ‘backfill’ allotment as an adequate substitute for the removal of first or second full-time reception service by an operating station and will deny a proposal relying on a ‘backfill’ allotment on Priority (1) and (2) grounds.”<sup>26</sup>

*Sells* solidified several bedrock Commission principles: (a) the replacement of an operating station with a vacant allotment or unconstructed permit “does not adequately cure the disruption to existing service;”<sup>27</sup> (b) the public has a legitimate expectation that existing service will continue,<sup>28</sup> and (c) the curtailment of existing service is not in the public interest.<sup>29</sup>

13. **The Media Bureau Understands What Is Involved.** The Joint Parties’ suggestion that the Media Bureau misunderstood how the KMSW-FM non-adjacent channel upgrade “relates to the overall rule making proposal that is before the Commission”<sup>30</sup> is wrong and ignores the history of this proceeding. The issue, pro and con, has been argued to the staff in numerous pleadings in Docket 05-10, starting with the Petition.<sup>31</sup> For example, in its Reply Comments, Cumulus clearly stated its position on the issue:

[T]he Joint Parties opine that MSW, which operates KMSW on Channel 224C3 at The Dalles, “wishes to upgrade KMSW to Channel 272C2” [citation omitted]. No support for this non-adjacent upgrade is offered other than that it could be done if a

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<sup>26</sup> *Id.* at 1246.

<sup>27</sup> *Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd 7094 (1990).

<sup>28</sup> *See, e.g., Hall v. FCC*, 237 F.2d 567 (D.C. Cir. 1956); *KTVO, Inc.*, 57 RR 2d 648 (1984).

<sup>29</sup> *Id.*

<sup>30</sup> *Joint Parties Comments*, *supra* note 1, at 2.

<sup>31</sup> Prior to the issuance of the Public Notice, as noted above, the Media Bureau may have failed to appreciate the gratuitous, non-adjacent nature of the KYYT-FM/Channel 272C2 portion of the Joint Parties Petition.

proposed change in channels at Goldendale, Washington is adopted, another aspect of the overall plan that will not happen for the reasons discussed in the following paragraph. The upgrade of KMSW to a higher class on a non-adjacent channel is not a necessary step required in order to accommodate any of the other changes proposed by the Joint Parties. Rather, it simply seems that a better channel could be allocated to The Dalles so why not assign it to MSW without its availability being subjected to any counterproposals or competing expressions of interest. Although for the reasons set forth herein [the Channel 300/FAA issue], the FM channel reallocations proposed in the Petition will not move forward, Cumulus, nevertheless, notes that it would have an interest in and would file an application for Channel 272C2 at The Dalles and would participate in an auction for that channel should it be so assigned.<sup>32</sup>

14. Additionally, in response to the Order To Show Cause issued to Cumulus by the Media Bureau on March 31, 2006,<sup>33</sup> Cumulus renewed its arguments relating to the gratuitous, non-adjacent nature of the proposed KMSW-FM upgrade.<sup>34</sup> The Joint Parties also filed “Comments On Order To Show Cause” on May 2, 2006.<sup>35</sup> The Joint Parties defended the non-adjacent channel upgrade for KMSW-FM on the basis of the following faulty reasoning:

In fact, while the upgrade of KMSW to higher class is on a non-adjacent channel, it is entirely proper under longstanding Commission precedent. It qualifies as an incompatible channel

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<sup>32</sup> *Cumulus Reply Comments, supra note 5*, at 7-8 (footnotes omitted).

<sup>33</sup> *In re* Amendment of 73.202(b), FM Table of Allotments, FM Broadcast Stations (Monument, Oregon; Prairie City, Prineville, and Sisters, Oregon and Weiser, Idaho; The Dalles, Tualatin, Eugene, Albany, Lebanon, Paisley, and Diamond Lake, Oregon and Goldendale, Washington), *Order to Show Cause*, MB Docket No. 05-10 (March 31, 2006).

<sup>34</sup> *In re* Amendment of 73.202(b), FM Table of Allotments, FM Broadcast Stations (The Dalles, Tualatin, Eugene, Albany, Lebanon, Paisley, and Diamond Lake, Oregon and Goldendale, Washington), *Comments of Cumulus Licensing LLC to Order to Show Cause*, MB Docket 05-10 (May 2, 2006), at 5-6.

<sup>35</sup> *In re* Amendment of 73.202(b), FM Table of Allotments, FM Broadcast Stations (The Dalles, Tualatin, Eugene, Albany, Lebanon, Paisley, and Diamond Lake, Oregon and Goldendale, Washington), *Comments on Order to Show Cause*, MB Docket 05-10 (May 2, 2006).

swap under Section 1.420(g)(3). In adopting the rule which permits upgrades on co- and adjacent channels without allowing competing expressions of interest, the Commission stated that it would consider analogous proposals involving channel substitutions at other communities which would be necessary to create a mutual exclusive relationship required to comply with Section 1.420(g)(3). It is only by the substitution of Channel 279C for Channel 300C by Station KHPE(FM) at Albany, Oregon and the substitution of Channel 300C for Channel 250C by KNRQ-FM at Eugene, Oregon that clear spacing is created to allow for the allotment of Channel 300C by Station KYYT(FM) at Goldendale. (citations omitted)<sup>36</sup>

15. As noted by Cumulus in its Step analysis above, the changes proposed by the Joint Parties for KYYT-FM and KMSW-FM are nice insofar as their plans are concerned, but neither modification is in any way required. Aside from the fatal flaw that the rule 1.420(g)(3) upon which the Joint Parties' scheme hinges no longer exists, the issue of whether the filing of competing expressions of interest should be permitted was directly argued by them. The Joint Parties stated unequivocally in response to the Show Cause Order that: "Accordingly, the proposed upgrade at The Dalles does not require the Joint Petitioners to specify an additional equivalent channel for use by other interested parties or allow the acceptance of competing expressions of interest."<sup>37</sup> In sum, the fact that the Media Bureau invited the filing of competing expressions of interest for Channel 272C2 at The Dalles after considering the Joint Parties argument that it should not be done, makes it clear that the staff does not "misunderstand" what is involved.

16. **In Accordance with Rule 1.420(g), Competing Expressions of Interests Are Required.** The Public Notice correctly invited the filing of competing expressions of interest for

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<sup>36</sup> *Id.* at 4-5.

<sup>37</sup> *Id.* at p. 5 (emphasis added).

Channel 272C2 at The Dalles, Oregon “pursuant to Section 1.420(g) of the Commission’s Rules.” Under Rule 1.420(g), KMSW-FM could upgrade to Channel 272C2 only if (emphasis added):

- (1) There is no other timely filed expression of interest, or
- (2) If another interest in the proposed channel is timely filed, an additional equivalent class of channel is also allotted, assigned or available for application.<sup>38</sup>

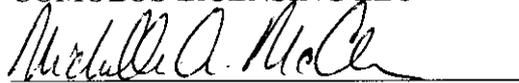
Neither condition applies in this case. Therefore, the license for KMSW-FM cannot be modified as proposed by the Joint Parties, and Cumulus' expression of interest must be accepted and processed.

**Conclusion**

For the reasons set forth above, Cumulus respectfully requests that the Media Bureau expeditiously deny or dismiss the Joint Parties' Comments Objecting To The Issuance Of Public Notice.

Respectfully submitted,

CUMULUS LICENSING LLC



Alan C. Campbell

Michelle A. McClure

Ronald P. Whitworth

Its Counsel

FLETCHER, HEALD & HILDRETH, PLC  
1300 N. 17<sup>th</sup> Street, 11<sup>th</sup> Floor  
Arlington, VA 22209  
703-812-0400

December 8, 2008

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<sup>38</sup> The Joint Parties note that Channel 272 is the only channel that would be available to operate as a class C2 at The Dalles. See *Petition Engineering Statement*, *supra* note 20, at 5.

**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 "Response to Comments Objecting to the Issuance of Public Notice" was sent this 8<sup>th</sup> day of December, 2008, via email where indicated, and via United States First Class Mail, postage prepaid, to the following:

Peter Doyle, Esq. (Peter.Doyle@fcc.gov)  
Chief, Audio Division, Media Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Room 2-A360  
Washington, DC 20554

John A. Karousos (John.Karousos@fcc.gov)  
Assistant Chief, Audio Division, Media Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Rodolfo Bonacci (Rodolfo.Bonacci@fcc.gov)  
Media Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Rolanda F. Smith (Rolanda.Smith@fcc.gov)  
Media Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

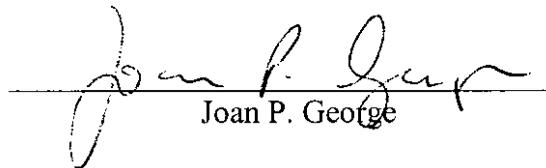
Lee J. Peltzman, Esq.  
Aaron P. Shainis, Esq.  
Shainis & Peltzman, Chartered  
Counselors at Law  
1850 M Street, NW  
Suite 240  
Washington, DC 20036

J. Dominic Monahan, Esq.  
Luvaas Cobb  
777 High Street, Suite 300  
Eugene, OR 97401

Lewis J. Paper, Esq.  
Dickstein Shapiro LLP  
1825 Eye Street, N.W.  
Washington, D.C. 20006

Erwin G. Krasnow, Esq.  
Garvey Schubert Barer  
1000 Potomac Street, N.W.  
5<sup>th</sup> Floor, Flour Mill Building  
Washington, D.C. 20007

Western Oregon Radio Club  
9115 SW 176th Avenue  
Beaverton, OR 97007

  
Joan P. George