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

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

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

OPPOSITION TO MOTION TO DISMISS
COMMENTS OF CUMULUS LICENSING LLC

Cumulus Licensing LLC ("Cumulus"), by its attorneys, submits this Opposition to Motion to Dismiss Comments of Cumulus Licensing LLC (the "Motion to Dismiss") filed in this proceeding by Portland Broadcasting, LLC, Bicoastal Media Licenses, IV, LLC and Extra Mile Media, Inc. (collectively, the "Joint Parties") on December 10, 2008.[1]

Introduction

1. In what has become a tiresome pattern within this proceeding, on December 10, 2008, the Joint Parties filed yet another creatively-titled pleading, its "Motion to Dismiss Comments of Cumulus Licensing LLC," less than two weeks after filing its "Comments

[1] *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) [hereinafter *The Dalles Proceeding*], *Motion to Dismiss Comments of Cumulus Licensing LLC*, MB Docket 05-10 (December 10, 2008) [hereinafter *Joint Parties Motion to Dismiss*].

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Objecting to the Issuance of Public Notice."[2] Neither of these pleadings was filed pursuant to any Commission rule, nor were they filed in response to any Commission request or pleading cycle.[3] Rather, the Joint Parties apparently feel obliged to consume even more of the Commission's time and resources by rehashing the arguments presented time and again, while ignoring other more relevant issues.

2. The Joint Parties fashioned their November 24, 2008 submission as Comments objecting to the Commission's November 7, 2008 issuance of a Public Notice (DA No. 08-2459), which invited interested parties to file competing expressions of interest for Channel 272C2 at The Dalles, Oregon. Despite there being no merit to the Joint Parties' claims, and no particular rule or pleading cycle associated with the Joint Parties Comments, Cumulus submitted a Response providing support for the Commission's action, demonstrating why issuance of the Public Notice was entirely appropriate.[4] The Joint Parties have now fired back with their Motion to Dismiss, which fails to address any of the relevant points Cumulus spelled out while defending the Commission's correct invitation for the filing of competing expressions of interest pursuant to Rule 1.420(g). Instead, the Joint Parties have put more lipstick on their dead pig, repeating the same flawed arguments while again failing to acknowledge the issues rendering their case moot.

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[2] The Dalles Proceeding, *Comments Objecting to the Issuance of Public Notice*, (November 24, 2008) [hereinafter Joint Parties Comments].

[3] It is ironic that the Joint Parties' two most recent pleadings were not filed pursuant to any Commission rule because, likewise, their argument relies on a non-existent Commission rule.

[4] The Dalles Proceeding, *Response to Comments Objecting to the Issuance of Public Notice*, (December 8, 2008) [hereinafter Cumulus Response].

Argument

3. ***The Joint Parties Refuse to Acknowledge Their Fatal Defects***. Noticeably absent from the Motion to Dismiss is any acknowledgment of what Cumulus has argued for more than three years: the Joint Parties' paired proposals to move Station KYYT-FM, Goldendale, Washington, from Channel 272C2 to Channel 300C2, and to upgrade KMSW(FM) from Channel 224C3 to Channel 272C2 at The Dalles, Oregon, are non-essential and technically unrelated bonuses that the Joint Parties now categorize as "inextricably intertwined" with the rest of their plan.[5] As demonstrated by Cumulus throughout this proceeding, there are only four requisite steps for the Joint Parties to relocate KACI-FM from The Dalles, Oregon, to Tualatin, Oregon. The two other proposed channel reallocations -- KYYT-FM's move from Channel 272C2 to Channel 300C2, and Channel 272C2's move from Goldendale, Washington to The Dalles, Oregon, for use by KMSW(FM) -- are extraneous from a technical standpoint. Additionally, the requested changes to relocate Station KXPC(FM) from Lebanon, Oregon to Paisley, Oregon on Channel 279C and to force Station KNRQ(FM) to move from Channel 250C to Channel 300C at Eugene, Oregon can be accomplished without the need for the KYYT-FM and KMSW(FM) changes.[6] This fact has been documented thoroughly by Cumulus and does not need to be reiterated in detail here but the bottom line is that KMSW(FM)'s current 224C3 facility is in no way mutually exclusive with the proposed 272C2 allocation, and, as such, does not link the KMSW(FM) move to the rest of the proposal.

4. ***The Failure of the Joint Parties to Respond to Their Fatal Defects is No Oversight***. The Joint Parties' multiple inventive pleadings with no reference to their fatal defects

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[5] *See* Cumulus Response at 2-5.

[6] *Id.*

are intentional. These defects cannot be addressed because to do so would inevitably expose the Joint Parties' three-year shell game in which they have attempted to conceal the purpose of including the last two steps of their rulemaking proposal. As demonstrated throughout the proceeding, the *real* reason the Joint Parties have categorized the non-adjacent channel upgrade of KMSW(FM) as essential to the rulemaking is because without it, their rulemaking confronts a significant service area loss issue. Contrary to the Joint Parties' assertions that "[n]o white or gray area will be created," their proposal to move KACI-FM to Tualatin, Oregon, in fact, results in a white area of 646 persons in 414.7 square kilometers, and a gray area of 1,502 persons in 464.9 square kilometers.[7] As explained in the Cumulus Response, creation of this white area results in the loss of a first aural service, which under the *Sells, Arizona*[8] case is a fatal flaw.[9]

5. ***The Joint Parties Fail to Acknowledge Their Use of a Non-Existent Rule.*** The non-essential elements of the proposal and the creation of white/gray areas are not the only issues that the Joint Parties have chosen to ignore. Absent from the Joint Parties' Motion to Dismiss is any explanation concerning their use of a non-existent rule. Until the Joint Parties filed their Comments, they had relied upon Section 1.420(g)(3) of the Commission's rules, contending that the KMSW-FM upgrade was an "incompatible channel swap."[10] In the Joint

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[7] Rather than burden the Commission staff with yet another recitation of the facts that are determinative to the outcome of this proceeding, we simply point the Commission to the record, throughout which Cumulus has demonstrated that white and gray areas are created by the Joint Parties' proposal. *See* Cumulus Response at 8-10.

[8] *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 (2008).

[9] *See* Cumulus Response at 8-10.

[10] The Dalles Proceeding, *Joint Parties Comments on Order to Show Cause*, filed on May 2, 2006, (2006), at 4.

Parties Comments, the Joint Parties amended their citation to Section 1.420(g), undoubtedly realizing that the subsection previously relied upon ceased to exist.[11] However, under the revised Section 1.420(g), KMSW-FM could upgrade to Channel 272C2 only if:

> (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.

In this case there was a timely expression of interest and the Joint Parties have not shown any other Class C2 channel to be available at The Dalles. Therefore, if Channel 272C2 were to be allotted to The Dalles, it would have to be as a vacant allotment. As such, *Sells* dictates that a vacant allotment cannot be relied upon to "backfill" the white area that would be created by the relocation of KACI-FM from The Dalles to Tualatin.[12]

6. ***The Joint Parties Continue to Hide the Ball with Misguided Allegations of Administrative Abnormalities***. Having lost on the main issue, the Joint Parties assert that Cumulus' expression of interest should be "rendered invalid" because of two alleged procedural deficiencies -- the failure to file an application "with the Commission for Channel 272C2 at The Dalles with the appropriate FCC filing fee," and the failure to "include a timely reimbursement pledge."[13]

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[11] *See* Comments Objecting to the Issuance of Public Notice at 4.

[12] *Sells, supra* note 8.

[13] *See Joint Parties Motion to Dismiss, supra* note 1, at 3. It is ironic that the Joint Parties attempt to rely on alleged technical deficiencies in Cumulus' expression of interest in light of the fact that the Joint Parties' original petition for rule making to move KACI-FM is technically deficient and should be dismissed accordingly. The original petition for rule making to move KACI-FM was treated as a counterproposal back in 2005. *See* Reply Comments at 2. The

7. ***The Filing of Form 301 and/or a Reimbursement Pledge Are Not Required with Cumulus' Competing Expression of Interest***. The *Community of License* Order cited by the Joint Parties (in fact, the very section specified in their footnote) is explicit about when a Form 301 is required.[14] A Form 301 must be filed with an original proposal or a counterproposal.[15] Likewise, the case cited by the Joint Parties for this proposition concerned the dismissal of a *counterproposal* for failure to file a Form 301.[16] Cumulus has not filed an original proposal or a counterproposal in this proceeding. The Joint Parties' assertion that this policy somehow applies to the filing of a competing expression of interest, despite the clear limitation of the Commission's Order, is simply without merit.

Commission requires counterproposals to "be technically and procedurally correct at the time they are filed". *In re* Amendment of Section 73.202(b), FM Table of Allotments, FM Broadcast Stations (Clewiston, Fort Myers Villas, Indiantown, Jupiter, Key Colony Beach, Key Largo, Marathon, and Naples, Florida), *Memorandum Opinion and Order*, 10 FCC Rcd 6548 (1995)(even if a timely expression of interest had been filed by the counterproposal proponent, the counterproposal would have been dismissed on independent grounds of technical deficiency). Significantly, the Joint Parties counterproposal was not technically correct at the time of filing. The channel the Joint Parties want KNRQ-FM at Eugene, Oregon, to be forced to use was in fact not available due to FAA issues. *See* Reply Comments at 5. If in fact those FAA problems now have been remedied -- a contention Cumulus rejects -- certainly that resolution was not reached until almost three years after the counterproposal deadline in this proceeding. Under *Clewiston*, the Joint Parties' counterproposal, which was not technically and procedurally correct at filing, should be dismissed. *See Clewiston* at 6549. *See also In re* Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Fort Bragg, California), *Report and Order*, 6 FCC Rcd 5817 (1991)(counterproposal was dismissed as technically defective); *In re* Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Springdale, Arkansas, Carthage, Aurora and Willard, Missouri), *Report and Order*, 4 FCC Rcd 674 (1988)(counterproposal dismissal due to technical deficiencies).

[14] *See In re* Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services, 21 FCC Rcd. 14212 (2006), at 13.

[15] *Id.*

[16] *In re* Amendment of 73.202(b), FM Table of Allotments, FM Broadcast Stations (La Grande and Prairie City, Oregon), DA 08-2345 (2008).

8. Likewise, the assertion that a reimbursement pledge is necessary with a competing expression of interest also is misguided. In making this assertion, the Joint Parties rely on two cases issued roughly two decades ago. In *Brookville*,[17] *York*[18] and the handful of cases that have cited those cases thereafter, the Commission staff gave specific notice to parties filing a competing expression of interest in those proceedings that such a pledge was required.[19] In *York*, for example, the Commission dismissed an expression of interest without a reimbursement pledge because the FCC "clearly placed [the party filing the competing expression of interest] on notice that his expression of interest could be dismissed if it did not include a reimbursement pledge."[20] In contrast, in this proceeding, the Public Notice issued by the Commission inviting competing expressions of interest for Channel 272C2 at The Dalles, Oregon, did not contain any requirement that a reimbursement pledge must be included.[21] Nor is

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[17] *In re* Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Brookville and Punxsutawney, Pennsylvania), *Request for Supplemental Information*, 3 FCC Rcd 5555 (1988).

[18] *In re* Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (York, Alabama), *Report and Order*, 4 FCC Rcd 6923 (1989).

[19] In fact, the majority of the cases citing *Brookville* involve parties which filed proposals or counterproposals, not competing expressions of interest. *See, e.g.*, In re Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Mary Esther, Apalachicola, and Crawfordville, Florida), 7 FCC Rcd 1417 (1997); *See also* In re Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Blair, Nebraska; Ames, Alta, Denison, Lake City, Perry, Sac City and Storm Lake, Iowa), 8 FCC Rcd 4086 (1993). There are no provisions of the Commission's rules requiring such a pledge to be filed with a competing expression of interest, absent an express requirement to include a pledge contained within a *Notice of Proposed Rule Making*, or in a separate Public Notice inviting the filing of competing expressions of interest as in Public Notice DA No. 08-2459 in this case.

[20] *York, supra* note 19, at n.5.

[21] However, despite the fact that no reimbursement pledge was expressly mandated in this proceeding, in the interest of clarifying the record, Cumulus hereby confirms that it has always

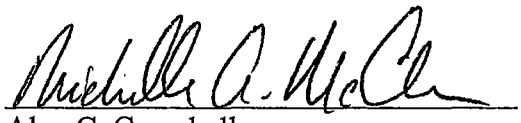
such a pledge necessary, since the Commission will condition the grant of the construction permit on the requirements of *Circleville* being satisfied.[22] That obligation exists regardless of whether the ultimate beneficiary of the channel change even participated in the rulemaking.

Conclusion

For the reasons set forth above, Cumulus respectfully requests that the Media Bureau expeditiously deny or dismiss the Joint Parties' Motion to Dismiss Comments of Cumulus Licensing LLC.

Respectfully submitted,

CUMULUS LICENSING LLC



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December 22, 2008

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had every intention of reimbursing KYYT-FM's reasonable costs associated with any channel change necessary.

[22] It is long-standing Commission policy that the party that eventually benefits from the allotment of a channel is obligated to reimburse a station that changes its channel to facilitate that allotment its reasonable costs in making that change. *In re* Amendment of Section 73.202, Table of Assignments, FM Broadcast Stations (Leitchfield, Ky., Rolla and Columbia, Mo., Bakersfield, Calif., Sandusky, Mich., Enterprise and Troy, Ala., Ladysmith, Wis., and Ironwood, Mich., Sturgeon Bay, Wis., Morris, Minn., Jerseyville, Ill., Augusta, Ga, Brewton and Andalusia, Ala., Wickenburg, Ariz., Potsdam, N.Y., New Albany, Ohio, and Circleville, Ohio), *Second Report and Order*, 8 FCC 2d 159 (1967).

Declaration of Lewis W. Dickey, Jr.

I, Lewis W. Dickey, Jr., hereby declare as follows:

1. I am the Chairman, President, and Chief Executive Officer of Cumulus Media, Inc., (Cumulus).

2. I have reviewed the accompanying Opposition to Motion to Dismiss Comments of Cumulus Licensing LLC and verify that the facts set forth therein are true and correct to the best of my knowledge, information and belief.

3. I declare under penalty of perjury that the foregoing is true and correct.

12/22/03
Date

Lewis W. Dickey, Jr.
Chairman, President, and CEO
Cumulus Media, Inc.

Certificate of Service

I, Barbara L. Lyle, a secretary in the law firm of Fletcher, Heald & Hildreth, PLC, do hereby certify that a true copy of the "Opposition to Motion to Dismiss Comments of Cumulus Licensing LLC" was sent this 22nd day of December, 2008, via email where indicated and via United States First Class Mail, postage prepaid, to the following:

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