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Federal Communications Commission  
Office of the Secretary

**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

To: The Office of the Secretary  
Attention: Chief, Audio Division, Media Bureau

**REPLY TO OPPOSITION TO MOTION TO DISMISS COMMENTS OF  
CUMULUS LICENSING LLC**

Portland Broadcasting, LLC, licensee of Station KXPC-FM, Lebanon, Oregon, Bicoastal Media Licenses IV, LLC ("Bicoastal")(successor in interest to Columbia Gorge Broadcasters, Inc. and M.S.W. Communications, LLC), licensee of Station KACI-FM, The Dalles, Oregon and Station KMSW(FM), The Dalles, Oregon and Extra Mile Media, Inc. ("Extra Mile"), licensee of Station KHPE(FM), Albany, Oregon (collectively, the "Joint Petitioners"), by their attorneys, hereby submit their Reply to the Opposition to Motion to Dismiss Comments of Cumulus Licensing LLC. In support of their position, the Joint Petitioners submit the following:

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The Joint Petitioners, on December 10, 2008, filed a Motion to Dismiss Comments of Cumulus Licensing LLC. Cumulus Licensing LLC ("Cumulus") has filed an *Opposition to Motion to Dismiss Comments of Cumulus Licensing LLC*.<sup>1</sup>

The Joint Petitioners demonstrated in their Motion to Dismiss Comments of Cumulus Licensing LLC that the competing expression of interest filed by Cumulus in response to the Media Bureau's November 7, 2008 Public Notice (DA No. 08-2459) was not valid and, accordingly, could not be credited because it contained multiple deficiencies. Cumulus' Opposition, while no doubt well intended, demonstrates a lack of understanding of the Commission's rule making process. Cumulus claims as a fatal defect in the Joint Petitioners' proposal the proposed non-adjacent channel upgrade to Station KMSW, which covers a proposed loss area. Cumulus asserts that this is a non-essential aspect of the rule making proposal, however, the Joint Petitioners' proposal to upgrade KMSW is quite appropriate and is consistent with numerous Commission precedent. For example, in *Arlington and Boardman, Oregon*,<sup>2</sup> the Commission approved a proposal which included a modification of a station license in order to cover a loss area. Likewise, in *Corona de Tucson, Sierra Vista, Tanque Verde and Vail, Arizona*,<sup>3</sup> the Commission granted aspects of a counterproposal which sole purpose was to replace service by stations that were being relocated to other communities. Thus,

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<sup>1</sup> As noted, the Joint Petitioners' Motion to Dismiss Comments was filed on December 10, 2008. Pursuant to Section 1.45(c), a party which files the original pleading may reply to oppositions within five days after the time for filing oppositions has expired. An Opposition to the Joint Petitioners' Motion to Dismiss would have been due to be filed on December 29, 2008 and the Reply to the Opposition is, therefore, due on January 9, 2009.

<sup>2</sup> 23 FCC Rcd 1174, para. 7 (MB 2008).

<sup>3</sup> 22 FCC Rcd 13933, paras. 3, 13 (MB 2007), *petition for recon. denied*, 23 FCC Rcd 4792, para. 3 (MB 2008), *app. for review pending*.

contrary to Cumulus' contention, there is nothing improper about the Joint Petitioners' upgrade proposal for Station KMSW.

Likewise, Cumulus again raises the argument that the KMSW upgrade does not constitute an incompatible channel swap. Cumulus points out that Station KMSW may be upgraded only if there is no other timely filed expression of interest filed. While Cumulus has filed an expression of interest, it is invalid for the multiple reasons pointed out by the Joint Petitioners in their Motion to Dismiss Comments of Cumulus Licensing LLC.<sup>4</sup>

Cumulus also argues that its expression of interest is not invalid and that it was not required to file an FCC Form 301 and an appropriate filing fee nor make a reimbursement pledge to the stations whose licenses it would modify as part of its expression of interest. In its *Community of License Order*,<sup>5</sup> the Commission concluded that a party requesting the addition of a new allotment in a rule making proceeding must simultaneously file an FCC Form 301 application specifying the proposed facilities and pay a fee for each proposed new allotment, and also certify that, if its allotment is adopted, it will participate in the auction for the new channel. Cumulus has certified that it will participate in an auction if its proposed allotment is adopted, however, it has not

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<sup>4</sup> Similarly, Cumulus' argument that the initial issuance of an Adverse Air Hazard Determination by the FAA renders the Joint Petitioners' proposal technically defective for all time is without substantive support. Cumulus cites no case holding this principle, nor can it since none exists. In the overwhelming majority of cases, rule making proponents need not even seek FAA approval until the application stage. Certainly, no petitioner has ever seen its proposal ruled procedurally defective because, even though it had FAA approval, it did not have an affirmative FAA determination at the time of filing.

<sup>5</sup> *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, paras. 18-21 (2006).

filed the required FCC Form 301 nor paid the FCC filing fee. Cumulus' half-hearted claim that it need not file an FCC Form 301 because it did not file the original proposal lacks substantive merit and must be rejected. If accepted, the Cumulus expression of interest could result in the allotment of an additional channel which would be auctioned and, as such, it has no less an obligation to timely file an FCC Form 301 and pay the required filing fee than any other rule making proponent.

Cumulus' assertion that it need not have included a reimbursement pledge as part of its expression of interest borders on the frivolous. It claims that the Commission gave specific notice to parties in the *York, Alabama* proceeding that anyone filing a competing expression of interest would be required to make such a pledge.<sup>6</sup> However, prior to the decision in *York, Alabama*, the Commission in *Brookville and Punxsutawney, Pennsylvania*,<sup>7</sup> could hardly have made itself clearer. It announced a prospective policy in all future proceedings that it would reject those expressions of interest that failed to include a necessary reimbursement pledge.

“[W]e are taking this opportunity to state our policy concerning the content of competing expressions of interest...[W]here, as here, the allotment of a channel requires an existing station to modify its operation by specifying a new channel, it is well established Commission policy that licensees and/or permittees required to change channels so as to allow a new allotment elsewhere are entitled to reimbursement. See *Circleville, Ohio*, 8 FCC 2d 159 (1967). Therefore, parties filing competing expressions of interest in cases which require channel changes

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<sup>6</sup> 4 FCC Rcd 6923 (MMB 1989).

<sup>7</sup> 3 FCC Rcd 5555 (MMB 1988).

by existing licensees to accommodate the new allotment are also required to state an intention to reimburse the affected parties. *The absence of such a statement will render the expression of interest invalid.*<sup>8</sup>

In view of this clear and express statement of policy, Cumulus' untimely reimbursement pledge must be rejected and its expression of interest considered invalid. It additionally suffers from Cumulus' failure to obtain the consent of those stations whose sites it would relocate as a result of its expression of interest.

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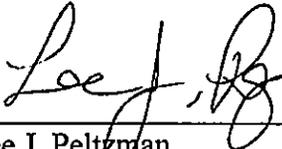
<sup>8</sup> *Brookville* at para. 9 (italics added). While it is accurate that the Commission made mention of prior notice in rejecting as untimely a late-filed reimbursement pledge in *York, Alabama*, that decision only made mention of that fact in passing because the party expressing the interest had claimed that it filed its expression of interest prior to the Commission's announcement of its new policy in the *Brookville* case. Here, Cumulus scarcely has that argument available to it. *Brookville's* statement of policy is fully applicable to it.

In view of the above, the Joint Petitioners urge the Commission, in view of the multiple deficiencies contained in the Cumulus Comments, to reject the Cumulus expression of interest and, instead, substitute Channel 272C2 for Channel 224C3 at The Dalles, Oregon and modify the license of Station KMSW accordingly.

Respectfully submitted,

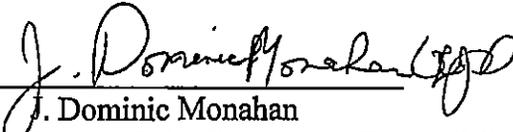
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Dated: January 9, 2009

CERTIFICATE OF SERVICE

I, Malinda L. Ellerman, hereby certify that on this 9<sup>th</sup> day of January, 2009, true and correct copies of the foregoing "Reply to Opposition to Motion to Dismiss Comments of Cumulus Licensing LLC" have been served via U.S. mail, postage prepaid, upon the following persons:

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