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February 11, 2009

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VIA HAND DELIVERY

Ms. Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C. 20554

FILED/ACCEPTED
FEB 11 2009
Federal Communications Commission
Office of the Secretary

Re: Amendment of Section 73.202(b)
Table of Allotments
FM Broadcast Stations
Evergreen, Alabama and Shalimar, Florida
MB Docket No. 04-219
RM-10986
Opposition to Motion to Dismiss

Dear Ms. Dortch:

Transmitted herewith on behalf of Qantum of Ft. Walton Beach License Company, LLC, are an original and four copies of its Opposition to Motion to Dismiss in the above-referenced matter.

If there are any questions concerning this submission, please contact the undersigned directly.

Respectfully submitted,

John M. Pelkey

Enclosures
JMP:yg
DC_DOCS:682754.1

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Before the
Federal Communications Commission
Washington, D.C. 20054

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Federal Communications Commission
Office of the Secretary

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	MB Docket No. 04-219
Table of Allotments,	)	RM-10986
FM Broadcast Stations.	)	
(Evergreen, Alabama, and Shalimar, Florida)	)	

To: Office of the Secretary
Attention: The Commission

OPPOSITION TO MOTION TO DISMISS

Qantum of Ft. Walton Beach License Company, LLC ("Qantum"), hereby opposes the "Motion to Dismiss" filed by Cumulus Licensing LLC ("Cumulus") with respect to the Petition for Reconsideration filed by Qantum on December 22, 2008, in the above-captioned proceeding. Qantum filed the Petition for Reconsideration in response to an October 31, 2008, Commission decision, adopted by a three-to-two vote, in which the majority failed to adhere to established precedent and affirmed a staff decision permitting Cumulus to relocate WPGG(FM)[1] more than 70 miles from Evergreen, Alabama, to Shalimar, Florida, a community that immediately neighbors Fort Walton Beach, Florida, and that is deeply embedded in the Fort Walton Beach Urbanized Area.

In its Petition for Reconsideration, Qantum pointed out that the majority's action (the "*Majority Decision*") was inconsistent with the Commission's *Report and Order* in the November 2006 rule making wherein the Commission held that it would permit licensees to

[1] WPGG(FM) now operates under the call sign of "WNCV(FM)." Because the pleadings in this proceeding have referred to the station under its old call sign of "WPGG(FM)," this Opposition will continue to refer to the station by that call sign for the sake of consistency.

change their communities of license simply by filing applications seeking the minor modification of facilities.[2] See *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services* (the "*Second Community of License Modification Rule Making*").[3] That *Report and Order* was issued by the Commission more than six months after Qantum had filed its Application for Review in the instant proceeding and, as a result, under the Commission's rules, Qantum had no opportunity to address the significance to the instant proceeding of the *Report and Order* in the *Second Community of License Modification Rule Making* prior to the issuance of the *Majority Decision.*

Similarly, Qantum's Petition for Reconsideration pointed out that the *Majority Decision* for the first time acknowledged the extent of the loss of service that would occur as a result of the relocation of WPGG(FM) to Fort Walton Beach.[4] That loss of service is unprecedented. For the first time, the Commission would permit more than 15,000 people to receive only four aural services and more than 5,500 people to receive only three aural services so that an already well-served community could receive additional service. The *Majority Decision*'s admission of the extent to which people in the Evergreen area would be deprived of fourth and fifth service stood in marked contrast to the staff's decision below. In its Memorandum Opinion and Order on Reconsideration, the staff claimed that only 105 people would no longer receive service from at least five other stations as a result of the relocation of WPGG(FM).[5] Thus, at the time that it filed its Application for Review, Qantum premised its argument on the staff's conclusion in that regard. It was not until the *Majority Decision* that the extent of the deprivation of service became apparent. Of course, Qantum had no opportunity to bring to the Commission's attention

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[2] Qantum Petition for Reconsideration at 5-6.
[3] 21 FCC Rcd 14212 (2006).
[4] Qantum Petition for Reconsideration at Summary, 1, 8n.16, 9, 10 & 20.
[5] *Evergreen, Alabama, and Shalimar, Florida*, 21 FCC Rcd 1636, 1637 (MB 2006).

the full impact of the majority's admission that more than 15,000 people, rather than 105 people, would be placed within the ranks of the underserved.

Nevertheless, Cumulus argues in its motion that Qantum's Petition for Reconsideration should be dismissed because, in Cumulus's view, Qantum's Motion "does not rely on any new facts or changed circumstances."[6] In fact, however, this claim is simply incorrect. Not only has Qantum used its Petition for Reconsideration to point out to the Commission the inconsistency between the *Majority Decision* and the *Report and Order* in the *Second Community of License Modification Rule Making*, which was not issued until *after* Qantum filed its Application for Review, but it also simply ignores the fact that Qantum's Petition for Reconsideration also addresses the *Majority Decision*'s unprecedented finding that an 18th additional service outweighs the creation of an underserved population of more than 15,000 people. The existence of such a large underserved population that has been created as a result of the *Majority Decision*'s action was not previously revealed by the Commission. Thus, the first opportunity that Qantum had to address this unprecedented action was in its Petition for Reconsideration. The Commission previously has acknowledged that the disclosure of new data by the Commission warrants the use of a petition for reconsideration to argue the implications of that new data. *See Banks, Redmond, Sunriver and Corvallis, Oregon*, 19 FCC Rcd 10068, 10069 (2004).[7]

Even if Cumulus were correct that Qantum had not relied upon new facts or changed circumstances in its Petition for Reconsideration, the fact would remain the Cumulus has simply misstated the applicable legal principle with respect to the appropriate use of a petition for

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[6] Cumulus Motion to Dismiss at 2.

[7] Indeed, Section 405 of the Communications Act would appear to *require* that the Commission be given an opportunity to address issues raised by a petitioner regarding that data before review can be sought at the Court of Appeals. If that data is not disclosed until after an application for review is filed, the only way in which such issues can be brought before the Commission is through the submission of a petition for reconsideration.

reconsideration. To its credit, Cumulus does acknowledge in a footnote in its Motion to Dismiss that the Commission has previously held that the use of a petition for reconsideration is appropriate not only to bring to the Commission's attention changes in facts or circumstances, but also to demonstrate a "material error." Cumulus's admirable acknowledgement of the cases acknowledging that a petition for reconsideration can be used to demonstrate a "material error," is then, unfortunately, subverted by Cumulus's attempt to belittle that principle. Cumulus implies that there are only two cases in which the Commission has recognized that petitions for reconsideration are appropriate to bring to the Commission's attention a "material error." Cumulus then takes issue with the first of those two cases, *Minority Television Project, Inc.*,[8] by claiming that the case did not reconcile its assertion that a petition for reconsideration can be used to demonstrate a "material error" with the language of Section 1.115(g) of the Commission's rules and the Commission's 1979 Order adopting that rule. Cumulus then further argues that the Commission's decision in *Hill & Welch,*[9]which also holds that a petition for reconsideration can be used to bring a material error to the Commission's attention, is tainted because it relies upon *Minority Television Project*. In essence, Cumulus claims that *Minority Television* and *Hill & Welch* are rogue cases.

The fact remains, however, that, as much as Cumulus may dislike the holdings in *Minority Television Project* and *Hill & Welch*, they nevertheless stand for the proposition that a party can petition for reconsideration of a Commission decision in order to demonstrate that the decision contains material errors. Indeed, Cumulus's argument would have the effect of hamstringing the Commission in its efforts to make sure that a correct determination is made in contested proceedings. Flexibility is especially necessary in cases such as the present one in

[8] 20 FCC Rcd 16923 (2005).
[9] 22 FCC Rcd 5271 (2007).

which the petition for reconsideration is filed pursuant to Section 1.429 of the Commission's rules. Unlike Section 1.106 of the Commission's rules, which limits a party to relying upon facts not previously presented to the Commission only in the event of changed circumstances or if the facts are newly discovered and, even then, only if the petitioner has been diligent in trying to discover such facts, Section 1.429 permits a petitioner to rely upon any new facts or circumstances, regardless of whether the petitioner has been diligent in presenting such facts, if consideration of those facts is "required in the public interest." In other words, Section 1.429 acknowledges that there is a public interest component to a petition for reconsideration and the Commission is entitled to rely upon facts as necessary to make sure that the correct decision is reached. Indeed, even Section 1.106, which establishes the ground rules for the submission of petitions for reconsideration in a non-rulemaking context, does not require that a petition for reconsideration be dismissed if it does not rely upon new facts or newly discovered evidence. Instead, that section does no more than recognize that a petition for reconsideration that does not rely upon new facts or newly discovered evidence "may be dismissed." Contrary to Cumulus's claim, the language is permissive, not mandatory. In short, the Commission did not err in stating in both *Minority Television Project* and *Hill & Welch* that a petition for reconsideration is appropriate to bring to the Commission's attention a "material error" in a decision issued in response to an application for review because the Commission, in the exercise of its discretion as an administrative agency, always has the flexibility to correct material errors in its decisions.

Inasmuch as Qantum has not only relied upon changed circumstances and new facts in its Petition for Reconsideration, but has also demonstrated that the *Majority Decision* was in material error, the use of a Petition for Reconsideration was appropriate. As a result, Cumulus's Motion to Dismiss must be denied.

Respectfully submitted,

Qantum of Ft. Walton Beach License Company, LLC

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Date: February 11, 2009

Certificate of Service

I, Yvette J. Graves, do hereby certify that copies of the foregoing have been sent via first-class mail, U.S. mail, postage prepaid, this 11th day of February, 2009, to the office of the following:

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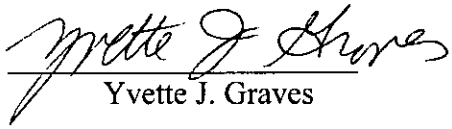

Yvette J. Graves

*VIA HAND DELIVERY

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