

Before the
Federal Communications Commission
Washington, DC 20554

DUPLICATE

RIC

2012 OCT -9 A 6:49

In re Application of)

6 Johnson Road Licenses, Inc.)
(Assignor))

File No. BALH-20120509AER

Facility ID No. 73256

and)

Cumulus Licensing LLC)
(Assignee))

File No. BALH-20120509AES

Facility ID No. 32946

For Consent to Assignment of)
Licenses for Stations WMEZ(FM),)
Pensacola, Florida, and WXBM-FM,)
Milton, Florida)

FILED/ACCEPTED

OCT -3 2012

Federal Communications Commission
Office of the Secretary

To: Secretary
Attn: Chief, Media Bureau

REPLY TO OPPOSITION TO MOTION TO STRIKE

Cumulus Licensing LLC ("Cumulus"), acting pursuant to Section 1.45 of the Commission's rules, 47 C.F.R. §1.45(c), hereby replies to the Opposition to Motion to Strike (the "Opposition") filed by ADX Communications of Escambia and ADX Communications of Pensacola (collectively referred to herein as "ADX") with respect to Cumulus' Motion to Strike (the "Motion") a Supplement to Petition to Deny (the "Supplement") which ADX filed to its Petition to Deny (the "Petition") against the above-captioned application (the "Application").¹

The Opposition fails to justify the filing of the Supplement, and the Motion should be granted.

¹ ADX filed an accompanying Motion for Leave to File Late-Filed Opposition to Motion to Strike ("Motion for Leave") which stated that its Opposition was being filed three (3) business days late "on September 17, 2012." However, the Certificates of Service to both ADX's Opposition and its Motion for Leave failed to state the date upon which ADX served those respective pleadings on counsel for the opposing parties and, to that extent, failed to comply with Section 1.47(g) of the Commission's rules. 47

I. ADX Opposition.

ADX claims that it filed its Supplement due to a “new filing submitted to the Commission by Cumulus *in this proceeding* on July 9, 2012.”² Opposition at 1 (emphasis added). ADX also claims (1) that “it is undisputed that the information contained in the Supplement was not available until *after* ADX filed its original ‘Petition to Deny’ in this proceeding,” *id.* at 2 (emphasis in original), and (2) that if it did not present these allegedly “new facts” to the Commission in its Supplement, ADX potentially could be precluded from seeking reconsideration if its Petition were denied because ADX would be unable to establish that it was relying on new facts or a change in circumstances since the last opportunity to present such matters to the Commission’s attention, which is a prerequisite to any reconsideration petition. Opposition at 3. *See* 47 C.F.R. §1.106(c)(1).

II. Opposition Has No Merit.

A. ADX’s Argument Regarding WABD TBA Should Have Been Raised in ADX’s Reply.

ADX’s reference to the filing date of its Petition is unavailing. The pertinent question is whether ADX could have submitted this allegedly “new” information in its Reply, which is an authorized pleading under Section 1.45 of the Commission’s rules.

C.F.R. §1.47(g) (certificate of service is required to show “the time and manner of service”). Counsel for Cumulus did not receive ADX’s Opposition – which was served by first-class mail – until Monday, September 24, 2012. Given that the office of ADX’s counsel is located in North Arlington, Virginia (official notice requested), this Reply is being filed on the assumption that service was made on Friday, September 21, 2012. It should be noted that counsel for Cumulus has been advised that ADX has never served counsel for 6 Johnson Road Licenses, Inc. with a copy of either ADX’s Opposition or its accompanying Motion for Leave. Nevertheless, to the extent the Commission deems it necessary, Cumulus hereby requests leave to file this Reply out of time because of the delay (whether occasioned by the United States Postal Service or the time of mailing) in Cumulus’ receipt of ADX’s Opposition.

² Contrary to ADX’s assertion, Cumulus did not submit any filing in this proceeding on July 9, 2012. ADX’s Supplement is based on a separate Form 314 assignment application (the “WABD Application”) which Cumulus filed in a *different* proceeding proposing to assign the license for WABD(FM) (formerly WLVM), Mobile, Alabama (Facility ID No. 70657), from Educational Media Foundation to Cumulus. File No. BALH-20120709AFX.

The WABD Application was filed on July 9, 2012, and appeared on public notice on July 12, 2012. *Public Notice, Broadcast Applications*, Report No. 27778 at 4 (July 12, 2012) (“July Public Notice”). The WABD Application contains a copy of a Time Brokerage Agreement (the “TBA”) which resulted in Cumulus holding an attributable interest in WABD. However, ADX did not file its Reply to Opposition to Petition to Deny (the “Reply”) until July 17, 2012. Thus, ADX had constructive notice of the filing of WABD Application and the accompanying TBA for at least five (5) days prior to filing its Reply.

It is of course true that Section 1.45(c) of the Commission’s rules states that replies shall be limited to matters raised in opposition pleadings. However, to the extent ADX believed that the TBA was relevant to the arguments in its Petition to Deny, it was incumbent upon ADX to bring that matter to the Commission’s attention in its Reply before the close of the pleading cycle. Contrary to the arguments in ADX’s Opposition, then, the filing of the WABD Application and Cumulus’ entry into the TBA in another radio market – which occurred prior to the filing of ADX’s Reply – did not and do not afford ADX any basis for filing an unauthorized pleading in the instant proceeding.

Commission decisions are replete with admonitions that a party cannot sit back and delay the inclusion of relevant information in an authorized pleading. The basis for that admonition was explained decades ago in *Lexington County Broadcasters, Inc.*, 40 FCC2d 320 (Rev. Bd. 1973) (“*Lexington County*”). In that case, a party who had filed a petition to deny requested the addition of a “feasibility issue” against an applicant for a construction permit for a new FM radio station because (i) the station allegedly would not provide the requisite signal coverage to its community of license, and (ii) the applicant’s proposal to substantially increase the height of the station’s existing tower structure and side-mount an FM antenna was not feasible. 40 FCC2d at

325. In denying the requested issue, the Review Board dismissed a supplement to the petitioner's reply to the applicant's opposition pleading. The Review Board found that the information contained in the petitioner's supplement "could have been obtained earlier and included within its original request." 40 FCC2d at 326 n.9. The Review Board further stated as follows:

To allow the supplement to serve the purpose of the original petition effectively renders meaningless the provisions in the Rules intended to provide a fair opportunity for another party to respond to allegations, and to avoid a proliferation of unauthorized pleadings. Rules 1.45 and 1.294. Orderliness, expedition and fairness [in] the adjudicatory process require that reasonable procedural limits be established and maintained.

Id.

Although Section 1.45 of the Commission's rules has been revised since the Review Board issued its decision in *Lexington County*, the underlying principle has remained unchanged: namely, a party cannot supplement authorized pleadings without securing the Commission's authorization. See 47 C.F.R. §73.3584(e) ("[u]ntimely Petitions to Deny as well as . . . any other pleadings or supplements which . . . are otherwise procedurally defective, are subject to return by the FCC's staff without consideration").

That basic principle is reflected in the cases cited in Cumulus' Motion. See e.g. *Lee G. Petro, Esq.*, 25 FCC Rcd 4486, 4488 (MB 2010) cited in Motion at 3. ADX makes no attempt to distinguish *Lee G. Petro, Esq.* (where the Media Bureau dismissed a supplement that was filed after the filing of a reply pleading even though the supplement was accompanied a motion for leave to accept the supplement). ADX does, however, identify certain factual distinctions between its situation and the circumstances underlying other cases cited in Cumulus' Motion, but ADX fails to explain why those factual distinctions excuse ADX's failure to secure Commission authorization to file its Supplement. As one example, ADX points out that *Juan Carlos Matos*

Barreto, 25 FCC Rcd 7293, 7294 n.5 (MB 2010) (“*Barreto*”), and some of the cases cited in the Motion arose in situations involving a reconsideration petition or an application for review rather than an initial Commission decision.³ See Opposition at 4-5. That, however, is a distinction without a difference. In each case – whether involving a reconsideration petition, an application for review or an initial decision (as here) – the reasoning of *Lexington County* is still applicable: to allow a party like ADX with complete freedom to file supplements at will would undermine the Commission’s interest in “[o]rderliness, expedition and fairness [in] the adjudicatory process.” *Lexington County*, 40 FCC2d at 326 n.9.

ADX nonetheless argues that its Supplement should be accepted because a failure to do so would unfairly preclude ADX from seeking reconsideration of any adverse Commission decision. ADX rightly points out that Section 1.106(b)(2) of the rules states that a party cannot raise arguments in a reconsideration petition that could have been but were not presented before the Commission rendered its initial decision. That argument is equally unavailing because, as stated above, ADX had constructive notice of the TBA prior to filing its Reply. Thus, this is not a situation where events have occurred or circumstances have changed since the petitioner’s last opportunity to present such matters to the Commission. On the contrary, through the exercise of ordinary diligence, ADX could have and should have learned of the TBA prior to filing its Reply.⁴

³ The cases cited in *Barreto* include *KOLA, Inc.*, 11 FCC Rcd 14297 n.2 (1996); *Kin Shaw Wong*, 11 FCC Rcd 11928, 11930 (1996); and *Secret Communications, Inc.*, 18 FCC Rcd 9139 n.1 (2003).

⁴ Contrary to ADX’s allegations, Cumulus has never suggested that ADX should be precluded from bringing relevant matters to the Commission’s attention. Rather, Cumulus is merely stating what precedent makes clear: that ADX was required to present such information to the Commission in a timely manner and in accordance with the Commission’s procedural rules.

B. No Basis for Treating Supplement as an Informal Objection.

In apparent recognition that its position cannot be squared with Commission rules or Commission precedent, ADX argues that the Commission should treat its Supplement as an informal objection if it has to be dismissed as an unauthorized pleading. *See* Opposition at 4. There is no basis for the Commission to treat the ADX's Supplement as an informal objection, and ADX has failed to cite even one case to support its novel proposition.

ADX's failure to identify any supporting decision is not surprising. As the Review Board stated in *Lexington County*, permitting parties to continue to file supplements after the close of a pleading cycle would result a proliferation of unauthorized pleadings, render the Commission's procedural rules effectively meaningless, and wreak havoc on the Commission's adjudicatory processes by precluding the Commission from being able to act on applications in any reasonable timeframe. Acceptance of ADX's argument would create the very same result which Commission rules and Commission precedent are designed to deter. Parties would be free to file "supplements" *ad nauseum* and claim that each one was a separate "informal objection."⁵

D. Supplement Contains Prohibited New Material.

Cumulus' Motion requested that the Supplement be stricken because the Supplement raised a new argument: "namely, that the Commission's use of Arbitron market definitions 'makes no sense' in considering the Application." Motion at 3. ADX disputes that observation because, according to ADX, the argument regarding the use of Arbitron market definitions was first presented in its Reply. ADX adds that its Supplement was designed to use the filing of the WABD Application and accompanying TBA to support that argument about the inapplicability of Arbitron-based market definitions. *See* Opposition at 5-6.

⁵ ADX's argument also highlights the nature of ADX's Supplement – it is not intended merely to bring "new" information to the Commission's attention; it is also designed to re-argue matters already covered in ADX's authorized pleadings.

ADX's argument fails for two reasons. First, ADX's argument – that the use of Arbitron market definitions in the instant case “makes no sense” (Supplement at 5) – could have and should have been raised in its Petition to Deny and not in its Reply (which is required under Section 1.45(c) to be “limited to matters raised in the opposition[.]”). Consequently, ADX's request that the Commission not apply Arbitron market definitions to the Pensacola and Mobile radio markets should be stricken not only from the Supplement but from the Reply as well because the argument was not raised in a timely manner.⁶ *See Lee G. Petro, Esq.*, 25 FCC Rcd at 4487-88 (Commission rules limit replies “to matters raised in the oppositions”).

Second, even assuming, *arguendo*, that ADX had raised its market-definition argument in its Petition to Deny (which it did not), its allegations regarding Cumulus holding an attributable interest in the WABD TBA would still be untimely because, as demonstrated above, the WABD Application was filed on July 9, 2012, and ADX's Reply is dated July 17, 2012. Accordingly, ADX had constructive notice of the WABD TBA five (5) days prior to filing its Reply in this proceeding. *See* July Public Notice at 4. Therefore, for this additional reason, the Supplement should be stricken from the record in this proceeding because it is an unauthorized pleading pursuant to Section 1.45 of the Commission's rules. *See Radio WCMQ*, 53 FCC2d 1210, 1211 (1975); *Lexington County*, 40 FCC 2d at 326 n.9; and *Reier Broadcasting Company*, 26 FCC Rcd 14270 n.4 (MB 2011).

The Supplement thus highlights the dilatory nature of ADX's conduct in this proceeding. ADX has not only violated Section 1.45 of the Commission's rules by (a) raising its Arbitron market definition argument for the first time in its Reply, and (b) filing its Supplement despite

⁶ ADX filed a Petition to Deny the WABD Application on August 13, 2012. In the WABD proceeding, ADX included its argument challenging the use of Arbitron market definitions in its original Petition, rather than waiting to raise the argument in its reply pleading because it undoubtedly recognized the untimeliness of failing to present that argument in its Petition in this proceeding.

having knowledge of the WABD TBA for at least five (5) days prior to filing its Reply; ADX has also advanced arguments in the Supplement which should not succeed because Cumulus' reliance on WABD's presence in the Mobile Metro is entirely consistent with Commission rules, Commission precedent, and Commission application forms – Cumulus did not (a) enlarge, reduce or cancel the boundaries of any Arbitron Metro, (b) “receive the benefit of changing the home status of its own station” (because WABD has been “home” to the Mobile Metro since 2003), or (c) do anything else that has not been approved by the Commission in numerous prior situations. *See* Cumulus Opposition to Petition to Deny (June 27, 2012) at 7-10 and sources cited therein.⁷

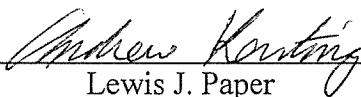
Conclusion

WHEREFORE, in view of the foregoing and the entire record herein, it is respectfully requested that the Supplement be dismissed without consideration.

Respectfully submitted,

PILLSBURY WINTHROP SHAW
PITTMAN LLP
2300 N Street, NW
Washington, D.C. 20037-1122
Tel.: (202) 663-8184
(202) 663-8203
Email: lew.paper@pillsburylaw.com
andrew.kersting@pillsburylaw.com

Attorneys for Cumulus Licensing LLC

By: 
Lewis J. Paper
Andrew S. Kersting

⁷ In a further effort to frustrate the Commission's adjudicatory processes, ADX has presented the same substantive arguments in a separate Petition to Deny the WABD Application, thereby collaterally attacking the instant Application in a separate proceeding.

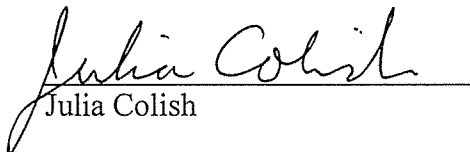
CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October, 2012, a copy of the foregoing "Response to Opposition to Motion to Strike" was sent by first-class U.S. mail, postage prepaid, to the following:

Peter Doyle, Chief*
Audio Services Division
Media Bureau
Federal Communications Commission
455 Twelfth Street SW
Washington, DC 20554

Lawrence M. Miller, Esq.
Schwartz, Woods & Miller
1233 20th Street, NW
Suite 610
The Lion Building
Washington, DC 20036-7322
(Counsel for 6 Johnson Road Licenses,
Inc.)

Dan J. Alpert, Esq.
The Law Office of Dan J. Alpert
2120 N. 21st Road
Arlington, VA 22201
(Counsel for ADX Communications of
Escambia and ADX Communications of
Pensacola)


Julia Colish

* by hand-delivery