

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
CUMULUS LICENSING LLC)	FCC File No. BRFT-20111201PCV
Application for Renewal of License)	FCC File No. BLFT-20110915ACL
Application for License)	Facility ID No. 148550
)	
FM Translator Station)	
W255CJ, Atlanta, Georgia)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: September 7, 2018

Released: September 7, 2018

By the Associate General Counsel:

I. INTRODUCTION

1. By this memorandum opinion and order, we grant in part and deny in part the Petition for Order to Show Cause, filed May 24, 2018, by WKNG, LLC (WKNG), the licensee of station WWGA(FM), Tallapoosa, Georgia (Petition).¹ WKNG alleges that Cumulus Licensing LLC (Cumulus), the licensee of FM translator station W255CJ (99X), has violated the Commission's *ex parte* rules by improperly soliciting *ex parte* presentations in violation of 47 CFR § 1.1210.² We find that Cumulus violated the *ex parte* rules and admonish it to avoid future violations, but otherwise deny the petition.

II. BACKGROUND

2. The alleged *ex parte* violation relates to an action by the Media Bureau ordering 99X to cease operation in response to WKNG's complaint that 99X causes interference to WWGA(FM) on 98.9 MHz.³ WKNG asserts that Cumulus posted a notice on its website informing listeners of the Media Bureau's action. According to WKNG, the notice indicated that Cumulus was disputing the interference finding and that listeners "can help" by emailing the five FCC Commissioners and five of their legal advisors.⁴ WKNG further indicates that the notice asked listeners to send a courtesy copy of their email to Cumulus to enable Cumulus to track the number of emails sent to the Commission. WKNG indicates that no comments resulting from the website posting were served on WKNG.⁵

¹ See also Opposition to Petition for Order to Show Cause, filed June 13, 2018, by Cumulus (Opposition); Reply to Opposition to Petition for Order to Show Cause, filed July 2, 2018, by WKNG (Reply). The Office of General Counsel has delegated authority to issue rulings on whether violations of the *ex parte* rules have occurred and to impose appropriate sanctions. 47 CFR § 0.251(g).

² The section provides that "No person shall solicit or encourage others to make any improper presentation under the provisions of this section." 47 CFR § 1.1210. *Ex parte* presentations (including emails not served on all parties to a proceeding) are prohibited in restricted proceedings. 47 CFR §§ 1.1202(b); 1.1208.

³ Letter from James D. Bradshaw, Senior Deputy Chief, Audio Division, to Mark D. Denbo, Esq., and Andrew Kersting, Esq. (April 11, 2018).

⁴ Petition at 2.

⁵ *Id.* at 3.

3. WKNG contends that Cumulus's conduct is similar to that found to violate the *ex parte* rules in *Columbia Union College Broadcasting, Inc.*⁶ In that case, CUCB, an FM broadcaster, asserted that Stu-Comm, a broadcaster on the same channel, had asked its listeners to complain to the Commission that the facilities specified in CUCB's license modification application caused interference to Stu-Comm's station. The Associate General Counsel found that Stu-Comm had violated § 1.1210 by soliciting public comments on CUCB's modification application (as well as a congressional letter) that were not served on CUCB. Of crucial importance, the Associate General Counsel found that the listener comments did not fall within an exemption to *ex parte* restrictions for viewer/listener comments on pending broadcast applications,⁷ since Stu-Comm had solicited its own station's listeners and not the listeners of CUCB's station, which was the subject of the pending application being commented on. The Associate General Counsel admonished Stu-Comm for soliciting listener (and congressional) *ex parte* presentations but took no other action. According to WKNG, an admonition here would be an insufficient sanction for Cumulus's conduct, and it therefore urges that Cumulus's pending renewal application for 99X be dismissed.⁸

4. In response, Cumulus offers three defenses to WKNG's allegations. First, Cumulus maintains that its website posting should not be regarded as a solicitation, because it merely provided information to listeners who were already upset about the termination of 99X and had contacted Cumulus, seeking to express their dissatisfaction to the Commission.⁹ Second, Cumulus explains that it had requested listeners to send it courtesy copies of the presentations so that Cumulus could serve them on WKNG.¹⁰ Cumulus further explains that it had not yet served the presentations because its counsel was preoccupied with unrelated legal proceedings.¹¹ Third, Cumulus argues that, in contrast to the *CUCB* case, the viewer/listener exemption does apply here, since the listeners were those of 99X, the subject of Cumulus's pending renewal application.¹²

5. WKNG replies that a reading of Cumulus's website clearly indicates that the site solicited listener presentations to the Commissioners and their legal advisors.¹³ Further, WKNG asserts that, despite Cumulus's claim that it intended to serve the listener comments on WKNG, Cumulus did not send copies to WKNG until after WKNG complained about the website.¹⁴ WKNG contends that the viewer/listener exemption set out in 1.1204(a)(8) does not apply here because the presentation solicited did not relate to 99X's pending renewal application but rather to the interference complaint, which

⁶ 21 FCC Rcd 316 (Associate General Counsel 2006). Petition at 3-4.

⁷ The provisions of 47 CFR § 1.1204(a)(8) make a presentation exempt if "[t]he presentations is a written presentation made by a listener or viewer of a broadcast station who is not a party . . . and the presentation relates to a pending application that has not been designated for hearing for a new or modified broadcast station or license, for renewal of a broadcast station license or for assignment or transfer of control of a broadcast permit or license."

⁸ Petition at 4. WKNG cites 47 CFR § 1.1216(d), which provides "[a] party who has violated or caused the violation of any provision of this subpart may be subject to admonishment, monetary forfeiture, or having his or her claim or interest in the proceeding dismissed, denied, disregarded, or otherwise adversely affected."

⁹ Opposition at 3-4, 8.

¹⁰ *Id.* at 3, 8.

¹¹ *Id.* at 4 n. 6.

¹² *Id.* at 5-7. Cumulus also argues that its conduct was not equivalent to that of parties in *Desert Empire Television Corp.*, 88 FCC 2d 1413 (1982) (\$6,000 forfeiture for *ex parte* violation), and *Elkhart Telephone Co.*, 11 FCC Rcd 1165 (1995) (\$5,000 forfeiture for *ex parte* violation), cited by WKNG.

¹³ Reply at 3.

¹⁴ *Id.* at 3-4.

constitutes a separate proceeding.¹⁵

III. DISCUSSION

6. We agree with WKNG that Cumulus violated the *ex parte* rules. The emails sent to the Commissioners and their legal advisors were prohibited presentations to decision-makers regarding a restricted proceeding in violation of 47 CFR § 1.1208.¹⁶ They do not fall within the scope of the plain language of the viewer/listener exemption, because they relate to the Media Bureau's order in response to WKNG's interference complaint, and not to Cumulus's pending renewal application.¹⁷

7. Our examination of the language posted on Cumulus's website indicates that Cumulus should be deemed to have solicited these presentations whether or not some listener had previously expressed an interest in contacting the Commission. For example, the site stated: "How you can help. 1. Begin by composing an email to any of these members of the FCC."¹⁸ We find that this language speaks for itself. Additionally, we cannot credit Cumulus's claim that it intended to timely serve the presentations on WKNG, because Cumulus did not do so until after WKNG filed its petition.

8. On the other hand, we see no reason to consider dismissal of Cumulus's renewal application. As WKNG itself observes, the renewal application and the interference complaint represent two different proceedings. WKNG does not explain why, consistent with the language of section 1.1216, an *ex parte* violation in one proceeding would warrant dismissal of a different application filed in a different proceeding. The rule provides that, in an especially egregious case, it might be appropriate for a party's "claim or interest *in the proceeding*" to be dismissed or otherwise adversely affected.¹⁹ The logic of the rule is that the proceeding involved might be irretrievably so tainted by the violation that dismissal is warranted, not that such a sanction could be arbitrarily applied to any other proceeding in which the violator might happen to be involved.²⁰

9. As WKNG points out, the facts of this case resemble those of the *CUCB* case, in which the violator received an admonition. We do not see any reason to treat Cumulus differently, and we admonish it to comply with the *ex parte* rules in the future. We do not think this case is equivalent to the past cases cited by WKNG in which we imposed monetary forfeitures out of concern that admonitions had been ineffective in preventing violations. The facts of this case do not raise such concerns.²¹ For this reason, while we admonish Cumulus for its violation of the *ex parte* rules here, we see no basis for issuing an order to show cause why Cumulus's renewal application should not be dismissed.

¹⁵ *Id.* at 2-3, 4-5.

¹⁶ Both license renewals and interference complaints are categorized as restricted, the category applicable to all proceedings not categorized as permit-but-disclosed or exempt. 47 CFR § 1.1208.

¹⁷ The exemption applies where a written presentation is made by "a listener or viewer of a broadcast station . . . and the presentation relates to a pending application . . ." 47 CFR § 1.1204(a)(8).

¹⁸ Petition, Attachment B.

¹⁹ 47 CFR § 1.1216(d) (emphasis added).

²⁰ WKNG does not ask that an issue be designated in the renewal proceeding.

²¹ Cumulus is not a repeat offender. Further, it does not appear that admonitions have been generally ineffective in this type of situation.

IV. ORDERING CLAUSE

10. ACCORDINGLY, IT IS ORDERED, that the Petition for Order to Show Cause, filed May 24, 2018, IS GRANTED in part and DENIED in part.

FEDERAL COMMUNICATIONS COMMISSION

Linda L. Oliver
Associate General Counsel
Chief, Administrative Law Division
Office of General Counsel