



Federal Communications Commission  
Washington, D.C. 20554  
March 12, 2013

John F. Garziglia, Esq.  
Womble Carlyle Sandridge & Rice  
1200 Nineteenth Street, N.W.  
Suite 500  
Washington, D.C. 20036

Re: WKNG, LLC ex parte complaint

Dear Mr. Garziglia:

This is a response to your letter of February 19, 2013 on behalf of Cumulus Licensing, LLC (Cumulus), in which Cumulus alleges that WKNG, LLC (WKNG) violated the Commission's ex parte rules.<sup>1</sup> Cumulus alleges that WKNG's owner and president, Steven L. Gradick (Gradick) violated 47 C.F.R. § 1.1210 by soliciting an ex parte presentation by Georgia Senator Johnny Isakson. Section 1.1210 provides that: "[n]o person shall solicit or encourage others to make any improper presentation under the provisions of this section."

**Background.** Cumulus' ex parte complaint is related to a dispute involving FM broadcasting facilities licensed to WKNG and Cumulus. WKNG is the licensee of station WWGA(FM), Tallapoosa, Georgia, while Cumulus is the licensee of FM translator station W255CJ, Atlanta, Georgia. Both stations operate on 98.9 MHz. Shortly after W255CJ was authorized to operate on the channel on September 9, 2011, WKNG submitted a series of letters to the Audio Division of the Media Bureau (MB), dated between September 27, 2011 and January 19, 2012, complaining of prohibited interference to WWGA(FM) from W255CJ. WKNG served each of these letters on Cumulus, which responded to them. On February 24, 2012, WKNG filed a petition to deny renewal of W255CJ alleging prohibited interference.<sup>2</sup>

On June 18, 2012, Gradick contacted Senator Isakson's office. In a cover sheet, Gradick recited the procedural history of WKNG's complaints and petition to deny and stated: "[t]he FCC has done nothing about these complaints despite the fact that the FCC Rules require that a translator must cease operations if it causes interference to the direct reception by the public of off-the-air signals of an authorized radio station."<sup>3</sup> Gradick continued: "I am requesting that your office contact the Audio Division requesting that it review and address the referenced filings by WKNG, LLC." Senator Isakson wrote to the FCC, stating: "I would appreciate your

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<sup>1</sup> See Letter from John F. Garziglia, Esq. to David Senzel, Esq. (Feb. 19, 2013) (Complaint).

<sup>2</sup> See Complaint at 1-3.

<sup>3</sup> See Letter from [The Honorable] Johnny Isakson to Ms. Dianne Atkinson, Director, Office of Legislative Affairs (Jun. 18, 2012) (June 18 Letter), attachment. A copy of the June 18 Letter is attached.

review of this information in accordance with established policies and procedures. Upon completion of your review, please forward clarification of your findings to [my office].”<sup>4</sup> Senator Isakson’s letter appended the June 18 cover sheet that Gradick provided to him. MB responded that: “[s]taff expects to complete its review in the fourth quarter of 2012 and the parties will be notified of the findings once a decision has been issued.”<sup>5</sup> As to WKNG’s petition to deny, MB stated: “[t]he Audio Division is reviewing the record developed in the proceeding, including WKNG’s petition to deny, and will issue a decision as expeditiously as possible.”<sup>6</sup>

On January 11, 2013, Gradick again contacted Senator Isakson. Gradick briefly reviewed the pleadings he had filed with the FCC and stated: “[i]t is now the 1st quarter of 2013 and there has been no resolution of the matter. I request that the Senator’s office follow up on the July letter to determine from the FCC a definitive date for resolution.”<sup>7</sup> Senator Isakson wrote: “This letter is a follow up on my recent inquiry to your office with regard to my constituent, Mr. Steve Gradick. . . . As yet we have not received a response to our request.”<sup>8</sup> MB responded describing the status of its review of WKNG’s complaints and other matters related to W255CJ.<sup>9</sup> MB also explained that it had been working on a large number of other matters related to the translator service, including the dismissal of approximately 3,000 pending translator applications. MB further stated: “[w]ith the dismissal of these applications, the Audio Division staff is [in] a position to complete its review of the W255CJ interference complaints. The Audio Division indicates that this review will be completed as soon as possible, after receiving the information requested from the legal representative for W225CJ.”<sup>10</sup> Cumulus’ ex parte complaint followed on February 19.

**Complaint.** Cumulus complains that it was not served with WKNG’s solicitation of Senator Isakson’s participation or with the correspondence between Senator Isakson and MB, making them ex parte communications.<sup>11</sup> Cumulus asserts that the solicitation of ex parte

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<sup>4</sup> See June 18 Letter at 1.

<sup>5</sup> See Letter from Michael S. Perko, Chief, Office of Communications and Industry Information to The Honorable Johnny Isakson (Jul. 11, 2012) (July 11 Letter). A copy of the July 11 Letter is attached.

<sup>6</sup> See *id.*

<sup>7</sup> See Letter from [The Honorable] Johnny Isakson to Ms. Dianne Atkinson, Director, Office of Legislative Affairs (Jan. 17, 2013) (January 17 Letter), attachment. Cumulus attached a copy of the January 17 Letter to its Complaint.

<sup>8</sup> See January 17 Letter at 1.

<sup>9</sup> See Letter from Michael S. Perko, Chief, Office of Communications and Industry Information to The Honorable Johnny Isakson (Feb. 11, 2013) (February 11 Letter). A copy of the February 11 Letter is attached.

<sup>10</sup> See February 11 letter at 2.

<sup>11</sup> See 47 C.F.R. § 1.1202(b) (definition of an ex parte presentation). By separate letter, Cumulus asks for further information about ex parte contacts other than the January 17 Letter. See Letter from John F. Garziglia, Esq. to David Senzel, Esq. (Feb. 22, 2013). We believe that the attachments to this letter furnish a complete record of the pertinent communications.

communications by Senator Isakson violated section 1.1210.<sup>12</sup> Cumulus acknowledges that it would not be improper for WKNG to solicit a communication that was no more than a status inquiry, including a communication expressing concern about administrative delay, since a status inquiry is not a “presentation” subject to restriction under the ex parte rules.<sup>13</sup> While Cumulus notes that permissible status inquiries include inquiries as to “the approximate time that action in a proceeding may be taken,” Cumulus submits that Gradick’s request that Senator Isakson seek “a definite date for resolution” was impermissible.<sup>14</sup> Cumulus also asserts that Gradick intended Senator Isakson to communicate to the Commission Gradick’s version of the facts and law, going to the merits and the outcome of the W255CJ proceeding desired by WKNG.<sup>15</sup> In Cumulus’ view, Gradick’s misconduct warrants a substantial forfeiture and the disqualification of WKNG from further proceedings involving W255CJ.<sup>16</sup> Cumulus claims that the public interest will not be harmed by disqualifying WKNG, inasmuch as members of the public can complain about interference directly to the Commission.<sup>17</sup>

WKNG responds that Senator Isakson’s communications were simply status inquiries and that they were directed to personnel who were not decision-makers, *i.e.*, the Office of Legislative Affairs.<sup>18</sup> WKNG alleges that the true purpose of Cumulus’ ex parte complaint is to retaliate for WKNG’s actions against W255CJ and to avoid scrutiny of matters relating to W255CJ.<sup>19</sup>

**Discussion.** We find no clear violation of section 1.1210. A fair reading of Gradick’s solicitations indicates that in substance Gradick sought Senator’s Isakson’s intervention to complain about administrative delay and to urge expedition.<sup>20</sup> Under the ex parte rules, permissible status inquiries include communications expressing concern about administrative

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<sup>12</sup> See Complaint at 3-4.

<sup>13</sup> See *id.* See also 47 C.F.R. § 1.1202(a) (definition of a presentation, generally a communication directed to the merits or outcome of a proceeding); § 1.1208 (ex parte presentations to or from decision-making personnel are prohibited in restricted proceedings).

<sup>14</sup> See Complaint at 3-4.

<sup>15</sup> See *id.*

<sup>16</sup> See *id.* at 4-5. Cumulus asserts this case is more egregious than *Elkhart Telephone Co.*, 11 FCC Rcd 1165, 1165-66 ¶¶ 5-8 (1995), in which the Commission imposed a \$5,000 forfeiture against a party that solicited an ex parte letter by a United States Senator.

<sup>17</sup> See *id.* at 5. Cumulus asserts that the complaints forwarded by WKNG are without merit..

<sup>18</sup> See Letter from Audrey P. Rasmussen to David Senzel, Esq. (Feb. 21, 2013) at 1.

<sup>19</sup> See *id.* at 2.

<sup>20</sup> On the other hand, we disagree with WKNG’s assertion that Senator Isakson’s letter was not directed to decision-making personnel. While the letter was addressed to the Office of Legislative Affairs (OLA), which is not decision-making, it was clearly foreseeable that OLA would have to inform decision-making personnel of the communication in order to respond. See *Columbia Union College Broadcasting, Inc.*, 21 FCC Rcd 316, 320 ¶ 9 (Assoc. GC 2006) (it is entirely foreseeable that an inquiry directed to OLA will be forwarded to the decision-making personnel responsible for the relevant proceeding).

delay or concern that a proceeding be resolved expeditiously so long as no reason is given as to why the proceeding should be expedited other than the need to resolve administrative delay, no view is expressed as to the merits or outcome of the proceeding, and no view is expressed as to the date by which the proceeding should be resolved.<sup>21</sup>

Our reading of Gradick's communication preceding the June 18 Letter indicates that Gradick asked Senator Isakson to urge the Commission to move forward with its review of WKNG's complaints and petition to deny. We see no intent to have Senator Isakson address the merits of the dispute or to urge action by a particular date. Consistent with this intent, we understand Senator Isakson's request that the Commission review pending matters "in accordance with established policies and procedures" to be a statement of neutrality as to the merits. We disagree with Cumulus' contention that, in soliciting the January 17 Letter, Gradick overstepped the permissible bounds of a status inquiry by seeking "a definitive date" for resolution. Gradick did not indicate that he sought action by any specific date. Given that MB did not act by the end of the 4th quarter of 2012, as it projected it would, Gradick's request seems no more than an attempt to obtain a more reliable estimate.

That Gradick might have foreseen that his requests to Senator Isakson, which addressed the merits of the proceeding, might be forwarded to the Commission, does not warrant a different result. Gradick's request summarized the status of matters already before Commission decision-makers and arguments made by WKNG in Commission proceedings, without seeking any action from the Senator with respect to these arguments. Gradick had no reason to believe that providing this background information to the Senator would result in any prejudice to Cumulus, and we see none. Accordingly, this case does not resemble *Elkhart*, relied on by Cumulus, in which the Commission imposed a \$5,000 forfeiture on a party soliciting a senatorial ex parte presentation. In *Elkhart*, a party to a complaint provided the senator with a draft letter urging favorable action on the party's complaint. Under these circumstances, the Commission rejected the party's argument that its correspondence was merely directed to administrative delay. The facts here support a contrary conclusion.

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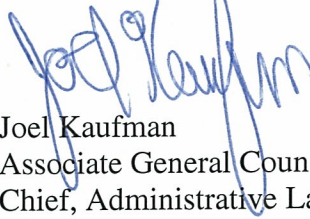
<sup>21</sup> See 47 C.F.R. § 1.1202(a) Note.

John F. Garliglia, Esq.

Page 5

We therefore find that no further action in this matter is warranted.

Sincerely yours,



Joel Kaufman  
Associate General Counsel, and  
Chief, Administrative Law Division.  
Office of General Counsel

Attachments

cc:

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