

**DUPLICATE**

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**MAY 31 1989**

Federal Communications Commission  
Office of the Secretary

**BEFORE THE  
Federal Communications Commission**

WASHINGTON, D.C. 20554

In re Application of )  
 )  
CAPROCK EDUCATIONAL BROADCASTING )  
FOUNDATION )  
 )  
For Modification of )  
Construction Permit )  
Lubbock, Texas )

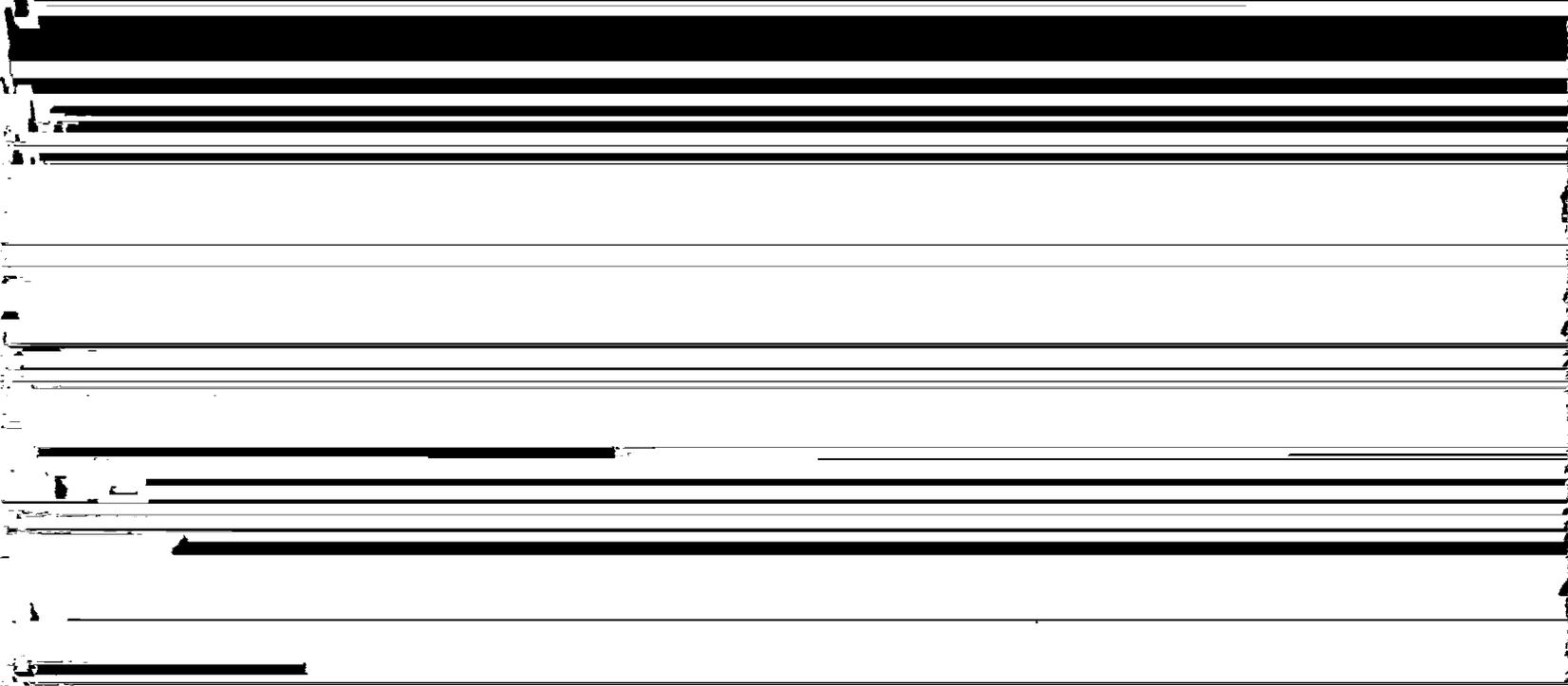
File No. BNPED-880328

**JUN 2 10 49 AM '89**  
AUDIO SERVICES  
DIVISION

To: The Chief, Mass Media Bureau

**REPLY TO OPPOSITION TO PETITION TO DENY**

Williams Broadcast Group (Williams), licensee of Station  
KJAK(FM), at Slaton, Texas, by its attorneys and pursuant to  
Section 1.45(b) of the Commission's Rules hereby submits its



transgressions with virtually everyone. First, Caprock would have the Commission believe that its egregious violations are Williams' fault, because Williams did not police Caprock's operations and warn Caprock of the consequences of its unlawful activities before reporting to the Commission. Caprock even suggests that "[i]f sanctions are to be imposed here, they ought to be imposed equally against Williams." *Opposition* at 9.

Caprock apparently would blame the Commission for its problems as well; the former permittee<sup>2</sup> does not feel that it should be subject to the Commission's Rules and policies because it decided to prosecute its application and commence construction without consulting an attorney. Notably, however, Caprock does not deny violating the statutes and rules set forth by Williams in its Petition; rather, Caprock claims former ignorance, apologizes and promises never to do such things again. *Opposition* at 3. Unfortunately, Caprock has never stopped. And, Caprock must be stopped.

Caprock's desperate attempts to deny the seriousness of its violations and its meager excuses for its prior misrepresentations lack either legal or logical foundation. Worse, Caprock has continued its misrepresentations in its *Opposition*, raising additional questions regarding its basic

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<sup>2</sup>Caprock's construction permit, BPED-840626IE, expired at 3:00 a.m. local time on April 16, 1989. See, *Petition to Deny*, filed by Williams on April 25, 1989.

character qualifications. Caprock is a wolf in sheep's clothing; clever, perhaps, but by no means innocent.

Caprock's purported ignorance regarding the provisions of the Communications Act and the Commission's Rules--even if true--provides no excuse for its unlawful behaviors. Over twenty-five years ago, this matter was settled once and for all, as the Commission stated:

An individual applicant who attempts to represent himself in a Commission proceeding must assume responsibility for full knowledge of the law and rules and cannot rely on his inexperience and lack of knowledge of procedures as an excuse for his improper conduct. . . .

*Western Broadcasting Co.*, 1 RR2d 732 (1963). See also *PacTel Mobile Access*, 63 RR2d 733 (1986). Caprock, whose dominant principal Kent Atkins is far from inexperienced,<sup>3</sup> must be held accountable for its admitted, willful and repeated violations, whether committed mistakenly or not. Otherwise, future permittees, licensees and applicants could merely refuse to seek counsel, do whatever they want (lack of authorization notwithstanding) and then use this "ignorance" to escape Commission scrutiny. The setting of such a precedent would seriously erode the effectiveness of the Commission's

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<sup>3</sup>Atkins, either as sole proprietor or dominant principal, has broadcast interests in both applications pending before the Commission and permitted and licensed stations, among them, KRGN(FM), KLMN(FM) and KENT(TV) at Amarillo, Texas. Additionally, Atkins has completed and tendered all filings on behalf of these facilities to the Commission, along with many others.

processes, which Caprock already has abused.

Notwithstanding Caprock's inability, as a matter of law, to fall back on its purported ignorance to excuse its conduct, as a matter of fact, such ignorance did not exist. Caprock's deceptive behavior in matters before the Commission is and has been pervasive and apparently extends to Caprock's representations to its own attorney. Caprock's claim, expressed on page 2 of its Opposition, that it ceased operation of the unauthorized KAMY facility of its own volition is hogwash, and is undermined by the sworn statement of Mr. Atkins, attached as an exhibit thereto. In paragraph 15 of Atkins' statement, Atkins acknowledges that it ceased operations following a call from Mr. Arthur Doak of the Commission. This call was a direct result of Williams' complaint; Caprock quit because Caprock got caught.

Similarly laughable is the notion, expressed in the same paragraph of Atkins' statement, that Caprock called counsel regarding Doak's request for information concerning the location and power of the KAMY facilities and then learned that its operations were unauthorized. Caprock's entire defense is premised upon the fact that its filings and operations were undertaken without consulting counsel at all. *Opposition* at 5. How is it then, that Caprock consulted the same counsel in order to find out where the station was located and what its power was? Moreover, how did Caprock

build and broadcast without reference to this information? Caprock's inconsistencies subvert its posed sincerity. The ultimate proof is in the pudding; Caprock builds wherever and whenever it wants to, without bothering with the Commission or its Rules.

Caprock's deception before the Commission is further evidenced by the telegram it sent to the Commission, which is attached to Caprock's Opposition as Exhibit 1. Caprock suggests that this exhibit ". . .clearly indicates that the applicant was not attempting to hide anything from the Commission." *Opposition* at 6. The opposite is true, however. First, as Caprock readily admits, ". . .this telegram was not an effective vehicle for obtaining program test authority." *Id.* Additionally, however, the telegram is deceptive. By its own wording, the telegram states that "In accordance with the construction permit . . . we shall begin broadcasting today . . . ." *Opposition* at Exhibit 1. However, this was a lie; Caprock actually began broadcasting at a location far away from that authorized by the construction permit. Caprock misrepresented its position before the Commission and now, it ironically seeks to use that misrepresentation as a defense against character allegations. No amount of rationalization, however, can transform the telegram from prevarication to truth.

Nor can rationalization or explanation eliminate the fact of Caprock's *continuing* violations. Even as Caprock pleaded innocent mistake and its counsel apologized to the Commission for its inadvertant error, Caprock continued to commit the

101 52 53, and to increase its power and antenna height.<sup>5</sup> Yet, Caprock already has commenced operations from and with the facilities described in its modification application. See *Affidavit of Stevan W. White*, attached hereto as Exhibit 1. As the photographs and recordings appended to Exhibit 1 indicate, Caprock's identical violations in Amarillo continued even after Caprock (supposedly voluntarily) pulled KAMY off the air. *Exhibit 1* at Attachments A, B. In fact, Caprock's Amarillo violations continued until one day following Williams' filing of a complaint with the Commission regarding the unauthorized operations of KLMN, a copy of which is attached hereto as Exhibit 3. See also *Exhibit 2*.

Undoubtedly, when faced with the filing of papers in

respect to the operations of KLMN at Amarillo. Rather, Caprock continued to operate gleefully until the arrival of yet another complaint at the Commission. Caprock had been counseled regarding its unauthorized operations and had received copies of Williams' complaint and Petition in this proceeding while it continued to operate an illegal facility elsewhere in Texas, and quite likely, even elsewhere. Caprock's excuses have worn thin, as have any vestiges of its "good" character.

Caprock directs great resentment towards Williams for reporting Caprock's violations to the Commission rather than privately informing Caprock, accusing Williams of choosing to ". . . secretly gather information in an effort to destroy a competitor." However, Caprock is wrong. Williams gave Caprock every conceivable benefit of the doubt. Williams did not complain, even in light of Caprock's extensive pre-authorization construction, because it is well established

that certain steps may be taken prior to receipt of authorization to construct: site clearance, pouring of concrete footings for a tower, installation of a tower base and anchors, installation of a new power line, purchase and on-site storage (but not installation) of radio equipment and other "preliminary steps" not having an "intrinsic" radio communication use "related to the proposed facility." *MCI Telecommunications Corp*, 64 RR2d 672 (1988); *Christian Broadcasting of the Midlands, Inc.*, 103 FCC 2d 375 (1986), reconsideration denied, FCC 87-328 (released October 19, 1987); *King Country Broadcasters*, 55 RR2d 1591, 1592 (1984) overruled on other grounds, *Christian County Broadcasting of the Midlands, Inc.*, *supra*; *Patton Communications Corp.*, 81 FCC 2d 336, 338 (1980); *Childress Broadcasting Corp.*, 24 RR 669 (1962).

However, when KAMY began full scale operations, it became apparent to Williams that Caprock's construction was not preliminary. Accordingly, and almost immediately upon the commencement of KAMY broadcast operations, Williams complained to the Commission. Williams gave Caprock every chance to be honest; Caprock was and is not.

In sum, Caprock's Opposition appears to be no more than stored-up resentment. Caprock does not deny its myriad of violations. Moreover, Caprock hardly appears penitent, especially in light of its continuing violations in Amarillo,

and the misrepresentations advanced in the pleading filed in this matter. Caprock's position quite obviously is that everything is "OK" until Caprock gets caught. Unfortunately, Williams is not ready to assume the responsibility or expense for investigating each aspect of operations with respect to

**EXHIBIT 1**

STATE OF TEXAS     )  
                          )  
COUNTY OF POTTER  )

SS

**AFFIDAVIT**

BEFORE ME, the undersigned Notary Public, on this 25th day of May, 1989, personally came and appeared:

**STEVAN A. WHITE**

who, having been first duly sworn, did hereby state as follows:

1. My name is Stevan A. White. I have personal knowledge of the facts recited herein.

2. From October, 1986, until January, 1988, I was employed by Kent Atkins as Director of Operations for FM Broadcast Station KRGN at Amarillo, Texas. Kent Atkins is the sole proprietor of Atkins Broadcasting, licensee of KRGN. Atkins also is a principal in Caprock Educational Broadcasting Foundation, licensee of FM Broadcast Stations KLMN at Amarillo, Texas.

3. KLMN operates at the same location from which KRGN operates. Both the antenna for KRGN and the antenna for KLMN

~~operate at the same location, located at 6000 N. Western Street~~

4. On Friday, May 19, 1989, at the request of Williams Broadcast Group, I went to the KRGV/KLMN tower site for the purpose of photographing the unauthorized location of the KLMN transmitter. Attachment A, appended hereto, consists of two

6. During the same day on which the attached photographs were taken, May 19, 1989, I also recorded a portion of the KLMN broadcast signal. The tape containing this recording is appended hereto as Attachment C, and included a station identification, for KLMN. The broadcasts embodied on the tape originated from the KLMN transmitter, located on the antenna shared with KRGN.

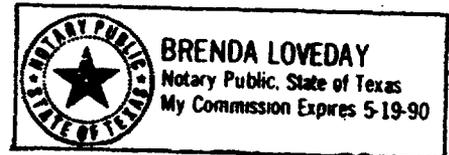
7. The photographs and recordings attached hereto are true and accurate, have not been retouched, and were taken at and from the KRGN tower site on the day referenced above.

Stevan A. White  
Stevan A. White

SWORN TO AND SUBSCRIBED BEFORE ME THIS 25 DAY OF May,  
1989.

Brenda Loveday  
NOTARY PUBLIC

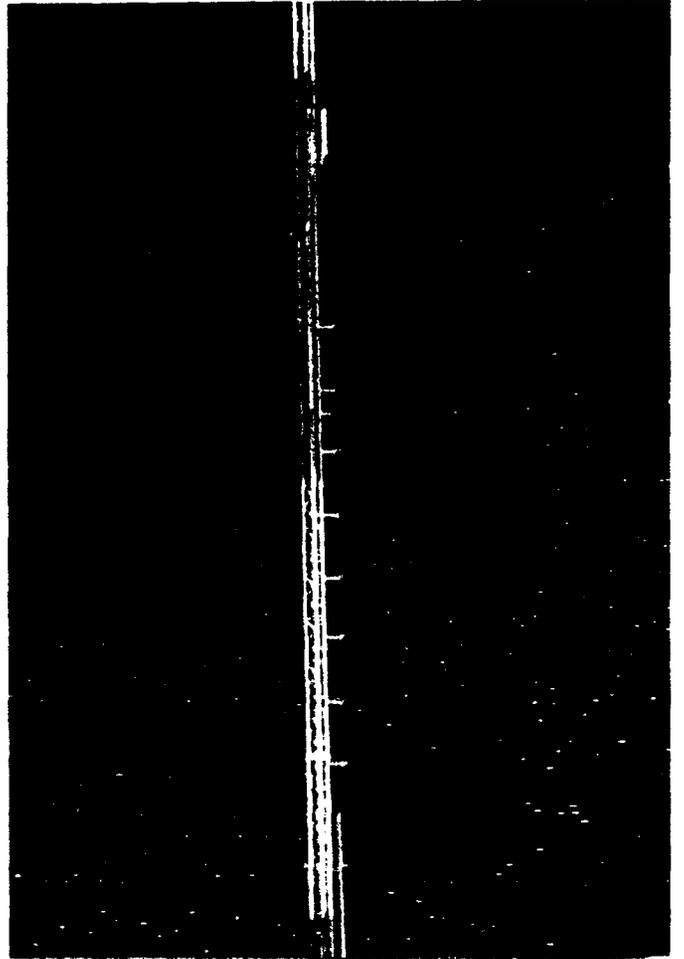
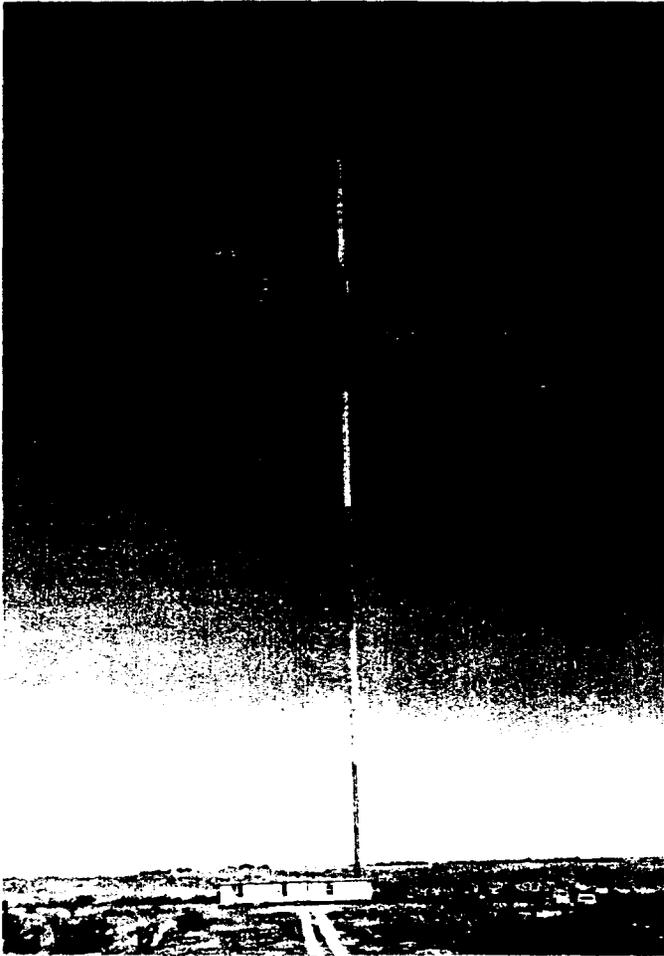
My commission expires 5/19/90.



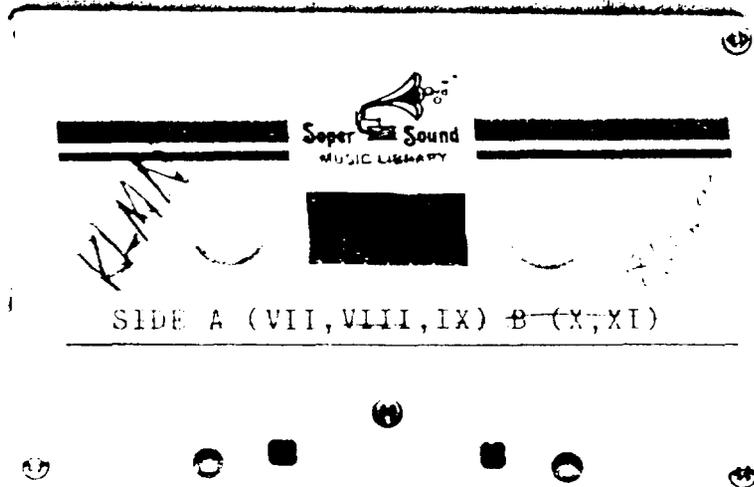
# ATTACHMENT A



**ATTACHMENT B**



ATTACHMENT C



Actual cassette tape submitted with original only.

**EXHIBIT 2**

DISTRICT OF COLUMBIA )  
 )  
CITY OF WASHINGTON )

**AFFIDAVIT**

BEFORE ME, the undersigned Notary Public, on this 26th day of May, 1989, personally came and appeared:

**MARY ELLEN SERA**

who, having been first duly sworn, did hereby state as follows:

1. My name is Mary Ellen Sera. I am Office Manager and General Secretary of the law firm of John H. Midlen, Jr., Chartered. I have personal knowledge of the facts recited herein.

2. On Wednesday, May 24, 1989, I was instructed to contact FM Broadcast Station KLMN, at Amarillo, Texas, in order to verify the location of the station's transmitter and antenna. In an attempt to comply with these instructions, at 12:06 p.m., I telephoned directory assistance for Amarillo, and asked for a listing for KLMN.

3. Upon contacting directory assistance for Amarillo, the directory assistance operator informed me that no listing existed for Station KLMN. Accordingly, I asked whether a

operator provided me with the following number for KRGN: (806) 376-5746. I then dialed the number provided.

4. My call was answered by a young gentleman, with the greeting, "KRGN." I told the gentleman that I wished to contact KLMN and asked for the station's address and telephone number. The gentleman implied that in calling KRGN, I had reached KLMN as well. The mailing address he provided to me for KLMN was Post Office Box 10050, Amarillo, Texas, 79116.

5. I then asked the gentleman where the KLMN transmitter and antenna were located. The man answered that the KLMN transmitter was located on North Western Street, on the north side of town, at North Western and St. Francis. I thanked the gentleman for the information and terminated the conversation.

6. On May 26, 1989, at approximately 11:20 a.m., I again contacted the above number and asked about KLMN. A young

**EXHIBIT 3**

Law Offices  
**JOHN H. MIDLEN, JR.**  
Chartered  
P.O. Box 5662  
Washington, D.C. 20016-5662

(202) 333-1980  
Facsimile (202) 699-0194

MAY 25 '89

OFFICE OF THE SECRETARY

May 25, 1989

Ms. Edythe Wise, Chief  
Complaints and Investigations Branch  
Mass Media Bureau, Room 8210  
Federal Communications Commission  
2025 M Street N.W.  
Washington, D.C. 20554

Re: COMPLAINT  
Station KLMN(FM), Amarillo, Texas  
Caprock Educational Broadcasting Foundation  
License File No. BLED-880620KB

Dear Ms. Wise:

Williams Broadcast Group (Williams), licensee of Station KJAK(FM), Slaton, Texas, requests that you investigate, and close down, the current operation of Station KLMN(FM), Amarillo, Texas, owned and operated by Caprock Educational Broadcasting Foundation (Caprock) on Channel 206A. Caprock's authorized transmitter location, as specified in its above-referenced license, is 0.4 kilometers southeast of 34th and Helium Road in Amarillo, Texas, at geographic coordinates North Latitude 35 10 21.0, West Longitude 101 57 13.0. Caprock has pending an application for modification of its construction permit, File No. BMPED-880321IA, seeking authorization to relocate its transmitter and antenna to a location 2.5 miles north of Amarillo on FM 1719, at geographic coordinates North Latitude 35 15 39, West Longitude 101 52 53, and to increase its power and antenna height.<sup>1</sup> However,

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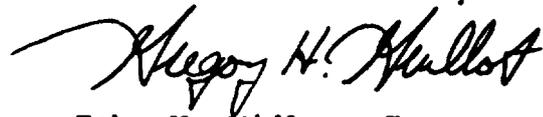
<sup>1</sup>Apparently, the proposed location is the same location as that used by FM Broadcast Station KRGN, Amarillo, Texas, on 6000 North Western. See FCC License No. BLH-861125KA. KRGN is licensed to Atkins Broadcasting, owned by Kent Atkins, Caprock's dominant principal. However, Williams notes that the geographic coordinates listed for KLMN's proposed move in its above-referenced application differ from the coordinates listed in KRGN's above-referenced license, although the address and tower are the same. This variance serves as yet another example of Caprock's imprecision and flagrant disregard for the Commission's Rules.

Ms. Edythe Wise  
May 25, 1989  
Page Two

Station KLMN has commenced operations from and with the facilities described in its modification application. Accordingly, the unauthorized operation is from an entirely different location than is currently authorized. Moreover, we believe current operation to be substantially over power.

It is requested that Station KLMN be contacted<sup>2</sup>, that the information contained herein be confirmed, and that the station be ordered, by telegram, to return to operation from its currently authorized facilities.

Very truly yours,



John H. Midlen, Jr.  
Gregory H. Guillot  
Counsel for  
Williams Broadcast Group

cc: Mr. Dennis Williams  
Mr. Arthur E. Doak  
James L. Oyster, Esq.

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<sup>2</sup>For the Commission's convenience Williams notes that no telephone listing or address is available for Station KLMN; all communications with the unauthorized facility apparently must be made through the listing available for KRGV; the stations are co-located.

CERTIFICATE OF SERVICE

I, Mary Ellen Sera, do hereby certify that I have caused to be sent via First Class U.S. Mail (postage prepaid) today, May 31, 1989, a copy of the foregoing REPLY TO OPPOSITION TO PETITION TO DENY, to the following:

James L. Oyster, Esquire  
Law Offices of James L. Oyster  
8315 Tobin Road  
Annandale, Virginia 22003

  
\_\_\_\_\_  
Mary Ellen Sera