

BEFORE THE

Federal Communications Commission

WASHINGTON, D. C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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| In the Matter of |) | |
| |) | |
| Amendment of Section 73.202(b), |) | MM Docket No. 93-74 |
| Table of Allotments, |) | RM-8153 |
| FM Broadcast Stations |) | |
| (Yermo, California). |) | |

RESPONSE

KHWY, Inc. ("KHWY"), licensee of KRXV(FM), Yermo, California, by its attorneys, hereby responds to the "Motion to Accept Supplemental Comments" (the "Motion") and the Supplemental Comments (the "Supplemental Comments") filed on July 27, 1993 by Antelope Broadcasting Co., Inc. ("Antelope"), the permittee of KYHT(FM), Yermo, California. 1/ Antelope's filings should be dismissed as untimely. Antelope does not posit any excuse for its failure to abide by the Commission's directive. Moreover, as the community of Yermo would be adequately served by Channel 287A, no compelling public interest benefit outweighs Antelope's abrogation of the Commission's procedures.

BACKGROUND

Antelope is the permittee of FM station KYHT, allocated to Channel 287A at Yermo, California. Although Antelope was granted the permit to construct

1/ KHWY requests leave to file this Response which is responsive to the late-filed Motion and Supplemental Comments.

over a year ago, it has not yet constructed the station. See FCC File No. BPH-891228MK. Antelope petitioned the Commission on December 23, 1992, to amend the Table of Allotments and its construction permit to specify operation on Channel 287B1. In its petition, Antelope specified a site for Channel 287B1 that is located 27.6 kilometers away from Yermo. In its Notice of Proposed Rule Making, the Commission observed that the selected site was outside the expected boundary from which city-grade coverage to Yermo could be provided.

See *Notice of Proposed Rule Making*, 8 FCC Rcd 2483, at ¶ 3 (Chief, Allocations Branch) ("*NPRM*"). Consequently, the Commission mandated that Antelope demonstrate compliance with the city coverage requirements "by the comment date." *Id.*

Antelope did not do so. It completely ignored the Commission's directive and provided no engineering statement or any reason for its failure to abide by the Commission's order. KHWY submitted timely Comments that demonstrated that the reference coordinates could not provide the requisite service to Yermo. Although Antelope was served with KHWY's Comments, it did not file any response during the reply period. Nor did Antelope seek leave to file a response following KHWY's timely Reply, which noted Antelope's dereliction and urged denial of the proposal.

Six weeks later, Antelope filed its Motion and Supplemental Comments. Antelope suggested no reason for its failure to comply with the Commission's express directive or to respond to KHWY's Comments in a timely manner. Instead, Antelope argues at this late date for the substitution of coordinates. Antelope contends that the pending proposal to substitute Channel 283A for Channel 285A at Lenwood, California, permits greater latitude in locating Channel 287B1. See Motion at ¶ 3; Supplemental Comments at ¶ 2. However, the *NPRM* provided that Antelope's engineering statement must be site-restricted to protect

Channel 285A at Lenwood unless and until the Commission grants a proposal to substitute Channel 283A. *See NPRM* at n.1.

DISCUSSION

Antelope's repeated disregard of the Commission's directive and procedures should not be excused. The *NPRM* was perfectly clear that Antelope's engineering statement was due "by the comment date." The *NPRM* also noted the pendency of the Channel 285A proceeding. Antelope did not file a request with the Commission by the comment date that it be afforded additional time while the Channel 285A proceeding was pending. Instead, it simply ignored the Commission's directive and procedural cut-offs.

The Commission's rules prohibit the filing of additional comments without the Commission's request or authorization. *See* 47 C.F.R. Section 1.415(d); *accord Metropolis, Illinois*, 7 FCC Rcd 6218, 6218 n.4 (Allocations Branch 1992) (rejecting petitioner's late-filed counterproposal). Despite the Commission's rule and the *NPRM*'s direct instructions, Antelope chose to proceed on its own schedule. The integrity of the Commission's processes would be undermined by the acceptance of Antelope's Motion and Supplemental Comments under these egregious circumstances.

While Antelope does not offer an excuse for its dereliction, it suggests that its Supplemental Comments should be accepted nevertheless by citing to other instances where late-filed comments or changes of reference coordinates were considered. *See* Motion at ¶ 2. However, those cases are distinguishable. In no instance had the petitioner failed to participate as required at the comment and reply comment stage. The parties in the cited cases had not abandoned their proposals as had Antelope.

Moreover, while the Commission may have permitted the filing of late comments in some instances by otherwise diligent parties when the proposal would

remove a conflict, Antelope's Supplemental Comments do not. While Antelope claims that substitution of the reference site will resolve the deficiency of its proposal, its "solution" is contingent on a pending proceeding. Commission allotment policy cannot proceed on a contingent basis.

See Oxford and New Albany, Mississippi, 3 FCC Rcd 615, 617 n.2 ("Commission policy does not provide for the acceptance of contingency proposals * * *").

Antelope's contingent "solution" is particularly inappropriate because it contravenes the *NPRM's* provision that Channel 285A should be protected until the grant of the proposed substitution. *See NPRM* at n.1.

Lastly, Antelope suggests in its Motion and its Supplemental Comments that its late filings should be accepted because of the countervailing public interest in the substitution of Channel 287B1 so as to provide increased service to the community of Yermo. *See Motion* at ¶ 4; *Supplemental Comments* at ¶ 3. In fact, Yermo is a small desert community 2/ that will be more than adequately served by the Class A channel already allotted. 3/ The best means of providing Yermo increased service would be the prompt construction by Antelope of its permit on Channel 287A. Antelope has made no showing that the public interest would be better served by the abrogation of the Commission's procedures in order to increase the class of an unconstructed station designed to serve this small community.

2/ The most recent Census listing for Yermo (1980), showed approximately 1,090 residents.

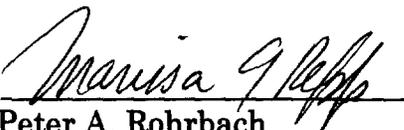
3/ KRXV(FM), Yermo, operates on Channel 251B, with the express Commission recognition that the station serves the travelers through the Mohave Desert as well as the community of Yermo. *See Yermo and Mountain Pass, CA*, 45 RR 2d 58, 59 ¶ 5 (Broadcast Bureau 1979). In contrast, the allotment for KYHT(FM) is limited to service to Yermo.

CONCLUSION

The integrity of the Commission's rules would be undermined by the acceptance of Antelope's inexcusably late filings. No compelling countervailing public interest supports the derogation of the Commission's procedures and its express directive that Antelope participate earlier in the proceeding. For the reasons stated herein and in KHWY's other filings in this matter, the proposal to allot Channel 287B1 to Yermo should be denied.

Respectfully submitted,

KHWY, INC.

By: 
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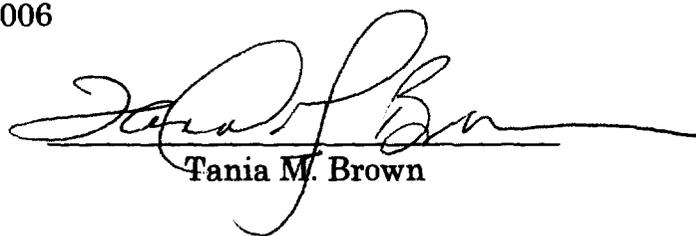
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August 11, 1993

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of August, 1993, a copy of the foregoing **Response** of KHWY, Inc. was sent by First Class United States Mail, postage prepaid, to the following:

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