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August 15, 1995

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

RECEIVED

AUG 15 1995

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

Re: MM Docket No. 93-136  
Opposition to Application for Review  
Radio Station WSKP(FM)  
Key West, Florida  
Spanish Broadcasting System of Florida, Inc.

Dear Mr. Caton:

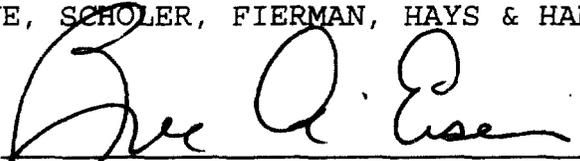
On behalf of Spanish Broadcasting System of Florida, Inc., licensee of Radio Station WSKP(FM), Key West, Florida, there is transmitted herewith and filed an original and four (4) copies of its "Opposition to Application for Review".

Should there be any questions concerning the enclosure, kindly communicate directly with the undersigned counsel to the licensee.

Very truly yours,

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

By:

  
Bruce A. Eisen

Enclosure

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BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

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AUG 15 1995

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
)  
Amendment of Section 73.202(b) ) MM Docket No. 93-136  
FM Table of Allotments )  
Clewiston, Fort Myers Villas, ) RM-8161, RM-8309, RM-8310  
Indiantown, Jupiter, Key Colony )  
Beach, Key Largo, Marathon and )  
Naples, Florida )

DOCKET FILE COPY ORIGINAL

TO: The Commission

**OPPOSITION TO APPLICATION FOR REVIEW**

SPANISH BROADCASTING SYSTEMS, INC.

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James M. Weitzman  
Allan Moskowitz  
Its Attorneys

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August 15, 1995

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## SUMMARY

On June 14, 1995, the Chief, Policy and Rules Division, released a Memorandum, Opinion and Order which approved certain license modifications which Spanish Broadcasting System of Florida, Inc. ("SBSF") had urged in a Petition for Rulemaking filed in order to cure RITOI interference. A counterproposal urged by three Florida licensees (Joint Petitioners) was properly dismissed because they had failed to timely commit to the reimbursement of a radio station that would have been forced to change channels pursuant to the counterproposal. In addition, the Allocations Branch held that Joint Petitioners had failed to demonstrate that there were suitable reference coordinates for the placement of an FM broadcast tower.

The counterproposal was not substantially complete when filed because the requisite reimbursement pledge had been omitted. Joint Petitioners cite inapposite cases in support of their faulty conclusions, and fail to consider that prejudice would accrue both to SBSF and, perhaps more importantly, to residents of the Florida Keys if diminished electrical power were to result from continued RITOI interference.

Finally, Joint Petitioners wrongly contend that the Allocations Branch refused to consider alternative tower sites for one of the proposed allotments under the counterproposal. SBSF has adequately shown that there is no suitable reference site for any of the alternative locations that Joint Petitioners urged.

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Beach, Key Largo, Marathon and )  
Naples, Florida )

TO: The Commission

**OPPOSITION TO APPLICATION FOR REVIEW**

Spanish Broadcasting System of Florida, Inc. ("SBSF"), by its attorneys, hereby opposes the application for review filed by Palm Beach Radio Broadcasting, Inc. ("Palm Beach"), WSUV, Inc. ("WSUV"), and GGG Broadcasting, Inc. ("GGG Broadcasting") (Joint Petitioners), with regard to the Memorandum, Opinion and Order, DA 95-1250, released June 14, 1995 by the Chief, Policy and Rules Division ("MO&O"). In support thereof, the following is shown:<sup>1</sup>

**BACKGROUND AND PRELIMINARY STATEMENT**

1. Joint Petitioners would, of course, like nothing better than to derail the assignments of frequencies in several Florida communities which the Commission approved in

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<sup>1</sup> Joint Petitioners consist of two licensees who were not parties to the original rulemaking proceeding. In this regard, Palm Beach and GGG Broadcasting have each filed "Notices of Continued Interest and Intent to Participate" as the successors in interest to Jupiter Broadcasting Corporation and Amaturio Group, Ltd.

order to eliminate "Receiver Induced Third Order Intermodulation Interference" ("RITOI"). Joint Petitioners, refusing to concede that they filed a deficient counterproposal, continue to fall back on erroneous arguments in the hope that the Commission will overlook the established principle that parties before the Commission who fail to meet minimal standards risk the prospect of dismissal.

2. SBSF is the licensee of radio station WZMQ(FM) at Key Largo, Florida. It filed a Petition for Rulemaking on December 17, 1992 in which it proposed the substitution of Channel 292C2 for Channel 280C2 at Key Largo and the modification of the station WZMQ(FM) license to operate on that channel. Grant of the petition would have implicated channel changes at Key Colony Beach, Florida and Marathon, Florida.

3. SBSF's petition and its subsequently filed supporting comments addressed existing problems with interference and resulting public safety factors. In particular, station WZMQ(FM) shares an antenna site with station WKLG(FM), operating on Channel 271C2 at Rock Harbor, Florida. SBSF demonstrated that this relationship caused RITOI interference to the reception of station WCTH(FM), operating on Channel 262C1 at Plantation Key, Florida. That station operates with facilities approximately 19 kilometers southwest of the WZMQ/WKLG antenna site. The newly proposed allotments and separations would have largely cured the RITOI problem. Moreover, SBSF acknowledged its responsibility, should it ultimately be granted a construction permit for Channel 292C2, to reimburse the licensees of stations WAVK(FM) at Marathon and WKKB(FM) at Key Colony Beach for the reasonable and prudent costs attendant to a change in frequency, as required by the Commission in

Circleville, Ohio, 8 FCC 2d 159 (1967). The latter stations would have been required to modify their licenses to propose operations on new channels.

4. The Commission ultimately released a Notice of Proposed Rulemaking and Order to Show Cause (“NPRM”), 8 FCC Rcd 3886 (1993), pursuant to which SBSF and other parties filed comments. The Florida Keys Electrical Cooperative Association, Inc., an electricity cooperative operating in the Florida Keys, noted that it used the station WCTH(FM) subcarrier for its load control because that station’s central location, power and height uniquely positioned the facility to provide the Cooperative with effective load control, the absence of which might prevent the cooperative from furnishing an uninterrupted supply of electricity to the Keys during peak loads. The Commissioner of Plantation Key Government Center also filed supporting comments, pointing to the electricity problems that the Keys could experience if the interference continued.

5. The NPRM requested SBSF to document the existence of serious RITOI interference. To this end, SBSF filed technical data which consisted of informal reception tests that demonstrated interference caused by the non-linear mixing of signals in FM receivers within one mile of the co-located transmitting antennas. Further tests confirmed RITOI interference to station WCTH(FM) caused by the frequency assignment and co-location of the WZMQ/WKLG transmitters. Station WCTH(FM) also cited numerous complaints from listeners who had experienced an inability to receive the station’s signal in the Key Largo area on various kinds of radios.

6. In their September 21, 1994 counterproposal, Joint Petitioners had offered no less than five channel substitutions for four licensees and one permittee. They made requisite

Circleville commitment to the licensee of station WAFC(FM) at Clewiston, Florida which would have had to change frequencies pursuant to the counterproposal. However, Joint Petitioners' counterproposal was fatally deficient because it omitted any Circleville reimbursement pledge to Sterling Communications, Corp., licensee of station WSGL(FM) at Naples, Florida, a second licensee which would have been required to change channels by virtue of the allotment scheme set forth in the counterproposal. Not until their reply comments, did Joint Petitioners make a reimbursement commitment to station WSGL(FM).

7. The Acting Chief, Allocations Branch, dismissed the counterproposal in his Report and Order, 9 FCC Rcd 4051 (1994). The Acting Chief determined that the Joint Petitioners' failure to pledge reimbursement to the Naples station violated the Commission's rule that counterproposals must be technically and procedurally correct at the time of filing. Similarly, the MO&O denied Joint Petitioners' Petition For Reconsideration, holding that precedent required counterproposals to be technically and procedurally correct when filed. The reimbursement pledge was categorized as a "fundamental component of any counterproposal" that had to be present ab initio if the counterproposal were not to be found deficient and subject to dismissal.

8. The MO&O also raised a technical basis upon which to dismiss the counterproposal. In this regard, the Chief, Policy and Rules Division, found that the station WROC(FM) reference site area near Sanibel Island, although appropriately spaced and capable of providing a city grade signal to the proposed community of license, was unsuitable because it was located in an environmentally sensitive region which was home to many endangered species and that, further, the record showed that environmental and zoning restrictions would

preclude the construction of the necessary broadcast tower on Sanibel Island. A second reference site urged by Joint Petitioners was shown to be located in water.

**I. THE ALLOCATIONS BRANCH CORRECTLY DISMISSED  
THE JOINT COUNTERPROPOSAL**

9. Joint Petitioners argue that the Allocations Branch incorrectly dismissed the Joint Counterproposal for not including a full reimbursement pledge because the counterproposal was "substantially complete", citing Fort Bragg, California, 6 FCC Rcd 5817, 5817 n.2 (Assistant Chief, Allocations Branch) (1991). Per Fort Bragg, Joint Petitioners parse the requirement that counterproposals must be "technically correct and substantially complete", arguing that counterproposals need only be "substantially" complete and are not required to comply with a "letter perfect" standard. Thus, Joint Petitioners argue that the Commission has denied counterproposals which are technically deficient, without permitting an opportunity to cure the defect, but that the Commission has, where the proposal is "substantially" complete, accepted the proposal and permitted the proponent an opportunity to cure procedural defects.

10. First, the distinction in this case is irrelevant. Since the Joint Counterproposal did not include a full reimbursement pledge, the simple truth is that it was not "substantially" complete at the time of filing, and consequently does not even meet the standard of Fort Bragg; Eldorado, Oklahoma, FCC 5 Rcd 6737 (1990), etc. The reimbursement pledge is an integral, basic requirement of a counterproposal and "the absence of such a statement will render the expression of interest invalid." See, Brookville and Punxatawney, Pennsylvania, 3 FCC Rcd 5555 (1988).

11. Second, the examples that Joint Petitioners' marshal to prove their argument that where the "proposal is substantially complete, the Commission has accepted the proposal and permitted the opponent an opportunity to cure procedural defects" are completely off the mark. Each of the cases cited by Joint Petitioners involve situations in which the offending party is either pro se and/or it has been determined that no prejudice will occur to any competing, mutually-exclusive party to the proceeding.

12. In Wewoka, Oklahoma, 9 FCC Rcd 6769, 6769 n.1 (1994), the pro se petitioner requested the allotment of a new channel to Wewoka, Oklahoma, but failed to comply with Section 1.52 of the Commission's Rules which requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his or her address stated. First, this is an extremely common failing by pro se petitioners, and the Commission regularly invites the petitioner to cure the defect and readily accepts the curative amendment.<sup>2</sup> Second, and significantly, no other party existed at the Wewoka proceeding at that time who would be prejudiced by the perfection of the petition for rulemaking. Woodville, Mississippi, 9 FCC Rcd 5718, 5718 n.1 (1994) presents an almost identical situation; i.e., a pro se applicant which failed to comply with Section 1.52 of the Commission's Rules.<sup>3</sup> Once again, as in Wewoka, no other party would have been prejudiced or harmed by allowing the Woodville petitioner to cure the defect in his petition.

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<sup>2</sup> For example, see, Rushville, Indiana, DA 95-1727 (Chief, Allocations Branch), released August 14, 1995, for the exact same situation.

<sup>3</sup> Despite being pro se, the petitioner in Woodville did, at least, manage to comply with the reimbursement requirement.

13. In Cavalier, North Dakota, 9 FCC Rcd 5713 (1994), not only did the petitioner fail to comply with the subscription and verification requirement of Section 1.52 in its original petition, but it failed to cure its petition even following a specific request for a curative amendment in the Notice of Proposed Rulemaking. Yet the Commission noted that:

While the failure to provide the affidavit can constitute grounds for dismissal of the petition, we believe that in this instance, such a severe penalty is not warranted. The request to allot a first local channel to Cavalier is unopposed and does not conflict with any other proposed allotment or application. Therefore, we believe that the proposal should be considered on its merits.

In other words, the Commission determined that no other party would be prejudiced by accepting, considering and even granting the petition despite its procedural defect.

14. In Neenah-Menasha, Wisconsin, 7 FCC Rcd 4594, 4594 n.5 (1992), the petitioner sought the substitution of a channel at Neenah-Menasha, Wisconsin, and also a change in the channel of Radio Station WRHN(FM), Rhinelander, Wisconsin. While, unlike Joint Petitioners, the petitioner in that case complied with the reimbursement requirement, it failed to serve its petition for rulemaking on the Rhinelander licensee. The Commission, however, specifically concluded that the Rhinelander licensee "had sufficient time to comment on the proposal and is not at a disadvantage because of our acceptance of the comments." Once again, the Commission concluded that no party was prejudiced by the petitioner's procedural failing. Furthermore, it should be noted that, in Wewoka, Oklahoma, supra; Woodville, Mississippi, supra; Cavalier, North Dakota, supra; and Neenah-Menasha, Wisconsin, supra, while the Commission allowed petitioners to cure certain procedural

defects, none of the cases involved the failure of a counterproponent to make the reimbursement pledge.

15. Finally, however, with respect to Clintonville, Wisconsin, 4 FCC Rcd 8462 (1989), Joint Petitioners cite a case which does involve the reimbursement requirement. In Clintonville, Sail Communication Corp., licensee of Radio Station WJMQ(FM) in Clintonville, proposed, inter alia, the substitution of channels at New Holstein, Wisconsin, and the modification of the license of Radio Station KFKQ(FM) at New Holstein. While the petitioner failed to state its intention to reimburse Radio Station KFKQ(FM) in its petition for rulemaking, the Commission advised it to state its intention in its comments, and did not dismiss Sail's petition.

16. However, the situation in Clintonville is in no way akin to the situation in the instant proceeding. First, once again, Sail Communication Corp. was unrepresented by legal counsel; its engineering consultant filed its petition. Second, the offending party was the petitioner. Most significantly, at that point in the proceeding there were no other parties to be prejudiced by the failure of Sail to make its reimbursement pledge in its petition. In the instant case, Joint Petitioners were counterproponents, who were represented by counsel, and their failure to include a reimbursement pledge for WSGL(FM) in their Joint Counterproposal did prejudice an already existing party to the proceeding. SBSF, the original petitioner. The standard is clearly higher for a counterproponent and should be. Procedural due process requires that a counterproposal be "technically correct and substantially complete" when filed if it is to be considered mutually-exclusive with a competing party in the proceeding so as not to unfairly advantage or disadvantage either party. Consequently, the leeway the Commission

has permitted in the rulemaking proceedings cited by Joint Petitioners was awarded either because no other party existed in the proceeding to be prejudiced (e.g., Wewoka, Oklahoma; Woodville, Mississippi; Cavalier, North Dakota; and Clintonville, Wisconsin), or because the Commission determined that the defect in question would not prejudice any other party (e.g., Neenah-Menasha, Wisconsin).

17. Conversely, where a party already exists in a rulemaking proceeding and would be prejudiced by the acceptance of a competing expression of interest or a counterproposal which does not include the reimbursement pledge, the Commission has dismissed the counterproposal. See, York, Alabama, 4 FCC Rcd 6923 (1989); Augusta, Kansas, 6 FCC Rcd 2043 (1991); Mary Esther, Appalachicola, and Crawfordville, Florida, 7 FCC Rcd 1417 (1992). It is clear that not only was the Joint Counterproposal properly dismissed, but that its acceptance would have been arbitrary and capricious and would have constituted reversible error in light of the procedural equities extant in the proceeding at the time that the counterproposal was filed.

18. Joint Petitioners' further argument that Brookville is no longer being followed, or should no longer be followed, is completely erroneous and self-serving. First, Joint Petitioners rely on Clintonville, Wisconsin which, as previously shown, involved a pro se petitioner, did not prejudice any other party, and, therefore, is not on point. Second, the argument relies on dicta in Mary Esther, Florida, supra, in which the Commission dismissed a petition treated as a counterproposal because the Report and Order noted that "the petition and the record" provided no evidence of a reimbursement pledge by the counterproponent. Hanging on the phrase " . . . and the record" like a life preserver, Joint Petitioners have

concluded that they were entitled to file their supplementary, corrective reimbursement pledge in reply comments. Joint Petitioners are just plain wrong. No case, including Mary Esther, provides that a reimbursement pledge can be provided at any time prior to the close of the pleading cycle where it would prejudice another party. Not only does Mary Esther not overrule, limit or in any way circumscribe Brookville, it, in fact, cites Brookville for support. Consequently, Joint Petitioners' argument that "if Brookville is still valid, then the Commission should have rejected the counterproposal in Mary Esther on the sole basis that the counterproponent did not include a reimbursement pledge" answers its own question. The Commission did reject the counterproposal in Mary Esther because the counterproponent did not include a reimbursement pledge, and the phrase ". . . and the record" is superfluous.

19. Joint Petitioners' further reliance on Caldwell, Texas, DA 95-1433 (Chief, Allocations Branch), released July 5, 1995, is inapposite. In Caldwell, a counterproponent filed its Reply Comments on May 21, 1991, but failed to attach its engineering exhibit to the Reply Comments. On May 22, 1991, one day later, the counterproponent filed an Erratum to its Reply Comments which consisted of the engineering exhibit. While acceptance of the Erratum was opposed by another party, the Commission accepted the exhibit because it pertained to a relevant issue in the proceeding. Joint Petitioners further comment that the Erratum was filed "after the record closed" is specious because (1) it was filed the following day, and (2) the Commission did not close the record but, in fact, issued a Request for Supplemental Information in that proceeding on March 13, 1992, nearly 11 months later.

20. In comparison, Joint Petitioners failed to comply with an established procedural requirement in its initial pleading, i.e., the Joint Counterproposal. They did not attempt to correct this defect the next day with an erratum but rather in their Joint Reply Comments which, filed nearly 30 days later on August 25, 1993, disingenuously "reaffirm[ed] their obligation and willingness to pay for their costs incurred by WAFC, Clewiston, Florida, and WSGL, Naples, Florida, in moving to their new channels." (emphasis added). Consequently, merely because the Commission allowed a party to submit an erratum to a reply pleading one day after the reply was due in no way diminishes or revises the established precedent of Brookville. See, East Wenatchee, Ephrata and Chelan, Washington, 8 FCC Rcd 5193 (1993); Hazelhurst, Utica and Vicksburg, Mississippi, 9 FCC Rcd 6439, 6439 n.4 (1994); and Sulphur and South Fort Polk, Louisiana, et al., 10 FCC Rcd 4952, 4952 n.7 (1995). The fact that the counterproponents made a reimbursement pledge with respect to one station and not with respect to another is irrelevant; they failed to comply with the reimbursement pledge with respect to WSGL and, therefore, the Joint Counterproposal should be and was correctly dismissed.<sup>4</sup>

21. Therefore, the Commission's dismissal of the Joint Counterproposal was not only proper pursuant to Brookville and subsequent case law, procedural due process required such action in order not to prejudice SBSF which followed the Commission's Rules, complied with its processes, and justly expected other parties to do the same or bear the consequences.

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<sup>4</sup> Consequently, the staff correctly relied upon Lonoke, Arkansas, 6 FCC Rcd 4861 (1991), and York, Alabama, *supra*.

## **II. THE JOINT PETITIONERS HAVE FAILED TO PROPOSE A SUITABLE WROC(FM) TOWER SITE**

22. Joint Petitioners had initially proposed a tower site for WROC(FM) on Sanibel Island. Upon reviewing the counterproposal, SBSF concluded that the site was clearly unsuitable because of environmental concerns. Despite the fact that Joint Petitioners have now noted their refusal to concede the unsuitability of Sanibel Island for a tower site, it is apparent that they have folded their tents on that issue. Indeed, it could hardly be otherwise given the very specific information previously supplied by SBSF in addition to the decision in Sanibel Island, 7 FCC Rcd 850 (1992) (local zoning ordinances prohibit construction of tower, justifying change in community). Hence, all Joint Petitioners can now do is to rely upon their alleged “other reference coordinates” for station WROC(FM), “including the reference coordinates contained in the Commission’s FM Table of Allotments for Punta Rassa, Florida as well as potential tower sites within the community of Punta Rassa”. Application for Review, par. 21.

23. The Punta Rassa reference site is encompassed by the Sanibel Island reference site area. However, nowhere have Joint Petitioners come to grips with the fact that their alternative reference site has been shown to be located in the water and that, moreover, the closest land area comprises the shoreline that exists within a public park. The Punta Rassa site is totally unsuitable.

24. Joint Petitioners contend that in rejecting the Punta Rassa reference coordinates as a suitable tower site, the Allocations Branch adopted a different standard for Joint Petitioners than for the proponent of the Punta Rassa allotment. However, the engineering

statement submitted by SBSF clearly showed the impossibility of proposing a tower from the Punta Rassa reference in its coordinates. Without regard to past Commission statements concerning Punta Rassa, Joint Petitioners nevertheless had an obligation to specify a reference site that they knew would be suitable for a tower. Having failed to do so, Joint Petitioners should not be heard to complain.

25. It transcends reason to argue that the Commission should legitimize for rule making purposes the “alternative tower sites” which Joint Petitioners they say are available at Punta Rassa. Since they allege that there are several high rise buildings with antennas located on top, a marina, and other office buildings, they conclude that Punta Rassa is a community capable of supporting a tower site, because SBSF has failed to provide evidence that a tower site in Punta Rassa is unsuitable. Application for Review, par. 25.

26. Joint Petitioners have failed to urge any information which could result in a conclusion that a particular set of coordinates within Punta Rassa would be suitable for a tower site. Joint Petitioners incorrectly assume that the burden has always been upon SBSF to show otherwise. It is well established that the underlying requirement for an allotment is the reasonable expectation that a useable site is available to comply with the minimum spacing requirements. The actual availability of a potential transmitter site is a matter which can be raised in comments from all interested parties, including of course, the proponent of a particular site. Joint Petitioners have presented no data that any of its “alternative sites” are satisfactory for allocation purposes. Hence, their vague and speculative conclusion must be rejected. See, Sebring and Miami, Florida, DA95-1273 (Chief, Allocation Branch) (released June 16, 1995).

27. Certainly there are basic matters which the proponent of an allotment must be expected to show. If there are buildings or other structures which it believes can support an FM tower, then some specificity about the location and other essential should be provided in response to a commenters, claim that the site is unsuitable. At no time have Joint Petitioners submitted information regarding the coordinates of the purported alternate sites, any information about the buildings to which they allude, and no demonstration that the site would be suitable for purposes. Hence, even if Joint Petitioners were correct in their conclusion that the counterproposal would solve the problems in this proceeding, it would nevertheless be neutralized because of the lack of a suitable site. See, FM Channel and Class Modifications by Application, 8 FCC Rcd 4735, 4737, n.19 (1993) (necessary to demonstrate that allotment reference site will meet allotment standards, including suitability for tower construction).

### **III. SBSF'S PROPOSAL WAS PROPERLY GRANTED**

28. Despite the record evidence in this proceeding and in other filings before the Commission documenting the evidence of RITOI interference, Joint Petitioners still contend that SBSF failed to justify the channel substitutions approved in the Report and Order by an inadequate documentation of SBSF's allegation of RITOI interference to Radio Station WCTH(FM), Plantation Key, Florida, caused by the co-location and proximity of WKLG(FM) and WZMQ(FM). Without rearguing and redocumenting the RITOI situation, suffice it to state that SBSF has submitted or pointed to (1) a statement by WZMQ(FM)'s technical consultant; (2) a statement by WCTH(FM)'s technical consultant; (3) a letter from the Commissioner of the Plantation Key Government Center personally attesting to the interference; (4) a statement from Charles A. Russell, General Manager of Florida Keys

Electric Cooperative Association, Inc. noting the problem and its effect on public safety; and (5) the engineering report filed with WZMQ(FM)'s application for license (File No. BALH-930427KA) which contains spectrum plots and a detailed description of the measurement equipment used in the potential for RITOI interference. In sum, more than enough tests, measurements and third-party verifications have been submitted to demonstrate the existence of the RITOI problem, its effect on WCTH(FM)'s listeners, and its very likely deleterious effect to the area's electricity supply and, therefore, its public safety. Other than demands as to what SBSF should have filed or what the Commission should have required of SBSF, Joint Petitioners have submitted no data, measurements, or any concrete information which in any way contradicts SBSF's documentation of the RITOI problem. Consequently, the Commission properly concluded (1) that a legitimate interference problem existed; (2) that amending the Table of Allotments was an appropriate remedy given the evidence presented; and (3) that the evidence presented by SBSF was sufficiently credible and accurate to warrant the relief sought by SBSF.

**IV. THE COMMISSION APPLIED THE SAME STANDARDS IN PROCESSING SBSF'S PETITION AND THE JOINT PETITIONERS' JOINT COUNTERPROPOSAL**

29. Joint Petitioners' final argument, that the Allocations Branch applied different standards in ruling on the Joint Counterproposal and SBSF's Petition for Rulemaking, is duplicitous and (hopefully) facetious.

30. SBSF's Petition for Rulemaking completely complied with all technical and procedural requirements pursuant to the Commission's Rules, and neither the NPRM nor any succeeding Commission decision has ever faulted SBSF's original Petition for any requisite

procedural or technical defect. SBSF, on its own volition, noted that the basis for its Petition was to reduce the potential for RITOI. No Commission rule, policy or precedent exists that mandates that a petitioner provide a detailed and documented basis, technical or otherwise, for, or to accompany, its petition other than an allegation that the requested action be "in the public interest." SBSF could have complied with the Commission processes if it merely stated that its proposed channel substitutions would provide a more preferential arrangement of the channels in the area. Paragraph 3 of the NPRM states that "[w]e note that petitioner offers no evidence of interference, and is requested to do so in comments." (emphasis added). SBSF complied with that request in its comments and provided ample evidence of the RITOI interference.

31. In stark contrast (and not to beat a dead horse), counterproposals in rulemaking proceedings must be technically correct and substantially complete when filed. Fort Bragg, California, supra. Further, a counterproponent is required to state its intention to reimburse all stations for expenses incurred in changing channels to accommodate the counterproponent's proposal. Brookville and Punxatawney, Pennsylvania, supra. Joint Petitioners' counterproposal failed to make a reimbursement commitment to WSGL(FM). Consequently, the counterproposal was dismissed.

32. Joint Petitioners' argument that "two different standards" were applied to the parties is, on the basis of the facts, an insult to all concerned. The Commission did not allow SBSF "an opportunity to cure a defect." SBSF was not required to provide technical documentation in its petition for rulemaking. Instead, the Commission "requested" SBSF to provide additional information. Joint Petitioners, on the other hand, were required, ab initio, to commit to reimburse each and every relevant station in its counterproposal, which it failed to do. That Joint Petitioners would even dream of comparing SBSF's provision of requested information to Joint Petitioners' failure to comply with a well established procedural requirement is less evidence of reasoned legal argument than of "try anything" desperation.

**V. THE COMMISSION CORRECTLY REJECTED THE JOINT COUNTERPROPOSAL**

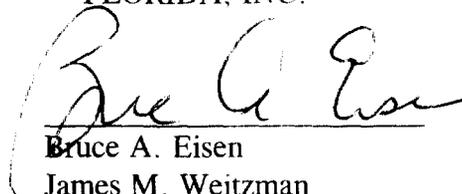
33. The Commission correctly rejected the Joint Counterproposal on procedural grounds because the filing was incomplete when tendered to the Commission. None of the arguments which Joint Petitioners urge should be credited, and were the decision of the Allocations Branch set aside, not only would SBSF be prejudiced, but also, local residents

might be deprived of electrical power. Finally, Joint Petitioners have failed to provide any convincing argument that alternative tower sites would be suitable for WROC(FM) allocation purposes. Hence, even if the Commission did not uphold the staff's dismissal of the Joint Counterproposal on procedural grounds, denial would be justified upon substantive grounds.

Respectfully submitted,

SPANISH BROADCASTING SYSTEM OF  
FLORIDA, INC.

By:



Bruce A. Eisen  
James M. Weitzman  
Allan Moskowitz  
Its Attorneys

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August 15, 1995

CERTIFICATE OF SERVICE

I, Linda G. Walker, a secretary in the law firm of Kaye, Scholer, Fierman, Hays & Handler, hereby certify that on this 15th day of August, 1995, I have caused a copy of the foregoing "Opposition to Application for Review" to be sent via regular United States mail, postage prepaid, to the following:

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Mass Media Bureau  
Federal Communications Commission  
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Washington, D.C. 20554

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Acting Chief, Allocations Branch  
Policy and Rules Division  
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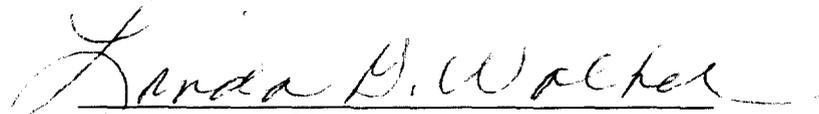
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