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September 3, 1996

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

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SEP 3 - 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

RE: Motion for Leave to File Supplemental Comments and Supplemental Comments
Platte Broadcasting Company, Inc.
MM Docket No. 96-95 (RM 8787-8838)
Plattsmouth, Nebraska

Dear Mr. Caton:

Transmitted herewith, on behalf of Platte Broadcasting Company, Inc., through counsel, are an original and six (6) copies of its Motion for Leave to File Supplemental Comments and Supplemental Comments in connection with the above-captioned Rule Making Proceeding.

Should any questions arise concerning this matter, kindly contact the undersigned, directly.

Respectfully submitted,

By: RHayes
Richard J. Hayes, Jr., Esquire
Counsel to: Platte Broadcasting Company, Inc.

RJH:tb
Enclosures

0+6

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON DC 20554

RECEIVED

SEP 3 - 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of:	)	
	)	
Amendment of Section 73.202(b)	)	MM Docket No. 96-95
Table of Allotments	)	RM-8787
Plattsmouth, Nebraska	)	

To: Chief, Allocations Branch

Motion for Leave to File
Supplemental Comments

Comes now, Platte Broadcasting Company, Inc. ("Platte"), through counsel, with this Motion for Leave to File Supplemental Comments in the above-captioned proceeding.

On August 6, 1996, Lifestyle Communications Corporation ("Lifestyle") submitted to the Commission a "Motion for Leave to File Supplemental Comments" and "Supplemental Comments" in this rule making proceeding. Lifestyle argued that it's "Supplemental Comments" would "...assist the Commission with resolution of the issue(s)". Lifestyle's objective in its "Supplemental Comments" is to persuade the Commission that Platte's "Reply Comments" are actually a "Counterproposal" which should have been submitted by the deadline date for "Counterproposals". Platte's "Supplemental Comments", attached hereto, will demonstrate that Platte's "Reply Comments" did not expand either the procedural or substantive scope of authorized Reply Comments and that Lifestyle's assertions to the contrary are without merit.

Lifestyle's "Supplemental Comments" are an unauthorized pleading in this proceeding and, as such, should be stricken from the record. Platte also understands that its "Supplemental Comments" stand in no brighter light and should be given no better treatment. If, however, the Commission accepts Lifestyle's "Supplemental Comments", Platte's similar submission should also be considered.

Respectfully submitted,

PLATTE BROADCASTING COMPANY, INC

By: _____
Richard J. Hayes, Jr., Esquire
Its Attorney

Richard J. Hayes, Jr., Esq.
Attorney at Law
13809 Black Meadow Road
Spotsylvania, Virginia 22553
(540) 972-2690

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON DC 20554

In the Matter of:	)	
	)	
Amendment of Section 73.202(b)	)	MM Docket No. 96-95
Table of Allotments	)	RM-8787 - 8738
Plattsmouth, Nebraska	)	

To: Chief, Allocations Branch

SUPPLEMENTAL COMMENTS

Platte Broadcasting Company, Inc. ("Platte"), licensee of KOTD-FM, Plattsmouth, Nebraska, through counsel, hereby submits "Supplemental Comments" in opposition to the "Supplemental Comments" submitted by Lifestyle Communications Corp. ("Lifestyle") in the above-captioned proceeding.

BACKGROUND INFORMATION

Platte is the original petitioner in this proceeding. Platte requested a simple upgrade of its FM facility at Plattsmouth Nebraska from channel 295A to channel 295C3 utilizing its present tower co-ordinates. To accomplish its upgrade, Lifestyle would have to make a minor channel change at its station in Osceola (KJJC-FM) from 295C2 to 296C2. The Notice of Proposed Rule Making established June 17, 1996 as the date for "Comments" and "Counter-proposals". Platte submitted "Comments", on June 12, 1996, which restated its intention to file an application for and to construct the upgraded facility. On the cutoff date, Lifestyle submitted a "Counter-proposal" which conflicted with Platte's upgrade request although Lifestyle did not present any fact or circumstance to demonstrate why its channel should not be changed. Lifestyle's "Counter-proposal", if preferred by the Commission, would destroy any chance of an upgrade for Platte's facility. Lifestyle would add additional FM service to Papillion, a community which is already served by Petitioner's

KOTD-FM, dozens of Omaha stations and is contained within the urbanized area of Omaha. Lifestyle's proposal also limits the power and class of its Papillion proposal to a 6,000 watt class "A" facility when the more efficient use of the frequency would clearly be as a class "C-3" station. As shown in Platte's "Reply Comments", Lifestyle's objective in limiting the power and class of the Papillion station is to warehouse spectrum for as long as possible in order to shelter its Osceola station (KJJC) from having to make a simple, one-channel change in its facility. Lifestyle, faced with the argument that its "Counter-proposal" is a transparent attempt to shelter KJJC from having to change channels, now wants to the Commission to believe that Platte's "Reply Comments" are nothing more than an unauthorized and untimely "Counter-proposal". As will be demonstrated, below, nothing could be farther from the truth.

LIFESTYLE'S COUNTERPROPOSAL

In its "Counter-proposal", Lifestyle seeks to shelter its present channel assignment at Osceola on 295B. Lifestyle does not want to change its channel even though Platte has stated that it would reimburse Lifestyle for the costs of the simple channel change. To accomplish its objective, Lifestyle suggested that the Commission take Platte's channel 295A and move it a mere few miles down the road to Papillion, Nebraska, a community already fully served by Platte's KOTD-FM. According to Lifestyle's "Counter-proposal", the channel to be used in Papillion would be a class "A" facility. To accommodate Platte's loss of channel 295A, Lifestyle proposed that Platte's KOTD-FM be moved to channel 299A. According to Lifestyle, this change would allow for *first local service* in Papillion, even though Papillion is already served by KOTD-FM, Plattsmouth and by the dozens of stations from the Omaha market.

PLATTE'S REPLY COMMENTS

Platte submitted its "Comments" on June 12 1996. The Comment deadline was June 17, 1996 and, on that deadline date, Lifestyle filed its "Counter-proposal". Platte reviewed Lifestyle's "Counter-proposal" and submitted its "Reply Comments" prior to the cut-off date of July 2, 1996. It its "Reply Comments", Platte noted that Lifestyle had proposed the allotment of channel 295A to Papillion. Channel 295A is Platte's channel for KOTD-FM, Plattsmouth, Nebraska. KOTD-FM already serves Papillion as do dozens of stations from Omaha. Lifestyle had also proposed that channel 299A be substituted for channel 295A at Plattsmouth to accommodate Platte's interests in Plattsmouth. The allotment scheme proposed by Lifestyle wasted the resources of the limited FM band by not proposing a class "C-3" facility at Papillion. Obviously, this was no oversight by Lifestyle because a class C-3 facility at Papillion, a mere few miles down the road from Plattsmouth, would require KJJC-FM (Lifestyle's station) to change channels as proposed by Platte in its original Petition for Rule Making. On its face, Lifestyle's "Counter-proposal" was totally self-serving. Clearly, Lifestyle's proposal was offered for the sole purpose of sheltering the channel used by Lifestyle's KJJC at Osceola, Iowa although cloaked in the usually thin veil of altruism.

Platte recognized that there was a better way to utilize the scarce resources of the FM band and, in its "Reply Comments", suggested that the Commission change Platt's KOTD-FM city of license from Plattsmouth to Papillion. This change would be minor in substance since Platte proposed that it utilize the exact same co-ordinates it proposed for its upgrade at Plattsmouth. As stated, above, KOTD presently serves Papillion! (Papillion is to Plattsmouth what Woodbridge, Virginia is to Alexandria, Virginia...a distinction without much difference except to the commuter and the Post Office.) Platte suggested that a change in its city of license to Papillion would satisfy the proposal for a local service at Papillion while permitting KOTD to upgrade to class C-3 status. Such a change in community of license could not be viewed as a "migration" of a

small town station to the "big city" because the tower and transmitter would stay in the same location as specified in Platte's Petition for Rule Making. KOTD would not be moving any closer to Omaha than it already is. The only change would be in the city of license. Furthermore, such a change would not add any new community to the caption of this case nor would it add any new channels. Platte, furthermore, suggested that channel 299A be added at Plattsmouth as a new FM facility. Lifestyle had suggested that channel 299A be used at Plattsmouth as the replacement channel for KOTD. Platte's suggestion that 299A be allotted as a new channel did not add any new community to the caption of this proceeding nor did it add or change any channels under consideration.

The allotment scheme suggested by Platte in its "Reply Comments" not only brings new service to Papillion (whether it needs it or not), but it also adds new service on channel 299A at Plattsmouth. The net effect of Platte's proposal is that service to Papillion on a class "C-3" facility and new service in Plattsmouth on a class "A" facility would serve tens of thousands more people than Lifestyle's proposal for a small Class "A" facility in Papillion. It should also be noted that Platte's re-licensing to Papillion would not result in a complete loss of service to Plattsmouth because KOTD-AM is licensed to Plattsmouth. Additionally, Platte is proposing new FM service to Plattsmouth on channel 299A, the channel Lifestyle proposed for Plattsmouth as a substitute for KOTD-FM.

LIFESTYLE'S MAJOR ARGUMENT IS ILLOGICAL

Despite all of the facts which damage Lifestyle's ingenuous "Counter-proposal", it wants the Commission the declare that Platte's "Reply Comments" are really nothing more than an untimely counter-proposal. Here is why Lifestyle's position makes no sense:

Lifestyle argues that Platte should have offered its new allotment scheme (channel 295C3 to Papillion and channel 299A to Plattsmouth) ***prior*** to the deadline for filing counter-proposals in this proceeding. It would make no sense for Platte to file a counter-proposal to its own proposal unless it was prompted to do so by conditions or circumstances. At the time of the deadline for Comments, no such circumstances or conditions were known to Platte. The time to respond or to rebut would logically come ***after*** an incentive to do so. Platte would need a ***reason*** to change its proposal and that reason didn't arise until ***after*** it had received a copy of Lifestyle's "Counter-proposal...one week after the Comment deadline. In this proceeding, Platte requested a simple upgrade on its co-channel. There was no reason to modify this proposal until Lifestyle filed its "Counter-proposal." That "Counter-proposal" turned-out to be mutually exclusive with Platte's upgrade. Platte received a copy of Lifestyle's "Counter-proposal" a week ***after*** the initial Comments deadline date. Prior to that time, Platte had no reason or incentive to consider any allotment scheme other than that which it filed in its original "Petition for Rule Making". Yet, on page 3 of Lifestyle's "Supplemental Comments", Lifestyle argues that "...It was wholly within Petitioner's ability to file for Papillion by the Comment deadline yet it failed to do so until after Lifestyle filed its 'Counter-proposal'". Lifestyle's argument makes no logical sense, at all. Platte could not have filed a responsive pleading until it had received Lifestyle's "Counter-proposal". That is the whole point of Reply Comments! One thing is totally certain: Platte cannot predict the future nor can it logically be expected to respond to something before that "thing" exists!

PLATTE FILED APPROPRIATE "REPLY COMMENTS"

Platte did NOT file a *counter-proposal* (often referred-to as a 'Counter-counter-proposal' by Lifestyle in its "Supplemental Comments"). Platte filed a proper "Reply Comment" in a proceeding in which it is the original petitioner. Those "Reply Comments" properly addressed the issues, communities and channels counter-proposed by Lifestyle ***without*** adding any new issues, communities or channels to the proceeding for

which Public Notice had not already been published. In other words, Platte's "Reply Comments" fall within the scope of proper Reply Comments and should be fully considered in this proceeding. To do otherwise would be to subject Platte to considerable, procedural unfairness and result in an allotment scheme which makes neither logical sense nor wisely utilizes scarce FM resources.

The channels and communities originally affected by Platte's "Petition for Rule Making" are Channel 295A and Channel 295C3 at Plattsmouth and Channel 295B and Channel 296B at Osceola, Iowa. Public Notice was provided by the Commission with respect to these channels in the Notice of Proposed Rule Making. The channels and communities affected by Lifestyle's "Counter-proposal" are Channel 295A in Plattsmouth, Channel 295A at Papillion, and Channel 299A in Plattsmouth. Public Notice with respect to these communities and channels was given in the Commission's Public Notice dated July 11, 1996 in RM-8838.

In its "Reply Comments", Platte did not expand either the procedural or substantive scope of this rule making proceeding. Platte's "Reply Comments" addressed only the communities of Osceola, Iowa, Plattsmouth, Nebraska and Papillion, Nebraska. The channels discussed in Platte's "Reply Comments" did not change from those originally proposed in Platte's original "Petition for Rule Making" or as proposed by Lifestyle in its "Counter proposal". By any test, Platte's "Reply Comments" were limited to those channels and communities for which public notice had already been given by the Commission. Platte merely *replied* to Lifestyle's "Counter-proposal" with an allotment scheme which made better use of the limited frequencies in the region without adding either new channels or communities for Commission consideration.

THE COMMISSION'S PUBLIC NOTICE OF JULY 11, 1996

On July 11, 1996, the Commission published a Public Notice in RM-8838 which stated that Lifestyle's "Counter-proposal" would be considered in the context of MM Docket 96-95. "***COMMENTS***" to

this Counter-proposal "...should be submitted in this Docket no later than 15 days (rather than 30 days) after the date of this Public Notice". Obviously, the Commission's intent with this Public Notice is to give the public the opportunity to express its thoughts with regard to Lifestyle's "Counter-proposal". Conceivably, a third-party may advise the Commission of another allotment scheme which would make more sense than that suggested by Lifestyle. (If that is ***not*** the purpose of a Public Notice than the Public Notice procedure offered by the Commission is nothing more than an empty gesture devoid of any possibility of impacting the proceeding.) If Lifestyle so desires, it may consider Platte's "Reply Comments" as "Comments" solicited in accordance with the July 11, 1996 Public Notice. Either way, it is doubtful that the Commission intends for Platte to just sit back and let the public pick away at its original proposal without affording it the opportunity to step back up to the podium and say..."hey, this doesn't make sense", or, "here's a better idea".

There have been many instances where the Commission has evaluated conflicting proposals and has resolved disputes by allotting a channel *different* from one which any party to the proceeding proposed. The Commission has also encouraged parties to find substitute, equivalent channels to eliminate mutual exclusivity. In hundreds of cases, solutions to conflicts have been offered by interested parties at the Reply Comment stage because, logically, solutions are not required until there is a conflict.

Obviously, there is considerable benefit to the public and to the Commission in establishing cutoff dates and pleading deadlines. Without clear procedures, there would be no end to some proceedings and the costs to the public would be greater than any benefit to be gained by keeping the door open for unlimited counter-proposals. In this case, however, Lifestyle is arguing for a "one-shot" rule making system wherein the original petitioner in a rule making proceeding has but one opportunity to make his case and must be tied and gagged while everyone else has had his say. Platte's position on this matter is that Reply Comments are designed to give the original petitioner an opportunity to respond to those matters raised in a Counter-proposal

with the aim toward resolving any mutual exclusivity or other disputes in a manner which best serves the public interest. Reply Comments afford the Commission the opportunity to develop a complete record of the competing interests in a proceeding before it decides which proposal (if any) best serves the needs of the affected communities.

With these principles in mind, Platte submitted its "Reply Comments" and deliberately refrained from introducing new issues, communities or channels. Therefore, Platte argues that allotment scheme presented in its "Reply Comments" is far superior to the proposal offered by Lifestyle. Platte suggests that the public interest is better served by changing its city of license to Papillion and proposing new class "A" service at Plattsmouth. This scheme results in a better use of scarce FM resources, provides superior services to the communities involved and serves a substantially greater number of people. Lifestyle's "Counter-proposal" limits the class of FM service to Papillion for the sole purpose of sheltering its own FM channel at Osceola, Iowa. Lifestyle needlessly proposes a change of channels at Plattsmouth to accommodate its Papillion proposal and the net effect is service to far fewer people.

As a result of the exchange of ideas in this proceeding, the Commission has a more complete record upon which to base its judgment. That exchange would not have been possible unless Platte submitted its "Reply Comments" in the manner in which it did. That is the whole point of Reply Comments! Procedurally, Platte is obligated to respond to any counter-proposal and must craft its Reply Comments in such a manner as to address those issues which are raised by the counterproposal. Platte did just that. Lifestyle argues that Platte is not permitted to offer any allotment scheme at the Reply Comment stage which may be more clearly tailored to the public interest. The mere suggestion of this proposition absolutely destroys the value, purpose and spirit of Reply Comments and also works toward the elimination of any public interest in these proceedings. Such a result would be to render Reply Comments meaningless. Furthermore, Lifestyle's argument also fails when

considered in the light of the purpose underlying the Commission's invitation for **COMMENTS** to Lifestyle's "Counter-proposal" dated July 11, 1996. If Lifestyle's position is given the benefit of the doubt, the Commission would be so much as saying that no party to a proceeding or member of the public shall ever challenge a counter-proposal and no allotment schemes will ever be considered other than those offered by the original petitioner and the counter-proponent. The effect would be to state that procedural rules are more important than developing a complete record of the needs and interests of a community and the public interest be damned! Lifestyle argues that "the continuous filing of proposals without regard to a cut-off date is not conducive to the efficient transaction of Commission business and would delay service to the public." *Amendment of Section 73.202(b) (Pinewood, South Carolina),* 5 FCC Rcd. 7609, 7610 (1990). To support this proposition, in this proceeding, would be the equivalent (again) of stating that the original Petitioner should be hog-tied to his original proposal without regard for the public interest. In this case, Platte submitted proper "Reply Comments" and those comments should be considered in this proceeding.

NONE OF THE CASES CITED BY LIFESTYLE ARE ON POINT

In its "Supplemental Comments", Lifestyle directs the Commission's attention to several Rule Making proceedings in an attempt to demonstrate that the FCC has previously ruled in a manner which supports the argument that Platte's "Reply Comments" are merely untimely counterproposals.

In *Woodville and Liberty, Mississippi; Clayton and Jena, Louisiana* (11 FCC Rcd. 4712 n4 (MMB 1996)), Lifestyle relies on a mere footnote to support its position. When the case is thoroughly studied, the Commission's result in that proceeding is justified because the Petitioner, PDB Broadcasting, wanted to upgrade its construction permit just before that permit was set to expire. PDB filed its Petition for Rule Making and, shortly thereafter, the Commission revoked the construction permit. In the meantime, another interested party filed a counterproposal to the PDB upgrade request seeking to use the channel formerly authorized for its

construction permit in another community. PDB, in a panic, filed a request to withdraw its upgrade request and terminate the proceeding in the belief that a termination of the proceeding would eliminate the counterproposal. The Commission treated that request to withdraw and terminate as an untimely counterproposal. In this case, the Petitioner sought to completely change the character of an on-going proceeding...in fact, the Petitioner wanted to kill the whole proceeding because it did not want to lose its channel even though its construction permit was canceled! (Apparently, the Petitioner wanted to fight the cancellation of its construction permit but wanted to preserve the channel because it had the potential to become a high powered facility.) In the Plattsmouth/Papillion proceeding, The original Petitioner (Platte) merely seeks to resolve the conflict by rearranging the use of channels and communities for which public notice has already been given. Platte does not seek to terminate the proceeding. Platte has introduced no new channels, communities or issues and its "Reply Comments" are proper. The "Woodville" case is not similar in any respect to the instant proceeding.

In *Canovanas, Culebra, et al* (7 FCC Rcd. 3324, 3327 (MMB 1992), the Petitioner filed a counter-proposal to its own Petition for Rule Making *before* the deadline for Comments and Counter-proposals in that proceeding because it discovered, after it filed its original petition, that there was an allocation scheme which would better serve its interests than originally proposed. The Petitioner's counter-proposal was not discussed in the "Notice of Proposed Rule Making" although the counter-proposal completely changed the entire character of the proceeding by proposing new channels and communities. The Canovanas proceeding has been on the Commission's desk since 1991 and, in 1996, the FCC released a "Further Notice of Proposed Rule Making" to give sufficient public notice to all interested parties with respect to Canovanas' counter-proposal. The Canovanas case, as cited by Lifestyle, involves a counter-proposal submitted by the original petitioner prior to the deadline date for counter-proposals and the case addresses the matter of adequate public notice and the Commission's responsibilities for adequate notice under the Administrative Procedures Act. The Canovanas case has nothing to do with the Plattsmouth/Papillion proceeding. Platte is introducing no new

channels, issues or communities for which public notice is required. Platte's "Reply Comments" are appropriate and proper.

In *Amendment of Section 73.202(b), Brookville and Punxsatawney, Pennsylvania, et al.*, (FCC Rcd 2517 (MMB 1996)), Renda Radio, Inc., the licensee of WPXZ-FM had filed a Petition for Rule Making seeking an upgrade from channel 288A to channel 288B1 at Punxsatawney. That Petition was dismissed by the Commission because it failed to provide unobstructed city-grade coverage over the community of license from the petitioner's proposed tower site. Contesting that dismissal, Renda filed a Petition for Reconsideration. In another proceeding, Stratten Broadcasters, licensee of Station WMKX-FM was seeking an upgrade from channel 240A to channel 288B1. The Stratten upgrade proposal would have required Renda's station to be relocated from channel 288A to 281A. The Commission issued a "Notice of Proposed Rule Making and Order to Show Cause" asking Renda, inter alia, to show why its channel should not be changed. Renda filed a Petition for Reconsideration of the Order to Show Cause objecting to the channel change and another "Petition for Rule Making" which requested an upgrade on its co-channel but with a change in its community of license from Punxsatawney to Brookville. The Commission ruled that the Petition for Reconsideration was improperly filed because such petitions are appropriate only after a final action has been taken (an Order to Show Cause is only an intermediate action). The FCC dismissed Renda's Petition for Rule Making as improperly filed. However, The Commission elected to treat Renda's Petition for Rule Making and it's Petition for Reconsideration as "Comments" in the Brookville proceeding. By this time, though, Renda had so totally fouled-up the procedures associated with comments, petitions and counter-proposals, that it's request for a change in community of license and an upgrade was submitted too late for consideration under any scheme of procedural law. Obviously, this case is so far away from the facts of the Plattsmouth/Papillion proceeding that it is a wonder that Lifestyle bothered to mention it at all.

In Amendment of Section 73.202(b), *Pinewood, South Carolina* (Memorandum Opinion and Order) 5 FCC Rcd., 26, the Commission stated that, "...After the counter-proposal deadline, we believe it is appropriate for a party in a proceeding to suggest alternate channels which may lead to a resolution with respect to the communities already at issue in the proceeding. *(emphasis added)* In contrast, we believe it is inappropriate, after the counter-proposal deadline, for a non-party to offer a new suggestion regarding a new community not previously at issue in the proceeding." In the Plattsmouth/Papillion proceeding, Platte's proposal was offered for the purpose of resolving the conflict but did not add any new issues, communities or channels. Platte's "Reply Comments" were, therefore, appropriate.

In Grove City, Pennsylvania, and Hubbard, Ohio (6 FCC Rcd, 25), A Notice of Proposed Rule Making proposed the allotment of channel 270A to Grove City. A timely counter-proposal requesting the use of that same channel was made at Hubbard, Ohio. After the counter-proposal deadline, a non-party to the proceeding filed a counter-proposal seeking to totally re-arrange the proceeding in order to request an upgrade to a completely different station in a distant community. This case has nothing to do with the Plattsmouth/Papillion proceeding and does not support Lifestyle's arguments.

LIFESTYLE'S OBJECTIVE

Platte argues that Lifestyle's Counter-proposal is a sham. On Page 7 of its "Supplemental Comments", Lifestyle states that (it) "...initially found the available channel for Papillion". Not true. The channel Lifestyle refers to is channel 295A which is used by KOTD-FM just a few miles up the road from Papillion. Lifestyle could ***NEVER*** have successfully proposed the use of channel 295A at Papillion because it knew that KOTD would have responded by counter-proposing a change in community of license from Plattsmouth to Papillion on channel 295A or channel 295C3, receiving the protection of Section 1.420(g) of the Commission's rules. Alternatively, had Lifestyle proposed channel 295A at Papillion and also proposed

channel 299A as a substitute channel for KOTD at Plattsmouth, Platte could simply have counter-proposed the use of channel 299A to another, nearby community as a first local service removing the availability of channel 299A as a substitute for KOTD. Clearly, for logical and practical reasons, Lifestyle had no interest in serving the community of Papillion or in channel 295A until Platte filed its request to upgrade its facility in Plattsmouth. The only logical conclusion is that Lifestyle, faced with the proposition of having to relocate from channel 295B to channel 296B, sought to find a way to destroy the upgrade at Plattsmouth. If it could destroy the upgrade at Plattsmouth, it would not need to change channels in Osceola, Iowa. To state otherwise can only be interpreted as a bold-faced lie! Lifestyle found Papillion to be a "community of convenience" in its scheme to keep form having to change channels. The allocation studies pertaining to channel 295 in the Plattsmouth/Papillion area were fully discussed in Platte's "Petition for Rule Making". The only thing Lifestyle had to do was send a copy of Platte's "Petition" to an engineer for verification that channel 295A would provide city grade service to Papillion and meet the Commission's mileage separation requirements...an academic exercise since this fact could have been easily obtained from Platte's original "Petition". There is no way in the world, given the current regulations and the crowded state of the FM spectrum in the Plattsmouth/Papillion area, that Lifestyle would ever have had the slightest chance of successfully proposing a new FM facility at Papillion except as a counter-proposal in this proceeding.

Furthermore, as stated above, Lifestyle also had to know that channel 295C3 (a higher class facility) would be available at Papillion yet deliberately proposed only a class A facility. The ***ONLY*** explanation for this is that Lifestyle deliberately proposed a lesser-powered facility in order to eliminate any short-term possibility that its channel at KJJC, Osceola, Iowa would be changed. If it had proposed a class C3 facility at Papillion, Lifestyle would have had to change channels at KJJC, Osceola, as originally proposed by Platte. Platte is at a loss to find a clearer example of a Counter-proposal filed for the purpose of manipulating spectrum in order to prevent having to change channels. This manipulation masquerades under the noble banner of

(questionable) first local service at Papillion but, when viewed in the clear light of logic, there is no question that the sole purpose of Lifestyle's "Counter-proposal" is to serve its *private* interest in side-stepping a channel change. Lifestyle's *private* interest, if given sway, will result in an allotment scheme which is not in the best public interest. It will also have the effect of destroying the opportunity for establishing a first, wide-area FM service at Plate's KOTD-FM.

THE SPIRIT AND INTENT OF SECTION 1.420(g)

Section 1.420(g) of the Commission's Rules states that, in general, competing expressions of interest in a rule making proceeding will not be entertained where the Petitioner proposes an upgrade on its co-channel or on any one of its three upper or lower adjacent channels within the same community of license. The purpose of this rule, inter alia, was to provide the Petitioner with a more stable environment in which to propose an upgrade to an existing facility. Under the old rules, a Petitioner for an upgrade would be placing his license "in play" if he proposed an upgrade because the rules of that day stated that a change in channels represented a new use of the spectrum which triggered the opportunity for competing expressions of interest. The Commission could not, on the one hand, encourage licensees to upgrade their facilities while, one the other hand, subjecting those same licensees to the potential loss of their license if a successful competing expression of interest prevailed. The Commission wisely reached the conclusion that *but for* the use by a licensee of a particular channel, that channel would not be available to other interested parties merely because the licensee was requesting an upgrade in its technical facilities.

The new policy is a dramatic improvement over the old state of affairs. The problem with the new policy, however, lies in the fact that communities have adjacent borders. An infinitesimally thin line often separates one community from another resulting in a loophole large enough to drive a caravan through. In this case, Platte's proposal for an upgrade should not have been challenged by a proposal for new service a mere

few miles up the road where Platte's station already provides established, local service. Platte's upgrade, furthermore, would also provide city-grade service to Papillion. The spirit and intent of Section 1.420(g) of the Commission's rules is being stretched to the limit when a counter-proposal, such as the one offered by Lifestyle, is accepted for consideration in this proceeding.

First of all, the idea of first local service in a market so close to Omaha is a complete fiction which requires the Commission to erase the Omaha market from its maps if the proposition is to be given any consideration because Papillion is part of the Omaha Urbanized Area. Secondly, denying Platte the protection afforded by Section 1.420(g) of the rules for an upgrade on its co-channel while accepting a counter-proposal in a community a mere few miles away ***on that same channel*** is ridiculous. For section 1.420(g) to have *any* meaningful purpose at all, protection must be afforded to the limit of the Petitioner's 1.0 mV/m contour in much the same way as that contour is protected for a myriad of other purposes. To use an example from the Commission's backyard, a co-channel upgrade proposed at Washington DC could be easily defeated by proposing the use of that same channel in Arlington provided a substitute equivalent channel could be found for the petitioner seeking the upgrade. The effect of the application of this principle destroys the entire spirit and intent of Section 1.420(g).

In this case, Platte's proposed co-channel upgrade at Plattsmouth would also provide full city-grade service to Papillion. Logically, Section 1.420(g) of the Commission's Rules *should* apply to a situation such as this. A proposal for first-local service on the same channel should not pre-empt an upgrade in a community a mere few miles up the road. A conclusion to the contrary would be ridiculous. The public interest is not served by such a conclusion and, furthermore, such a conclusion would be quite difficult to *explain* to the public! This huge loophole needs to be closed and licensees need to know that the protection supposedly afforded by Section 1.420(g) of the Commission's Rules cannot be diminished by self-serving "strike" pleadings which have self-centered private interests at their hearts. Platte argues that Section 1.420(g) of the rules should have prevented

the Commission from accepting Lifestyle's "Counterproposal" in the first place because the rule was designed to afford a more stable environment for a licensee seeking an upgrade and, in this case, it is clear that the spirit of the Rule was either disregarded, overlooked or stretched to the point of absurdity. Had the Rule been employed by the Commission when it first reviewed Lifestyle's "Counter-proposal", the needless complexity now evident in this case could have been avoided, and new, wide-area FM service could have been initiated sooner. But for this huge loophole in Section 1.420(g), this proceeding could have been resolved, by now. Instead, the battle rages, private and public money is wasted and in the final analysis the only substantive change in the FM Table of Allotments might only be the addition of a new class "A" station. That's all! The continued application of Section 1.420(g), with the loophole, might only result in one class "A" FM station if Lifestyle's proposal is adopted. What a waste of precious spectrum and scarce tax dollars! This fight is over a class A" FM station which no one really needs and no community cares about. On the other hand, had the spirit of Section 1.420(g) been preserved in this proceeding, a valuable upgrade might have been automatic and another class "A" FM station would still be available for intelligent use in another community which could benefit from it. Tens of thousands more people would be served by two new facilities, the number of voices in the marketplace would have been increased and the Commission's goal of diversity of expression, furthered. Instead, the class "A" facility could very well be squandered as a sacrificial pawn in a game of hide the pea in Osceola where the pea is the existing channel utilized by Lifestyle's KJJC-FM simply because Lifestyle doesn't want to change its channel from 295B to 296B. Plate again states that the spirit of Section 1.420(g) of the Commission's Rules should be extended to cases such as this in order to prevent outcomes where the application of a rules actually subverts the public interest.

LIFESTYLE CONTRADICTIONS

In its "Counter-proposal", Lifestyle argues that its allotment scheme should be preferred over Platte's because Lifestyle's proposal for new service would provide Papillion with *first local service*. In its

"Supplemental Comments", Lifestyle argues that Papillion is contained within the Omaha Urbanized Area and that the Commission will not "blindly accept claims of first local service" where an existing licensee seeks to change its community of license. Unfortunately for Lifestyle, that knife cuts both ways. In question here is the community of Papillion, Nebraska. Lifestyle seems to argue that under one set of criteria Papillion should qualify for first local service but, under another set of criteria, it might not. Simply stated, Lifestyle wants the Commission to adopt the argument that its proposal for service in Papillion should be entitled to consideration as "first local service" because its proposal requests the allotment of a new FM station. Lifestyle also argues that Platte's proposal to relocate to Papillion should not be entitled to *first local service* consideration because Papillion is contained within the Urbanized Area of Omaha. Under the proposition that "getting there is half the fun", Platte suggests that the allotment proposed at Papillion *by either party* be considered as either first local service or not first local service. A conclusion which would treat an allotment at Papillion as first local service under one proposal and not as first local service in another proposal (within the context of the same rule making proceeding) would be ridiculous.

For all of the reasons stated herein, Platte respectfully requests that the Commission reject Lifestyle's "Counterproposal" and adopt Platte's proposal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Terry Breeden, Secretary to Richard J. Hayes, Jr., Attorney at Law, hereby certify that a copy of the foregoing was sent via first class mail, postage prepaid, on this 3rd day of September, 1996, to the following:

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