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March 6, 1997

**BY HAND DELIVERY**

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

Re: MM Docket 96-10

Dear Mr. Caton:

Transmitted herewith, on behalf of Galen O. Gilbert, are an original and four copies of an "Opposition to Joint Emergency Motion for Stay of Filing Window" with regard to the above-referenced proceeding.

Should any questions arise concerning this matter, please communicate with this office.

Very truly yours,



Anne Goodwin Crump  
Counsel for Galen O. Gilbert

Enclosures

cc: Robert Hayne, Esquire (By Hand Delivery)

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BEFORE THE

**Federal Communications Commission**

WASHINGTON, D.C. 20554

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Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	MM DOCKET NO. 96-10
Table of Allotments,	)	RM-8738
FM Broadcast Stations	)	RM-8799
(Farmersville, Blue Ridge, Bridgeport, Eastland,	)	RM-8800
Flower Mound, Greenville, Henderson, Jacksboro,	)	RM-8801
Mineola, Mt. Enterprise, Sherman, and Tatum,	)	
Texas; and Ada, Ardmore, and Comanche,	)	
Oklahoma)	)	

Directed to: Chief, Allocations Branch

**OPPOSITION TO JOINT EMERGENCY MOTION FOR STAY OF FILING WINDOW**

Galen O. Gilbert, by his attorneys, hereby respectfully submits his Opposition to the Joint Emergency Motion for Stay of Filing Window submitted by Farmersville Radio Group ("FRG"), Gleiser Communications, Inc. ("Gleiser"), Hunt Broadcasting, Inc., and Cowboy Broadcasting, L.L.C. (together "KIKM") on February 27, 1997. With respect thereto, the following is stated:

1. The Joint Emergency Motion requests that the filing window for Channel 221A at Farmersville, Texas, allotted to the community by the Commission's Report and Order, DA 96-2210, released January 17, 1997, be stayed pending Commission review and approval of a Settlement Agreement by and among FRG, Gleiser, and KIKM. That Settlement Agreement, which had not been signed on February 27 and has not been filed with the Commission, reportedly proposes to delete the Farmersville allotment in order to allow a grant of Gleiser's application for construction permit to upgrade Station KDOK(FM), Tyler, Texas, to Channel

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221C2. The joint movants state that the Settlement Agreement is likely to be approved and the channel deleted because there is no remaining interest in the Farmersville allotment.

2. The joint movants are incorrect in their premise, however. Mr. Gilbert initiated the rule making proceeding which led, among other allotment changes, to the allotment of Channel 221A to Farmersville. Mr. Gilbert had initially sought the allotment of Channel 260C3 to Farmersville through a Petition for Rule Making. The Commission thereafter issued a Notice of Proposed Rule Making, DA 96-104, released February 13, 1996. In response, several parties submitted comments and counterproposals, including the counterproposal of KIKM, involving twelve communities.

3. Thereafter, Mr. Gilbert agreed to enter into a Settlement Agreement to resolve the rule making proceeding. While at that time he withdrew his proposal to allot Channel 260C3 to Farmersville, at no time did he indicate that he had no further interest in a Farmersville proceeding. At the time that Mr. Gilbert entered into the Settlement Agreement, he was aware that Channel 221A would be proposed for allotment to Farmersville. Since the channel was allotted, Mr. Gilbert has gone forward with preparations for filing an application for a construction permit for a station to operate on the Farmersville allotment. Work is now in progress on completing that application, and Mr. Gilbert expects to file well prior to the close of the filing window. Therefore, it is incorrect to state that there is no remaining interest in the Farmersville allotment.

4. Furthermore, FRG itself has not unconditionally renounced its interest in a station at Farmersville. The Joint Petitioners explicitly state that, if the Settlement Agreement among them is not approved, the parties reserve their rights to pursue their respective proposals. Joint

Emergency Motion at 3, n. 7. Thus, FRG apparently has some continuing interest in the Farmersville allotment; an interest which it may abandon only if paid some amount not yet reported to the Commission.<sup>1</sup>

5. It also must be understood that the recent Settlement Agreement among the Joint Petitioners was the result of an utterly meritless Petition for Reconsideration submitted by Gleiser. Gleiser submitted its application for upgraded facilities on June 25, 1996, long after the counterproposal deadline in this proceeding of April 5, 1996, and long after the Settlement Agreement in this proceeding was submitted on May 24, 1996. The Gleiser upgrade application is in conflict with the allotment of Channel 221A to Farmersville.

6. Because the Gleiser application was filed after the counterproposal deadline, it is well-settled Commission policy that the application must be rejected. The Commission has stated that, after the counterproposal deadline, it is appropriate for a party to a rule making proceeding to suggest an alternate channel to resolve the proceeding with regard to communities already at issue. Table of Allotments (Pinewood, South Carolina), 5 FCC Rcd 7609 (1990). It is not appropriate, however, for a non-party to offer a new suggestion with regard to a community not previously at issue. Id. While the Pinewood case involved petitioners for rule making exclusively rather than an application and a rule making proceeding, the one-step upgrade application is the functional equivalent of a petition for rule making. Indeed, prior to 1993, such upgrades required a rule making proceeding. See, FM Channel and Class Modifications, 8 FCC

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<sup>1</sup> FRG has already received approval by the Commission to be paid by KIKM the full amount of FRG's costs of participation in the rulemaking proceeding leading to allotment of Channel 221A. On what basis it would receive an additional amount for agreeing to renounce its interest is altogether unclear.

Rcd 4735 (1993). Thus, the Gleiser application was an untimely proposal. When the Commission changed its procedures, it reiterated that applications filed after the counterproposal deadline represent an applicant's mere preference for a particular site and must be resolved with the rule making proceeding. *Id.* Therefore, the Gleiser application was unacceptable at the time it was filed and must be dismissed.

7. Further demonstrating the continuing interest in the Farmersville allotment, Mr. Gilbert is filing simultaneously herewith a Petition for Rule Making proposing the allotment of Channel 221A at Farmersville. While Mr. Gilbert believes this step to be unnecessary, he is submitting the Petition out of an abundance of caution and to conclusively demonstrate continued interest in the Farmersville allotment. Although the Petition is in conflict with the Gleiser application, as set forth above, that application was unacceptable at the time of its filing. Therefore, it is a nullity with regard to any cut-off protection and cannot preclude the filing and acceptance of Mr. Gilbert's rule making petition.

8. Since there is no basis for deleting the current Farmersville allotment, there is little likelihood of the Commission's approving the Settlement Agreement among the joint movants. Since there is no substantial likelihood that the Settlement Agreement will be approved, the Commission is precluded from granting the requested stay. Moreover, Mr. Gilbert has already expended funds for the preparation of his application, and it is likely that other parties have done the same. The filing window opened on March 3 and remains open. Any party interested in the Farmersville allotment must go forward with its preparations at this time if it is to be ready to file during the window. Accordingly, the requested stay would not conserve potential applicants' resources and would only lead to uncertainty. Moreover, the existence of potential applicants

underlines the continuing interest in the Farmersville allotment and provides further support for retention of the allotment.

WHEREFORE, the premises considered, Mr. Gilbert respectfully requests that the Joint Emergency Motion for Stay of Filing Window be denied.

Respectfully submitted,

GALEN O. GILBERT

By:   
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Anne Goodwin Crump

His Attorneys

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March 6, 1997

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**CERTIFICATE OF SERVICE**

I, Barbara Lyle, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., do hereby certify that a copy of the foregoing "Opposition to Joint Emergency Motion for Stay of Filing Window" was sent this 6th day of March, 1997, by first-class United States mail, postage prepaid, to:

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Federal Communications Commission  
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