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- NOT ADMITTED IN D.C.

September 24, 1998

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SEP 24 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
Washington, D.C. 20554

Re: **Opposition to Request for  
Immediate Issuance of Erratum  
Amendment of Section 73.202(b),  
FM Table of Allotments  
MM Docket No. 97-26; RM-8968; RM-9089; RM-9090  
(Detroit, Howe and Jacksboro, Texas,  
Antlers and Hugo, Oklahoma)  
MM Docket No. 97-91; RM-8854  
(Lewisville, Gainesville, Robinson,  
Corsicana, Jacksboro, and Mineral Wells, Texas)**

Dear Ms. Salas:

Transmitted herewith on behalf of K95.5, Inc. is an original and four copies of its Opposition to Request for Immediate Issuance of Erratum concerning the above-referenced allotment proceedings.

Should any questions arise concerning this matter, please contact this office directly.

Sincerely,

John F. Garziglia

Enclosure

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
Amendment of Section 73.202(b),	)	MM Docket No. 97-26
Table of Allotments	)	RM-8968
FM Broadcast Stations.	)	RM-9089
(Detroit, Howe and Jacksboro,	)	RM-9090
Texas, Antlers and Hugo, Oklahoma)	)	
In the Matter of	)	
Amendment of Section 73.202(b),	)	MM Docket No. 97-91
Table of Allotments,	)	RM-8854
FM Broadcast Stations.	)	
(Lewisville, Gainesville, Robinson	)	
Corsicana, Jacksboro and Mineral	)	
Wells, Texas)	)	

**OPPOSITION TO REQUEST FOR  
IMMEDIATE ISSUANCE OF ERRATUM**

K95.5, Inc., by its attorneys, pursuant to Section 1.429(f) of the Commission's rules, hereby submits its opposition to the September 3, 1998 Request for Immediate Issuance of Erratum ("Request") filed by Great Plains Radiocasting to Report and Order, DA 98-1650, released August 21, 1998.<sup>1/</sup> In opposition thereto, the following is submitted:

1. Great Plains Radiocasting argues that the Commission should issue an "Erratum" to the above-referenced Report and Order. Great Plains Radiocasting asks for the deletion of the allotment of Channel 294C2 to Detroit, Texas due to a purported

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<sup>1/</sup> The Report and Order was published in the Federal Register on August 25, 1998 in 63 Fed. Reg. 45182. Therefore, it is presumed that the Great Plains Radiocasting pleading is a petition for reconsideration of the Report and Order. This pleading should be treated as an opposition to such a petition for reconsideration, assuming the Great Plains Radiocasting pleading is accorded the status of a petition for reconsideration.

absence of an expression of interest in such an allotment. Great Plains Radiocasting is wrong, however, and the allotment should not be deleted.

2. This proceeding was commenced by the November 26, 1996 Petition for Rule Making of Great Plains Radiocasting which sought the allotment of a new channel to Detroit, Texas as its first aural service. In that November 26, 1996 Petition for Rule Making, Great Plains Radiocasting stated that:

If the Commission allots Channel 294C2 to Detroit, GPR will immediately tender for filing an application with the Commission seeking a construction permit for the new station. If granted the construction permit, GPR will promptly build the new facility at Detroit.

Thereafter, a Notice of Proposed Rule Making proposing the allotment of Channel 294C2 to Detroit, Texas in response to the Great Plains Radiocasting Petition for Rule Making was released by the Commission on January 24, 1997. See Detroit, Texas, DA 97-114, released January 24, 1997. On March 12, 1997, Great Plains Radiocasting filed Comments of Great Plains Radiocasting restating its intention to apply for a construction permit for the new station if Channel 294C2 is allotted to Detroit, and upon the grant of a construction permit, a commitment to promptly construct the new station.

3. Great Plains Radiocasting now asks that the Detroit, Texas Channel 294C2 allotment be deleted, even though it twice requested such an allotment, due to its purported withdrawal of its expression of interest on June 29, 1998. As shown below, however, the June 29, 1998 Withdrawal of Expression of Interest

of Great Plains Radiocasting is legally defective. Further, since K95.5, Inc. has an interest in applying for the Channel 294C2 Detroit, Texas channel, it should not be deleted.

**The Great Plains Radiocasting Withdrawal of Expression of Interest is Defective as a Matter of Law**

4. Great Plains Radiocasting on June 29, 1998 filed a pleading titled "Withdrawal of Expression of Interest of Great Plains Radiocasting" which was signed only by its attorney of record, William J. Pennington. While this withdrawal was filed prior to the adoption of the Report and Order, this withdrawal fails to comply with the provisions of Section 1.420(j) of the Commission's rules. Therefore, the purported withdrawal is defective as a matter of law and cannot be recognized by the Commission.

5. Section 1.420(j) of the Commission's rules is specific that whenever a party seeks to dismiss or withdraw its expression of interest, that party must file an Affidavit setting forth the information as to consideration and agreements in Section 1.420(j)(1)-(5) of the Commission's rules. Great Plains Radiocasting has failed to submit such an Affidavit. Rather, it has only submitted the statement of its attorney which in no way substitutes for an Affidavit under the Commission's rules. Indeed, the name or names of the principals constituting Great Plains Radiocasting are not even revealed in the purported withdrawal.

6. Section 1.52 of the Commission's rules confirms that an Affidavit is required for a withdrawal of an expression of interest pursuant to Section 1.420(j). Section 1.52 states that:

Except where otherwise specifically provided rules or statutes, documents signed by the attorney for a party need not be verified or accompanied by Affidavit.

Section 1.420(j) specifically requires that a party file an Affidavit. Great Plains Radiocasting has failed to do so. Therefore, its purported withdrawal of its expression of interest is defective. Since a valid withdrawal of its expression of interest was not filed prior to the adoption date of the Report and Order (August 12, 1998), there is no occasion to delete the allotment of Channel 294C2 to Detroit.

**K95.5, Inc. Expresses Its Interest in Applying for the Detroit, Texas Channel**

7. K95.5, Inc. hereby expresses its present intention to apply for Channel 294C2 at Detroit, Texas and, if authorized, to build a station promptly. When K95.5, Inc. originally filed its counterproposal in this proceeding on March 17, 1997, it did not contemplate that new channels could be allotted to both Detroit, Texas, and to Antlers, Oklahoma, the community to which K95.5, Inc. proposed a new channel. Since channels may be allotted to both communities, K95.5, Inc. hereby notifies the Commission that it has an interest in filing an application for the new facility allotted on Channel 294C2 at Detroit, Texas.

8. K95.5, Inc. recognizes that its expression of interest in Channel 294C2 at Detroit, Texas is being filed after the comment date in this proceeding. It is well settled, however, that late-filed expressions of interest are acceptable where there is no adverse impact on another pending rule making pro-

ceeding. See Patterson, California, 7 FCC Rcd 1719, 1720 (1992); Gosnell and Osceola, Arkansas, 6 FCC Rcd 4579 (1991).

9. In the proceeding here, no proposal was denied because of the Commission's allotment of Channel 294C2 to Detroit, Texas. The Metro Broadcasters counterproposal for a Channel 237C2 upgrade at Howe, Texas was dismissed as defective because of the failure of Metro Broadcasters to state its willingness to reimburse K95.5, Inc., the licensee of KITX(FM) for changing its channel. See Report and Order at paragraph 6. Additionally, even if Metro Broadcasters' counterproposal was acceptable, it was not to be preferred over the proposed upgrade for Lewisville and Robinson, Texas. Thus, the retention of the already-made allotment to Channel 294C2 at Detroit, Texas will not impact adversely any other proposal in this proceeding.

10. Additionally, there should be a limit to which the Commission's processes can be used for the proposal and withdrawal of new FM channels to the allotment table. Here, Great Plains Radiocasting twice professed its interest in applying for the channel, both in its original petition for rule making, and in comments filed in support of the original petition for rule making. Not until the eve of the adoption of the Report and Order in a complicated proceeding did Great Plains Radiocasting, for unexplained reasons, seek a withdrawal of its original proposal. Much effort was expended, both by the Commission and other proponents for the various channels in this proceeding, in reaching the result contained in the Report and Order. It is detrimental to the Commission and to the functioning of its

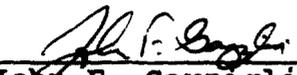
administrative processes if at any time and for no stated reason a proponent is allowed to withdraw its expression of interest in a channel, particularly where the Commission has already adopted and released its Report and Order allotting the channel and modifying the FM Table of Allotments. In short, the public interest would not be served by the deletion of Channel 294C2 to Detroit, Texas, particularly when at least one other entity, K95.5, Inc. has expressed its interest in applying for the channel.

WHEREFORE, for the reasons above, the September 3, 1998 Request for Immediate Issuance of Erratum filed by Great Plains Radiocasting should be denied, and the Channel 294C2 allotment to Detroit, Texas should not be deleted.

Respectfully submitted,

K95.5, INC.

By: \_\_\_\_\_

  
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Its Attorney

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September 24, 1998

**CERTIFICATE OF SERVICE**

I, Tracey S. Westbrook, a secretary in the law firm of Pepper & Corazzini, L.L.P., do hereby certify that true copies of the foregoing "Opposition to Request for Immediate Issuance of Erratum" were sent this 24th day of September, 1998 by U.S. first class mail, postage prepaid, to the following:

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\* Via hand delivery