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**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) of the) MM Docket No. 98-176
Commission's Rules, FM Table of Allotments) RM-9363
(Killeen and Cedar Park, Texas))

To: The Chief, Allocations Branch

RESPONSE TO "SUPPLEMENTAL REPLY COMMENTS"

Capstar Royalty II Corporation ("Capstar"), the licensee of radio station KIIZ-FM, Killeen, Texas and successor to the interest of GulfStar Communications Killeen Licensee, Inc. ("GulfStar") in this proceeding,¹ by its attorneys, hereby responds to the late-filed "Supplemental Reply Comments" (the "Supplement") submitted by LBJS Broadcasting Company, L.P. ("LBJS") on June 1, 1999.² As shown below, the April 1999 rulemaking notice that LBJS cites employs long-standing Commission allotment

¹ Capstar acquired the license of KIIZ-FM from GulfStar on December 31, 1998 by way of a *pro forma* assignment authorized in File No. BALH-980810GM.

² LBJS's Supplement comes precisely six months after the December 1, 1998 deadline for reply comments in this proceeding, and so the Commission has ample basis to dismiss the Supplement without consideration. Nonetheless, as shown herein, the April 1999 rulemaking notice relied on by LBJS does not support the premise on which the Supplement is filed. Thus, the Supplement adds nothing to an informed analysis of the issue in this proceeding. Regardless, fundamental fairness requires that Capstar be permitted to respond to the Supplement, and Capstar respectfully requests leave (to the extent necessary) to file this response.

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policy. It does not serve as support for the “policy decision” that LBJs claims the Commission “has reached.”

LBJs proposes in this proceeding to reallocate Channel 227C, the channel of operation of its station KLNC(FM), from Killeen, Texas to Cedar Park, Texas. At issue is whether the Commission should replace an old allotment (Channel 227C at Killeen) with a new allotment (Channel 227C at Cedar Park) when the new allotment would violate the minimum spacing requirements of Section 73.207 with respect to no less than four other stations – three of which short-spacings arose after 1964. LBJs has contended that this result is justifiable because the proposed reallocation entails no change in the location of KLNC’s transmitter site, and thus would not alter the current interference between FM stations. Capstar, however, has argued that LBJs’s proposed reallocation contravenes longstanding Commission policy, and that approval of the reallocation would undermine the integrity of the FM Table of Allotments.

The Commission obviously has seen the potential policy ramifications of the LBJs proposal. The *Notice of Proposed Rule Making* in this proceeding, 13 FCC Rcd 18790 (M.M. Bur. 1998) (“*Notice*”), specifically requested comment on whether the policy articulated in *Newnan and Peachtree City, Georgia*, 7 FCC Rcd 6307 (1992) (“*Newnan*”), should be extended to permit LBJs’s proposed reallocation. In *Newnan*, the Commission permitted a community reallocation that would carry over a *pre-1964 grandfathered* short-spacing. In this case, the reference coordinates for new proposed Channel 227C at Cedar Park, Texas involve short-spacings to four other stations, three of which arose *after* 1964. Thus, approval of LBJs’s proposed reallocation would require

the extension of *Newnan* to permit new allotments that carry over any number of existing post-1964 short-spacings.

Rather than offer any additional insight on what the Commission obviously regards as an open policy question, LBJs devotes its six month-late Supplement to citing a recent notice of proposed rulemaking which indicates, according to LBJs, that the Commission has *already* decided the policy question. Specifically, LBJs points to the Commission's April 30, 1999 *Notice of Proposed Rule Making in Kennett, Missouri and Keiser, Arkansas* (DA 99-819, MM Docket No. 99-140), in which the Commission has proposed to reallocate station KTMO(FM)'s channel of operation from Kennett to Keiser while noting that a Section 73.215 application for Channel 256A at Pangburn, Arkansas will provide the requisite interference protection to KTMO. This *NPRM*, claims LBJs, indicates the staff's "conclusion that a station providing contour protection will maintain the desired technical integrity of the FM band." Supplement at 3.

The *Kennett/Keiser NPRM* in fact provides not a shred of support for LBJs's stance in this case. In the first place, the *Kennett/Keiser NPRM* is just that – a notice of proposed rulemaking (on which the comment deadline has not yet passed), which by definition cannot serve as any staff policy "conclusion." Secondly, the *Kennett/Keiser NPRM*, far from standing for any new statement of policy, is merely an employment of standard Commission technical procedures. As the notice specifically observes (and as LBJs itself notes), the reference coordinates for the proposed KTMO reallocation (*i.e.*, the licensed KTMO site) are *fully spaced* to the reference coordinates for the vacant Pangburn, Arkansas allotment. See *Kennett/Keiser NPRM* at 2 n.2. Thus, unlike the case

here, the *Kennett/Keiser NPRM* proposes a fully-spaced allotment, albeit while noting that the Pangburn applicant is in the process of invoking Section 73.215 to provide contour protection from its *application* site.

A far better example of Commission policy applicable to this case is found in *Wasilla, Anchorage and Sterling, Alaska*, MM Docket No. 97-227, DA 99-675 (M.M. Bur. Apr. 9, 1999) (“*Wasilla/Anchorage*”) – a *Report and Order* (not merely an *NPRM*) decided a mere three weeks prior to issuance of the *Kennett/Keiser NPRM*. In *Wasilla/Anchorage*, a rulemaking petitioner proposed an alternative channel substitution for station KMXS(FM), Anchorage, Alaska. The proponent suggested, as LBJs has proposed in this case, that the licensed KMXS site be used as the allotment reference for the substitute channel. The proponent conceded that these reference coordinates were short-spaced to a first-adjacent channel station, but argued that the KMXS licensee could invoke Section 73.215 and operate a full 100 kW facility at the existing KMXS site without causing prohibited overlap to the first-adjacent channel station. See *Wasilla/Anchorage*, para. 7. The Commission rejected this proposal, explaining:

The Commission has clearly stated that use of the contour protection method, while permitted at the application stage, is not intended to cure short spacings at the allotment level. See Report and Order, MM Docket No. 87-121, 4 FCC Rcd 1681 (1989). *Unlike the application process, which authorizes the use of contour protection methods, the allotment proposal must comply with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission’s Rules.*

Id., para. 9 (emphasis added).

If, as LBJS claims, the Commission has reached the policy “conclusion” that “a station providing contour protection will maintain the desired technical integrity of the FM band,” see Supplement at 3, then presumably the Commission in *Wasilla/Anchorage* would have permitted a short-spaced allotment at the existing KMXS site based on a showing that KMXS could provide equivalent protection by invoking Section 73.215. That is not what the Commission did, however, because its policy is not as LBJS claims it to be. While the Commission has for a number of years permitted Section 73.215 contour protection at the application stage, its consistent policy – as expressed in *Wasilla/Anchorage* and other cases dating back years – has been to refuse to allow contour protection to cure short-spaced allotments. The *Kennett/Keiser NPRM* cited by LBJS, as discussed above, is entirely consistent with this policy because the Pangburn, Arkansas *allotment coordinates* are fully spaced to the coordinates of the substitute channel proposed in that rulemaking.³

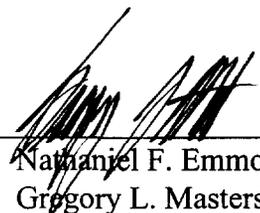
³ LBJS also cites footnote 16 of *Camden, East Camden and Stamps, Arkansas; Gibsland and Minden, Louisiana*, 10 FCC Rcd 7208 (M.M. Bur. 1995), in which the Commission allotted a channel that was short-spaced to the licensed site of a station authorized pursuant to Section 73.215. Nowhere in that footnote, however, did the Commission purport to make a “policy decision” in favor of making short-spaced allotments where contour protection is provided, and the Commission’s action in that case would appear to be contrary to the policy expressed in later cases such as *Wasilla/Anchorage*.

In sum, the alleged “policy decision” that LBJS proclaims is in fact nonexistent, and the Supplement is singularly unhelpful to LBJS’s position in this proceeding.

Respectfully submitted,

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Dated: June 10, 1999

CERTIFICATE OF SERVICE

I, Semoyne Arana, a secretary in the law firm of Wiley, Rein & Fielding, hereby certify that copies of the foregoing "Response to 'Supplemental Reply Comments'" were sent this 10th day of June, 1999, by first class United States mail, postage prepaid, to the following:

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