



**TABLE OF CONTENTS**

	<b><u>Page</u></b>
<b>SUMMARY .....</b>	<b>i</b>
<b>BACKGROUND .....</b>	<b>2</b>
<b>DISCUSSION .....</b>	<b>3</b>
<b>1.    The Pitkin NPRM Must Be Rescinded.....</b>	<b>4</b>
<b>2.    TLC’s Counterproposal is Not Technically Feasible.....</b>	<b>5</b>
<b>3.    Status of First Local Service at Missouri City.....</b>	<b>6</b>
<b>4.    Proposals for Crystal Beach and Moss Bluff do not Serve           Public Interest .....</b>	<b>7</b>
<b>5.    TLC’s Counterproposal is Anticompetitive .....</b>	<b>8</b>
<b>6.    Relationship Between TLC and Panther .....</b>	<b>10</b>
<b>7.    TLC’s Counterproposal for Missouri City Should be Deemed a           Petition for Rule Making.....</b>	<b>12</b>
<b>8.    Channel 285A at Reeves Serves Allotment Priorities.....</b>	<b>13</b>
<b>CONCLUSION .....</b>	<b>13</b>

## SUMMARY

El Dorado is the corporate parent of two radio station licensees that compete with Tichenor Licensee Corporation (“TLC”) stations in the Houston, Texas, radio market.<sup>1</sup> Because TLC’s proposal would give it an unfair competitive advantage against other stations in the Houston market, and El Dorado’s stations in particular, El Dorado is a party in interest with regard to the above-captioned proceeding. El Dorado submits that the Pitkin, Louisiana, proposal that led to the commencement of this proceeding was flawed *ab initio*, because its proponent failed to meet the requirement to demonstrate Pitkin’s community status and failed to submit a continuing expression of interest. As a result, the Notice of Proposed Rulemaking (“NPRM”) issued by the Commission must be rescinded and all counterproposals filed in response to the NPRM dismissed. Even if the NPRM is not rescinded, however, TLC’s counterproposal for Missouri City must be dismissed because it is not technically feasible due to FAA constraints that eliminate all potential sites that would be created by a Missouri City allotment. TLC’s counterproposal also does not advance the Commission’s allotment priorities and it would, if approved, exacerbate the anticompetitive situation that has arisen in the Houston market as a result of excessive concentration of ownership. In the event the Commission does not dismiss the Pitkin and Missouri City proposals, El Dorado submits that in view of the Pitkin proponent’s failure to submit a continuing expression of interest, fundamental fairness and administrative due process require that the Commission treat the counterproposals advanced in this proceeding as the equivalent of petitions for rule making that must be put on public notice for comment and counterproposals or refiled as petitions for rule making. Finally, if the Commission considers the two counterproposals advanced in this proceeding, the proposal to allot Channel 285A to Reeves, Louisiana, should be granted to provide that community with its first local service.

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<sup>1</sup> El Dorado is the corporate parent of KXTJ License, Inc., licensee of Station KXTJ(FM), Beaumont, Texas, and KQQK License, Inc., licensee of Station KQQK(FM), Galveston, Texas.

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554**

In the Matter of	)	
	)	
Amendment of Section 202(b)	)	MM Docket No. 99-26
Table of Allotments, FM Broadcast Stations	)	RM-9436
(Pitkin, Louisiana, Missouri City, Texas, and	)	RM-9651
Reeves, Louisiana)	)	RM-9652
	)	
	)	

To: Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau

**REPLY COMMENTS AND  
OPPOSITION TO COUNTERPROPOSAL**

El Dorado Communications, Inc. ("El Dorado"), by its attorneys and pursuant to Sections 1.415 and 1.420 of the Commission's Rules, hereby submits its reply comments and opposition to counterproposal in the above-referenced rule making proceeding. El Dorado opposes the counterproposal filed by Tichenor License Corporation ("TLC") on March 29, 1999.

In support hereof, El Dorado states as follows:

El Dorado is the corporate parent of two radio station licensees that compete with TLC stations in the Houston, Texas, radio market.<sup>1</sup> Because TLC's proposal would give it an unfair competitive advantage against other stations in the Houston market, and El Dorado's stations in particular, El Dorado is a party in interest with regard to the above-captioned proceeding.

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<sup>1</sup> El Dorado is the corporate parent of KXTJ License, Inc., licensee of Station KXTJ(FM), Beaumont, Texas, and KQKQ License, Inc., licensee of Station KQKQ(FM), Galveston, Texas.

El Dorado submits that the Pitkin, Louisiana, proposal that led to the commencement of this proceeding was flawed *ab initio*, because its proponent failed to meet the requirement to demonstrate Pitkin's community status and failed to submit a continuing expression of interest. As a result, the Notice of Proposed Rulemaking ("NPRM") issued by the Commission must be rescinded and all counterproposals filed in response to the NPRM dismissed. Even if the NPRM is not rescinded, however, TLC's counterproposal for Missouri City must be dismissed because it is not technically feasible due to FAA constraints that eliminate all potential sites that would be created by a Missouri City allotment. TLC's counterproposal also does not advance the Commission's allotment priorities and it would, if approved, exacerbate the anticompetitive situation that has arisen in the Houston market as a result of excessive concentration of ownership. In the event the Commission does not dismiss the Pitkin and Missouri City proposals, El Dorado submits that in view of the Pitkin proponent's failure to submit a continuing expression of interest, fundamental fairness and administrative due process require that the Commission treat the counterproposals advanced in this proceeding as the equivalent of petitions for rule making that must be put on public notice for comment and counterproposals or refiled as petitions for rule making. Finally, if the Commission considers the two counterproposals advanced in this proceeding, the proposal to allot Channel 285A to Reeves, Louisiana, should be granted to provide that community with its first local service.

### **BACKGROUND**

On February 5, 1999, the Commission released the NPRM to allot Channel 285A to Pitkin, Louisiana. MM Docket No. 99-26, 14 FCC Rcd 2275, 2276-77 (1999). The Commission issued the NPRM in response to the petition of Panther Broadcasting of Louisiana ("Panther") to allot Channel 285A to Pitkin as its first local aural service. In the NPRM, the Commission noted

that Pitkin is neither incorporated nor listed in the U.S. Census. The Commission cited its requirement that Panther, as the rule making proponent, demonstrate the community status of Pitkin. NPRM, 14 FCC Rcd at 2276, citing Beacon Broadcasting, 2 FCC Rcd 3469 (1987), *aff'd*, 2 FCC Rcd 7562 (1987). The Commission recited some of the objective indicia of community status that it had considered in prior proceedings. NPRM, 14 FCC Rcd at 2776, citing Kenansville, Florida, 5 FCC Rcd 2663 (Policy and Rules Div. 1990), *aff'd*, 10 FCC Rcd 9831 (1995). The Commission established March 29, 1999, as the deadline for comments, including a statement of continuing interest from Panther. Id., at 2281, 2283.

Examination of the Commission's records indicates that Panther did not file a timely statement of continuing interest in Pitkin, nor did it file any evidence supporting Pitkin as a community for allotment purposes. No other party filed comments in support of Pitkin and no other party provided objective indicia of Pitkin's status as a community. Two counterproposals were filed on the Pitkin comment deadline – one by TLC, proposing to relocate Station KOVA(FM) to Missouri City, Texas, and to upgrade its operations to Channel 285C3 (an upgrade requiring two additional channel reallocations) and one by Arkansas Wireless Co. ("AWC"), proposing to allot Channel 285A to Reeves, Louisiana, as that community's first local service. See Public Notice (Report No. 2335), released June 9, 1999.

### **DISCUSSION**

For the reasons set forth below, the Pitkin NPRM must be rescinded and TLC's Missouri City counterproposal must be dismissed.

## **1. The Pitkin NPRM Must Be Rescinded**

The above-captioned rule making was initiated by a petition for rulemaking filed by Panther. Panther selected Pitkin as its proposed community of license even though, as the Commission noted in the NPRM, Pitkin is neither incorporated nor listed in the U.S. census. Were Panther truly interested in establishing a radio station in Western Louisiana, it could have selected any number of communities of a higher profile and larger population while still proposing a first local aural service. Just one example of such a community is the community of Elizabeth, Louisiana.

Given the lack of community indicia applicable to Pitkin, the Commission properly required Panther to establish Pitkin's status as a community. In essence, the Commission's issuance of the Pitkin NPRM was contingent on Panther establishing that Pitkin is, in fact, a community for allotment purposes.

Of course, Panther failed to do so. It offered no evidence to demonstrate Pitkin's status as a community. Indeed, Panther did not even file an expression of continuing interest in the allotment of a frequency to Pitkin.

Because the Commission issued the NPRM premised on Panther's establishing Pitkin as a community and Panther's expressing a continuing interest in a Pitkin allotment, Panther's failure to do either negated those premises and rendered the NPRM fatally flawed from the start. Where the underlying premises for the rule making are revealed to be erroneous, the Commission has no proper choice other than to rescind the NPRM. As a result, all counterproposals must also be dismissed because they were filed in response to an NPRM that should never have been issued in the first place. This is analogous to situations in which the

Commission has dismissed applications filed pursuant to allotments later shown to be short-spaced, and not awarded such applicants procedural rights. See, e.g., Pinckneyville, Illinois, 41 RR 2d 69 (Broadcast Bureau 1977); see also Sparta, Georgia, 42 RR 2d 625 (Broadcast Bureau 1978). Similarly, where, as here, subsequent events demonstrate that there was no factual basis to support the proposed allotment to a nonexistent community, subsequently filed counterproposals are entitled to no procedural protection.

## **2. TLC's Counterproposal is Not Technically Feasible**

The counterproposal advanced by TLC must also be dismissed because there is no technically feasible site to accommodate Channel 285C3 at Missouri City. As demonstrated in the attached exhibit of airspace consultant John P. Allen, the FAA will not consent to the proposed operation by TLC at any location within the potential site area for the proposed Missouri City allotment on Channel 285C3, due to electromagnetic interference ("EMI") problems. See Exhibit 1 hereto. In situations involving site moves for existing stations, the FAA will not permit a station to exceed at the new site the level of EMI it causes at the station's current site. TLC would need to change the transmitter site for KOVA(FM) and increase the station's power significantly to move the station to Missouri City with an upgrade to Channel 285C3. Moreover, operation of KOVA(FM) from any point within the site area for the proposed Missouri City allotment would result in interference significantly greater than at KOVA's existing facility, a situation that would not be approved by the FAA, even on a conditional basis. Exhibit 1 at pp. 2-3.

The Commission will not make a new allotment where there is a substantial question about the availability of a technically feasible (or suitable) site to accommodate the channel. See

Twin Falls and Hailey, Idaho, 13 FCC Rcd 20172 (1998); Creswell, Oregon, 3 FCC Rcd 4608 (1988); and Pinckneyville, Illinois, 41 RR 2d 69, 71 (1977). FAA restrictions are a major impediment in the site selection process for broadcasters. For that reason, the Commission specifically mentioned FAA compliance as a prerequisite to site suitability in its “one-step” application processing order. FM Channel and Class Modifications by Application, 8 FCC Rcd 1735, 1737, n.19 (1993).

Furthermore, the Commission recently deleted a channel from the FM Table of Allotments precisely because of unacceptable EMI levels throughout the site area. La Fayette, Georgia, 13 FCC Rcd 2093 (1998). In La Fayette, the Commission deleted an FM channel at La Fayette, Georgia, finding that there was no site that would provide city grade coverage to La Fayette and meet FAA approval with respect to EMI constraints. The Commission stated that “[h]ad this information been included in the record of the rulemaking proceeding allotting this channel, we would not have allotted this channel to La Fayette.” *Id.*, at 2094. See also Sebring and Miami, Florida, 10 FCC Rcd 6577 (1995).

For these reasons, TLC’s counterproposed allotment at Missouri City must be dismissed because no technically suitable site exists that could accommodate Channel 285C3 and the Commission has refused to allot channels and has deleted allotments where there is no suitable site within the site window created for the allotment. See, e.g., San Clemente, California, 10 FCC Rcd 13159 (1995); Atlantic City, New Jersey, 57 RR 2d 1436 (1985).

### **3. Status of First Local Service at Missouri City**

TLC’s counterproposal is premised on Channel 285C3 representing a first local aural service for Missouri City. That premise will not be valid if the Commission grants the petition

filed today by El Dorado's subsidiary KQQK License, Inc., pursuant to Section 1.420(i) of the Commission's Rules, to reallocate Channel 293C from Galveston to Missouri City as Missouri City's first local aural service.

El Dorado's proposal is far superior to TLC's because Galveston is otherwise well-served while TLC would be leaving KOVA(FM)'s current community of license (Rosenberg, Texas) with but a single station.

More fundamentally, however, TLC may not reallocate Channel 285 from Rosenberg because the Commission does not permit reallocations where the community from which the allotment is being taken does not have at least one other full time service. TLC has proposed to have KOVA(FM) abandon Rosenberg when KOVA(FM) is actually the only full-time service licensed to that community. Rosenberg's only other licensed station is TLC's KRTX(AM), a daytime only station. KRTX had a permit to operate with night time power, but the permit expired on April 15, 1999. The license application for the station filed that day was defective because necessary field measurements had not been completed. Accordingly, the application must be dismissed and the expiration of the underlying permit allowed to take effect. Rosenberg is a city of substantial size (population 20,183), and the public interest would not be served by depriving it of its only full-time service. See Exhibit 2.

#### **4. Proposals for Crystal Beach and Moss Bluff do not Serve Public Interest**

In order to effectuate the reallocation of Channel 285 to Missouri City, TLC has proposed that Channel 287A be substituted for Channel 285A and reallocated from Galveston, Texas, to Crystal Beach, Texas, and that Channel 285C3 be substituted for Channel 287C2 and reallocated from Lake Charles, Louisiana, to Moss Bluff, Louisiana. These proposals are contrary to the

public interest because both result in a very substantial reduction in service to the public. Channel 285A at Galveston currently provides service to 107,331 people, and 287C2 at Lake Charles currently provides service to 340,412 people. Under TLC's proposal, 287A at Crystal Beach would serve only 3,874 people, or **96.4%** fewer than it currently serves, and 285C3 at Moss Bluff would serve 177,079 people, or **48%** fewer than it currently serves. In addition, nearly 2,000 of those people losing service currently are not well-served under the Commission's allotment criteria, as they receive only three or four aural services. See Exhibit 2, pp. 3-4. Thus, the proposed reductions in service would be contrary to the Commission's mandate under Section 307(b) to provide for an equitable allocation of frequencies. By contrast, TLC's proposed upgrade would merely expand service in a market that is already served by many radio stations. Indeed, Houston is one of the nation's largest radio markets.

#### **5. TLC's Counterproposal is Anticompetitive**

In addition to being technically infeasible, TLC's proposal represents an unacceptable attempt to increase its and its affiliates' dominant oligopolistic market share in the Houston market.

TLC is wholly owned by Hefel Broadcasting Corporation, which has recently changed its name to Hispanic Broadcasting Corporation. ("Hefel"). Hefel is a non-minority owned broadcaster and programmer of Spanish language radio stations. Clear Channel Communications, Inc. ("Clear Channel"), has a 29 percent, nominally non-voting, equity interest in Hefel. Also, Clear Channel recently merged with Jacor Communications, Inc. ("Jacor"). Following the Jacor merger, Clear Channel and its affiliates own approximately 470 radio

stations nationwide. Clear Channel and Jacor own seven FM stations and three AM stations<sup>2</sup> in the Houston market. Heftel and TLC own four FM stations and two AM stations<sup>3</sup> in the Houston market. Such concentration significantly impedes competition in the market, particularly for minority owners such as El Dorado.

TLC seeks to exacerbate this situation by increasing its penetration of the Houston market by upgrading KOVA(FM) and moving it from Rosenberg to Missouri City, a suburb of Houston. According to TLC, the proposed change would increase KOVA(FM)'s coverage of the Houston Urbanized Area from a small portion of the southwest part of the Area to a substantial portion of the southern part of the Area. See Figure 7 to the Engineering Statement in Support of Comments and Counterproposal of Tichenor License Corporation.

El Dorado is the only Hispanic-owned operator in the Houston market and there are very few other minority-owned stations in the market. El Dorado cannot retain a meaningful presence in the Houston market without the ability to grow in that market. As the owner of two FM stations, El Dorado is anxious to expand its presence in the Houston market. However, El Dorado has been impeded in its ability to compete effectively in the Houston market by the rapid consolidation of ownership in fewer and fewer hands. Clear Channel, through its merger with Jacor, and its acquiring an interest in Heftel and TLC, has been the major consolidating entity.

The Commission should not allow TLC to exacerbate the anticompetitive consolidation in the Houston market that is foreclosing competitive opportunities for El Dorado, and should deny TLC's counterproposal as contrary to the public interest.

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<sup>2</sup> KJOJ-FM, KRXX(FM), KMJQ(FM), KKTL(FM), KHMV(FM), KTBZ(FM), KHYS(FM) (operated pursuant to LMA), KJOJ(AM), KPRC(AM) and KSEV(AM).

<sup>3</sup> KOVE-FM, KRTX-FM, KLTN(FM), KOVA(FM), KRTX(AM) and KLAT(AM).

## 6. Relationship Between TLC and Panther

TLC has tried, unsuccessfully, to relocate Station KOVA(FM) to Missouri City in the past. See Llano and Marble Falls, Texas, 12 FCC Rcd 6809 (1997), recon. denied, 13 FCC Rcd 25039 (1998). In Llano, Tichenor filed a joint counterproposal, along with Roy E. Henderson (“Henderson”), seeking to substitute Channel 285C3 for 285A at Rosenberg, Texas, and to reallocate Channel 285C3 to Missouri City. At that time, Henderson was the licensee of Channel 285A -- now KOVA(FM) -- at Rosenberg, and Tichenor was the licensee of Channel 285A -- now KLTO(FM) -- at Galveston. The filing was joint presumably because the move to Missouri City required changes in TLC’s Galveston station, and because Henderson and Tichenor had mutual interest in the success of the outcome of the counterproposal. Henry E. Crawford was the attorney for Henderson and TLC throughout most of that proceeding.

The parties to the Llano and Marble Falls proceeding submitted numerous pleadings, including a proposal by TLC, a year after the pleading cycle had ended, for global resolution of the proceeding. During the course of the proceeding, TLC contracted to acquire KOVA(FM) from Henderson.

The Henderson/TLC counterproposal was ultimately dismissed, as the Commission found that the proposal did not comply with the Commission’s Rules. 12 FCC Rcd at 6811; 13 FCC Rcd at 25042-25044. The proposed global resolution was also dismissed. Id. at 25044.

Thus, after years of effort and presumably at significant cost, TLC was not successful in upgrading either its Class A station in Galveston (KLTO) or its newly acquired Class A station at

Rosenberg (KOVA). Against this background, it is understandable that TLC would be highly motivated to find, or create, another opportunity to try to upgrade its station(s).<sup>4</sup>

In light of this history, the Commission should examine the circumstances surrounding Panther's filing of the petition for rule making in this proceeding by requiring Panther to identify its principals and provide a declaration as to why it filed for Pitkin and then failed even to express a continuing interest in the allotment – particularly where by doing so, it facilitated a counterproposal by TLC to accomplish an objective that TLC had failed to accomplish earlier. Should this examination demonstrate that Henderson or TLC had an involvement in the decision to file a rule making petition for Pitkin, such actions would establish additional grounds for voiding the Pitkin NPRM *ab initio*.

In the aftermath of the Llano and Marble Falls proceeding, TLC knew well that another attempt to reallocate Channel 285 from Rosenberg to Missouri City would draw opposition and counterproposals. Thus, the only way to accomplish that objective without allowing for counterproposals would be to wait for a rule making petition to which it could file its own counterproposal. The filing of the Pitkin petition is, in this context, far too convenient to be written off to chance. This is particularly true where the attorney for TLC and Henderson in the Llano and Marble Falls proceeding also represented the Pitkin proponent and where the filing makes little economic sense given Pitkin's lack of community indicia.

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<sup>4</sup> It can be assumed that the value of a Class C3 station at Marble Falls, which would serve 2,424,036 people in the Houston area, would be vastly greater than the current value of TLC's Class A station, which serves 610,359 people at Rosenberg. See Exhibit 2, p. 3.

**7. TLC's Counterproposal for Missouri City Should be Deemed a Petition for Rule Making**

Because there has been no timely filed expression of interest in the Pitkin proposal, the Commission should rescind the NPRM or dismiss the above-referenced proceeding. To do otherwise, *i.e.*, to cancel the Pitkin proposal yet continue this proceeding as a Missouri City/Reeves proceeding, would be manifestly unfair to the public, which had no notice of the introduction of Missouri City or Reeves into the proceeding until the June 9, 1999, public notice. That notice did not provide the public with the opportunity to counterpropose, only to file reply comments on, those new proposals.

The Pitkin NPRM, lacking a community for allotment purposes, notified the public merely of a proposal to allot a new channel in western Louisiana. That NPRM cannot be deemed to have adequately notified the public of the subsequently-filed proposal for Missouri City, which involves numerous changes to stations in Texas communities, many miles away in a different state. That counterproposal and one for Reeves, Louisiana, has introduced a total of four new cities (Missouri City, Crystal Beach, Moss Bluff, and Reeves) to a Pitkin proceeding that never should have been initiated in light of the failure of Pitkin's proponent to submit evidence of Pitkin's community status or even an expression of continuing interest in the proposed allotment. Parties that may have had no interest in the Pitkin proceeding but do have an interest in counterproposing to one or more of the cities added by Tichenor and/or Arkansas Wireless are unfairly prejudiced if denied an opportunity because of the flawed circumstances in which the Pitkin proposal was advanced.

## **8. Channel 285A at Reeves Serves Allotment Priorities**

As stated above, El Dorado submits that the Pitkin NPRM must be rescinded or the above-captioned proceeding terminated due to the flaws in the initial Pitkin petition for rulemaking and Panther's failure to submit the evidence necessary for the NPRM to survive. Nevertheless, should the Commission decide to compare the counterproposals advanced in this proceeding, the proposal for Reeves serves the Commission's FM allotment priorities to a far greater extent than the Missouri City proposal and should prevail. Reeves is a U.S. Census designated place with a 1990 population of 188 persons, located in Louisiana's Allen Parish, with a population of over 21,000 persons. Operation from the referenced site for the proposed allotment, utilizing maximum facilities, would provide new radio service to 25,580 people. See Exhibit 2, p. 2. Allotment of Channel 285A to Reeves would not only provide Reeves, but also Allen Parish, with its first local radio station. By contrast, as indicated above, the Missouri City allotment would actually create underserved areas and merely move an existing station from the fringes of the well-served Houston market to a more central location within that market at a community of license for which El Dorado has now proposed to provide a first local service, while at the same time TLC would be depriving Rosenberg of its only full-time service. Accordingly, the Reeves proposal would serve the public interest to a greater extent and should be granted.

### **CONCLUSION**

The Pitkin rulemaking was flawed from its inception, as subsequent events have demonstrated beyond a shadow of a doubt. As a result, the Pitkin NPRM was fatally flawed and should be rescinded or the above-captioned proceeding terminated. If it is not, the Commission

should take note that no first local service preference is warranted for TLC's Missouri City proposal. Not only is TLC's counterproposal anticompetitive, given the undue concentration of radio stations in the Houston market among TLC and its affiliates, but also the Commission must inquire as to TLC's role in the submission of the Pitkin rule making petition. At the very least, the Commission must either dismiss TLC's counterproposal, deem TLC's counterproposal a new petition for rule making, or recognize that TLC's counterproposal is inferior to that of the Reeves proponent.

WHEREFORE, El Dorado respectfully requests that the Commission RESCIND the Pitkin Notice of Proposed Rule Making, TERMINATE the above-captioned proceeding without making any allotments, DISMISS TLC's counterproposal, DEEM TLC's counterproposal as a petition for rule making, or GRANT Reeves's counterproposal and DENY TLC's counterproposal.

Respectfully submitted,

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