

Before the  
Federal Communications Commission  
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL  
RECEIVED

AUG 26 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
Amendment of Section 73.202(b), ) MM Docket No. 99-214  
Table of Allotments, ) RM-9546  
FM Broadcast Stations. )  
(Camp Wood, Texas) )

To: The Chief, Allocations Branch

REPLY TO COUNTERPROPOSAL

La Radio Cristiana Network, Inc. ("LRCN") is the permittee of FM radio broadcast station KAYG, Channel 256A, Camp Wood, Texas. By a petition for rulemaking filed March 3, 1999, LRCN requested the substitution of Channel 251C3 for Channel 256A at Camp Wood and the modification of the construction permit for KAYG to specify operation on Channel 251C3.

On June 4, 1999, the Commission released its notice of proposed rule making (MM Docket No. 99-214, RM-9546), contemplating amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, to substitute the allotment of Channel 251C3 for Channel 256A at Camp Wood, Texas.

On July 22, 1999, Frank McCoy submitted a counterproposal seeking allotment of Channel 251C2 at Rocksprings, Texas. This allotment is mutually exclusive with LRCN's suggested allotment of Channel 251C3 at Camp Wood. McCoy submitted data which, he

No. of Copies rec'd 014  
List ABCDE

argued, demonstrated that use of Channel 251C2 at Rocksprings would be superior to the Camp Wood allotment.

**I. The Counterproposal Was Not Properly Verified.**

Section 1.52 of the Commission's Rules provides, in pertinent part, that:

The original of all petitions, motions, pleadings, briefs, and other documents filed by any party represented by counsel shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign and verify the document and state his address....[D]ocuments signed by the attorney for a party need not be verified or accompanied by affidavit. The signature or electronic reproduction thereof by an attorney constitutes a certificate by him that he has read the document; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If the original of a document is not signed or is signed with intent to defeat the purpose of this section, or an electronic reproduction does not contain a facsimile signature, it may be stricken as sham and false, and the matter may proceed as though the document had not been filed.

The McCoy Counterproposal was not signed by counsel. Nor did Mr. McCoy provide an affidavit to verify the Counterproposal. Thus, consistent with Commission precedent, the staff must dismiss the Counterproposal.

In similar channel allotment rule making proceedings, where counterproposals have been submitted without the required verifying affidavit, the Allocations Branch has consistently dismissed such Counterproposals. In denying reconsideration in one such case, the Allocations Branch recently stated:

In its petition for reconsideration, petitioner in essence argues that ... it should not be penalized for lack of verification of its counterproposal as required by Section 1.52 of the Commission's Rules. Petitioner contends that since this

rule has not been consistently applied in past proceedings the Commission should examine the merits of its proposal....

Discussion. We have considered petitioner's reconsideration request and find that it should be denied. Petitioner's argument concerning the acceptability of its counterproposal is without merit for several reasons. First, we disagree that the Commission has not consistently applied Section 1.52 of the Rules to rule makings in allotment proceedings. The primary purpose of the signature requirement is to assure accountability of the party signing the document. Section 1.52 requires that: 1) documents filed by attorneys bear the actual handwritten signature of the attorney and 2) the original of any document filed with the Commission by a party not represented by counsel shall be signed and verified by the party. Section 1.402(b) places petitioners on notice that their proposal must conform with the requirements of Section 1.52. There are no exceptions in the rule that excludes Commission permittees or licensees from its requirements. . . .

Second, in allotment proceedings where a petitioner has failed to verify a petition or to rectify the omission of the proper signature in a later petition, the pleading has been dismissed. . . . We have consistently held that counterproposals must be technically and procedurally correct at the time of their filing. See *Fort Bragg, California*, 6 FCC Rcd 5817 (1991); *Hattiesburg, Mississippi*, 7 FCC Rcd 7602 (1992). In light of the above we believe the staff acted properly in dismissing the counterproposal. See *Remington and Falmouth, Virginia*, 8 FCC Rcd 6627 (1994)(counterproposal dismissed for failing to rectify omission); *Bay Minette, Butler, Evergreen and Jackson, Alabama, and Bay Springs, Ellisville and Waynesboro, MS*, 9 FCC Rcd 3154 (1994); *Three Lakes, Newbold, Nakoosa and Port Edwards, Wisconsin*, 8 FCC Rcd 3889 (1993). See also, *Latta, Marion, Camden and Blythewood, South Carolina*, 10 FCC Rcd 7204 (1995)(counterproposal was subsequently dismissed because petitioner attempted to cure omission in an unauthorized pleading).

*Lincoln, Osage Beach, Steelville and Warsaw, Missouri*, 11 FCC Rcd 6372 (1996).

In numerous other cases, the Commission has sustained the dismissal of a Counterproposal that lacked the requisite verification by affidavit. See, e.g., *Broken Arrow*

*and Bixby, Oklahoma and Coffeyville, Kansas*, 3 FCC Rcd 6507 (1988); recon. denied, 4 FCC Rcd 6981 (1989); *Holbrook, Arizona*, 7 FCC Rcd 1330 (1992); *Atchison, Horton and Wathena, Kansas*, 7 FCC Rcd 4645 (1992); *Decatur, Petal and Newton, Mississippi*, 7 FCC Rcd 4998 (1992); *Fisher, Mattoon, Neoga, Teutopolis, and Tuscola, Illinois*, 7 FCC Rcd 5223 (1992); *Flora and Kings, Mississippi and Newellton, Louisiana*, 7 FCC Rcd 5477 (1992); *Hondo, Hollywood Park and Dilley, Texas*, 7 FCC Rcd 7610 (1992); *Three Lakes, Newbold, Nakoosa and Port Edwards, Wisconsin*, 8 FCC Rcd 3889 (1993); *Corning, California*, 8 FCC Rcd 5149 (1993); *Oakhurst, Firebaugh and June Lake, California*, 9 FCC Rcd 653, (1994), *Bay Minette, Butler, Evergreen and Jackson, Alabama, and Bay Springs, Ellisville and Waynesboro, MS* (cited in *Lincoln* above); and *Galena and Baxter Springs, Kansas*, 12 FCC Rcd 1966 (1997).

The Commission has considered unverified pleadings in allotment proceedings in only two sets of circumstances. The first has been where an unverified counterproposal would not conflict with any other pending request or allotment. See, e.g., *Blair, Nebraska; Ames, Alta, Denison, Lake City, Perry, Sac City and Storm Lake, Iowa*, 8 FCC Rcd 4086 (1993), and *Thief River Falls and Walker, Minnesota*, 8 FCC Rcd 2944 (1993). The other has been where the lack of verification can be cured before the end of the comment period, *Cedar Key, Florida* (1999).

At least as early as 1975, the Commission determined that a pleading had been verified within the meaning of the Rule only when it had been attested to before an appropri-

ate officer. *Harrea Broadcasters, Inc.*, 52 FCC 2d 998, 1001, 33 RR 2d 1075 (1975). See also *Scott Broadcasting Corp.*, 52 FCC 2d 1029, 1030, 33 RR 2d 1065 (1975).

An unsworn declaration under penalty of perjury may substitute for an affidavit pursuant to Section 1.16 of the Rules. However, no such declaration was submitted with the Counterproposal. Counterproposals that are not technically and procedurally correct at the time the window for their filing closes are dismissed. See *Hattiesburg, Mississippi*, 7 FCC Rcd 7602 (1992). Dismissal is the correct disposition for the McCoy Counterproposal.

## **II. The Counterproposal Was Filed in Bad Faith.**

In his Counterproposal, McCoy promises that if Channel 251C2 is allotted to Rocksprings, he will apply for the channel, and, “if such application is granted, [he] will promptly construct a station to operate on the channel.” Counterproposal at 4.

Contrary to this assertion, there is every doubt that Mr. McCoy has any intention of constructing a station to serve Rocksprings. Rather, Mr. McCoy’s transparent purpose in filing the Counterproposal is as a mechanism to “warehouse” spectrum so that Station KVET-FM, Channel 251C1, Austin, Texas, can upgrade to Channel 251C.

Capstar Texas Limited Partnership is the licensee of Station KVET-FM. Capstar Texas Limited Partnership is controlled by, or is under common control with, Capstar Broadcasting Corporation (“Capstar”). AMFM Inc. is in the process of merging with Capstar.

On June 7, 1999, three days after the Commission released its Notice, Frank McCoy, acting on behalf of his employer Capstar, telephoned a representative of LRCN. Mr. McCoy said that Capstar had purchased other stations in order to modify their facilities so as to make spectrum available to upgrade KEVT-FM to Channel 251C. Mr. McCoy stated that the LRCN proposal for Channel 251C3 in Camp Wood would be short-spaced to the planned Austin facility on Channel 251C. He threatened to file a counterproposal that would block the Camp Wood allotment unless the LRCN proposal was withdrawn.

Specifically, Mr. McCoy said that he would submit a plan for an allotment to provide a first local service to Rocksprings on Channel 250 or 251. His reason for doing this did not stem from any desire to provide service to Rocksprings. Rather, his stated objective was to block the proposed allocation of Channel 251C3 to Camp Wood.<sup>1</sup>

In a proceeding addressing problems caused by abusive filings, the Commission denounced those who, in bad faith, file expressions of interest, including counterproposals, for improper purposes. Specifically, the Commission stated:

[W]e are of the opinion that these expressions have the status of representations to the Commission, as do any assertions contained in pleadings filed with the Commission. Thus, a statement of interest in operating a station made by

---

1

As further evidence of this plan, LRCN notes that an application was filed on May 5, 1999, to assign the license of station KRYL, Channel 252A, Gatesville, Texas from LDR Broadcasting, LTD to Capstar Royalty II Corporation (FCC File No. BALH-990510EA). Shortly thereafter, on May 27, 1999, an application (FCC File No. BALH-990527ID) was filed to reduce the antenna height and ERP of KRYL, and to relocate the station's transmitting facilities. This application, if effectuated, will eliminate one of the short-spacings that currently preclude the upgrade of Capstar's Station KVET-FM to Channel 251C.

a party who, in fact, lacks the requisite intent to construct and operate the proposed facility will henceforth be considered a material misrepresentation within the meaning of Section 73.1015 of the Rules and would be subject to prosecution pursuant to Section 502 of the Act, forfeiture pursuant to section 503 of the Act or other appropriate administrative sanctions. *Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911 (1990), recon. denied, 6 FCC Rcd 3380 (1991).

Mr. McCoy may feel that his exposure to such sanctions is limited to the extent that he is not personally a licensee of the Commission. However, the scope of Section 502 is not restricted to Commission licensees. Moreover, such sanctions are applicable not only to the party filing the offending pleading but also those who may have orchestrated the filing. In that regard, appropriate sanctions may extend, in this case, to Mr. McCoy's employer.

Clearly, this Counterproposal is fulfillment of McCoy's threat. Inasmuch as the beneficiary of McCoy's improper blocking maneuver is Capstar, it follows that Capstar likely knew of Mr. McCoy's plan even if his superiors at Capstar did not actually instigate it. In any event, the actions of an agent are ascribed to the agent's principal under the doctrine of *respondeat superior*.

The Commission should investigate the facts and circumstances surrounding the Rocksprings filing to determine the extent of involvement by Capstar and AMFM Inc. in this matter. As the Commission indicated in *Abuses of the Commission's Processes, supra*, appropriate sanctions for this conduct include referral to the Department of Justice for

prosecution for violation of Section 502 of the Act, a forfeiture pursuant to Section 503 of the Act, or initiation of license revocation proceedings.

**III. Channels Other Than 251C2 Are Available For Allocation To  
Rocksprings.**

In the unlikely event that the Commission should entertain Mr. McCoy's request for allotment of an FM frequency to Rocksprings, despite the procedural infirmities of the Counterproposal, it is not necessary to forestall the LRCN plan for Camp Wood in order to satisfy Mr. McCoy's alleged devotion to a future FM operation in Rocksprings. It appears that Channel 271C2 is also available for allocation to Rocksprings. The allotment of that channel to Rocksprings would eliminate the mutual exclusivity of the LRCN petition and Mr. McCoy's request for a station in Rocksprings.

**IV. Conclusion.**

The McCoy Counterproposal is fatally defective because it was supported only by an unsworn document labeled "Verification" rather than by an affidavit as required by the Commission's Rules. It is now too late for Mr. McCoy to cure this defect, since the deadline for perfection of counterproposals in this proceeding has passed. Accordingly, the Counterproposal should be dismissed.

Ignoring, *arguendo*, the lack of proper verification, an independent basis exists for dismissal of the counterproposal: that it was filed in bad faith. If the Commission harbors

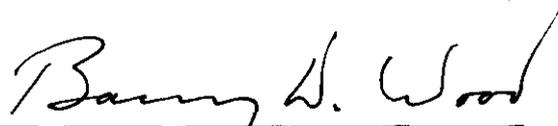
any doubt on that score, it should undertake an investigation into the conduct of Mr. McCoy and the beneficiary of his actions.

Finally, if the Commission were for some reason to disregard the motives surrounding the filing of the Counterproposal and the omission of a sworn verification, the Commission could provide an alternate channel with which Mr. McCoy could pursue his supposed desire to serve Rocksprings.

In view of the foregoing, LRCN urges the Allocations Branch to dismiss the Counterproposal filed by Frank McCoy and to amend the Table of Allotments, 73.202(b), so as to allocate Channel 251C3 to Camp Wood, Texas.

Respectfully submitted,

**LA RADIO CRISTIANA NETWORK, INC.**

By:   
Barry D. Wood  
Paul H. Brown

WOOD, MAINES & BROWN,  
CHARTERED  
1827 Jefferson Place, NW  
Washington, D.C. 20036  
(202) 293-5333

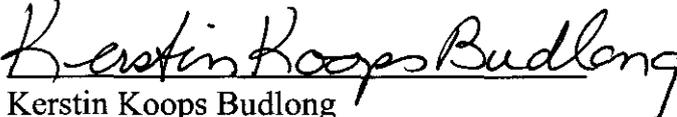
Its attorneys

Dated: August 26, 1999

CERTIFICATE OF SERVICE

I, Kerstin Koops Budlong, hereby certify that on this date I caused the foregoing "Reply to Counterproposal" to be served by U.S. first class mail, postage prepaid, on the following:

Frank McCoy  
11508 Chancellroy Drive  
Austin, Texas 78759

  
Kerstin Koops Budlong

Dated: August 26, 1999