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OFFICE OF THE SECRETARY

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July 6, 2000

**BY HAND DELIVERY**

Magalie R. Salas, Esquire  
Secretary  
Federal Communications Commission  
Room TW-B204  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Re: Detroit Lakes and Barnesville, Minnesota  
MM Docket No. 00-53; RM-9823

Dear Ms. Salas:

Transmitted herewith on behalf of Triad Broadcasting Co., L.L.C., are an original and four copies of its "Reply to Opposition to Motion to Strike," filed in the above-referenced proceeding.

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

Very truly yours,  
FLETCHER, HEALD & HILDRETH, P.L.C.



Andrew S. Kersting  
Counsel for Triad Broadcasting Co., L.L.C.

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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), )  
Table of Allotments, )  
FM Broadcast Stations, )  
(Detroit Lakes and Barnesville, Minnesota) )

MM Docket No. 00-53  
RM-9823

To: Chief, Allocations Branch

**REPLY TO**  
**OPPOSITION TO MOTION TO STRIKE**

Triad Broadcasting Co., L.L.C. ("Triad"), by counsel, hereby replies to the "Opposition to Motion to Strike," filed June 26, 2000 ("Opposition"), by T&J Broadcasting, Inc. ("T&J") in the above-captioned proceeding. In support of this reply, the following is stated:<sup>1</sup>

In its Opposition, T&J acknowledges that Section 1.420(d) of the Commission's rules requires that counterproposals be submitted in initial comments. Nevertheless, T&J claims that the FCC has "general authority to suspend, waive or amend its own rules if there is 'good cause' to do so." Opposition, p. 2, citing 47 C.F.R. §1.3 and *Wait Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). T&J contends that the Commission should waive its requirement that counterproposals be advanced in initial comments because, in its view, its untimely proposal to (i) substitute Channel 256C1 for the proposed allotment of Channel 233C1 at Enderlin, North Dakota,<sup>2</sup> and (ii) substitute Channel

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<sup>1</sup> This reply is timely filed pursuant to Section 1.45 of the Commission's rules. *See* 47 C.F.R. §1.45.

<sup>2</sup> Enderlin Broadcasting Company filed a timely counterproposal proposing the allotment (continued...)

296C for the vacant Channel 256C allotment at Gackle, North Dakota, is the only means of resolving this proceeding in a manner that would accommodate both its proposal and that of Enderlin Broadcasting Company. See Opposition, pp. 2-3. T&J claims that although its untimely proposal introduces a new community after the comment deadline, the Commission should make the requested channel substitutions because it “will better serve the public interest.” Opposition, p. 3.

Despite its allegations, T&J’s arguments in support of its untimely counterproposal are no different from those raised in other cases which previously have been rejected by the Commission. See, e.g., *Corpus Christi and Three Rivers, Texas*, 11 FCC Rcd 517 (Policy & Rules Div. 1996);<sup>3</sup> *Ashland, California, Rolla and Monroe City, Missouri*, 8 FCC Rcd 1799, n.3 (Allocations Branch 1993), *recon. granted on other grounds*, 9 FCC Rcd 2306 (1994). T&J apparently fails to understand that acceptance of its untimely counterproposal would require the Commission to violate the notice and comment requirements expressly set forth in the Administrative Procedure Act (“APA”). Section 553 of the APA requires the Commission to publish notice of a proposed rule making in the Federal Register, and provide interested persons with an opportunity to participate in the rule making through the submission of, *inter alia*, written arguments. 5 U.S.C. §553(c). T&J’s

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<sup>2</sup>(...continued)  
of Channel 233C1 at Enderlin, which would provide the community with its first local transmission service.

<sup>3</sup> T&J’s argument that it could not have filed its untimely proposal earlier because it could not have predicted the filing of Enderlin Broadcasting Company’s counterproposal is unavailing. See Opposition, p. 2, n.3. In *Corpus Christi*, the Policy and Rules Division rejected an untimely counterproposal despite the proponent’s argument that it filed its proposal at “the earliest possible time” because it was responding to a counterproposal “whose filing it could not have predicted earlier.” 11 FCC Rcd at 517.

untimely proposal to substitute Channel 296C for the vacant Channel 256C allotment at Gackle, North Dakota, would violate the statutory notice requirements set forth in the APA because it would deprive interested persons of notice and the opportunity to comment on the proposed channel substitution at Gackle. *See Corpus Christi and Three Rivers, Texas*, 11 FCC Rcd at 517, ¶5. Indeed, although T&J relies on Section 1.3 of the Commission's rules in support of its position, that rule provision states in pertinent part:

The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, . . . *subject to the provisions of the Administrative Procedure Act* and the provisions of this chapter.

47 C.F.R. §1.3 (emphasis added). Thus, despite T&J's reliance on Section 1.3 of the Commission's rules, this rule provision makes abundantly clear that the Commission's discretion to waive its rules upon a showing of "good cause" is expressly subject to the statutory requirements of the APA.

Furthermore, in *Corpus Christi and Three Rivers, Texas*, the Chief, Policy and Rules Division, rejected a proposal submitted after the expiration of the initial comment period which involved a new community that previously had not been at issue in the proceeding. In doing so, the Policy and Rules Division stated as follows:

To allow otherwise would prejudice parties who would be deprived of notice and opportunity to comment on proposals involving new communities as required by the Administrative Procedure Act. The Commission would also be burdened by having to issue a Further Notice of Proposed Rule Making on these new communities or to initiate another rulemaking proceeding on these questions. Furthermore, such a result would preclude the efficient conduct of the Commission's business which requires that parties adhere to cut-off dates and refrain from filing limitless responsive pleadings.

*Corpus Christi and Three Rivers, Texas*. 11 FCC Rcd at 517-18. As demonstrated in Section 1.3 of the rules and the Policy and Rules Division's decision in *Corpus Christi*, the Commission has no

authority to waive the statutorily-mandated notice and comment requirements set forth in the APA. Therefore, T&J's untimely counterproposal should be rejected and given no consideration in this proceeding.

WHEREFORE, in light of the foregoing, Triad Broadcasting Co., L.L.C., respectfully requests that Section IV of the "Reply to Comments and Counterproposal," filed May 30, 2000, by T&J Broadcasting, Inc. be STRICKEN and given no consideration in this proceeding.

Respectfully submitted,

TRIAD BROADCASTING CO., L.L.C.

By: 

Harry C. Martin  
Andrew S. Kersting

Its Counsel

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July 6, 2000

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**CERTIFICATE OF SERVICE**

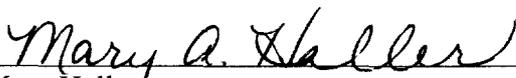
I, Mary Haller, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., hereby certify that on this 6<sup>th</sup> day of July, 2000, copies of the foregoing "Reply to Opposition to Motion to Strike" were hand delivered or mailed first-class, postage pre-paid, to the following:

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Policy and Rules Division  
Mass Media Bureau  
Federal Communications Commission  
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\* Hand Delivered