

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

ORIGINAL

In the Matter of)
)
Amendment of Section 73.606(b),)
Table of Allotments,)
Television Broadcast Stations)
(Boise, Idaho))

MM Docket No. 01-85
RM-9039
RECEIVED

JUN 15 2001

To: Chief, Video Services Division

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REPLY COMMENTS OF KM COMMUNICATIONS, INC.

1. KM Communications, Inc. ("KM"), by its counsel, and pursuant to Sections 1.415 and 1.420 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.420, respectfully submits these Reply Comments in support of the amendment of Section 73.606(b) of the Commission's rules, 47 C.F.R. § 73.606(b), the Television Table of Allotments, to substitute Channel 39 for Channel 14 as currently allotted to Boise, Idaho, as proposed by KM's Petition for Rule Making, as amended,¹ and the Notice of Proposed Rule Making in the above-captioned proceeding.² In support of these Reply Comments and the proposed channel substitution for Boise, KM submits the following:

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¹ See Petition for Rulemaking filed July 10, 1996 ("Petition"), as amended by an Amendment to Petition for Rulemaking filed May 15, 1997 ("First Amendment"), an Amendment to Petition for Rulemaking filed October 19, 1999 ("Second Amendment"), and an Amendment to Petition for Rule Making filed July 17, 2000 ("Third Amendment", and the Petition as amended by the First Amendment, Second Amendment and Third Amendment, the "KM Petition").

² See Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations (Boise, Idaho), MM Docket No. 01-85, RM-9039, Notice of Proposed Rule Making, DA 01-863 (Video Services Division, released April 9, 2001)(the "NPRM").

2. In Comments timely-filed by KM in this proceeding,³ KM demonstrated that grant of the channel substitution proposed by KM would serve the public interest by facilitating the processing and grant of a settlement that was first filed with the Commission over 5 years ago, in December 1995, by resolving objections raised by certain land mobile radio licensees that operate on frequencies adjacent to Channel 14, for which the pleading cycle was completed over 6 years ago, in April 1995.⁴ See KM Comments at ¶¶ 2-12. As a result, this relief would speed the initiation of a third commercial television service licensed to Boise. *Id.* at ¶ 15.

3. As far as KM has been able to determine, no other interested party filed comments in this proceeding.⁵ No interested party has disputed KM's showings in the KM Petition, or suggested that the channel substitution proposed by KM would not serve the public interest. Therefore, the Commission should promptly adopt an order amending Section 73.606(b) by substituting analog Channel 39 for analog Channel 14 at Boise, and directing KM to amend its pending application for construction permit to specify operation on Channel 39, with cut-off protection. See KM Comments at ¶ 14 (citing Sioux Falls, South Dakota, 11 FCC Rcd 1069 (Allocations Branch 1996), Roseburg, Oregon, 6 FCC Rcd 4369 (1991) and Copeland, Kansas, 5 FCC Rcd 7682 (1990)). Upon KM's filing of such an amendment to its pending application to

³ See Comments of KM Communications, Inc. filed May 31, 2001 ("KM Comments").

⁴ Later, in April 1996, KM also filed an amendment to its pending application for Channel 14 at Boise (File No. BPCT-941215KF, Facility ID No. 35097) in response to a Commission letter request for more information on the potential for interference to existing land mobile radio stations.

⁵ KM and its counsel have not been served with copies of any comments filed by any other party, as would be required by the Commission's rules and the NPRM. See NPRM at ¶ 6. A search of the Commission's Electronic Comment Filing System ("ECFS") as of June 11, 2001 also reflects that the only comments filed in this proceeding were the KM Comments.

propose operation on Channel 39, the Commission should promptly finish processing and grant the long-pending settlement and KM's construction permit application, with as little delay as possible.

4. In the KM Comments, KM stated its present and continuing intention to amend its pending application to specify analog Channel 39, or any other alternate channel in the core spectrum (Channels 2-51) that the Commission may elect to substitute for analog Channel 14, with cut-off protection for KM, and to proceed promptly to build a station upon the grant of a construction permit authorizing the construction of a station. See KM Comments at ¶ 15.

5. KM also stated that it was not aware, based on its review of the Commission's Public Notice listing the LPTV stations certified as eligible for Class A status,⁶ of any LPTV station certified as eligible for a Class A license that would be adversely impacted by the proposed channel substitution. Id. at ¶ 16. KM has also specified "reference facilities" for its proposed Channel 39 allotment operation, as required by the Commission in the Class A proceeding.⁷ Id. at ¶ 16 and n.15. Therefore, the KM Petition and the proposed channel change fully comply with the Commission's rules and policies adopted in the Class A proceeding. KM notes that no Class A or Class A-eligible LPTV station has disputed this showing. KM also notes that it has not been served with any competing mutually-exclusive displacement application(s) filed by a Class A, LPTV or TV translator station prior to the May 31, 2001 initial comment filing date in this proceeding, and

⁶ See Public Notice, Certificates of Eligibility for Class A Television Station Status, DA 00-1224 (released June 2, 2000).

⁷ See Engineering Report attached to the Third Amendment. The reference facility parameters specified by KM are geographic coordinates (NAD27) of 43° 45' 18" north latitude, 116° 05' 52" west longitude; 2570 kilowatts effective radiated power, and a directional antenna with a height of the antenna radiation center of 812 meters above average terrain and of 2195 meters above mean sea level. Id. The site elevation above mean sea level of 2146 meters above mean sea level and the radiation pattern and orientation of the directional antenna remain the same as proposed in the original pending application, for Channel 14.

therefore any future Class A, LPTV or TV translator displacement applications that may be filed that would conflict with KM's Channel 39 allotment or application proposal would have to be dismissed without consideration.⁸

6. KM also noted that the Commission has expressly recognized that, in certain circumstances, petitions for rule making to amend the analog Television Table of Allotments filed prior to the November 29, 1999 enactment of the Community Broadcasters Protection Act of 1999 (the "CBPA", i.e., the Class A legislation), such as KM's pending Petition to substitute an alternate channel for analog Channel 14 at Boise, are not required to protect -- and indeed are entitled to protection from -- Class A eligible LPTV stations.⁹ *Id.* at ¶ 17. In Achernar, the Commission expressly found that an analog petition for rule making filed prior to the enactment of the CBPA -- such as the analog Channel 39 substitution KM has had on file since October 19, 1999 (i.e., prior to the November 29, 1999 enactment of the CBPA) -- was entitled to protection where, as in KM's case with Boise, there is a settlement agreement pending that proposes "a reasonably ascertainable predicted Grade B contour". *See Achernar* at ¶ 20. KM submitted that the circumstances in this case are as extraordinary and as compelling as, if not more compelling than, the facts in Achernar,

⁸ See Establishment of a Class A Television Service, MM Docket No. 00-10, Report and Order, FCC 00-115, 15 FCC Rcd 6355, 20 CR 154 at ¶ 101 (2000) ("In order to be considered in a [full power television] channel-change rulemaking proceeding, a conflicting displacement application from an LPTV station that has been determined to be eligible for Class A status must be filed by the end of the initial comment filing period. Conflicting displacement applications filed after that date will be dismissed.").

⁹ See Achernar Broadcasting Company, MM Docket No. 86-440, Memorandum Opinion and Order, FCC 00-149, 15 FCC Rcd 7808 at ¶ 20 (released April 28, 2000) ("Achernar"). Although the Commission in the Class A proceeding declined to adopt the precedent from Achernar as a general rule, see Establishment of a Class A Television Service, MM Docket No. 00-10, Memorandum Opinion and Order on Reconsideration, FCC 01-123 at ¶ 57 and n.125 (released April 13, 2001), the precedent remains valid and may be applied in the context of specific cases where the facts are as extraordinary as in the Achernar case.

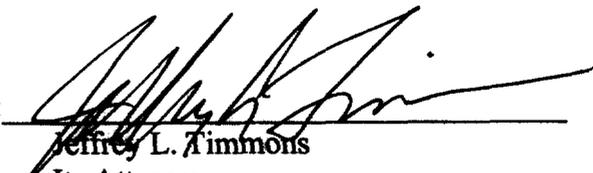
and offered to submit a comparison of the facts between this case and Achernar in the event that any LPTV station filed comments opposing the proposed substitution of Channel 39 for Channel 14 based on claims that it is certified as eligible for Class A status. See KM Comments at ¶ 17.

7. Last, KM noted that Achernar also makes clear that the Commission may substitute Channel 39 (or some other alternate channel) for analog Channel 14 at Boise on its own motion, under its authority under Section 316(a) of the Act, 47 U.S.C. § 316(a), and Section 1.87 of the Commission's rules, 47 C.F.R. § 1.87, even without the benefit of a petition for rule making (which KM has pending here) or even further proceedings. Id. at ¶ 18 (citing Achernar at ¶¶ 17-19, 24-25, which found that the analog Television Table of Allotment has "ceased to function as an evolving mechanism", and as such modifying it is "an essentially ministerial act designed purely to ensure the continuing accuracy of the table"). KM had suggested that the Commission take the approach of substituting an alternate channel of its choosing and on its own motion back in 1995, even before filing the Petition in 1996, in the hopes of getting the matter moving toward resolution. Id. at ¶ 18 (citing the Opposition at 7). KM again requested in the KM Comments that the Commission identify and substitute any other channel within the core (i.e., Channels 2-51) for Channel 14, on its own motion, in the event that the Commission determines that Channel 39 is not a suitable alternate channel to substitute for Channel 14. Id. at ¶ 18.

8. WHEREFORE, in light of the showings set forth in these Reply Comments and the KM Comments, as well as in the KM Petition, KM respectfully requests that the Commission grant the KM Petition, substitute analog Channel 39 for the current analog Channel 14 allotment at Boise, Idaho, and permit KM to amend its pending application to specify Channel 39 with cut-off protection.

Respectfully submitted,

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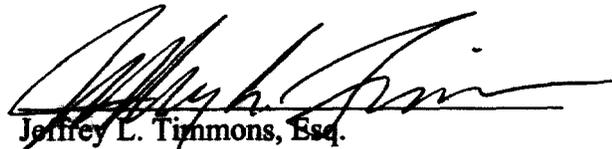
CERTIFICATE OF SERVICE

I, Jeffrey L. Timmons, hereby certify that on this 14th day of June, 2001, copies of the foregoing "Reply Comments of KM Communications, Inc." have been served by Airborne Express then hand delivery or by United States priority mail, postage prepaid, upon the following:

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