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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),	)	MM Docket No. 01-69
Table of Allotments,	)	RM - 10081
FM Broadcast Stations.	)	
(Parker, Arizona)	)	

To: John A. Karousos, Chief
Allocations Branch, Policy and Rules Division
Mass Media Bureau

MOTION TO STRIKE FARMWORKER REPLY COMMENTS

Infinity Radio License Inc. ("Infinity"), licensee of KMXB(FM), Henderson, Nevada ("KMXB"), by its attorneys and pursuant to Section 1.45 of the Commission's Rules, respectfully moves to strike the Reply Comments filed by Farmworker Educational Radio Network, Inc. ("Farmworker") on May 22, 2001 in the above-captioned rule making proceeding (the "Farmworker Reply"). The Farmworker Reply is an impermissible and untimely fundamental alteration of the May 7, 2001 Farmworker Counterproposal in this proceeding and should be dismissed. In support whereof, the following is shown.

1. On May 7, 2001, Farmworker filed its Comments and Counterproposal in this proceeding (the "Counterproposal"), proposing to modify its construction permit for a new FM station on Channel 230C3 at Parker, Arizona, to specify Channel 248B1. In order to accommodate this change, the Counterproposal also requested a change in the community of

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license for Station KFLG-FM, Kingman, Arizona to Searchlight, Nevada and a downgrade of KFLG-FM's channel class from Channel 234C to Channel 234C0, along with other site or channel change requests at Caliente, Boulder City, and Henderson, Nevada and Baker, California. Under the Counterproposal, KMXB's channel would change from 231C to 230C. In its May 22, 2001 Reply Comments, Farmworker seeks to amend its Counterproposal to substitute a new reference point for the proposed relocation of KFLG-FM from Kingman, Arizona to Searchlight, Nevada.

2. The Farmworker Reply is an attempt to fundamentally alter the Farmworker Counterproposal. As originally filed, the Farmworker Counterproposal proposed to move KFLG-FM to Searchlight at coordinates 35-56-30 / 115-03-01. As the Engineering Statement of Benjamin Dawson attached hereto makes clear, Farmworker's original KFLG-FM Class C0 counterproposal would place a city grade signal over the entire Las Vegas, Nevada Urbanized Area. That fact brings Farmworker's Counterproposal as originally filed within the ambit of Faye and Richard Tuck, Inc., 3 FCC Rcd 5374 (1988) ("Tuck"), which requires a highly detailed showing that Searchlight is sufficiently independent of Las Vegas so as to deserve a preference for first local service. In its Counterproposal, Farmworker failed to proffer, or even acknowledge the need for, the requisite Tuck showing. The Farmworker Reply seeks to amend the Searchlight allotment reference points to specify coordinates in Searchlight itself, which will "theoretically" pull the KFLG-FM city grade contour away from the Las Vegas Urbanized Area and, at least arguably, make Tuck inapplicable.

3. Such a fundamental change in the Counterproposal by way of Reply Comments is impermissible. It is well established that counterproposals must be "technically correct and substantially complete at the time of the filing." Strasburg, Colorado, 12 FCC Rcd 6065, 6066 (1997) (citing Frederiksted and Charolotte Amalie, Virgin Islands, 12 FCC Rcd 2406 (1997)). Because of the Tuck showing ramifications, the proposed Searchlight reference point is basic to the Counterproposal and the attempt to change it by means of Reply Comments must be rejected out of hand. In Strasburg, supra, 12 FCC Rcd at 6066, the Commission held that where a counterproponent failed to provide engineering data specifying the exact coordinates of its proposed site and a technical study demonstrating compliance with the minimum distance and city grade coverage requirements, a counterproposal was technically and substantially incomplete. The Commission has also explained its policy that "allotment proposals must be technically correct at the time of the filing in order to afford interested parties an opportunity to respond in reply comments." Arlington, McKinney, Celina, Terrell, Daingerfield, College Station, Caldwell, Howe, Texas, and Durant, Oklahoma, 8 FCC Rcd 4281, 4282 (1993); Eldorado and Lawton, Oklahoma, 5 FCC Rcd 6737 (1990). Here, Farmworker has fundamentally altered its original Counterproposal, thereby denying interested parties an opportunity to fully respond in reply comments, and making this Motion to Strike entirely appropriate.

4. Once the Farmworker Reply is stricken, Farmworker is left with a clearly incomplete Counterproposal for many of the reasons set forth in the Reply Comments filed on

May 22, 2001, by McMullen Valley Broadcasting Company ("McMullen's Reply"). First, as McMullen points out, the Commission requires that proposals involving a change in community of license must include a gain/loss study and a showing of at least 5 aural services remaining in the loss area. McMullen's Reply at p. 3. See also Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 4870 (1989); Atlantic and Glenwood, Iowa, 10 FCC Rcd 8074 (1995). Farmworker's counterproposal lacks such a showing.

5. Second, while there are substantial questions as to whether the Commission will entertain a request to change a community of license that does not originate with the affected licensee, Farmworker claims that H & R Broadcasting, Inc. ("H & R"), licensee of Station KFLG-FM, has consented to the proposed change. However, H & R has not itself expressed an intention to apply for the new channel if it is ultimately allotted to Searchlight. McMullen's Reply at p. 2. According to Commission policy, an expression of interest is required before a channel will be allotted to a community. See Sanford and Robbins, North Carolina, 12 FCC Rcd 1, 3 (1997) (explaining that the Commission "usually expect[s] expressions of interest to appear in the body of a counterproposal itself," or at least in its related engineering exhibit). Farmworker's Counterproposal is therefore fundamentally deficient because it fails to include the requisite expression by the affected licensee that it will apply for the new channel proposed to be allotted to Searchlight.

6. Third, as McMullen notes, the Commission requires all beneficiaries from another station's channel change to share in the reimbursement costs associated with such a change and

H & R has not affirmatively stated that it will reimburse Infinity, as the licensee of KMXB, Henderson, Nevada, for the change in frequency of KMXB, in accordance with Circleville and Columbus, Ohio, 9 RR 2d 1579 (1967).

7. Fourth, Farmworker failed to provide the required Tuck showing. See also Huntington Broadcasting Co. v. FCC, 192 F.2d 33 (D.C. Cir. 1951); RKO General Inc. (KFRC), 5 FCC Rcd 3222 (1990) ("KFRC"). In Tuck, the Commission recognized that an applicant for a new frequency who hopes to compete in a lucrative metropolitan advertising market can "increase the probability of being awarded a license if it proposes a nearby town or suburb as its community of license, rather than the central city." 3 FCC Rcd at 5374. The Commission also recognized that to grant a first local transmission service to a community near a metropolitan center "would seem to contravene the original statutory mandate of section 307(b) 'to provide a fair, efficient, and equitable distribution of radio service' to ' the several States and communities.'" Id. (citing 47 U.S.C. § 307(b)). Because the coordinates originally proposed for KFLG-FM's proposed 70 dBu service contour at Searchlight entirely encompass the Urbanized Area of Las Vegas, Nevada, Farmworker was required to make the necessary showing under Tuck and KFRC in order to demonstrate that KFLG's move to Searchlight would serve the public interest. The failure to provide such evidence leaves Farmworker with a substantially incomplete counterproposal when filed.

8. If the FCC for any reason finds Farmworker's Counterproposal, whether or not modified by the Farmworker Reply, to be acceptable, then the Commission must require a Tuck

showing because the Counterproposal as originally filed demonstrated that a Searchlight facility will in fact serve the Las Vegas Urbanized Area. In the absence of a Tuck showing, the FCC should restrict H & R from later applying for a transmitter site from which it could place a city grade signal over the Las Vegas Urbanized Area. For example, allowing KFLG-FM, after the rule making is completed, to return to the original coordinates listed in Farmworker's Counterproposal, despite the absence of a Tuck showing, would sanction blatant gamesmanship and circumvention of Tuck. Under the special circumstances presented here, if the Counterproposal is not dismissed as substantially incomplete, the integrity of Tuck and the first local service preference must be safeguarded by special measures.

CONCLUSION

For the reasons set forth above, Farmworker's Reply is defective and must be stricken.

Respectfully submitted,

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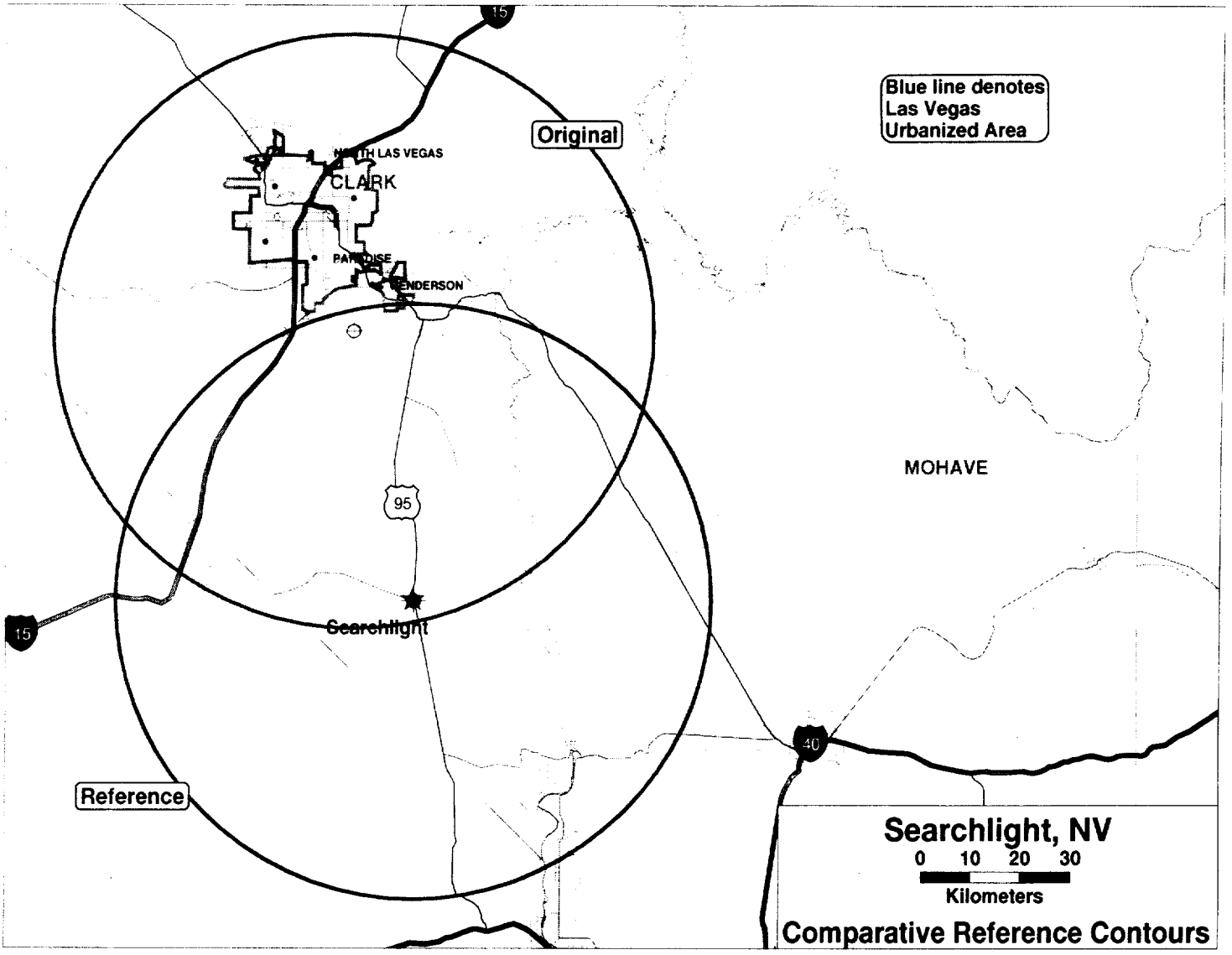
Blue line denotes
Las Vegas
Urbanized Area
Original
Reference
NORTH LAS VEGAS
CLARK
PARADISE
HENDERSON
MOHAVE
Searchlight
15
95
40
Searchlight, NV
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Kilometers
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ENGINEERING STATEMENT

This Engineering Statement has been prepared on behalf of Infinity Radio License Inc., licensee of KMXB(FM), Henderson, NV, in connection with the comments and counterproposal and reply comments filed in MM Docket 01-69 (Parker, AZ et al) by Farmworker Educational Radio ("Farmworker").

The original Farmworker counterproposal specified a site for channel 234C0 (Searchlight, NV) located at the edge of the Las Vegas metropolitan area, at the coordinates NL 35 56 50 X WL 115 03 01.* The use of this site with maximum C0 facilities would have provided a "flat earth" 70 dBu contour to a distance of 59 km, which would cover all of the Las Vegas Urbanized Area.

The reply comments by Farmworker of May 22 attempted to revise the reference coordinates for the allotment proposal to the reference coordinates for Searchlight, NL 37 27 55 X WL 114 55 08. The revised 59 kM radius would therefore cover considerably less than 50% of the Las Vegas Urbanized Area.

The urbanized area of Las Vegas and the respective 59 km radii from the two sites are shown on the attached map.

June 19, 2001

Benj. F. Dawson III, P.E.

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PROFESSIONAL ENGINEER
EXPIRES 06/14/02

* The text of the original Farmworker technical statement specifies NL 35 56 30, but NL 35 56 50 is specified in the attached technical exhibit Figure 7. Since NL 35 56 50 X WL 115 03 01 is the site of authorized FM facilities serving Las Vegas, it is assumed to be the correct location. The difference in distance is only 0.62 km.

CERTIFICATE OF SERVICE

I, Genevieve Edmonds, a secretary in the law firm of Leventhal, Senter & Lerman P.L.L.C., do hereby certify that on this 20th day of June, 2001, I have mailed the foregoing Motion to Strike Farmworker Reply Comments to the following:

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* Hand Delivered