

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. 01-105
Table of Allotments) RM-10104
FM Broadcast Stations)
(Shiner, Texas))

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

MOTION TO STRIKE

First Broadcasting Company, L.P., Next Media Licensing, Inc., Rawhide Radio, L.L.C., Capstar TX Limited Partnership and Clear Channel Broadcasting Licenses, Inc. ("Joint Parties"), by their respective counsel, hereby move to strike (i) the Reply Comments of Elgin FM Limited Partnership and Charles Crawford filed on July 3, 2001; (ii) the Reply Comments of Stargazer Broadcasting, Inc. filed on June 25, 2001; and (iii) the Reply Comments of Maurice Salsa filed on June 2, 2001 in the above-captioned proceeding. In support hereof, the Joint Parties state as follows:

1. This proceeding was initiated by the filing of a petition for rule making on April 6, 2001 to allot Channel 232A to Shiner, Texas. A *Notice of Proposed Rule Making* was released on April 27, 2001. The Joint Parties filed timely comments opposing the proposed allotment because it conflicts with the portion of the Joint Parties' prior-filed counterproposal in MM Docket No. 00-148 (Quanah, Texas) wherein it proposes to allot Channel 232A to Flatonia, Texas.

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2. Elgin FM Limited Partnership and Charles Crawford filed reply comments opposing the Joint Parties' request for the dismissal of the Shiner proposal. Elgin and Crawford state instead that the Joint Parties' counterproposal in the Quanah proceeding "should be dismissed due to technical deficiencies" which they go on to enumerate. These allegations regarding "technical deficiencies" are, of course, directed towards the merits of the Joint Parties' counterproposal. Similar objections to the Joint Parties' counterproposal were filed by Stargazer (the petitioner) and Maurice Salsa, who expressed an interest in the Shiner allotment. Each pleading is solely devoted to the argument that the Joint Parties counterproposal in the Quanah proceeding is technically deficient.

3. Despite having been filed under caption of the Shiner proceeding, the Elgin and Crawford pleading, the Stargazer pleading, and the Salsa pleading are actually late-filed comments in the Quanah proceeding. As such, each is time-barred under the Commission's procedural rules. *See* 47 C.F.R. § 1.415(d) ("No additional comments may be filed unless specifically requested or authorized by the Commission"). All three Reply Comments should be stricken from the record of this proceeding.

4. As to the direct conflict between the Shiner proposal and the prior-filed and cut-off Flatonina proposal, case law clearly requires the dismissal of the Shiner proposal, and this would be true even if the Joint Parties' rule making proposal were defective, which it is not. The Shiner proposal is procedurally defective on its face.

5. The Commission will not accept a petition for rule making that conflicts with a counterproposal advanced in another proceeding after the deadline for filing counterproposals in that proceeding. For example, in *Pinewood, South Carolina*, 5 FCC Rcd 7609 (1990), the Commission

affirmed the staff's dismissal of a petition filed six months after the deadline for filing counterproposals in an earlier proceeding due to a conflict with a *possible* allotment in the earlier proceeding. Channel 232A at Flatonia is a possible allotment in the Quanah proceeding. Channel 232A at Shiner conflicts with Channel 232A at Flatonia. The Shiner petition was filed more than six months after the counterproposal deadline in the Quanah proceeding. Therefore, *Pinewood* requires its dismissal. It does not matter if the Shiner petitioner had no notice of the Flatonia proposal. Flatonia became a part of the Quanah proceeding when the Joint Parties filed their counterproposal, and no more notice than the original *NPRM* is required. *See Pinewood, South Carolina, supra*. It does not matter if the Flatonia proposal was not entered into the Commission's FM engineering data base. The Commission has repeatedly cautioned applicants that its data base is an unofficial source and cannot be relied upon.¹

6. Elgin and Crawford, Stargazer, and Salsa each allege that the Joint Parties' counterproposal was defective when filed because of a conflict with a previously filed application for a one-step upgrade to Station KICM, Krum, Texas. However, this is not a defect in the counterproposal. Under the Commission's rules, a counterproposal that is in conflict with an application can be considered if it is amended to remove the conflict within 15 days from the date the counterproposal appears on public notice. *See Note to Section 73.208 of the Commission's Rules; Conflicts*

1. *See, e.g., Application of Robert Fetterman*, FCC 01-121, at para. 6 (rel. April 11, 2001); Public Notice, 12 FCC Rcd 20351 n.2 (1997); *Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments, Memorandum Opinion and Order*, 8 FCC Rcd 4743, 4746 n.13 (1993); *Lafayette, Louisiana*, 3 FCC Rcd 4614, 4619 (1988).

Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments, Memorandum Opinion and Order, 8 FCC Rcd 4743 (1993). Because the 15-day period for a curative amendment has not yet begun to run, the Joint Parties' counterproposal cannot be defective on that basis.

7. What is more, the remaining substance of Elgin and Crawford's pleading, which questions other aspects of the Joint Parties' counterproposal in an effort to avoid the dismissal of the Shiner petition, is irrelevant. The Commission has addressed this precise issue before. When a rule making proponent (Munbilla Broadcasting) alleged defects in a prior-filed and cut-off counterproposal in another proceeding with which its proposal was in conflict (the Luling Counterproposal), the Commission stated:

Contrary to the Munbilla Broadcasting assertion, the Luling Counterproposal was not void *ab initio* and was entitled to protection from subsequently filed rulemaking proposals. While the purported defects in the Luling Counterproposal may have eventually precluded favorable consideration, it was entitled to consideration in the context of MM Docket No. 98-198 along with all other timely proposals. During the time of that consideration, we see no public interest benefit or benefit to the efficient processing of rulemaking petitions, to accept or consider untimely proposals contingent on the outcome of a particular proposal.²

8. The law could not be clearer. The Joint Parties' counterproposal was timely filed and is entitled to consideration in the Quanah proceeding. The Shiner petition conflicts with it. Whether or not the counterproposal eventually succeeds, the Shiner petition must be dismissed.

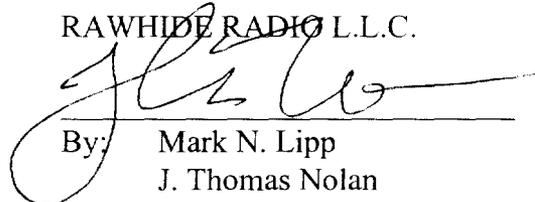
WHEREFORE, the Joint Parties urge the Commission to strike the "Reply Comments of Elgin FM Limited Partnership and Charles Crawford," the "Reply Comments" of Stargazer

2. *Mason, Menard, and Fredericksburg, Texas*, 15 FCC Rcd 12618, 12619-20 (2000).

Broadcasting, Inc., and the "Reply Comments of Maurice Salsa" from the record of this proceeding and dismiss the rule making proposal for Shiner expeditiously.

Respectfully submitted,

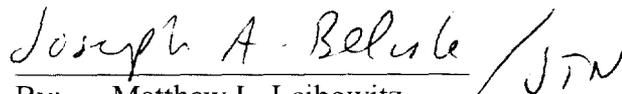
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July 18, 2001

CERTIFICATE OF SERVICE

I, Kay D. Dallosta, a secretary in the law firm of Shook, Hardy & Bacon, do hereby certify that I have on this 18th day of July, 2001 caused to be mailed by first class mail, postage prepaid, copies of the foregoing "**Motion to Strike**" to the following:

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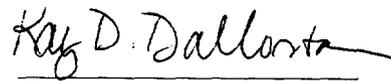
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