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

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

OPPOSITION TO
"MOTION TO STRIKE FARMWORKER REPLY COMMENTS"

1. Farmworker Educational Radio Network, Inc. ("Farmworker") hereby opposes the "Motion to Strike Farmworker Reply Comments" filed in the above-captioned proceeding by Infinity Radio License, Inc. ("Infinity"). As set forth below, Infinity's Motion is lacking both procedurally and substantively.

2. As a preliminary matter, Infinity's Motion is an unauthorized pleading which should not be accepted or considered. The Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment periods specified in the Notice of Proposed Rule Making. Atlantic and Glenwood, Iowa, 10 FCC Rcd 8074, n. 2 (1995). Infinity has provided no justification for its late filing. Indeed, Infinity's Motion appears to be little more than a belated challenge to Farmworker's original counterproposal, dressed up with some fluff to suggest that the Motion is directed to Farmworker's reply comments. Had Infinity wanted to respond to Farmworker's counterproposal, Infinity could have filed reply comments.

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Having failed to do so, Infinity cannot without some substantial justification barge in well after the deadline for reply comments. Since that is just what Infinity's Motion seeks to do, that Motion can and should be rejected.

3. But even if Infinity's claims were to be considered, those claims are in any event wholly without substantive merit.

4. The initial thrust of Infinity's Motion is that Farmworker's Reply Comments "fundamentally alter" the Farmerworker counterproposal, supposedly because acceptance of the Reply Comments might relieve Farmworker from the obligation of making a Tuck showing. Infinity Motion at 2, citing, e.g. Faye and Richard Tuck, Inc., 3 FCC Rcd 5374 (1988). Review of the pleadings demonstrates that that claim is wrong.

5. The Notice of Proposed Rule Making in this proceeding proposed simply the addition of a Class C3 channel to Parker, Arizona. Farmworker's counterproposal would also add a Class C3 channel in Parker, while making several other adjustments to the table of allotments which would result in modified channels and, in one case, a channel reallotted from Kingman, Arizona to Searchlight, Arizona. In other words, Farmworker's counterproposal would accommodate precisely the original proposal (i.e., allotment of a new Class C3 channel to Parker), while allowing additional improvements both in Parker and elsewhere. Thus, the counterproposal does not require the Commission to pick between two communities, one of which would receive an allotment and the other of which would go unserved.

6. According to Infinity, Farmworker's counterproposal was required to include a Tuck showing. Infinity Motion at 2. Infinity then interprets Farmworker's reply comments -- which merely noted an alternate reference point for the proposed Searchlight allotment -- as a sinister effort to avoid having to make such a showing. From this arises Infinity's grandiose claim that the counterproposal supposedly "fundamentally alters" the original proposal.

7. But Infinity's initial premise is flawed: Farmworker's initial proposal was not required to include a Tuck showing. Tuck, its progenitor, Huntington Broadcasting Co. v. FCC, 192 F.2d 33 (D.C. Cir. 1951), and its progeny relate to situations in which a proponent seeks a "comparative preference" for a proposed allotment to a suburban community in an Urbanized Area. E.g., Lockport and Amherst, New York, 14 FCC Rcd 15438, 15440, ¶6 (Allocations Branch 1999). [1/] Here, Farmworker is not seeking any "comparative preference". No comparison of communities is necessary because channels are available both for Parker (the originally-proposed allotment community, to which a new Class C3 channel would be allotted in both the original proposal and in Farmworker's counterproposal) and the other communities referenced in Farmworker's counterproposal. Accordingly, no "comparison" is necessary, no need for any

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[1/] As succinctly stated in Lockport and Amherst, New York, the "gravamen of Huntington [and Tuck et al.] is whether a proposal for a suburban community in an Urbanized Area is entitled to a comparative preference as a first local service." 14 FCC Rcd at 15440 (emphasis added).

"comparative preference" exists, and no Tuck analysis is required.

8. Since no Tuck analysis was required with Farmworker's initial counterproposal, it is clear that Farmworker's reply comments were not motivated by some concern about the supposed need to avoid such a requirement or to correct a flawed proposal, as Infinity suggests. [2/] Farmworker's reply comments were simply intended to provide the Commission with an alternate set of reference coordinates which could be used for the Searchlight allotment proposed by Farmworker.

9. Infinity next claims that "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." Infinity Motion at 4. Infinity cites Atlantic and Glenwood, Iowa, supra, in support of that proposition. But in that case, the proponent of a channel reallotment from one community to another did NOT include such a study, and the Commission did NOT reject that proposal. To the contrary, the petitioner "was requested to provide" such a study. Id. at ¶2. The Commission's own language demonstrates that

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[2/] Farmworker does not quarrel with the general proposition, re-stated several times by Infinity, that counterproposals should be "technically correct and substantially complete." Infinity Motion at 3. But Farmworker's counterproposal was "technically correct and substantially complete". None of the various cases cited by Infinity in support of its general proposition supports the application of that proposition to the instant situation as Infinity claims.

Infinity has overstated its argument considerably. [3/]

10. Infinity next quibbles that, while Farmworker specifically represented that H & R Broadcasting, Inc. ("H & R") has consented to the proposed change in community of license from Kingman to Searchlight, Farmworker failed to include an "expression of interest" from H & R. Infinity Motion at 4. Under the somewhat unusual circumstances of this situation, it is not clear that Farmworker was required to submit a separate "expression of interest" from H & R, an unrelated third-party. Nevertheless, in the interest of eliminating any questions concerning the matter, such an "expression of interest" is included herewith as Attachment A.

11. Infinity also quibbles that H & R has not affirmatively stated its willingness to reimburse Infinity for the proposed change in frequency of Infinity's Statin KMXB(FM), Henderson, Nevada. Infinity Motion at 4-5. Of course, Farmworker's counterproposal specifically indicated that appropriate reimbursement of expenses would be made. To the extent that Infinity seems to want more, Attachment A hereto contains an express commitment to that effect from H & R.

12. Finally, Infinity brings its argument full-circle, claiming yet again that Farmworker failed to provide a Tuck showing. But as shown above, no such showing was required, and the lack of any such showing cannot be deemed a flaw in

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[3/] Of course, if the Commission were to "request" such a study of Farmworker, Farmworker would gladly provide one.

Farmworker's counterproposal.

13. In closing, Infinity advances the novel notion that the proposed Searchlight allotment should be restricted in some way so as to reduce (if not minimize) the efficient use of that channel. Infinity Motion at 6. This notion appears to be based, loosely, on some kind of penumbral effect which Infinity seems to perceive as radiating from Tuck. But, again, Tuck is not relevant to this proceeding, and Infinity cites no authority in support of the unprecedented action it proposes. No legitimate reason exists for the Commission to hamstring the use of any channel, an action which would require the Commission to disregard its statutory obligations under Section 307(b) to promote the efficient use of spectrum. Accordingly, Infinity's suggestion must be rejected.

Respectfully submitted,

/s/ Anne Thomas Paxson
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Counsel for Farmworker Educational
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July 19, 2001

ATTACHMENT A

DECLARATION

William Jaeger, under penalty of perjury, hereby declares the following to be true and correct:

1. I am President of H & R Broadcasting, Inc. ("H & R"), licensee of Station KFLG(FM), Kingman, Arizona. I am preparing this Declaration for submission to the Federal Communications Commission in connection with a counterproposal filed in MM Docket No. 01-69 by Farmworker Educational Radio Network, Inc., which proposes, among other things, to relocate Station KFLG(FM)'s channel from Kingman, Arizona to Searchlight, Nevada.

2. I hereby confirm that, prior to the filing of the Farmworker counterproposal with the FCC, H & R consented to a change in Station KFLG(FM)'s community of license to Searchlight, Nevada and a change in Station KFLG(FM)'s transmitter site in the event such changes are approved by the FCC. I further confirm that, if the proposed reallotment of KFLG(FM)'s channel is approved, H & R intends to file an application for the channel in Searchlight and that, if such application is granted, H & R intends to modify and operate its station in accordance with such application. Finally, I further confirm that, if the proposed reallotment of KFLG(FM)'s channel is approved, H & R, as a beneficiary of the FCC's action, will share in the reasonable reimbursement costs associated with the changes in other stations' facilities necessitated by that action.

Dated: July 18, 2001

William Jaeger

CERTIFICATE OF SERVICE

I, Simone Parrish, hereby certify that on this 19th day of July, 2001, I caused copies of the foregoing "Opposition to 'Motion to Strike Farmworker Reply Comments'" to be placed in the U.S. Postal Service, first class postage prepaid, or hand delivered (as indicated below), addressed to the following persons:

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/s/ Simone Parrish
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