

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

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JUL 31 2001  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
Amendment of Section 73.202(b), )  
Table of Allotments, )  
FM Broadcast Stations. )  
(Parker, Arizona) )

MM Docket No. 01-69  
RM - 10081

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

**REPLY TO OPPOSITION**  
**TO 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, hereby replies to the Opposition to "Motion to Strike Farmworker Reply Comments" filed by Farmworker Educational Radio Network, Inc. ("Farmworker") on July 19, 2001 in the above-captioned rule making proceeding (the "Opposition") with respect to Infinity's Motion to Strike Farmworker Reply Comments ("Motion to Strike").

In its Opposition, Farmworker alleges that Infinity has "provided no justification for its late filing." Opposition at 1. However, as Infinity explained in its Motion to Strike, Farmworker's May 22, 2001 reply comments attempted to fundamentally alter the original counterproposal, with no party afforded an opportunity to comment on that alteration. In such circumstances, a motion to strike is entirely appropriate. Commission case law provides that

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allotment proposals and counterproposals "must be technically correct and substantially complete when filed in order to afford all parties an opportunity to fully respond in reply comments."

Eldorado and Lawton, Oklahoma, 5 FCC Rcd 6737 (1990); see also Arlington, McKinney, Celina, Terrell, Daingerfiled, College Station, Caldwell, Howe, Texas, and Durant, Oklahoma, 8 FCC Rcd 4281, 4282 (1993). Farmworker's reply should be stricken accordingly.

Farmworker's other arguments are equally without merit. Farmworker contends that its counterproposal in this proceeding was not required to include a so-called Tuck showing<sup>1</sup> and claims that its counterproposal should be preferred over the original proposal (filed by McMullen Valley Broadcasting Company ("McMullen")) because, like the original proposal, Farmworker requests an allotment of a new Class C3 channel to Parker, Arizona, while "allowing additional improvements both in Parker and elsewhere." Opposition at 2. Farmworker claims that its initial proposal was not required to include a Tuck showing because the Tuck line of cases relates to situations where a "proponent seeks a 'comparative preference' for a proposed allotment to a suburban community in an Urbanized Area." citing Lockport and Amherst, New York, 14 FCC Rcd 15438, 15440 (1999); see also Tuck, supra. Farmworker contends that "[h]ere, Farmworker is not seeking any 'comparative preference'." Opposition at 3.

Farmworker's argument is erroneous for several reasons. First, Farmworker's counterproposal is, by definition, a proposal requiring a comparative analysis to the original proposal. Second, Farmworker requests the relocation of an existing service from Kingman to a

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See Faye and Richard Tuck, 3 FCC Rcd 5374 (1988) ("Tuck").

new community of license, thereby mandating a comparison between the existing and proposed allotments. Under these circumstances, a Tuck analysis is required.

I. A Counterproposal Requires a Comparison Between the Original Proposal and the Counterproposal.

First, there is always an inherent "comparative" element to a counterproposal. Here, Farmworker's counterproposal requires the FCC to compare McMullen's originally proposed allotment of Channel 247C3 to Parker, Arizona to Farmworker's request to allot Channel 239C3 to Parker, Arizona, move Channel 234C from Kingman, Arizona, to Searchlight, Nevada and downgrade it to Channel 234C0, and modify five other channels, including a change of Farmworker's own channel and the substitution of Channel 230C for KMXB's 231C in Henderson, Nevada. Farmworker is asking the Commission to compare the two proposals under the public interest standard and is claiming a preference in part because its own counterproposal arguably entails a provision of a first local service to Searchlight. Furthermore, because McMullen, the original proponent, has opposed the counterproposal, these are most certainly "rival" comparative proposals.

II. When Considering a Change of Community of License Proposal, the FCC Considers Whether the Proposal Would Result in a Preferential Arrangement of Allotments.

Farmworker's counterproposal is not simply about the request for an allotment of a new Channel C3 to Parker, as Farmworker contends. It also involves removing an existing service from Kingman, Arizona and moving it to Searchlight, Nevada, much nearer to Las Vegas. The Commission's policy is that "[i]n considering a change of community of license proposal, [the

FCC] must determine whether the proposal would result in a preferential arrangement of allotments. This [the FCC does] by comparing the existing arrangement of allotments with the proposed arrangement of allotments using [its] FM allotment priorities." Tuscola and Clio, Michigan, 15 FCC Rcd 8958, 8960 (2000), citing Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1982) ("FM Allotment Priorities").<sup>2</sup> Furthermore, the Commission has explained that:

if the Commission is presented with conflicting options, such as the option of retaining the existing arrangement of allotments or adopting a new arrangement of allotments, it will adopt the proposal which best discharges the Commission's statutory mandate. Among other factors relevant pursuant to Section 307(b), the Commission considers under these residual [public interest] categories, the location of the proposed allotment with respect to other communities, and the availability of other services in the communities affected by the proposed change. Under these circumstances, it is proper for the Commission to consider whether a proposal would result in shifting of service from an underserved rural to a well-served urban area and the public interest consequences of any such change.

Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, 5 FCC Rcd 7094, 7096 (1990). Moreover, when a licensee seeks to amend the table of allotments, the Commission "will compare the proposed allotment plan to the existing state of allotments for the communities involved" and the Commission "will rely solely on a determination as to whether the change would result in a

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<sup>2</sup> The priorities are: (1) first full-time aural reception service; (2) second full-time aural reception service; (3) first local transmission service; and (4) other public interest matters [co-equal weight given to priorities (2) and (3)]. 90 FCC 2d 88 (1982).

preferential arrangement of allotments." Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 4870, 4873 (1989).<sup>3</sup>

Lockport and Amherst, New York, 14 FCC 15438 (1999) ("Lockport"), cited by Farmworker, is inapposite. Lockport involved a case in which neither the proposal nor the counterproposal would provide either a first or second fulltime aural reception service. Both communities involved had local aural transmission services and the first three priorities set forth in FM Allotment Priorities were therefore inapplicable. Id. Lockport compared the rival proposals under the fourth priority, "other public interest matters." Id. Unlike Lockport, however, Farmworker's counterproposal does seek credit for proposing a first local service. More specifically, Farmworker claims that its proposal change will result in a "new service to Searchlight, which presently has no local radio service." Farmworker Counterproposal at 3. In any event, Farmworker ignores the fact that the Commission in Lockport examined "the proposed allotment as being for a suburban community pursuant to the criteria set forth" in RKO General, Inc., 5 FCC Rcd 3222 (1990) ("KFRC") and Tuck, 14 FCC Rcd at 15440. Despite the absence of a claimed first local service preference, Lockport did in fact utilize a Tuck analysis.

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<sup>3</sup> The Commission also disfavors the removal of existing service from a community and has explained that a community of license change request resulting in removal of existing service must be compared with the original allotment. Tuscola and Clio, Michigan, 15 FCC Rcd 8958, 8961 (2000) ("[t]he public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from allotting a channel from one community to another, regardless of whether the service removed constitutes a transmission service, a reception service, or both.").

III. A Tuck Showing Is Required When a Proposed Channel Would Provide a 70 dBu Signal Over 50% or More of an Urbanized Area.

Farmworker's repeated claim that it did not need to include a Tuck showing with its counterproposal is flatly inconsistent with well-established Commission policy that if a station seeks to move from a more rural community to a suburban community located outside but proximate to an Urbanized Area then it must "make the same showing [the FCC currently requires] of stations seeking to move into Urbanized Areas if they would place a city-grade (70 dBu) signal over 50% or more of the Urbanized Area." Headland, Alabama and Chattahoochee, Florida, 10 FCC Rcd 10352, 10354 (1995) ("Headland"); see also Fort Bridger, Wyoming and Hyrum, Utah, 14 FCC Rcd 9543 (1999). The Commission has explained that Tuck clarifies the type of evidence the Commission will consider in situations where a station "seeks to change its community of license to one which is outside an urbanized area but whose signal would place a city-grade 70 dBu signal over 50% or more of an Urbanized area." Shelby and Dutton, Montana, 14 FCC Rcd 9514 (1999), citing Headland, 10 FCC Rcd 10352. The Commission has noted that this policy prevents rural stations from migrating to urban areas in a manner inconsistent with the goals of Section 307(b) of the Communications Act. See 10 FCC Rcd at 10354.

Farmworker initially proposed to move Channel 234C in Kingman, Arizona, with a population of approximately 33,000 people, to Channel 234C0 in Searchlight, Nevada and initially proposed a site that would allow a 70 dBu signal to be placed over the entire Urbanized Area of Las Vegas, with a population of over 1 million people. This is a classic scenario requiring a Tuck analysis in accordance with Commission precedent. Rather than provide such a

showing, however, Farmworker sought to change the proposed Searchlight transmitter site to eliminate the 70 dBu Las Vegas coverage. This attempted change, which would dramatically reduce the coverage of the Searchlight station, makes no sense unless one were trying to avoid a Tuck showing. Farmworker mysteriously states that, for no particular reason, it merely wished to demonstrate the existence of an alternate set of coordinates for Searchlight. Under these circumstances, the reply comments should be stricken, leaving Farmworker without the requisite Tuck showing.

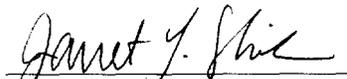
Finally, Farmworker claims that its counterproposal was technically and substantially complete when filed. Farmworker's Opposition at 4. However, Farmworker, among other things, failed to provide a Tuck showing, failed to provide an expression of interest for the new channel allotment to Searchlight, and failed to have the beneficiaries of these channel changes affirmatively indicate an intention to reimburse Infinity. Farmworker's counterproposal was clearly not technically and substantially complete when filed. Farmworker's attempt to cure the latter two deficiencies by attaching the requisite declarations of intent to its Opposition fails completely. A motion to strike does not provide a delinquent counterproponent with an opportunity to correct a failure to submit a counterproposal that was technically correct and substantially complete at the time of filing. Strasbourg, Colorado, 12 FCC Rcd 6065, 6066 fn 3 (1997) [emphasis added] (explaining that a counterproposal was unacceptable because it failed to specify exact coordinates for its proposed site that met the city grade coverage requirements of the Commission's Rules).

**CONCLUSION**

For the reasons set forth above and for the reasons explained in the Motion to Strike, Farmworker's reply comments are defective and must be stricken.

Respectfully submitted,

INFINITY RADIO LICENSE INC.

By:   
Steven A. Lerman  
Dennis P. Corbett  
Janet Y. Shih

Leventhal, Senter & Lerman P.L.L.C.  
2000 K Street, N.W., Suite 600  
Washington, DC 20006-1809  
(202)429-8970

July 31, 2001

Its Attorneys

**CERTIFICATE OF SERVICE**

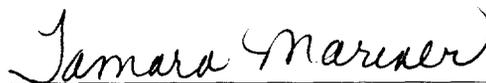
I, Tamara Mariner, a secretary in the law firm of Leventhal, Senter & Lerman P.L.L.C., do hereby certify that on this 31st day of July, 2001, I have mailed the foregoing Reply to Opposition to Motion to Strike to the following:

\* R. Barthen Gorman  
Federal Communications Commission  
Mass Media Bureau  
445 12<sup>th</sup> Street, SW  
Room 3-A224  
Washington, D.C. 20554

Anne Thomas Paxson, Esq.  
Borsari & Paxson  
2021 L Street, NW  
Suite 402  
Washington, D.C. 20036  
(Counsel to Farmworker Educational Radio Network, Inc.)

Mark N. Lipp, Esq.  
James E. Morgan, Esq.  
Shook, Hardy & Bacon LLP  
600 14<sup>th</sup> Street, NW  
Suite 800  
Washington, D.C. 20005  
(Counsel to McMullen Valley Broadcasting Company)

Clifford M. Harrington, Esq.  
JoEllen Dinges, Esq.  
Shaw Pittman  
2300 N Street, NW  
Washington, D.C. 20037  
(Counsel to Baker Broadcasting, LLC)



Tamara Mariner

\* Hand Delivered