

AUG 20 2001

Before the
Federal Communications Commission
Washington, DC

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

<i>In the Matter of</i>)	
)	
Amendment of Section 73.202(b),)	MM Docket No. <u>00-148</u>
Table of Allotments,)	RM-9939
FM Broadcast Stations.)	RM-10198
(Quanah, Texas, <i>et al.</i>))	

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

JOINT REPLY COMMENTS

Fritz Broadcasting Co., Inc. ("Fritz"), licensee of Stations KNAF(AM)/KFAN-FM, Fredericksburg, Texas; and M&M Broadcasters, Ltd. ("M&M"), licensee of KCLE(AM), Cleburne, Texas; KKTK(AM), Waco, Texas; KTFW(FM), Glen Rose, Texas; and KWOW(FM), Clifton, Texas, hereby respectfully submit their Joint Reply Comments with regard to the above-captioned proceeding. As licensees operating radio stations in communities in the region to be affected by proposed relocations of stations under consideration in this proceeding, Fritz and M&M clearly have an economic interest in the outcome of this proceeding and thus are parties in interest.

I. BACKGROUND

1. This proceedings in this docket commenced with the petition for rule making to allot Channel 233C3 to Quanah, Texas, and the subsequent release of the *Notice of Proposed Rule Making*, DA 00-1905, released August 18, 2000 ("*NPRM*") in this proceeding. Subsequently, on October 10, 2000, Next Media Licensing, Inc.; Capstar TX Limited Partnership; Clear Channel Broadcast Licenses, Inc.; and Rawhide Radio, L.L.C. (together, the "Joint Parties") submitted a

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Counterproposal, proposing the allotment and reallocation of various channels to various communities. That Counterproposal was accepted by *Public Notice*, Report No. 2500 (Aug. 3, 2001). Fritz and M&M hereby oppose the adoption of that Counterproposal. The Counterproposal as filed is both technically deficient and contrary to Commission policies. Accordingly, the Counterproposal must be dismissed.

II. TECHNICAL DEFICIENCY

2. It is long-standing Commission policy that counterproposals must be technically correct at the time that they are filed. *Susquehanna and Hallstad, PA*, 15 FCC Rcd 24160, n.2 (Allocations Branch 2000); *Broken Arrow and Bixby, Oklahoma, and Coffeyville, KS*, 3 FCC Rcd 6507, 6511 (Allocations Branch 1988). The Joint Parties' Counterproposal fails to meet that requirement. The Joint Parties admit that the proposal to substitute Channel 230C1 for Channel 248C1 at Archer City is short-spaced to the previously filed application for a one-step upgrade for KICM(FM), Krum, Texas, File No. BMPH-20000725AAZ. Counterproposal at 13, n.5. While the Joint Parties assert that they "expect" that this application will be "dismissed shortly" (*id.*), they do not provide the basis for that "expectation." Furthermore, at the time that the Counterproposal was filed, the KICM(FM) application had not been dismissed, nor has it yet been dismissed. The Joint Parties do not suggest any other solution to the short-spacing.

3. Therefore, their Counterproposal was not in compliance with the Commission's spacing requirements at the time that it was filed, and must be dismissed. *Cloverdale, Montgomery, and Warrior, AL*, 12 FCC Rcd 2090 ¶ 6 (Policy and Rules 1997); *Frederiksted, VI and Culebra, PR*, 10 FCC Rcd 13627 ¶ 2 (Chief, Allocations Branch 1995). Moreover, even if the KICM(FM) application is later dismissed, or if the Joint Parties were to reach an agreement

with the applicant, it is too late to cure the deficiency in the Counterproposal. The Commission is quite clear that the controlling question is whether a proposal was technically correct at the time of filing, and defects which existed then cannot later be corrected. *Id.* In this instance, the Counterproposal did not meet the spacing requirements with regard to a previously filed, pending application. Accordingly, the Joint Parties' Counterproposal is fatally flawed and must be dismissed.

III. VIOLATIONS OF COMMISSION POLICY

A. Loss of Service

4. The characteristic of the Counterproposal which stands out the most is that it is a nearly unvarnished attempt to move stations from smaller and rural markets to large urban centers, in direct contravention of the Commission's policies and concerns as set forth in *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd 7094 (1990). Additionally, the changes proposed would require at least four downgrades of existing facilities and one loss of an upgrade. Specifically, KGOK(FM), would go from Channel 249C3 at Healdton, Oklahoma, to Channel 249A at Purcell, Oklahoma; KWTX-FM would go from Channel 248C at Waco, Texas, to Channel 247C1 at Lakeway, Texas; KAJA(FM) would go from Channel 247C to Channel 245C1 at San Antonio, Texas; KHFI(FM) would go from Channel 241C1 at Georgetown, Texas to Channel 243C2 at Lago Vista, Texas; and KICM(FM), Krum, Texas, would be required to give up its Class C1 upgrade. While the Joint Parties state that the overall result of adoption of their Counterproposal would be a net increase in the total number of persons served, that increase would come about largely due to the fact that stations would be moving close to large, urban

areas with denser populations than currently served. Clearly, the downgrading of facilities for the purpose of moving stations close to urban areas which already are well served does not represent an efficient or equitable use of the spectrum.

5. Furthermore, the Joint Parties have admitted that the proposed move of KVCQ from McQueeney to Converse would create “gray area” within the loss area resulting from the proposed move. The Joint Parties claim that this defect can be cured by the allotment of a channel at Flatonia, as a station there would provide service to the entire gray area. Counterproposal at 31. The Joint Parties’ answer is far from complete, however.

6. The Commission has recognized that “the potential for service at some unspecified future date is a poor substitute for the signal of an operating station that can be accessed today simply by turning on a TV or radio set.” *Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd 7094, 7097 (1990). The Joint Parties are proposing here that persons living within the gray area to be created would be reduced to having only one aural service available to them. In exchange for this loss, those persons would receive only the promise of Rawhide Radio, L.L.C. (“Rawhide”) to file an application for construction permit for a new station.

7. Furthermore, that promise is equivocal at best. First, it should be noted that Rawhide does not make any commitment to actually build a station at Flatonia, but only to file an application to obtain the authorization to do so. Second, Rawhide essentially states that, if the Flatonia allotment is not required to make the KVCQ move palatable to the Commission, then Rawhide has no interest in such an allotment. Thus, Rawhide has made it plain that it cares nothing for an allotment at Flatonia, except as a means to its desired end, and it is telling the

Commission whatever is necessary to reach that goal. Finally, Rawhide has a bad history of maintaining its interest in a requested facility after the allotment is made. Channel 249C1 was re-allotted from Cuero, Texas, to McQueeney in MM Docket 99-357. In that proceeding, Rawhide expressed its support for the allotment at McQueeney. Thereafter, a mere 90 days after the allotment at McQueeney had become effective, Rawhide joined with the Joint Parties to propose that the channel which it fought to have allotted to McQueeney should now be moved to Converse.¹

8. Even if Rawhide were diligently to go forward with seeking an authorization for a Flatonia station, there would be substantial delays before a station could begin operation. After allotment of the channel, it would be necessary to wait for an auction window to open in order to file an application, and that window could not take place until after completion of the Commission's currently scheduled FM auction. After applications are filed and an auction held, if necessary, the eventual permittee then would have a period of three years in which to complete construction. During all of this time, persons living in the gray area could be forced to make do with only one radio station. Such a delay is not acceptable.

B. Moves to Large Cities

9. The Joint Parties have proposed that a number of stations move to communities within Urbanized Areas, and also have claimed that these moves are deserving of credit as providing a first local service to the specified communities. The Commission has ruled, however, that

¹ The extremely short time which elapsed between the effective date of the McQueeney allotment and the filing of the instant Counterproposal raises the question of whether reallotment to McQueeney was ever the true goal or, rather, was merely a stepping stone in the attempt to move KVCQ to a community in the San Antonio market.

granting a preference to a party proposing “first local service” for a station in or near a metropolitan area has the potential to produce anomalous results in cases where the suburban community is not truly independent from the larger urban community. *Faye & Richard Tuck*, 3 FCC Rcd 5374 (1988). In assessing whether a suburban community merits a preference for first local service, the Commission first looks to whether the signal of the proposed facility covers the metropolitan area as well as the alleged community of license. Second, the Commission determines whether the proposed community is within the urbanized area and the relative size of the center city and the nearby small community. Finally, the Commission considers whether the proposed community is independent from or interdependent with the larger urban area. In making that analysis, the Commission considers the following factors:

- 1) the extent to which community residents work in the larger metropolitan area, rather than the specified community;
- 2) whether the specified community has its own newspaper or other media that cover the community's local needs and interests;
- 3) whether community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area;
- 4) whether the specified community has its own local government and elected officials;
- 5) whether the smaller community has its own telephone book provided by the local telephone company and/or its own zip code;
- 6) whether the community has its own commercial establishments, health facilities and transportation systems;
- 7) the extent to which the specified community and the central city are part of the same advertising market; and
- 8) the extent to which the specified community relies on the larger metropolitan area for various municipal services such as police,

fire protection, schools and libraries.

Faye & Richard Tuck, 3 FCC Rcd at 5357.

10. In the instant proceeding, the Joint Parties have provided some evidence of the independence of the communities to which they propose to relocate stations. Those indicia, however, are no more than would be expected of many suburban communities within a larger metropolitan area. It must be remembered that the presence of attributes sufficient to allow a determination that a location is a "community" for allotment purposes is not the equivalent of a determination that the community in question is deserving of a preference for first local service. For example, in the Washington, D.C. area, the communities of Alexandria and Falls Church, Virginia, technically are independent cities which have their own government, provide their own municipal services, have their own businesses, zip codes, and, at least for Alexandria, bus services and a newspaper. Nevertheless, both of these communities are integrally part of the Washington, D.C. urbanized area and advertising market and would not be deserving of a preference for first local service. Accord, *Archilla-Marcocci Spanish Radio Co.*, 104 F.C.C.2d 405 (1986). A careful examination reveals that the same determination should be made with regard to many of the communities chosen by the Joint Parties. A market-by-market examination of those communities follows.

1. Dallas-Fort Worth Market

11. The Joint Parties have proposed to relocate KLAQ(FM) from Durant, Oklahoma, to Keller, Texas, with the allotment of Channel 248C at Keller. The community of Keller lies within the Dallas-Fort Worth Urbanized Area. It is located only 18 miles from Fort Worth and 35 miles from Dallas. The population of Keller (13,683) is approximately one percent of the

population of Dallas and three percent of the population of Fort Worth. These factors point toward a finding that Keller should not be accorded a preference for a first local service. While the Joint Parties have cited cases in which the Commission has accorded a preference to communities with populations similarly small relative to the central city, none of those cases involved subject communities within an urbanized area.

12. Furthermore, while the Joint Parties claim that the 70 dBu contour of the proposed facility would cover only five percent of the geographically large Dallas-Fort Worth Urbanized Area, a review of the map attached to the Counterproposal at Exhibit E, Figure 2 shows that the proposed allotment co-ordinates have been chosen so that the community of Keller is located at the southern edge of the proposed service contour. It does not take much imagination to project that, at an application stage, the station would move away from the allotment coordinates as far south as technically feasible, and it is highly likely that a Keller station would actually cover a much greater percentage of the Dallas-Fort Worth Urbanized Area than currently is represented on the map. In any event, it should be noted that the facilities as described in the Counterproposal would cover more than 50 percent of the Denton and Lewisville Urbanized Areas.

13. With regard to the question of interdependence with the Urbanized Area, while the Joint Parties have provided some evidence of independence, there are other factors which show that the community of Keller is merely a suburban part of the urbanized whole. Although Keller may have begun as an independent community in the 1880's, urban growth has now encompassed it. Perhaps the most telling evidence of this fact is the view of Keller residents as expressed on the Keller Library's web page. *See* Joint Comments at Exhibit 2. Therein, in a description

entitled "About Keller," it is stated that "Keller is now considered one of the fastest growing communities in the metroplex..." (emphasis added). It is clear, therefore, the residents of Keller consider themselves to be part of the larger Urbanized Area.

14. Additionally, according to the 1990 U.S. Census Data attached to the Counterproposal at Exhibit 2, only approximately 12.7 percent of the residents of Keller actually work in Keller. Thus, over 87 percent of the residents of Keller work outside of the community. Of those who work outside of Keller, approximately 64.2 percent work in the Dallas-Fort Worth Metropolitan Statistical Area, while 35.1 percent work in a different MSA, presumably Denton and Lewisville. These figures make it quite plain that Keller functions as a suburban community within the larger Urbanized Area. As such, it would be expected to home to a number of businesses which would provide services close to home for the people who live in Keller but work elsewhere. Similarly, it is not unusual that such suburban communities will have weekly community newspapers. These factors do not change the functioning of the community as merely a part of the larger Urbanized Area, however. Perhaps the Keller Library web page expressed it best in describing Keller as one community in the "metroplex." Indeed, Keller is just one among many communities in the Dallas-Fort Worth metroplex. Consequently, the Commission must treat the proposal to move KLAQ(FM) as a proposal to take away one of four existing stations in Durant, Oklahoma, and to add it as approximately the sixty-first station in the nation's sixth largest radio market. Clearly, this change would not represent a preferential arrangement of allotments.

2. Austin Market

15. Another component part of the Counterproposal would substitute Channel 247C1 for

Channel 248C at Waco, reallocate the channel to Lakeway, and modify the license for KWTX-FM accordingly. Once again, the Joint Parties have claimed that the community of Lakeway, population 4,044 should receive a preference for first local service. Lakeway, however, is located within the Austin Urbanized Area. The signal contour map representing the proposed Lakeway station shows that the proposed station would cover all of the city of Austin with a 70 dBu contour. See Counterproposal at Exhibit E, Figure 38. Furthermore, the population of Lakeway is 0.9 percent of that of Austin. All of these factors plainly show that the true intent of the proposed move is not to provide a first local service to Lakeway but rather to serve the greater Austin market.

16. Additionally, the Joint Parties have failed in their attempt to depict Lakeway as an independent community. While there are certain indications of independence, there are at least as many others which show that Lakeway is merely one small part of the overall Urbanized Area.

17. Review of the employment figures set forth in the 1990 Census data attached to the Counterproposal shows that only 12.1 percent of Lakeway's residents work in the community of Lakeway. Counterproposal at Exhibit 4. In contrast, leaving aside the 222 Lakeway residents who work there, 80.8 percent of Lakeway residents work in the Austin MSA, with 55.7 percent of those residents working within the city limits of Austin. Thus, the overwhelming majority of Lakeway residents draw their employment and income from the Austin Urbanized Area.

18. The Joint Parties also attempt to make much of the fact that Lakeway is served by a "local" newspaper which is published weekly. It should be noted, however, that this newspaper, the *Lake Travis View*, serves a number of communities in the area south of Lake Travis and is not local to the community of Lakeway in particular. More importantly, printouts from the *Lake*

Travis View website attached to the Counterproposal show that the newspaper identifies itself as being “affiliated with Austin community newspapers...” (emphasis added). Furthermore, the newspaper gives an Austin address as its mailing address. Thus, the newspaper identifies itself as being part of the Austin community. Thus, it cannot fairly be said that Lakeway has a local newspaper. It also is quite telling that a newspaper that covers events in Lakeway associates itself with Austin and is operated from Austin. These facts underline the true closeness of the ties between Lakeway and Austin.

19. Furthermore, the residents of Lakeway identify themselves in terms of proximity to Austin. For example, the City of Lakeway General Information attached to the Counterproposal at Exhibit 4 describes Lakeway as being only “a 25 minute drive from downtown Austin.” Given that the majority of Lakeway residents work in Austin, the convenience of downtown Austin to Lakeway is a matter of some importance. The ties between Austin and Lakeway also are illustrated by the fact that Lakeway had to obtain the consent of the city of Austin before it could incorporate.

20. Moreover, it is well known that the licensee of Station KWTX-FM already enjoys a commanding share of the radio advertising revenues in the Austin radio marketplace. Not only is it licensee of Station KWTX-FM, it also is licensee of Station KVET(AM), Austin, Texas; Station KPEZ(FM), Austin, Texas; Station KVET-FM, Austin, Texas; Station KHFI-FM, Georgetown, Texas, and Station KFMK(FM), Round Rock, Texas, all of which are co-owned, and located in the Austin Radio Market. As the Commission has stated in the past, “Where broadcast licenses are concerned, the effects of a proposed transaction on the diversity of voices and economic competition in a given market have long been core considerations in determining

whether a transaction serves the public interest, convenience, and necessity.” *Applications of Shareholders of AMFM, Inc. and Clear Channel Communications, Inc.*, 15 FCC Rcd 16062, 16066 (2000). The Commission generally performs a competition analysis when a proposed radio merger would result in a single radio group controlling 50 percent or more of the radio advertising revenue in a market, or when the two largest radio groups would account for 70 percent or more of the revenue in a market. *Shareholders of Citicasters, Inc.*, 11 FCC Rcd 19135, n.10 (1996). See also, *Great Empire Broadcasting, Inc.*, 14 FCC Rcd 11145 (1999). Approving this rulemaking proposal will allow KWTX-FM to increase its coverage of the Austin market, and thereby expand its market share even more beyond those limits.

21. In sum, it is clear that the community of Lakeway functions as merely a planned suburb within the greater Austin Urbanized Area. The proposed station at Lakeway would provide a city grade signal over all of the city of Austin, and the population of Lakeway is minute in comparison with the population of Austin. Furthermore, analysis of the relevant facts shows that signs that Lakeway is an independent community are offset by signs of its interdependence with Austin. Clearly, therefore, an allotment to Lakeway is not deserving of a first local service preference. Rather, the proposed reallocation should be seen for what it really is, namely, a plan to move KWTX-FM from Waco to the Austin market. The result would be to remove one of approximately ten stations from the nation’s 193rd radio market and to add approximately the 31st station to the nation’s 49th largest radio market. This change cannot be said to represent a preferential arrangement of allotments. Accordingly, the proposed change must be denied.

3. San Antonio Market

22. The Joint Parties also propose to reallocate Channel 249C1 from McQueeney to

Converse, Texas. The Joint Parties acknowledge that this plan would result in the removal of the first local service at McQueeney but claim that it would allow the allotment of a first local service at Converse. The facts of the matter, however, demonstrate that an allotment at Converse is not deserving of a first local service preference, as Converse is simply a part of the San Antonio Urbanized Area.

23. The community of Converse lies within the San Antonio Urbanized Area. Further, the population of Converse represents only 0.9 percent of the population of San Antonio. In addition, the map attached to the Counterproposal at Exhibit E, Figure 56 shows that the proposed Converse station would cover the entire city of San Antonio with a 70 dBu signal. These factors clearly demonstrate that the proposed station would function as an additional San Antonio station rather than as a true first local service to Converse.

24. Moreover, the evidence demonstrates that the community of Converse functions as a part of San Antonio and is interdependent with that city. As the Census figures attached to the Counterproposal show, only 11.6 percent of residents of Converse work in that community. *See* Counterproposal, Exhibit 6. In contrast, leaving aside the residents working in Converse, 85.8 percent of Converse residents work in the San Antonio MSA, with 62.9 percent working in the city of San Antonio itself. Thus, the overwhelming majority of Converse residents derive their livelihood from the San Antonio MSA, with a substantial majority working within the city limits.

25. The Joint Parties point to the fact that businesses in Converse may join the Randolph Metrocom Chamber of Commerce. It must be noted, however, that this Chamber of Commerce was not established to serve only Converse businesses. Rather, as the Randolph Metrocom Mission Statement attached to the Counterproposal at Exhibit 6 states, the Chamber of

Commerce “incorporates businesses within 10 suburban communities and several unincorporated section[s] of northeast San Antonio. This Metrocom is bound together by similar economic purposes and potential for growth.” Thus, the Randolph Metrocom Chamber of Commerce describes itself as being part of San Antonio and describes the communities included as “suburban” or sections of San Antonio. Furthermore, in a description of the communities that comprise the Randolph Metrocom, the Chamber of Commerce states that the Randolph Metrocom “is part of the San Antonio metropolitan area....” Counterproposal, Exhibit 6.

26. Additionally, turning to the description of the community of Converse, the Chamber of Commerce describes Converse as a “suburban city.” Furthermore, it states that Converse is located “near F.M. 1604, the San Antonio area’s outer loop....” The Chamber of Commerce also notes that there is direct municipal bus service to downtown San Antonio. Finally, it notes that Converse has “one of the lowest crime rates in the San Antonio metropolitan area.” Counterproposal, Exhibit 6. All of these statements unequivocally demonstrate that the residents and business people of Converse regard their community simply as a suburb of San Antonio. They identify themselves with the San Antonio metropolitan area as a whole.

27. The Joint Parties point to the existence of a “local” newspaper, the *Metrocom Herald* as an indication of independence from San Antonio. As set forth above, however, the very title of that newspaper, which uses the word “Metrocom,” links it with the San Antonio metropolitan area. The Joint Parties acknowledge that Converse does not have its own school system, but rather joins in a school district with a number of other communities in the area. Taken together, therefore, the relevant facts indicate that Converse is a suburban community interdependent with San Antonio. Consequently, no first local service preference can apply to an allotment to

Converse.

28. Consequently, the analysis in this case must focus on a proposal to reallocate a sole local service from McQueeney to San Antonio. Furthermore, as set forth above, this reallocation would create a gray area. Thus, the Commission must weigh, on the one hand, the loss of a first local service at McQueeney and the creation of gray area against, on the other hand, the addition of approximately the 41st radio station to the San Antonio market. Clearly, the latter alternative represents the inferior, not the superior, arrangement of allotments.

III. CONCLUSION

29. In sum, the Joint Parties Counterproposal is technically deficient and contrary to Commission policies. It must be dismissed on the basis of its technical deficiency alone. Further, the proposed reallocations would result, not in any significant first local service, but rather primarily in the addition of service to large cities which already have an abundance of radio stations. Accordingly, the Counterproposal must be rejected.

WHEREFORE, the premises considered, Fritz and M&M respectfully request that the Joint Parties' Counterproposal be dismissed or denied.

Respectfully submitted,

**FRITZ BROADCASTING CO., INC.
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CERTIFICATE OF SERVICE

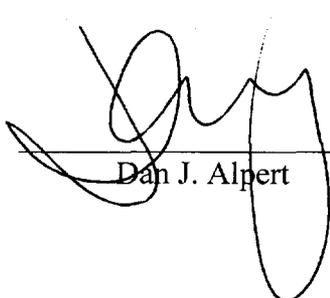
I, Dan J. Alpert, hereby certify that true and correct copies of the foregoing "Reply Comments" have been served upon the following by First Class Mail:

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