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

NOV 20 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Amendment of Section 73.202(b)	)	MM Docket No. 02-124
Table of Allotments	)	
FM Broadcast Stations	)	
(Amboy, California)	)	
TO: Assistant Chief, Audio Division		
Media Bureau		

**OPPOSITION TO MOTION TO DISMISS  
COUNTERPROPOSAL OF CAMERON BROADCASTING. INC.**

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November 20, 2002

NOV 21 2002 044  
LISTENING

1. Canieron Broadcasting, Inc. (“Cameron”) hereby opposes the “Motion to Dismiss Counterproposal” (“Motion to Dismiss”) filed by Infinity Radio Operations, Inc. (“Infinity”) with respect to the counterproposal tiled by Cameron on July 15,2002 in the above-captioned proceeding. As set forth below, Infinity’s concerns here are largely misdirected: to the extent that any problem might exist along the lines identified by Infinity, it is a problem *not* with Cameron’s counterproposal, but rather with the counterproposal of Marathon Media Group, L.L.C. (“Marathon”) for the allotment of Channel 233A at Tecopa, California in MM Docket No. 01-135 (Caliente, Nevada).

2. The primary thrust of Infinity’s Motion to Dismiss is the claim that Cameron’s counterproposal in the instant proceeding -- *i.e.*, the proposal to allot Channel 234C to Pahrump, Nevada in MM Docket No. 02-124 (Amboy, California) -- was barred by a “protected allotment petition” (see Motion to Dismiss at 2, 5) which Marathon had previously filed as a counterproposal in MM Docket No. 01-135 (Caliente, Nevada). According to Infinity,

[Marathon’s] Tecopa channel [proposal] was the subject of Public Notice, Report No. 2506 issued on October 23,2001, with Reply Comments due on November 7,2001, a date well before Cameron filed its July 2002 Counterproposal. As a result, when the [Cameron] Counterproposal was “initially filed,” the Tecopa channel required protection from Cameron’s subsequently filed Counterproposal. See *Pinewood, South Carolina*, 5 FCC Rcd 7609 (MMB 1990); *Mason, Texas*, DA 02-1389 (MMB 2002), *recon. pending*; *Benjamin, Texas*, DA 02-1372 (MMB 2002), *recon. pending*; *Taccoa, Georgia*, DA 01-2784 (MMB 2001).

Motion to Dismiss at 5

3. In advancing this argument, Infinity is simply picking up a cudgel originally brandished, but then dropped, by Marathon earlier in this proceeding. Marathon submitted Reply Comments herein which sought the dismissal of Cameron’s Pahrurnp counterproposal for essentially the same reasons now advanced by Infinity.<sup>1</sup>

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<sup>1</sup> Since Marathon’s **Reply** Comments closed out the comment/reply comment cycle in MM Docket  
(Footnote continued on next page)

4. The problem with the Infinity (nee Marathon) argument is that it assumes that Marathon's Tecopa counterproposal was, in fact, "protected". That assumption is wrong. Infinity failed to dig deeply enough into the Commission's records to realize that, when it was filed, Marathon's Tecopa counterproposal was itself barred by an already-pending proposal in another proceeding.

5. In March, 2001, the Commission issued a notice of proposed rule making, DA 01-693 (released March 16, 2001) in MM Docket No. 01-69 (Parker, Arizona). The deadline for counterproposals in MM Docket No. 01-69 (Parker, Arizona) was May 7, 2001. In response to that notice, Farmworker Educational Radio Network, Inc. ("FERN") submitted a timely counterproposal to, *inter alia*, allot Channel 234C0 to Searchlight, Nevada.

6. On August 13, 2001, Marathon filed its Tecopa Counterproposal in MM Docket No. 01-134 (Caliente, Nevada). The deadline for counterproposals in that proceeding was August 13, 2001, so Marathon's counterproposal was timely as far as the Caliente, Nevada proceeding went. But Marathon's Tecopa Counterproposal was also mutually exclusive with

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*(Footnote continued from preceding page)*

No. 02-124 (Amboy, California), Cameron did not have an opportunity to respond as a matter of right to Marathon's ill-founded arguments. While Cameron was contemplating seeking permission to file a response, Marathon advised Cameron that Marathon was willing to revise its Tecopa counterproposal to eliminate any arguable mutual exclusivity. Since the revision of Marathon's Tecopa counterproposal did not require any modification at all of Cameron's Pahruinp counterproposal, and since Cameron expected that the elimination of even arguable mutual exclusivity would lead to the withdrawal of Marathon's suggestion that Cameron's counterproposal should be dismissed (which it did) and thus remove potential delays in the processing of the instant proceeding, Cameron of course had no objection to Marathon's proposed revision. Marathon has since submitted its proposed revision (in conjunction with the pleading to which Infinity is ostensibly responding with its Motion to Dismiss), and as a result the viability of Marathon's Tecopa counterproposal is no longer a matter of potential concern here.

Cameron is constrained to observe that the overall counterproposal advanced at Marathon's suggestion -- *i.e.*, its proposed revision of its Tecopa proposal to eliminate the mutual exclusivity with Cameron's Pahruinp proposal -- would, if adopted, permit the Commission to resolve promptly two separate proceedings, with consequent improvements in FM allotments and FM service to the public. To the extent that that result can be achieved without undue delay to the favorable resolution of Cameron's counterproposal, Cameron submits that the Commission may pursue such an approach.

FERN's earlier-tiled Searchlight Counterproposal and, as noted above, the deadline for filing proposals mutually exclusive with the original Parker, Arizona proposal was May 7, 2001, more than three months *before* Marathon's counterproposal was filed. Having met that deadline, FERN's Searchlight counterproposal was protected against later-filed mutually exclusive proposals. Marathon's Tecopa Counterproposal therefore could not be considered and should have been summarily dismissed. *E.g., Pinewood, South Carolina*, 5 FCC Rcd 7609 (1990); *Mason, Texas. supra; Benjumin, Texas, supra.* <sup>2</sup>

7. The Searchlight Counterproposal was ultimately dismissed on May 24, 2002. *Parker, Arizona*, DA 02-1249 (released May 24, 2002). At that point, of course, it was too late for Marathon to re-file its Tecopa Counterproposal, because that counterproposal is mutually exclusive with the proposed Caliente, Nevada allotment as to which counterproposals were due no later than August 13, 2001. So Marathon's Tecopa Counterproposal cannot be considered here. *See, e.g., Mason, Texas*, DA 02-1389 (released June 14, 2002), *recon. pending; Benjamin, Texas*, DA 02-1372 (released June 14, 2002), *recon. pending.* <sup>3</sup>

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<sup>2</sup> For an impassioned defense of the wisdom, efficacy and ultimate validity of the first-come, first-served approach to allotments -- *i.e.*, the approach which here necessitated the dismissal of the Tecopa Counterproposal -- the Commission's attention is directed to the Opposition filed on August 19, 2002 by Rawhide Radio, LLC ("Rawhide") with respect to the petitions for reconsideration in the *Mason, Texas* (MM Docket No. 01-131) and *Benjumin, Texas* (MM Docket No. 01-133) proceedings, both of which are cited by Infinity (and both of which were cited by Marathon as well). While the defense advanced by Rawhide may not be universally applicable (*see, e.g.*, the Reply to the Rawhide Opposition filed by the Petitioner for Reconsideration in those proceedings), it is certainly applicable here, as discussed in Paragraphs 6-8, above. Nor could Marathon (were it to be given the opportunity) disclaim the arguments advanced by Rawhide, as those arguments were advanced by the same counsel who represents Marathon.

<sup>3</sup> Cameron's Pahrump counterproposal would also have been mutually exclusive with FERN's Searchlight counterproposal -- *but for the fact that* the Searchlight proposal was dismissed in May, 2002, while the Pahrump proposal was not submitted until two months later, in July, 2002. So there was no mutual exclusivity. Moreover, Cameron's Pahrump counterproposal includes the express concurrence of FERN, thus conclusively foreclosing any conceivable argument that the dismissed Searchlight proposal might somehow preclude the Pahrump proposal.

8. The record in MM Docket No. 01-69 (Parker, Arizona) reflects that a motion to dismiss FERN's counterproposal was tiled by a party represented by counsel for Marathon. So we may assume that, at the time Marathon filed its Tecopa Counterproposal, Marathon (through its counsel) may have believed that the FERN counterproposal was defective in some way and therefore subject to dismissal at some time. But that does not mean -- as Infinity's argument would seem to suggest -- that Marathon could simply ignore the Searchlight Counterproposal, file its own Tecopa Counterproposal, and claim that that later-filed counterproposal was holding a place in some line or queue which might entitle Marathon to some preferred position should the Searchlight Counterproposal ultimately be dismissed.

9. Even the authority on which Infinity itself (and Marathon before it) relies is to the contrary.

10. In *Pinewood, South Carolina, supra*, cited by Infinity, a party (the "Pinewood Proponent") had filed a rule making petition which, as it turned out, was mutually exclusive with a counterproposal (the "Summerton Counterproposal") filed earlier in response to a notice of proposed rule making. The Pinewood proposal was dismissed because of the earlier-filed Summerton Counterproposal. The Pinewood Proponent argued extensively that the Summerton Counterproposal was flawed for multiple reasons, but its arguments were unavailing. The Commission summarized its position as follows:

The untimeliness of the Pinewood proposal now requires that [the Pinewood Proponent] await the outcome of [the Summerton proceeding]. If [the channel in question] is not assigned to Summerton, [the Pinewood Proponent] **may then resubmit** its petition for rule making proposing [that channel] for Pinewood.

5 FCC Rcd at 7610,712 (emphasis added). Thus, where an allotment proposal is untimely, it must be dismissed (as was the Pinewood proposal), even if the mutually exclusive proposal which mandates that dismissal may itself be flawed in some respect. Only after the fate of that

earlier-filed mutually exclusive proposal is resolved adversely to that proposal can the later-filed counterproposal be “resubmit[ted]”, *see id.*<sup>4</sup>

11. Marathon has conceded that its Tecopa Counterproposal was in conflict with the FERN Searchlight Counterproposal. And the Commission’s records establish beyond argument that the Searchlight Counterproposal was timely filed on May 7, 2001, the counterproposal deadline in the Parker, Arizona proceeding, while the Tecopa Counterproposal was not filed until August 13, 2001. Thus, the Tecopa Counterproposal was unquestionably late-filed and it should have been dismissed. *E.g., Pinewood, South Carolina, supra.*

12. Infinity’s argument (first advanced, of course, by Marathon) assumes that Marathon was entitled to: (a) file a counterproposal which it knew to be blatantly defective and then (b) hide out somewhere in the Commission’s files, waiting and hoping that the source of its defect (*i.e.*, the FERN counterproposal in Docket No. 01-69 (Parker, Arizona)) might somehow be removed. And should that source indeed be removed, the Infinity (*née* Marathon) argument next requires that the initial filing date of the Marathon counterproposal automatically entitled it to some preferred position, *nunc pro tunc*, in a queue of competing proposals, even if its proposal was unquestionably defective as of that initial filing date.

13. The problems with that apparent position are several. First, it is clear from, *e.g.*, *Pinewood, South Carolina* -- a case on which Infinity itself places primary reliance -- that a

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<sup>4</sup> *See also* Rawhide’s Opposition to the *Mason, Texas* and *Benjamin, Texas* petition for reconsideration described in Footnote 2. above:

There is no way to accommodate late-filed conflicting petitions or applications in an efficient administrative manner. . . . Should [a late-filing petitioner for an allotment] be permitted to file late and occupy spectrum that other parties could use in legitimate non-conflicting proposals while the Commission makes a determination?. . . Of course not.

Rawhide Opposition to Petition for Reconsideration in MM Docket Nos. 01-131 and 01-133, filed August 19, 2002.

defective allotment proposal must be dismissed whether or not some question exists concerning the validity of the allotment or proposal which gives rise to the defect. According to *Pinewood*, if the problem is at some point resolved so as to permit the initially-defective allotment proposal, then that proposal may thereafter be “resubmit[ted]”. In other words, in *Pinewood* the Commission clearly indicated that defective proposals would have to be dismissed subject to resubmission if and when the defect was eliminated.

14. Further supporting that notion is the fact that the Commission has consistently held that allotment counterproposals must be free of defects as of the date they are filed. *See, e.g., Broken Arrow, Oklahoma et al.*, 3 FCC Rcd 6507, 6511, n. 2 (Policy and Rules Division 1988); *Springdale, Arkansas et al.*, 4 FCC Rcd 674, 677, n. 7 (Policy and Rules Division 1989); *Detroit, Texas et al.*, 13 FCC Rcd 16561, 16563 (Allocations Branch 1998). In view of the clear mutual exclusivity between the Tecopa proposal and the previously-filed-and-then-still-pending Searchlight proposal, the former obviously fell well short of this standard and should have been dismissed.

15. Further supporting that notion is the fact that the Commission has never announced any “queue” system in the allotment area. That is, the Commission’s rules and processes do *not* provide *any* mechanism for submitting defective proposals and then having those proposals sit in a file drawer somewhere in the Commission until some subsequent event supposedly cures the defect, at which point the defective proposal is suddenly treated as if it had been defect-free from day one. Such an approach to allotments would wreak havoc on the Commission’s processes, as it would make it virtually impossible to determine on any given day whether any particular proposal is acceptable or unacceptable. Marathon’s counsel, for one, has expressly recognized this. *See, e.g.,* Footnote 4, above.

16. Accepting Infinity's argument here would lead to a dramatic increase in the filing of clearly unacceptable proposals, as proponents would likely see no harm in lobbying in flawed proposals in the hope that, at some point down the line, lightning might strike and those proposals might become sound. The Commission's processing staff, already faced with a surfeit of acceptable proposals, would suddenly be faced with an overwhelming increase in proposals, most of them defective. And bona fide proponents attempting to advance valid proposals would be faced with uncertainty and delay of far greater magnitude than they face today.

17. Unless the Commission is prepared to take this dramatic step off the cliff and suffer the inevitable, and likely irreversible, consequences of the steep and slippery slope down which it would quickly slide, the Commission should act promptly here: it should reject Infinity's arguments and do what is necessary to assure that untimely proposals do not take root in the Commission's files and that, if perchance through some inadvertent oversight they do take root, they are extirpated as soon as their presence is recognized.

18. Infinity also claims that Cameron's counterproposal: (a) runs afoul of the Commission's "policy against contingencies in rule making proceedings", Motion to Dismiss at 7, n. 2; (b) does not have consent from enough affected stations; and (c) is therefore subject to dismissal on those bases. Again, Infinity dramatically overstates its case.

19. In connection with the preparation of its counterproposal, Cameron obtained the consent of KJUL License, LLC ("KJUL"), the licensee of Station KSTJ(FM), Boulder City, Nevada, to the submission of the counterproposal. After the counterproposal had been filed, KJUL filed a motion to dismiss Cameron's counterproposal. In that motion, KJUL acknowledged that it had initially consented to the filing of the Cameron counterproposal, but had since withdrawn that consent. But less than a week later, KJUL withdrew its motion to dismiss, reciting its renewed consent to that counterproposal. So the record reflects that

Cameron *did* (even by KJUL's admission) have KJUL's consent to the original submission of the counterproposal.

20. Infinity tries to cram the facts of this case into the convenient (for Infinity's purposes) pigeon-hole category of "contingent proposals" which are (according to Infinity) proscribed by Commission policy. See Motion to Dismiss at 7-8, citing *Cut and Shoot, Texas*, 11 FCC Rcd 16383 (Allocations Branch 1996) and *Auburn, Alabama*, DA 02-2063, released August 30, 2002. But the "contingent proposals" proscribed by the cases on which Infinity relies involved contingent *regulatory* matters then pending before the Commission. In the Commission's words.

it is our policy not to accept rulemaking proposals that are ***contingent on the licensing of facilities set forth in an outstanding construction permit or are dependent upon final action in another rulemaking proceeding.***

*Auburn, Alabama* at 3, ¶4 (emphasis added). But the instant situation does **not** involve any such regulatory "contingency", and Infinity's suggestion to the contrary is plainly misguided, if not unfortunately disingenuous.<sup>5</sup> Infinity would doubtless prefer that *Cut and Shoot, Texas* and *Auburn, Alabama* involve situations such as that presented here. But they do not, and no amount of careful redaction by Infinity can make them do so.

21. Infinity's arguments relative to some supposed lack of consent are equally spurious. According to Infinity, Cameron did not have KJUL's consent, and that in turn meant that Cameron lacked consent of three affected stations, one more than permitted by Commission policy.

22. According to Infinity, the Commission's policy requires that

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<sup>5</sup> Presumably Infinity was aware of the sentence quoted above, *as* it appears in the *Auburn, Alabama* decision immediately before the language quoted by Infinity at Footnote 2 to its Motion to Dismiss.

counterproponents reach “an assurance among the affected stations to the proposal . . . *in advance of the filing of the petition.*”

Motion to Dismiss at 8 (emphasis added by Infinity). But it is clear that Cameron ***did have such assurance*** “*in advance of the filing of the petition*”. Not only did Cameron so state in its counterproposal, but KJUL expressly confirmed that in its motion to dismiss. So Cameron’s counterproposal ***did*** comply with the Commission’s policy.

23. While Infinity attempts to make much of the fact that KJUL’s consent was momentarily withdrawn, that fact is of no consequence for at least two reasons.

24. First, KJUL has reached agreement with Cameron concerning matters relating to the possible acquisition of Station KFLG-FM by KJUL’s parent. The negotiation process took longer than the parties had expected, but agreement has been reached.<sup>6</sup>

25. Second, the momentary “hiccup” reflected in KJUL’s motion to dismiss and subsequent withdrawal of that motion to dismiss cannot be deemed fatal in any way to Cameron’s counterproposal. Infinity appears to believe that rulemaking proponents must have legally binding and enforceable agreements with all other affected licensees prior to filing their rulemaking proposals. That is not the law. To the contrary, the Commission has never to Cameron’s knowledge required rulemaking proponents to enter into formal, legally binding and enforceable agreements with other affected licensees prior to the submission of their proposals.

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<sup>6</sup> Cameron recognizes that, in its withdrawal of its motion to dismiss, KJUL indicated that it would report to the Commission on the status of its agreement with Cameron within 30 days of that withdrawal. Cameron has no control over KJUL and was not in a position to compel KJUL to follow up on that self-imposed reporting commitment. But from Cameron’s perspective, no follow up was necessary. The last report from KJUL correctly indicated that KJUL consented to the filing of the Cameron counterproposal, and unless and until that circumstance changed, there was technically nothing to report. And in any event, any reporting by KJUL on this subject was purely voluntary and not a matter of regulatory compulsion. As a result, KJUL can hardly be faulted for any failure to follow up, and Cameron -- which did not represent that it would file any follow up report and which had no control over KJUL, which did make such a representation -- is even less subject to blame on this score.

All that is needed is the other parties' consent to the filing, which Cameron clearly had in this case. The details of the relationship and the obligations to be borne by the parties at the time the rulemaking changes are implemented can be, and often are, left open until such implementation. For example, in *Columbus, Nebraska*, 59 RR2d 1184 (Allocations Branch 1986), cited by Infinity, the Commission acknowledged that a proponent might be expected to pre-pay reimbursement costs into an escrow fund in order to assure that other affected licensees would not have to wait unduly long for their reimbursements. The Commission's recognition of **the** likely need to adjust the parties' relationship at the time of implementation clearly demonstrates that the Commission does not anticipate, much less require, that the parties' relationship be concretized in all respects prior to the filing of the rulemaking proposal.

26. Since Cameron did have, and continues to have, KJUL's consent to the filing of its counterproposal, the momentary disruption reflected in KJUL's since-withdrawn motion to dismiss is of no consequence here.

WHEREFORE, for the reasons stated, Cameron Broadcasting, Inc. opposes the Motion to Dismiss filed by Infinity Radio Operations, Inc

Respectfully submitted,

  
/s/ Harry F. Cole  
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November 20, 2002

**CERTIFICATE OF SERVICE**

I, Harry F. Cole, hereby certify that on this 20th day of November, 2002, I caused copies of the foregoing "Opposition to Motion to Dismiss Counterproposal of Cameron Broadcasting, Inc." 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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