

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

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Amendment of Section 73.202(b),)
Table of Allotments,)
FM Broadcast Stations.)
(Amboy, California))

MB Docket No. 02-124
RM-0446

TO: Assistant Chief, Audio Division
Media Bureau

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

Infinity Radio Operations, Inc. ("Infinity"), licensee of radio station KMXB(FM), Henderson, Nevada, hereby replies to Cameron Broadcasting, Inc.'s ("Cameron") November 20, 2002 Opposition to Motion to Dismiss Counterproposal of Cameron Broadcasting, Inc. ("Opposition") in the above-captioned proceeding.¹ As shown below, the Opposition's principal argument, concerning defective counterproposals, ironically requires the dismissal of Cameron's own counterproposal. The Opposition otherwise attempts to draw a legal distinction where none exists and unsuccessfully tries to explain away the fact that Cameron's counterproposal violated the Commission's long-standing *Columbus, Nebraska* policy when it was filed.

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¹ With Cameron's consent, Infinity sought an additional week within which to submit this Reply and it is therefore timely filed.

I. The Searchlight, Nevada Rule Making Counterproposal Cited By Cameron In No Way Excuses Cameron's Failure To Timely Protect Marathon's Tecopa, California Allotment Proposal.

In its November 6, 2002 Consolidated (1) Opposition to Motion to Accept Supplement and (2) Motion to Dismiss Counterproposal of Cameron Broadcasting, Inc. ("Motion"), Infinity noted that Cameron's July 15, 2002 counterproposal in this proceeding failed to address the short-spacing conflict its proposal to allot Channel 234C at Pahrump, Nevada created with a previously filed, protected allotment petition filed by Marathon Media Group, L.L.C. ("Marathon") for Channel 233A at Tecopa, California. Motion at 2. Cameron attempts to make this fatal Tecopa obstacle disappear from its rule making path by arguing that it was defective *ab initio*. Cameron's contention must be rejected for multiple reasons.

The Opposition argues that the Marathon allotment at Tecopa should not have been protected because when filed, it was mutually exclusive with a counterproposal earlier filed by Farmworker Educational Radio Network, Inc. ("FERN") proposing a relocation of KFLG-FM from Kingman, Arizona (Channel 234C) to Searchlight, Nevada (Channel 234CO) in a separate proceeding (MM Docket No. 01-69). *Parker, Arizona*, DA02-129 (MMB 2002). This argument fails. Because the FERN counterproposal in MM Docket No. 01-69 was rife with errors, the FCC never accepted FERN's proposed searchlight allotment or solicited public comment on it (indeed, never entered it into its database). Because it was defective, FERN's counterproposal did not receive protection from subsequent proposals, including Marathon's Tecopa proposal.

As the FCC noted in *Parker, Arizona, supra*, the FERN counterproposal contained "two significant defects." The counterproposal was "unacceptable for consideration" because it did not include the required statements of consent from two broadcast stations whose operations

would be affected by the FERN counterproposal. *Id.* The counterproposal was also defective because the transmitter site proposed for Searchlight, Nevada could not provide the required 70 dBu contour encompassing Searchlight. *Id.* The Commission never accepted the FERN counterproposal, (indeed, never entered the proposed Searchlight allotment into the FCC database), and instead summarily dismissed it as “unacceptable for consideration.” *Id.* Consequently, no public notice of FERN’s patently defective counterproposal was given and a diligent search by Marathon, even of the FCC’s own allotment database, would not have uncovered the FERN counterproposal.

Because the FERN counterproposal was clearly defective as filed, and recognized as such by the FCC in *Parker, Arizona*, the FERN counterproposal has never been protected and the Marathon proposal for Tecopa met the Commission’s requirement that proposals be “technically correct and substantially complete”, *Casper, Wyoming*, 15 FCC Rcd 15806 (MMB 2000), when filed. Not surprisingly, the Marathon proposal, unlike the FERN counterproposal, was routinely accepted by the Commission after being placed in the FCC database, thereby providing public notice of its filing. Conspicuously absent from both Cameron’s counterproposal and its Opposition is any explanation of why Cameron did not discover its conflict with the Marathon proposal in a search of the database, assuming one was conducted.

Further, even the authority cited by Cameron shows that the FERN counterproposal did not merit protection. In *Mason, Texas*, cited by Cameron, the Commission decided to protect a timely, correct, and otherwise acceptable counterproposal from conflicting proposals filed in subsequent proceedings even though that counterproposal had erroneously not been publicized “due to a lapse in the database.” DA 02-1 1389 (MMB 2002). By contrast, the FERN counterproposal was “technically incorrect and substantially incomplete” due to FERN’s own

lack of diligence in not including the necessary consent statements and in not selecting a valid transmitter site. *Mason* stands for the proposition that a diligent and timely rule making proponent should not be penalized due to an administrative lapse beyond its control. The FERN counterproposal's defects were in no way the result of Commission error and it was not eligible for the relief provided in *Mason*

II. Cameron's Argument That Defective Counterproposals Must Not Be Permitted To Block Otherwise Valid Rule Making Proposals Requires The Dismissal Of Its Own Counterproposal.

The Opposition's central argument about the FERN counterproposal in MM Docket No. 01-69, taken to its logical conclusion, fatally undermines Cameron's position. That is, Cameron argues that its failure to timely protect Marathon's Tecopa proposal should be excused because Marathon's earlier filed proposal was defective. Marathon, according to this line of reasoning, had failed to protect the Searchlight counterproposal discussed above. As a matter of public policy, Cameron contends that defective counterproposals must not be permitted to block otherwise valid proposals. Opposition at ¶ 15. Under this reasoning, however, even if Marathon had somehow learned of the unpublicized Searchlight counterproposal, *Marathon had no obligation to protect that blatantly defective Searchlight submission*. By its own theory, Cameron must concede that the defective Searchlight proposal cannot block the otherwise valid Tecopa proposal. The simple fact is that at the time Cameron prepared its counterproposal, Commission rules and policy required *Cameron* to protect Marathon's previously and properly filed Tecopa proposal. Its failure to do so is fatal.

III. Cameron's Analysis Of The FCC's *Cut and Shoot* Policy Simply Identifies A Distinction Without Difference.

Cameron also attempts to show that its counterproposal does not violate the Commission policy articulated in *Cut and Shoot*, 11 FCC Rcd 16383 (1996), against accepting contingent rule

making proposals. Cameron's counterproposal alleged, without any accompanying statement of proof, that one of the licensee consents that Cameron claims to have obtained was given "subject to certain conditions," which were not disclosed to the Commission and which had yet to be met. Cameron counterproposal at ¶ 33. One of those "conditions" apparently later failed, leading to a messy withdrawal and attempted reinstatement of the licensee consent in question.

Cameron attempts to exempt itself from the *Cut and Shoot* policy by asserting that the Commission's refusal to accept contingent proposals applies only to contingent *regulatory* matters and that its counterproposal "does **not** involve any such regulatory contingency." Opposition at ¶ 20 (emphasis in original). In fact, however, Cameron's counterproposal **is** contingent on resolution of regulatory matters, and the Commission's stated rationale for the policy applies squarely to the Cameron counterproposal -- "processing contingent proposals is not conducive to the efficient transaction of Commission business and imposes unnecessary burdens on the staff [and] the staff's attempts at processing cases and achieving finality is frustrated." *Auburn, Alabama*, DA 02-2063, released Aug. 30, 2002 (Aud. Div. 2002). Furthermore, as Cameron itself concedes, the Commission will not accept rule making proposals that "are dependent upon final action in another rule making proceeding." Opposition at ¶ 20 (citing *Auburn, Alabama* at 3). Yet as Cameron also noted, the granting of its counterproposal as filed was contingent upon the dismissal of the Marathon proposal, which is nothing more than "a final action in another rulemaking proceeding."

The delay resulting from a contingent facility license being granted (the matter at issue in *Auburn*) and the delay resulting from the contingency of a proposal in another proceeding being dismissed (the matter at issue here) is a distinction without a difference. In both cases, the Commission and its staff are burdened and delayed until a regulatory contingency is resolved

As a result, Cameron's counterproposal should be dismissed under the Commission's *Cut and Shoot* policy.

IV. As Parker, Arizona Shows, Cameron's Counterproposal Violated The FCC's Columbus, Nebraska Policy And Should Be Dismissed.

Finally, Cameron incorrectly reasserts, Opposition at ¶ 21, that it complied with the Commission's well-established *Columbus, Nebraska* policy of "not considering petitions that involve more than two channel substitutions for which consent has not been received" at the time of filing. 59 RR 2d 1184, 1185 ¶ 4 (1986). By its own admission, Cameron lacked consent from the licensees of KMXB(FM), Henderson Nevada, and KKBK(FM), Baker, California. Cameron Counterproposal at ¶ 3. However, Cameron also failed to demonstrate that it had the required consent of KJUL License LLC ("KJUL"), licensee of KSTJ(FM), Boulder City, Nevada.

Again, Cameron's position is undermined by the very precedent it cites. The Opposition makes frequent reference to *Parker, Arizona, supra*, and yet its own counterproposal suffers from the same significant defect that led to the dismissal of the counterproposal in that case. In *Parker*, the *FERN* counterproposal was dismissed in part because it did not provide the Commission with any statement of consent from two licensees (including the licensee of KSTJ) that would have been affected by the counterproposal. *Parker, supra* at ¶ 3. The Commission expressly stated that the "failure to demonstrate such consent ... renders *FERN*'s counterproposal unacceptable for consideration." *Id.* Cameron's counterproposal suffers from the same deficiency. While Cameron's counterproposal includes statements of consent from *FERN* (Cameron's Attachment A), Pahrump Radio, Inc. (Attachment L), and Route 66 Broadcasting L.L.C., (Attachment M), it does not include statements of consent from the three licensees of stations KSTJ, KMXB, and KKBK. Without timely filed consent statements from

three affected licensees, the Cameron counterproposal runs afoul of the Commission's *Columbus, Nebraska* policy, and should be dismissed. 59 RR 2d 1184.

Cameron did assert that it was authorized "to represent to the Commission" that KJUL had consented to the proposed change "subject to certain conditions which Cameron anticipates will be satisfied." Cameron counterproposal at ¶ 4. However, similar language in the FERN counterproposal, stating that the relevant "licensees ... consented to the proposed changes," FERN Comments and Counterproposal, filed May 7, 2001, MM Docket No. 01-69, was deemed insufficient in *Parker, supra*. There, the FERN counterproposal was dismissed by the Commission for the failure to "submit any statement to the Commission" that the stations, *ironically including KTSJ*, consented. *Parker, supra* at ¶ 3.

In the case at hand, the Commission's *Kaukauna* policy requires Cameron to have obtained KJUL's consent "in advance of the filing of the petition", 6 FCC Rcd 7142, 7143 n.2 (MMB 1991), and to have filed a statement of consent from KJUL as part of its counterproposal. *Parker, supra* at ¶ 3. Cameron's counterproposal clearly violates the policies set forth in *Columbus, Kaukauna*, and *Parker* and the Commission should dismiss it without consideration.

CONCLUSION

For the reasons set forth above and in Infinity's Motion, the Commission should reject Cameron's Opposition to Motion to Dismiss, dismiss Cameron's defective counterproposal, grant KHYW's original allotment petition for Amboy, California, and terminate this proceeding.

Respectfully submitted,

INFINITY RADIO OPERATIONS, INC.

By: 

Steven A. Lerman

Dennis P. Corbett

Howard A. Topel

John W. Bagwell (Admitted Virginia only)

Leventhal Senter & Lerman PLLC

2000 K Street, NW

Suite 600

Washington, DC 20006-1809

202-429-8970

Its Counsel

December 10, 2002

CERTIFICATE OF SERVICE

I, Joan M. Trepal, a secretary in the law firm of Leventhal Senter & Lerman PLLC, hereby certify that on this 10th day of December, 2002, I caused copies of the foregoing "REPLY TO OPPOSITION TO MOTION TO DISMISS COUNTERPROPOSAL OF CAMERON BROADCASTING, INC." to be placed in the U.S. Postal Service, first class postage prepaid, addressed to the following persons:

John A. Karousos, Assistant Chief
Audio Division
Federal Communications Commission
445 Twelfth Street, SW, Room 3-A266
Washington, DC 20554

Deborah A. Dupont
Audio Division
Federal Communications Commission
445 Twelfth Street, SW, Room 2-A834
Washington, DC 20554

Anne Thomas Paxson, Esq.
Borsari & Paxson
2021 L Street, NW, Suite 402
Washington, DC 20036
(Counsel for Farmworker Educational Radio
Network, Inc., Licensee of Permit 971003ME,
Parker, AZ)

Dean R. Brenner, Esq.
Crispin & Brenner, P.L.L.C.
1156 15th Street, NW, Suite 1105
Washington, DC 20005
(Counsel for Pahrump Radio, Inc., Licensee of
KNYSE(FM), Pahrump, NV)

Joseph D. Sullivan, Esq.
Latham & Watkins
555 11th Street, NW, Suite 1000
Washington, DC 20004-1304
(Counsel for KJUL License, LLC, Licensee of
KSTJ(FM), Boulder City, NV)

David D. Oxenford, Jr., Esq.
Shaw Pittman
2300 N Street, NW
Washington, DC 20037-1128
(Counsel for Baker Broadcasting, LLC, Licensee of
KBKK(FM), Baker, CA)

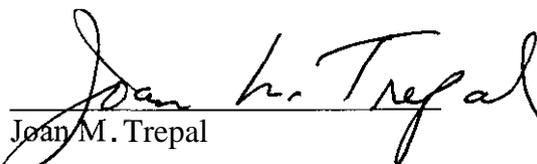
Marissa G. Repp, Esq.
F. William LeBeau, Esq.
Hogan & Hartson L.L.P.
555 Thirteenth Street, NW
Washington, DC 20004-1109
(Counsel for KHWW, Inc.)

Matthew H. McCormick, Esq.
Reddy, Begley & McCormick, LLP
2175 K Street, NW – Suite 350
Washington, DC 20037-1845
(Counsel for Route 66 Broadcasting, LLC, Licensee
of KZKE(FM), Seligman, AZ)

Lee J. Peltzman, Esq.
Shainis & Peltzman, Chartered
1850 M Street, NW
Suite 240
Washington, DC 20036
(Co-counsel for Marathon Media Group, LLC)

Mark N. Lipp, Esq.
Shook, Hardy & Bacon, LLP
600 14th Street, NW
Suite 800
Washington, DC 20005
(Co-counsel for Marathon Media Group, LLC)

Harry F. Cole, Esq.
Alison J. Shapiro, Esq.
Fletcher, Heald & Hildredth, PLC
1300 North 17th Street, 11th Floor
Arlington, VA 22209-3801
(Counsel for Cameron Broadcasting, Inc.)


Joan M. Trepal