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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	MB Docket No. 02-248
	)	
Amendment of Section 73.202(b)	)	RM-10537
Table of Allotments	)	
FM Broadcast Stations	)	
Smiley, Texas	)	

To: Assistant Chief,
Audio Division
Media Bureau

REPLY COMMENTS OF
NEW ULM BROADCASTING COMPANY

On June 11, 2003, the Commission released a Public Notice in this docket (Report No. 2609) listing the counterproposal of LBR Enterprises, Inc, and inviting Reply Comments. The Public Notice did not however include publication of a counterproposal that had also been filed in this docket by New Ulm Broadcasting Company ("New Ulm"). To the extent that the Commission did not propose further consideration of the New Ulm proposal, we believe it was in error, and without full consideration of the public interest that would be served by that proposal. To the extent that the LBR proposal which the Commission did publish relies upon a forced transmitter move of station KYKM in Yoakum, Texas, for which LBR has no agreement or consent, we also submit that that publication

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was in error 1/ In support whereof, New Ulm Broadcasting Company ("New Ulm") by its counsel, submits the following:

I. **The New Ulm Counterproposal Should have Been Published.**

The centerpiece of the New Ulm counterproposal was its proposal to provide a new first radio service to the town of Schulenburg, Texas, a town of nearly 3,000 persons which presently has no broadcast radio service at all. None. No AM reception service. No FM reception service, and obviously, no transmission service of any kind. It is not known if there are any other communities of this size in the entire country which are totally "white area", no broadcast radio service at all, and the plan to bring a first service to that town was paramount in the New Ulm proposal. In order to accomplish that most worthy goal, New Ulm proposed moving its station KNRG, presently operating on channel 222A in New Ulm, to provide the first transmission and reception service to the new city of Schulenburg on upgraded channel 222C3. It was then proposed to replace New Ulm's service with replacement channel 283A and New Ulm committed to apply for a new station on that replacement channel.

The public interest benefits of the New Ulm proposal for Schulenburg were so clear that even the original petitioner at one point conceded that

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1/ It is noted that New Ulm had the agreement and concurrence of the licensee of KYKM as part of its own proposal and with adoption of the New Ulm proposal, LBR might have also been the beneficiary of the agreed-upon change, but absent adoption of the New Ulm counterproposal, no such agreement by KYKM would remain in this case.

> "if the Commission concludes that the existence of white (or gray) area has been established, I concur that such service outweighs the 307(b) attributes of my petition to allot a channel to Smiley, Texas [the original rulemaking petition in this docket]. Response [of Linda Crawford] to Motion to Strike late-Filed Reply, page 1, January 29, 2003. (emphasis supplied)

LBR enterprises, the only other party filing a counterproposal in this docket also filed Reply Comments in support of the New Ulm proposal:

> Because the allotment plan submitted by new Ulm Broadcasting Company in its counterproposal...will result in a more preferential arrangement of allotments, LBR supports the adoption of New Ulm's allotment plan. Reply Comments of LBR Enterprises, Inc., page 1, November 5, 2002. (emphasis supplied)

There can simply be no question as to the clear public interest benefits that would be achieved by adoption of the New Ulm proposal. But yet, the New Ulm proposal was omitted from the Public Notice for further consideration in this docket. It is believed that the only possible explanation for that omission is the staff's belief that the new "backfill policy" announced by the Commission on February 11, 2003, in Pacific Broadcasting of Missouri LLC (Memorandum opinion and Order, FCC 03-18) constituted a conclusive bar to further consideration of any petition for rulemaking, including petitions pending at the time of the Pacific decision, such as New Ulm's, from any further consideration if they included a "backfill" proposal.

This, in fact was the substance of supplemental "Comments of Linda Crawford" filed in this docket on February 18, 2003, which suggested that the change in policy stated in the Pacific case

was meant to be conclusive and that it was meant to apply on a retroactive ex post facto basis to pending cases such as New Ulm's. Based upon that supposition, Crawford suggested that the New Ulm counterproposal "should be dismissed". New Ulm filed Comments in Opposition to Crawford on March 4, 2003, pointing out that there remained open questions as to whether the Commission meant its new policy to be conclusive in application and, if so, if it also meant it to apply on a retroactive, ex post facto basis to pending cases such as New Ulm's.

New Ulm indicated that answers to such questions of substance as well as questions as to the procedure used in adopting this policy change would be raised for clarification on reconsideration and that, until the Commission had an opportunity to respond to such questions, Crawford's suggestion that New Ulm's counterproposal should be dismissed on the most Draconian reading of Pacific by Crawford was premature. Finally, New Ulm suggested that if the Commission verified the most severe extent of the policy as was suggested by Crawford, that waivers of that policy should be considered in unique public interest cases such as New Ulm's.

New Ulm then proceeded to file a Petition for Reconsideration and Clarification with the full Commission in Pacific on March 13, 2003. In addition, at least one other Petition for Reconsideration and Clarification was filed with the Commission on that same date by Marathon Media Group. Both petitions raised serious matters of substance and procedure for

the Commission's consideration in Pacific, were in no way "frivolous" in nature, and remain pending awaiting Commission action at this time.

In releasing its Public Notice in this case on June 11, 2003, it appears that the staff concluded that it did not need further guidance from the Commission as to the scope and applicability of its new Pacific policy and apparently concluded that it was a complete bar to further consideration of the New Ulm counterproposal. We believe that the staff was in error on this, and that the equities of the parties as well as the importance of this matter to the people of Schulenburg require more consideration than that. But even if the staff concluded and predicted that the Commission meant this to be conclusive and meant it to apply retroactively to pending cases, the staff should also have considered whether a waiver was appropriate based upon the unique facts of this case.

If this were a new statute we were dealing with here, then we would agree that the staff would be powerless to consider a waiver, no matter what the public interest benefits were. But this is not a statute. It is not even a "rule". It is a new "policy", and as such, the staff in this case has the delegated authority and primary responsibility in the first instance to determine if application of the new policy is so contrary to the public interest in this case, and so contrary to the purpose of the new policy in this case, that in furtherance of the public interest, it should be waived in accordance with 47 CFR 1.3. The

public interest is not well-served by a mechanical application of this new policy without thought or regard as to whether such application of that policy here would be in furtherance, or in contravention, of the public interest.

In making this analyses, you do not have to look far, but you do have to look. The stated concern of the Commission in adopting the new policy was the delay in re-implementing backfill service to the original community. In our case, dismissing the New Ulm counterproposal would save any "delay" at New Ulm but at the expense of denying forever ANY service EVER to the 3,000 people in Schulenburg. That is a pretty high price to pay for any "delay". Moreover, whereas Schulenburg presently has NOTHING, no transmission service and no reception service, New Ulm, in addition to the channel proposed to be moved to Schulenburg, has at least THREE other existing reception services (see Attached Ex 1, Engineering Statement). So even if there were a delay in the Commission announcing the auction for the new replacement channel at New Ulm, New Ulm would continue to receive 3 FM radio reception services during any such time, which is already three more than Schulenburg receives now. To deny any service of any kind to Schulenburg under such conditions simply meets no possible standard of the "public interest" and cannot be defended as such.

In response to the Public Notice which omitted the New Ulm counterproposal, New Ulm on June 25, 2003, filed a Motion for Expedited Commission Action and Stay of Further Staff Action in

this docket pending Commission action on the pending Petition for Reconsideration and Clarification in Pacific Broadcasting (copy attached hereto as Exhibit 2). As stated there and as stated here, New Ulm believes that the public interest benefits from adoption of the new Ulm proposal to bring a first transmission service and first reception service to Schulenburg are too substantial and too important to be denied on the basis of the new general backfill policy as announced in Pacific Broadcasting, and that, in the event that the Commission verifies the substance and scope of that new policy as broadly as the staff has apparently assumed it to be, that the policy should nonetheless be waived in this case, based upon the clear public interest benefits of record of the New Ulm proposal. In recognition and consideration of the unique public interest benefits existent in the New Ulm proposal, it is therefore requested that the staff proceed to issue a supplemental Public Notice for the New Ulm counterproposal for further consideration in this docket.

II. The Proposal of LBR Enterprises, Inc. is inconsistent with FCC Policy and Should Be Accorded no Further Consideration

As part of the New Ulm counterproposal, New Ulm secured the agreement of LaGrange Broadcasting Corporation, sister company of New Ulm (both wholly owned and controlled by Roy E. Henderson) to a change of channel and transmitter location for radio station KYKM in Yoakum, Texas. New Ulm is aware that in adoption of the New Ulm proposal, LBR,Inc., could also benefit from the change at KYKM as agreed to as part of the New Ulm proposal, and had no objection to that. It is noted however that the agreement by

LaGrange was only with New Ulm and only as part of the New Ulm counterproposal and that there was, to New Ulm's knowledge, no separate agreement requested or granted by LaGrange to LBR, Inc. in this case.

That being so, if the New Ulm proposal is not further considered and adopted, then there is no agreement by LaGrange to move its transmitter site or change its channel as proposed by LBR, Inc. Although the Commission will require existing stations to make channel changes in certain circumstances, we are not aware of any case where an existing station has been forced to change its transmitter site location, over its objection, in order to accommodate a change as suggested by LBR, Inc.. Accordingly, absent adoption of the New Ulm counterproposal, it is submitted that the counterproposal by LBR, Inc. cannot stand or be accorded further consideration.

III. Conclusion

Wherefore, it is respectfully requested that the Audio Division issue a Supplemental Public Notice for the further consideration of the New Ulm counterproposal in this docket, or in the alternative, that it withhold further action in this docket pending response and clarification by the Commission to the pending Petitions for Reconsideration and Clarification in Pacific Broadcasting. It is further requested that in the event that the Commission rules that the policy would apply retroactively to New Ulm, that the Audio Division consider waiver of that policy as it might apply to New Ulm, and based upon the

unique benefits that would result from adoption of the New Ulm counterproposal, to waive that new policy and adopt the New Ulm Counterproposal.

Respectfully submitted,

NEW ULM BROADCASTING COMPANY, and

by _____
Robert J. Buenzle

Its Counsel

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June 26, 2003

Reply Comments of
New Ulm Broadcasting Co.
FM RM Docket 02-248
June 26, 2003

Exhibit 1

ENGINEERING STATEMENT

ENGINEERING STATEMENT

This firm has been retained by New Ulm Broadcasting Company to prepare this engineering statement to demonstrate that New Ulm, Texas presently has a number of aural reception services in addition to the presently licensed facilities of Radio Station KULM(FM)[1].

A cursory[2] examination of available aural reception services at New Ulm, Texas reveals that it receives the following aural services, (1 mV/m or greater signal intensity).

1. Radio Station KTTX(FM), Brenham, Texas.
2. Radio Station KULF(FM), Brenham, Texas.
3. Radio Station KULM(FM), Columbus, Texas.

The distances to the service contour were calculated using point to point analysis which is valid in the flat Texas terrain. The facilities listed were evaluated using licensed operating parameters in the Commission's CDBS database and this affiant believes that data to be accurate.

These calculations were performed by this affiant personally and are true and correct to the best of his knowledge. My qualifications are a matter of record before the Commission.

June 25, 2003.

Respectfully Submitted,

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[1] The Facilities of Radio Station KNRG(FM) are not included in this analysis as that facility has been proposed to be moved to Schulenburg, Texas as that community's first transmission service.

[2] This cursory evaluation is to show that New Ulm will not be deprived of a reception service should the Commission assign the requested replacement channel and is not an exhaustive evaluation of all possible aural reception services.

Reply Comments of
New Ulm Broadcasting Co.
FM RM Docket 02-248
June 26, 2003

Exhibit 2

JOINT MOTION FOR EXPEDITED COMMISSION ACTION AND STAY OF FURTHER STAFF ACTION

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In re Application of	)	
	)	
Pacific Broadcasting	)	File No. BSTA-20010216ABP
Of Missouri LLC	)	File No. BSTA-20010323ACD
	)	Facility ID No. 40798
For Special Temporary	)	
Authorization to Operate Station	)	
KTKY(FM), Refugio, Texas	)	

To: The Commission

JOINT MOTION FOR LEAVE TO FILE
JOINT MOTION FOR EXPEDITED COMMISSION ACTION
AND STAY OF FURTHER STAFF ACTION

On February 11, 2003, the Commission released a Memorandum Opinion and Order in this case (FCC 03-18) which, inter alia, changed an existing policy relating to the use of "backfill channels" in FM rulemaking proceedings and, in effect, deleting the acceptability of such a procedure. In response to the Commission action a Joint Petition for Reconsideration and Clarification was filed on March 13, 2003 by New Ulm Broadcasting Company (petitioner in MB Docket 02-248); Garwood Broadcasting Company of Texas (Petitioner in MB Docket 99-331); and Roy E. Henderson (Petitioner in MB Docket 02-177), referred to therein and here either individually, or collectively as "the Joint Petitioners"

In its Petition, it was pointed out that if the Commission's new policy were interpreted in the most drastic and Draconian way, as a complete prohibition of the use of backfill channels under any circumstance, and also applying on a retroactive, ex

post facto basis to pending petitions such as the Petitioner's, the result would demonstrably not be in the public interest. While Joint Petitioners awaited the Commission's response to their Petition, the Audio Division of the Mass Media Bureau by Public Notice released June 11, 2003 (Report No. 2609) , indicated that it has decided to proceed with no further guidance from the Commission on this matter and has undertaken further actions based upon its own interpretation of the new policy which are inequitable to the rights of the Joint Petitioners, denying New Ulm consideration of its Counterproposal in MB docket 02-248, and clearly contrary to the public interest of towns which would thereby be deprived of first radio service by such actions.

In view of the irreparable harm caused by such staff actions, there is good cause and necessity for filing of the instant Motion for Expedited Commission Action and Stay of Further Staff Action.

Wherefore it it respectfully requested that the attached Joint Motion be received and considered in this case.

Respectfully submitted,

JOINT PETITIONERS

GARWOOD BROADCASTING COMPANY OF TEXAS
NEW ULM BROADCASTING COMPANY
ROY E. HENDERSON

by _____
Robert J. Buenzle

Their Counsel

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June 25, 2003

CERTIFICATE OF SERVICE

I, Robert J. Buenzle, do hereby certify that copies of the foregoing Joint Motion For Leave To File Joint Motion For Expedited Commission Action and Stay of Further Staff Action have been served by United States mail, postage prepaid this 25th day of June, 2003, upon the following:

Pacific Broadcasting of Missouri LLC
Radio Station KTKY
7755 Carondelet Avenue
Clayton, Missouri 63105

Robert J. Buenzle

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In re Application of	)	
	)	
Pacific Broadcasting	)	File No. BSTA-20010216ABP
Of Missouri LLC	)	File No. BSTA-20010323ACD
	)	Facility ID No. 40798
For Special Temporary	)	
Authorization to Operate Station	)	
KTKY(FM), Refugio, Texas	)	

To: The Commission

JOINT MOTION FOR EXPEDITED COMMISSION ACTION
AND STAY OF FURTHER STAFF ACTION

On February 11, 2003, the Commission released a Memorandum Opinion and Order in this case (FCC 03-18) which, inter alia, changed an existing policy relating to the use of "backfill channels" in FM rulemaking proceedings and, in effect, deleting the acceptability of such a procedure. The Commission action was taken with no prior notice or request for consideration or comments from the public which would predictably be seriously impacted and affected by the change, in a case (the instant proceeding) where such consideration had not previously been raised.

In response to the Commission action a Joint Petition for Reconsideration and Clarification was filed on March 13, 2003 by New Ulm Broadcasting Company (petitioner in MB Docket 02-248); Garwood Broadcasting Company of Texas (Petitioner in MB Docket 99-331); and Roy E. Henderson (Petitioner in MB Docket 02-177), referred to therein and here either individually, or collectively

as "the Joint Petitioners". 1/ In its Petition, the Joint Petitioners pointed out their reliance upon the existing backfill policy in effect when they filed and prosecuted their rulemaking petitions, and the inequity of applying the new policy to them on a retroactive basis, as well as the demonstrable negative impact that the ex post facto application of the new policy would have upon the public interest in communities that otherwise would have received new service, but which service would be blocked and denied by application of the new policy to the pending cases. The Joint petitioners offered modified procedures for the Commission's consideration which would address the Commissions stated concerns with the existing backfill policy, but would not have the drastic negative impact that would result from the modification as set forth in the Pacific Broadcasting case.

Finally, the Joint Petitioners (at Section VII of the Petition) argued that if the Commission chose not to modify its new policy and also chose to apply it on a retroactive basis to pending cases, that, in that event, special consideration should then be accorded to waiver of that policy as it would otherwise apply to the pending cases of the Joint Petitioners.

Thus far the Commission has not responded to the Joint Petitioners' Petition and the predictable damage to Joint Petitioners and to the public interest has now started to appear.

1/ To our knowledge, at least one other Petition was also filed by Marathon Media Group, LLC, also pointing out substantive problems with the new policy as well as procedural problems with the manner in which it was adopted.

Most specifically, on June 11, 2003, the staff issued a Public Notice of counterproposals to be considered in Docket 02-248, a docket in which New Ulm had filed a counterproposal which would provide a first transmission and a first reception service to the nearly 3,000 residents of Schulenburg, Texas, who currently have no service of any kind at all, completely white area. Notwithstanding such clear public interest benefits, The New Ulm proposal was nonetheless omitted from the Public Notice, apparently due to the Audio Division's belief that it was now fatally inconsistent with the modified backfill policy as adopted by the Commission in Pacific Broadcasting.

The New Ulm counterproposal had obvious substantive merit and its omission from further consideration in Docket 02-248 is a diametrically opposed to any logical concept of "the public interest" and simply cannot be squared with the Commission's main and overriding duty and obligation under the Communications Act of 1934 to bring at least some radio service to all the people of this country. In fact, the overriding and obvious merit of the New Ulm proposal was so great and beyond dispute that the original Petitioner at one point concurred and conceded that the public interest benefits of the new white area service offered by New Ulm would outweigh the original service offered by the original petitioner in Docket 02-248 (Response [of Linda Crawford] to Motion to Strike late-Filed Reply, January 29,2003). And the only other party to the proceeding "LBR Enterprises, Inc. filed Comments in support of the New Ulm counterproposal, referring to the same obvious public interest benefits. So, prior

to the issuance of Pacific Broadcasting, all of the parties in Docket 02-248 either conceded to, or supported New Ulm's counterproposal to provide a new white area service to the town of Schulenburg.

It is most notable that subsequent to conceding the merits of New Ulm's proposal on January 29, 2003, the original petitioner in Docket 02-248 then filed new comments on February 18, 2003, referring specifically to the Commission's new action in Pacific Broadcasting and, relying upon that new policy, proposing that New Ulm's Counterproposal "should be dismissed". New Ulm responded to that Motion, recognizing the issuance of Pacific Broadcasting but suggesting that the intended application of the new policy was not yet clear, that petitions to reconsider or clarify what was said in Pacific Broadcasting would be filed and, if the policy was not modified, and was also held to apply to pending cases such as New Ulm's, that waivers would be requested of the new policy requirements. As such, New Ulm argued that Crawford's request for dismissal of New Ulm's counterproposal, based upon their interpretation of Pacific Broadcasting, was premature.

With issuance of the Public Notice on June 11, 2003, and the Audio Division's omission of New Ulm's Counterproposal from any further consideration in Docket 02-248, it is clear that the staff has agreed with Crawford's position that the New Ulm counterproposal is now conclusively barred from further consideration due to the staff's determination that it is now

inconsistent with the new backfill policy as set forth by the Commission in Pacific Broadcasting. In so doing, it is also clear that the Audio Division has decided that, rather than wait for the Commission to respond to the pending Petitions for Reconsideration and Clarification, it will just go forward and apply its own understanding of the new policy on a retroactive basis to pending cases such as New Ulm's. The inequity of this Ad Hoc determination by the Audio Division is as manifest as its patent inconsistency with any possible concept of "the public interest"

In view thereof, and of the clear damage such staff actions are having upon the Petitioners such as New Ulm and upon the town of Schulenburg which would be forever deprived of any radio broadcast services at all, no transmission service and no reception service ever, by the staff's mechanical interpretation and application of the new policy, it is requested that the Commission consider the pending Petition for Reconsideration and Clarification on an expedited basis and that the Commission also direct the Chief of the Audio Division of the Media Bureau to take no further action in any docket directly affected by the Petition filed by the Joint Petitioners (Dockets 02-248, 99-331, and 02-177) in Pacific Broadcasting until such time as the Commission acts upon that pending Petition for Reconsideration and Clarification.

A temporary stay of further action by the Audio Division pending clarifying action by the Commission would harm no party.

Conversely, further action by the staff would cause irreparable injury to Joint Petitioners and to the towns which would be denied service by such actions. In view of the equities presented here and in the Petition for Reconsideration and Clarification, Joint Petitioners have a reasonable expectation that some relief will be ultimately provided by the Commission.

Finally, in the event that the Commission rejects the arguments raised in the Petition for Reconsideration and determines to apply that new policy on a retroactive basis to pending cases, it is requested that in that case the Commission further direct the Audio Division of the Media Bureau to consider waivers of the new policy as it applies to the pending cases of the Joint Petitioners. Under Section 1.925 of the Commission's rules, any rule or policy may be waived if the underlying purpose of the rule would not be served or would be frustrated by its application to the case in question, or if in the unique or unusual factual circumstances of the case, application of the rule would be inequitable, unduly burdensome, or contrary to the public interest.

It is hard to imagine a case where waiver would be more appropriate than the instant one. A proposal, but for the new policy, conceded to be best by the initial rulemaking petitioner and supported by the only other counterproponent, a proposal that, but for the new policy, would have brought a new first transmission service <u>and</u> a new first reception service to a town of 3,000 people. It is noted that the Commission itself has

previously specifically recognized the importance of such white area service as a ground for waiver of a new FM rulemaking restriction as adopted in 1986 (Table of Allotments, Columbus, Nebraska, 59 P& F RR 2d 1184) where it said that

> while we do not intend to list what public interest benefits would be significant and overriding [of the new FM rulemaking restriction adopted in that case] we would, in the processing of petitions for rule making, look for such showings as service to unserved areas..."

Should the Commission conclude that the rule modification as announced in Pacific Broadcasting was provident, fair and in the public interest as adopted, and that it would also be provident, fair and in the public interest to apply that new restriction on an *ex post facto*, retroactive basis, even in that case, it is simply inconceivable that application of that new ruling to deny a first transmission and reception service to Schulenburg as proposed by New Ulm could be seen as being a "good thing", in the public interest. In fact, as the stated concern for the new restriction was to eradicate perceived "delays" in restoring promised service to a backfill community, application of that rule to the New Ulm case would mean that in order to avoid a "delay" in service to one community, the Commission is prepared to doom another community to NO radio service EVER. That simply cannot be the purpose of the new restriction and demonstrates that application of the new ruling to the pending New Ulm case, and to the other pending cases for different reasons, would be flatly contrary to the public interest.

Wherefore, it is respectfully requested that the Commission provide expedited consideration to the pending Petition for Reconsideration, and that it direct the Audio Division of the Media Bureau to hold any further processing of the Joint Petitioners' rulemaking petitions in abeyance until such time as the Commission rules on the Petition for Reconsideration And Clarification, and if the new rule is sustained as written and determined to apply retroactively to pending cases, that the Audio Division of the Media Bureau be further directed to give serious consideration to waivers of that rule in each of the Joint Petitioners' cases.

Respectfully submitted,

JOINT PETITIONERS

GARWOOD BROADCASTING COMPANY OF TEXAS
NEW ULM BROADCASTING COMPANY
ROY E. HENDERSON

by_____
Robert J. Buenzle
Their Counsel

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June 25, 2003

CERTIFICATE OF SERVICE

I, Robert J. Buenzle, do hereby certify that copies of the foregoing Joint Motion For Expedited Commission Action and Stay of Further Staff Action have been served by United States mail, postage prepaid this 25th day of June, 2003, upon the following:

Pacific Broadcasting of Missouri LLC
Radio Station KTKY
7755 Carondelet Avenue
Clayton, Missouri 63105

Robert J. Buenzle

CERTIFICATE OF SERVICE

I, Robert J. Buenzle, do hereby certify that copies of the foregoing Reply Comments Of New Ulm Broadcasting Company have been served by United States mail, postage prepaid this 26th day of June, 2003, upon the following:

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