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Before the
Federal Communications Commission
Washington, D.C. 20554

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DIS: 21

In the Matter of)	
)	
Amendment of Section 73.202(b),)	
Table of Allotments,)	MM Docket No. 01-135
FM Broadcast Stations.)	RM-10154
(Caliente, Bunkerville, Laughlin, Logandale,)	RM-10326
Nevada; Mohave, Arizona; St. George, Utah). ¹)	RM-10327
)	
)	

REPORT AND ORDER

Adopted: September 1, 2004

Released: September 3, 2004

By the Assistant Chief, Audio Division:

1. The Audio Division has before it: (1) a *Notice of Proposed Rule Making*² issued at the request of Schleicher County Radio ("Petitioner"); (2) a counterproposal filed jointly by Marvin Kent Frandsen ("Frandsen") and M&M Broadcasting, LLC ("M&M"); (3) a counterproposal filed by Marathon Media Group, L.L.C. ("Marathon"); (4) a petition for leave to intervene and a motion to dismiss rulemaking and counterproposals filed by Hodson Broadcasting ("Hodson"); (5) a motion to strike Hodson's petition for leave to intervene and motion to dismiss filed jointly by Marathon and M&M; and (6) other related pleadings.³

BACKGROUND

2. At the request of the Petitioner, the *NPRM* proposed the allotment of Channel 291C2 to Caliente, Nevada, (pop. 1,111) as a second local service. The Petitioner, however, did not file comments in response to the *NPRM* and did not submit a continuing expression of interest in the allotment.

3. Two counterproposals, which are not mutually exclusive with each other, were filed in response

¹ The communities of Bunkerville, Laughlin, Logandale, Nevada; Mohave, Arizona; and St. George, Utah, have been added to the caption.

² *Caliente, NV*, 16 FCC Rcd 12722 (MMB 2001) ("*NPRM*").

³ Marathon filed three supplements to its counterproposal. The first supplement was filed on August 23, 2001, and is timely because it was filed before the reply comment deadline of August 28, 2001, set forth in the *NPRM*. The second and third supplements to Marathon's counterproposal were filed on February 25, 2002, and August 16, 2002, and were accompanied by motions to accept the supplements. Likewise, M&M filed two supplements to its counterproposal and related motions to accept the supplements on August 16, 2002, and October 23, 2002. The latter supplement was jointly filed by Marathon and Cameron Broadcasting ("Cameron"). We will accept these supplements because they will facilitate resolution of this case based upon a full and complete factual record without prejudicing any other party. Finally, Marathon, M&M, and Frandsen jointly filed a motion to sever and request for expedited action on June 12, 2003, and a supplement to joint motion to sever and request for expedited action on March 26, 2004. See *infra* at para. 21.

to the *NPRM*. The first counterproposal was jointly filed by Frandsen, the licensee of Station KZHK(FM), St. George, UT, and M&M, the licensee of Station KADD(FM), Laughlin, NV. The Frandsen/M&M counterproposal seeks the reallocation and change of community of license of Station KZHK(FM) from Channel 240C at St. George to Channel 240C at Bunkerville, NV, as a first local service. The counterproposal also requests the reallocation and upgrade of Station KADD(FM) from Channel 228C1 at Laughlin, NV, to Channel 228C at Logandale, NV, as a first local service. In order to effectuate these changes, Station KSNN(FM), Channel 228C2, St. George, UT, consented to change its channel to Channel 291C2, and Channel 229A must be substituted for vacant Channel 240A at Mohave Valley, AZ. Further, as a precaution against the potential creation of a small "gray" area from the reallocation of Station KZHK(FM), Frandsen and M&M propose the allotment of Channel 275C to Grand Canyon Village, AZ, and Channel 236C2 to Mesquite, NV, and express interests in applying for these channels and constructing the facilities, if granted. This counterproposal is mutually exclusive with the *NPRM* because the substitution of Channel 291C2 at St. George, UT, is short-spaced to Channel 291C2 at Caliente, NV. However, Frandsen and M&M offer an alternative Channel 299C2 at Caliente, which would enable both their counterproposals and the Caliente allotment to be granted.

4. In the second counterproposal, Marathon seeks to change the channel, transmitter site, and community of license for its station KPLD(FM) (formerly KONY(FM)) from Channel 266C at Kanab, UT, to Channel 265C at Moapa, Nevada. To effectuate these changes, Marathon proposes (1) to substitute Channel 291C1 for Channel 266C1 at Amargosa Valley, NV, and to modify the license for Station KPUP(FM) accordingly;⁴ and (2) to substitute Channel 233A for vacant Channel 291A at Tecopa, CA.⁵ Further, to prevent the removal of the sole local aural service at Kanab, Marathon proposes to allot Channel 270C2 as a "backfill" replacement channel and states that it will apply for the channel if it is allotted and construct the facility. Likewise, to prevent the creation of "white" area from the reallocation of Station KONY(FM), Marathon proposes to allot Channel 262C at Escalante, UT (pop. 818) and states that it will apply for and construct the facility. The counterproposal is mutually exclusive with the *NPRM's* proposal because Channel 291C1 at Amargosa is short-spaced to Channel 291C2 at Caliente, NV.

5. Hodson petitions for leave to intervene in this proceeding pursuant to Section 1.223(c) of the Commission's Rules. Hodson contends that it is a party in interest because it intends to apply for vacant Channel 291A at Tecopa, CA, when a filing window is opened and because Marathon's counterproposal would affect this allotment. Hodson also complains that it was not served with a copy of Marathon's counterproposal and that service was required because Hodson was the original rulemaking petitioner for the Tecopa allotment.

6. As to the merits, Hodson argues that the Petitioner's rulemaking petition for the allotment of Channel 291C2 at Caliente should be dismissed because it did not file a continuing expression of interest in the allotment and because no other party filed an expression of interest. Hodson also argues that both counterproposals should be dismissed because they are attempts by larger, multiple station owners to desert their original communities of license in smaller areas and to move their station locations to "... a population pocket that would easily be within signal reach of the top 40 radio market of Las Vegas, Nevada."⁶ Hodson also argues that Marathon's proposed substitution of Channel 233A for vacant Channel 291A at Tecopa would cause prejudice to Hodson because it has already purchased a ten kilowatt transmitter tuned to Channel 291 in preparation for applying for and constructing a station on the vacant allotment at Tecopa.

⁴ Subsequent to the filing of Marathon's counterproposal, Station KPUP(FM), Amargosa Valley, NV, was sold and the buyer consented to this proposed channel change in exchange for reimbursement for its out of pocket expenses, obviating the need for an Order to Show Cause.

⁵ Channels 291A at Tecopa, CA, and 240A at Mohave Valley, AZ, are included among the 290 FM channels listed for auction in FM Auction 37, scheduled to commence November 3, 2004. See *infra* at para. 14.

⁶ Hodson motion to intervene and motion to dismiss at 7.

7. In their motion to strike, Marathon and M&M argue that Hodson's pleading is untimely⁷ and must be dismissed pursuant to Section 1.415(d) of the Commission's Rules, which provides that "[n]o additional comments may be filed unless specifically requested or authorized by the Commission." They further contend that Section 1.223(c) of the Commission's Rules does not support Hodson's intervention because that section applies to adjudicatory and "formal" rulemaking proceedings under the Administrative Procedure Act and not to informal rulemaking proceedings such as the instant FM allotment proceeding. Marathon and M&M also allege that the Commission's Rules do not require service of their counterproposal on Hodson. Finally, they contend that since no filing window has been opened for Channel 291A at Tecopa, Hodson has no rights that are affected by the substitution of an equivalent class channel at that community.

DISCUSSION

Caliente, Nevada Petition

8. As stated in the Appendix to the *NPRM*, a showing of continuing interest is required before a channel will be allotted.⁸ It is also the Commission's general policy to refrain from making a new allotment to a community absent an expression of interest.⁹ Since the Petitioner did not submit a continuing expression of interest in Channel 291C2 at Caliente, NV, we will dismiss its proposal. Further, since no other party filed an expression of interest, we will not allot Channel 291C2 at Caliente.

9. Because the remaining two counterproposals are not mutually exclusive with each other, we will discuss them separately without the need for any comparison. As explained below, we will grant the Frandsen/M&M counterproposal and dismiss Marathon's counterproposal as contingent and premature.

Frandsen/M&M Counterproposal

10. We will grant the Frandsen/M&M counterproposal because it will provide first local services to two new communities, Bunkerville and Logandale, NV, and a net population gain of 218,450 and area of 17,471 sq. km. able to receive service from the Bunkerville and Logandale reallocations and upgrade. First, we will reallocate, change the community of license, and relocate the transmitter site for Station KZHK(FM) from Channel 240C at St. George, UT, to Channel 240C at Bunkerville, NV.¹⁰ This proposal complies with Section 1.420(i) of the Commission's Rules because the channels are mutually exclusive and because it creates a preferential arrangement of allotments. The reallocation will create a first local service to Bunkerville (pop. 1,014), triggering Priority 3 of the FM Allotment Priorities,¹¹ while retention of the station at St. George would be a fifth local service under Priority 4. In addition, as explained below, the reallocation advances Priority 2 because 787 people will receive a second full-time aural service.

11. Further, Bunkerville is a community for allotment purposes because it is listed in the 2000 U.S. Census.¹² It also has other indicia of community status such as its own Town Board, an elementary school, a Parks and Recreation Department, Fire Department, the Bunkerville Library, churches, and businesses.

⁷ The deadlines established in the *NPRM* in this proceeding for submitting comments and reply comments were August 13, 2001, and August 28, 2001; Hodson's opposition was received at the Commission on March 26, 2002.

⁸ *Caliente, NV*, 16 FCC Rcd at 12726.

⁹ See, e.g., *Powers, MI*, 13 FCC Rcd 22295 (MMB 1998).

¹⁰ The reference coordinates for Channel 240C at Bunkerville, NV, are 36-50-52 and 114-28-37.

¹¹ The FM allotment priorities are (1) first fulltime aural service; (2) second fulltime aural service; (3) first local service; and (4) other public interest matters. [Co-equal weight is given to priorities (2) and (3). See *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

¹² See, e.g., *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d at 101 (1982); and *Cleveland and Ebenezer, MS*, 10 FCC Rcd 8807 (MMB 1995).

12. Contrary to any general allegations by Hodson, this reallocation will not result in an impermissible “move-in” to an Urbanized Area as defined by the U.S. Census. Bunkerville is not located in an Urbanized Area, and the proposed 70 dBu contour will not reach any Urbanized Area. Consequently, no *Huntington/Tuck* showing is required to demonstrate the independence of Bunkerville from the Las Vegas Urbanized Area.¹³

13. Although Frandsen and M&M propose the allotments of Channel 275C at Grand Canyon Village, AZ, and Channel 236C2 at Mesquite, NV, to prevent the creation of a “gray” area¹⁴ containing 11 people, we find it unnecessary to do so. On the contrary, our staff engineering analysis reveals that while the reallocation of Channel 240C to Bunkerville will create an area of 1,642 sq. kilometers that will be reduced from two to one aural reception service and an area of 1,333 sq. km. that will be reduced from three to two reception services, these areas are unpopulated. Overall, the reallocation will create no net gain or loss in service area, but there will be a net gain in population of 83,238 people. Within the loss area, seven people within 1,047 square kilometers will be reduced from four to three reception services, and 3,252 people within 2,191 sq. kilometers will receive four instead of five aural services. However, these losses are outweighed by 787 people within a 246 sq. km. area receiving a second fulltime reception service, thereby triggering higher allotment Priority (2). Further, 35 people within 1,357 sq. km will receive a third service, and 1,119 people within an area of 1,744 sq. kilometers will receive a fourth service.

14. Second, in order to reallocate Channel 240C to Bunkerville, the vacant allotment at Mohave Valley, AZ, must be changed from Channel 240A to 229A. Channel 229A can be allotted at the current Mohave Valley reference point, provided that Channel 228C1 is deleted at Laughlin, Nevada, as discussed below.¹⁵ We also note that Channel 240A at Mohave Valley is included among the 290 FM channels listed for auction in FM Auction No. 37, scheduled to commence November 3, 2004.¹⁶ Parties interested in bidding on this channel should be aware that the channel we are now substituting at Mohave Valley is different from the channel listed in the Commission’s *Auction Public Notice*.¹⁷ In addition, Mexican concurrence in the allotment of Channel 229A at Mohave Valley has been requested because the proposed allotment is located within 320 kilometers (199 miles) of the U.S.-Mexico border. Since concurrence has not yet been received, this allotment will be conditioned as follows: the use of Channel 229A at Mohave Valley, AZ, is subject to suspension, modification, or termination without right to hearing, if found by the Commission to be necessary in order to conform to the 1992 USA-Mexico FM Broadcast Agreement or if specifically objected to by Mexico’s Secretaria de Comunicaciones Y Transportes.

15. Third, in order to accommodate the allotment of Channel 229A at Mohave Valley, we will grant M&M’s request to relocate its Station KADD(FM) to a new transmitter site, change its community of license

¹³ See *Headland, AL, and Chattahoochee, FL*, 10 FCC Rcd 10352 (MMB 1995); *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951), and *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988).

¹⁴ A “gray area” is an area in which there is only one full-time aural reception service; a “white area” is an area in which there are no full-time aural reception services. See, *Cheyenne, WY, and Gerring, NE*, 15 FCC Rcd 7528, 7530 (MMB 2000).

¹⁵ The reference coordinates for Channel 229A at Mohave Valley, AZ, are 34-55-40 and 114-35-51. Although Channel 229A at Mohave Valley is short-spaced to a subsequently filed counterproposal in MM Docket 01-224 to substitute Channel 232A for Channel 229A at Mohave Valley, the Channel 232A proposal was recently dismissed as defective because, *inter alia*, it attempted to modify the pending, cut-off proposal for Mohave Valley. See *Amboy, Baker, and Desert Center, CA, et al.*, MB Docket 02-124, DA 04-2059, released July 8, 2004, at 4-5.

¹⁶ *Public Notice*, DA 04-1699, released June 10, 2004 (“*Auction Public Notice*”).

¹⁷ See *Auction Public Notice* discussion of Due Diligence at 8-10. “Potential bidders are also strongly encouraged to conduct their own research prior to Auction No. 37 in order to determine the existence of any pending administrative or judicial proceedings that might affect their decision to participate in the auction.” *Id.* at 9.

from Laughlin to Logandale, NV, and upgrade the facility from Channel 228C1 to 228C.¹⁸ This upgrade and reallocation complies with Section 1.420(i) of the Commission's Rules because the proposed use of Channel 228C at Logandale is mutually exclusive with the current use of Channel 228C1 at Laughlin. It also creates a preferential arrangement of allotments because a first local service to Laughlin (Priority 3) would be favored over the retention of the third local service at Logandale (Priority 4). No "move-in" to an Urbanized Area will occur because Logandale is not located within an Urbanized Area and the proposed 70 dBu contour will not reach an Urbanized Area.

16. Although not listed in the U.S. Census, Logandale is a community for allotment purposes because M&M has demonstrated that it has indicia for community status. Specifically, Logandale is listed in the *Rand McNally Commercial Atlas* with a population of 800, and the community provides its residents with many municipal services such as an elementary school, a public library, and water and sewage. The community also has a local newspaper, churches, and numerous businesses.

17. The reallocation and upgrade will result in a net gain in 17,481 sq. km. of area and a net gain to 99,642 persons. The loss area of 8,994 sq. km. containing 112,354 persons is well served with five or more reception services.

18. Finally, in order to allot Channel 228C at Logandale, we will substitute Channel 291C2 for Channel 228C2 at St. George Utah and modify the license for Station KSNM(FM) accordingly. Channel 291C2 can be allotted to St. George at Station KSNM(FM)'s current site.¹⁹ The licensee of Station KSNM(FM) has provided a statement, consenting to the change in channel, and Station KSNM(FM) will be reimbursed for its reasonable costs in changing channels.

Marathon Counterproposal

19. As a threshold matter, Hodson's opposition, which is directed primarily at Marathon's counterproposal, is dismissed on two grounds. First, it is untimely. Hodson's opposition was filed approximately six months after the deadline for filing reply comments set forth in the *NPRM* and four months after the deadline established in the *Public Notice*²⁰ announcing the treatment of the Fransden/M&M and Marathon filings as counterproposals in this proceeding. While Hodson appears to argue that his late filing is justified by a lack of service of the Marathon counterproposal on him, we do not agree. There is no legal requirement to serve the original rulemaking proponent of a vacant channel that has not been opened up for the filing of applications. Second, Hodson's opposition is moot because, as explained below, we will dismiss Marathon's counterproposal since it violates our policy on "backfill" allotments and is premature and contingent.

20. **Backfill Policy.** Marathon's proposed reallocation and change of community of license for its Station KPLD(FM) from Kanab, UT, to Moapa, NV, relies upon a "backfill" allotment²¹ of Channel 270C2 at

¹⁸ The reference coordinates for Channel 228C at Logandale, AZ, are 36-50-52 and 114-28-37.

¹⁹ The reference coordinates for Channel 291C2 at St. George, UT, are 36-50-49 and 113-29-28. Although Channel 291C2 at St. George is short-spaced to KWBR-LP, Channel 289L1, St. George, and to a construction permit for KTIM-LP, Channel 291L1, St. George, these short-spacings do not prevent making this allotment because low power FM stations are a secondary service and are not protected from interference from subsequent modifications to full-power FM stations. See *Creation of a Low Power Radio Service*, 15 FCC Rcd 19208 (2000), *recon denied*, 15 FCC Rcd 1908 (2000).

²⁰ Report No. 2506, Mimeo No. 27252, released October 23, 2001

²¹ A "backfill" allotment is one specifically made to replace an allotment that is being modified to permit a change in the city of license of an authorized station. See, e.g., *Cheboygan, Rogers City, Bear Lake, et al., MI*, 17 FCC Rcd 20491 (MB 2002).

(continued....)

Kanab to prevent the removal of that community's sole local aural service. While this proposal comported with agency policy at the time Marathon filed its counterproposal, the Commission in February, 2003, directed the staff to cease granting proposals that rely in this manner upon a backfill allotment, finding that "the licensing of vacant allotments is too remote and too contingent to justify the filing of move-out proposals premised on such replacement services."²² In denying reconsideration of that policy change, the Commission recently ruled on a petition for partial reconsideration or, in the alternative, clarification filed by Marathon. Therein, the Commission specifically rejected Marathon's arguments and found that it is permissible to apply the revised policy to proposals that were pending at the time of the policy change because application of the prior policy is not in the public interest. In view of this determination by the Commission, Marathon's counterproposal must be dismissed because it relies upon the "backfill" allotment of Channel 270C2 at Kanab, UT, as a replacement channel and, therefore, violates this revised policy.

21. **Application Contingency.** As an alternative to dismissal of its counterproposal, Marathon requested that this proceeding be bifurcated and that its counterproposal be held in abeyance pending the processing of a major change application filed on January 30, 2004, by Opp Broadcasting Co., Inc. ("Opp Broadcasting"), seeking to change the community of license of its Station WAMI(AM), 860 Khz, from Opp, AL, to Kanab, UT. Marathon states that Opp Broadcasting filed its major change application pursuant to a contractual understanding with Marathon and that Opp Broadcasting is committed to serving Kanab and desires to have its application coordinated with this FM proceeding.

22. We deny this request to sever, and we dismiss Marathon's counterproposal as contingent, speculative, and premature. Our policy is not to accept rulemaking proposals or counterproposals that are contingent upon applications²³ or upon other pending rulemaking proceedings.²⁴ Processing proposals that are not capable of being effectuated on the date of filing would cause an unnecessary expenditure of Commission resources and would impose an unfair burden on other parties.²⁵ Since Marathon's counterproposal is dependent upon a pending application, it will be dismissed.²⁶

ORDERING CLAUSES

23. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and ®, and Section 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b), and 0.283(b) of the

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²² *Pacific Broadcasting of Missouri LLC*, 18 FCC Rcd 2291 (2003), *recon denied*, FCC 01-140, released June 16, 2004, at para. 14.

²³ *See, e.g., Cut and Shoot, TX*, 11 FCC Rcd 16383 (MMB 1996);

²⁴ *See, e.g., Auburn, AL, et al.*, 18 FCC Rcd 10333 (MB 2003).

²⁵ *See, e.g., Cut and Shoot, TX*, 11 FCC Rcd 16384 (MMB 1996);

²⁶ The Marathon proposal is also subject to dismissal because it was not technically correct when it was filed. *See, e.g., Broken Arrow and Bixby, OK*, 3 FCC Rcd 6507 (MMB 1998), *recon. denied*, 4 FCC Rcd 6981 (MMB 1989); *Fort Bragg, CA*, 6 FCC Rcd 5817 (MMB 1991). On the date of the filing of the Marathon counterproposal, the proposed allotment of Channel 233A at Tecopa, CA, was short-spaced to a cut-off counterproposal in MM Docket No. 01-69 to allot Channel 234C0 to Searchlight, NV. Even though the Searchlight counterproposal was subsequently dismissed in MM Docket No. 01-69 as defective, the staff had not ruled on that counterproposal by the counterproposal deadline in MM docket No. 01-135, rendering the Marathon counterproposal defective as filed and not entitling it to counterproposal status.

Commission's Rules, IT IS ORDERED, That effective January 5, 2005,²⁷ the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below as follows:

<u>Communities</u>	<u>Channel Number</u>
Mohave Valley, Arizona	229A
Bunkerville, Nevada	240C
Laughlin, Nevada	---
Logandale, Nevada	228C
St. George, Utah	291C2

24. IT IS FURTHER ORDERED, That pursuant to Section 316 of the Communications Act of 1934, as amended, the licenses for the stations listed below ARE MODIFIED to specify operation on channels and/or communities listed below, subject to the following conditions:

<u>Station</u>	<u>Community</u>	<u>Channel</u>
KZHK(FM)	Bunkerville, NV	240C
KADD(FM)	Logandale, NV	228C
KSNN(FM)	St. George, UT	291C2

- (a) Within 90 days of the effective date of this *Order*, the licensees shall submit to the Commission minor change applications for construction permits (Form 301).
- (b) Upon grant of the construction permits, program tests may be conducted in accordance with Section 73.1620 of the Commission's Rules.
- (c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

25. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rulemaking fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, the licensees of Stations KZHK(FM), Bunkerville, NV, and KADD(FM), Logandale, NV, are required to submit rulemaking fees in addition to the fees required for the applications to effect the change in community of license.

26. IT IS FURTHER ORDERED, That the rulemaking petition (RM-10154) filed by Schleicher County Radio IS DISMISSED.

27. IT IS FURTHER ORDERED, That the counterproposal (RM-10327) filed by Marvin Kent Frandsen and M&M Broadcasting IS GRANTED.

28. IT IS FURTHER ORDERED, That the counterproposal (RM-10326) filed by Marathon Media Group IS DISMISSED.

29. Additionally, IT IS ORDERED That the Consumer Governmental Affairs Bureau, Imaging Center, shall send a copy of this *Order* to the following:

²⁷ See 47 C.F.R. § 1.427(a) and 47 U.S.C. § 553(d). See, e.g., *Authorization and Use of Software Defined Radios*, 16 FCC Rcd 17373 (2001) (new rules effective 120 days after publication in the Federal Register).

KWBR-LP
Association of Community Resource
477 Damascus Drive
St. George, UT 84790

KTIM-LP
Wastecon Environmental LLC
PMB 195
929 Sunset Blvd
St. George, UT 84770

30. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

31. For further information concerning this proceeding, contact Andrew J. Rhodes, Audio Division, Media Bureau (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief, Audio Division
Media Bureau