

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of:)
Revision of Procedures Governing) MB Docket No. 05-210
Amendments To FM Table of) RM - 10960
Allotments and Changes)
Of Community of License in the Radio)
Broadcast Services)

To: The Commission

REPLY COMMENTS OF KLEIN BROADCAST ENGINEERING, LLC¹

Klein Broadcast Engineering, LLC (“Klein”) hereby submits these reply comments in connection with the Comments filed in response to the Notice of Proposed Rule Making (the “NPRM”) released on June 14, 2005,² in the above-referenced proceeding.

The public interest mandates of Section 307(b) are paramount. By following those mandates, the Commission will foster both innovation in broadcast spectrum management and improve administrative efficiency. Klein initially filed comments along with a group of Joint Commenters³ – a group that is not alone in this viewpoint. Nor are they alone in sounding an

¹ A separate motion for leave to file these reply comments after the published deadline for filing has been separately and simultaneously filed pursuant to 47 C.F.R. § 1.44.

² Revision of Procedures Governing Amendments To FM Table of Allotments and Changes Of Community of License in the Radio Broadcast Services, *Notice of Proposed Rule Making*, MB Docket No. 05-210, RM-10960, FCC 05-120 (Jun. 14, 2005).

³ *Comments of American Media Services, LLC, Radio One, Inc., Mattox Broadcasting, Inc., Klein Broadcast Engineering, LLC, On-Air Family, LLC, Hunt Broadcasting, Inc., Media Services Group, Inc. Starcom, LLC, Milestone Radio, LLC, Desert West Air Ranchers Corporation, Superior Broadcasting, LLC, Four Corners Broadcasting, LLC and Western Slope Communications, LLC* (collectively, the “Joint Commenters”), filed Oct. 3, 2005

alarm that the FCC’s proposal in this rule making to “limit the number of channel changes that may be proposed in one proceeding”⁴ would freeze out innovative spectrum management solutions – precisely when needed most.

As the dozen “Parties” to the comments filed by Apex Broadcasting, Inc., *et al*, noted: “[a]doption of such a proposal would prohibit the achievement of many beneficial arrangements of allotments, contrary to Section 307(b).”⁵ The Parties demonstrated that very few proceedings over the past five calendar years involved more than five channel changes – that is, a grand total of 3.3 percent of all such rule makings.⁶ The Parties’ statistics also make clear that the proposed number of channel changes alone has little or no correlation to administrative burden. Indeed, the Parties specifically name several “simple rule making” proposals that, while simple on the surface, actually led to a jumble of counterproposals and petitions that imposed great administrative burden on the Commission. None of these counterproposals or petitions would have been precluded by the Commission’s proposed limitation. As the Parties noted: “[e]ach of those proceedings was difficult to resolve, yet none would have been affected”⁷ At the same time, the Parties showed how specific named proceedings with a larger number of proposed channel changes created great public interest benefits – benefits that would not have been possible had the proposed cap on channel changes been in effect.⁸ The bottom line here is

⁴ *NPRM* at ¶¶ 35-37.

⁵ *Comments of Apex Broadcasting, Inc., Alexander Broadcasting, Inc., Charles Anderson & Associates, Cumulus Licensing LLC, Great Southern RFDC, LLC, Hunt Broadcasting, Inc., Marathon Media Group, LLC, Media Services Group, Inc., Multicultural Radio Broadcasting Licensing, LLC, Spanish Peaks Broadcasting, Inc. and Wagon Wheel Broadcasting, Inc.* (collectively, the “Parties”), Filed Oct. 3, 2005, at 6.

⁶ *Id.* at 7.

⁷ *Id.* at 9.

⁸ *Id.* at 7-8.

that any anticipated lightening of administrative burden is illusory and the potential damage to the public interest is great.

Statistics such as these demonstrate, as the Joint Commenters also previously noted, that the Commission has not shown, nor can it show, that the proposed limitation on station channel changes would be in the public interest. In the absence of such evidence, and in light of the ill effects on the Commission's ability to meet the statutory mandates of Section 307(b) that these statistics also demonstrate, the Commission may not impose the proposed limitation. Such a limitation would be arbitrary and capricious, as well as contrary to law.

Klein also concurs with the Parties that the Commission would be righting procedural wrongs by requiring the filing of a feeable application to change an existing station's community of license and applying this same principle when parties seek to create new allotments. Not only will such fee requirements dissuade insincere proponents and counter-proponents from clogging the Commission's dockets but, as the Parties note, such requirements comport wholly with the intent of Congress.⁹ The current system imposes no costs for frivolous or wholly speculative filing. Nor does it cover the costs of administration related to the filing of such proposals, since no one pays until successful. Rather than limit the number of serious, well-considered and well-articulated station changes proposed in any single proposal, the Commission can cut its administrative burden substantially by imposing the user fees that Congress intended to support the administration of Commission business.

Some, such as Keymarket Licenses, LLC ("Keymarket"), propose refunding fees to unsuccessful proponents.¹⁰ Such a mechanism would, however, still encourage free-riding. The

⁹ *Id.* at 10-14.

¹⁰ *Comments of Keymarket Licenses, LLC, Forever Broadcasting, LLC, Forever Communications, Inc., Megahertz Licenses, LLC and Forever of PA, LLC* (collectively "Keymarket"), filed Oct. 3, 2005, at 6.

price of admission is the cost of the application. It defrays the Commission's expenses and will help ensure that only proposals made by serious parties consume Commission resources. If the Commission is serious about curtailing over-taxing administrative burdens without harming the public interest, it will impose feeable application requirements, but not limit the number of station changes.

The Commission can also take steps to further limit speculative activities by insincere proponents by creating a mechanism to rectify distortions to the Table of Allotments created by insincere proposals. As Vox Communications Group LLC ("Vox") noted: "[r]etention of non-viable vacant FM Allotments do not [sic] serve the public interest, and may prevent rule making proposals or minor change applications that would better serve the public interest."¹¹ The Commission needs a procedure to delete or allow the deletion of vacant, non-viable allotments. Vox suggests that if two auctions pass without the sale of a vacant allotment, then such an allotment should be subject to deletion. Such a proposal is reasonable as the second auction would likely open at a lower price. At some point, no sale is likely and the allotment becomes nothing more than a roadblock to the kind of spectrum innovation required to meet the requirement for fair and efficient distribution of radio service under Section 307(b).

Moreover, as the statutory mandates of Section 307(b) are paramount, the Commission must not adopt Keymarket's proposal to hinder involuntary channel changes pursuant to the proposed use of minor change applications for station relocations. Keymarket claims that such a plan "is an abrogation of the licensee's rights."¹² But a licensee's rights are limited by the clear and unambiguous command that the Commission act to ensure "fair, efficient and equitable

¹¹ *Comments of Vox Communications Group LLC*, filed Oct. 3, 2005, at 7.

¹² *Keymarket Comments* at 3.

distribution of radio services.”¹³ No licensee has a right to undermine this statutory imperative. If a channel change is required to meet it, then a licensee must comply. To do otherwise would turn a legal license to broadcast into legal title to spectrum. Such exclusive property rights have never been part of the broadcast landscape – nor is there any legal basis to claim such rights. Applicants know when they apply that any license contains limitations. It is not theirs to have and to hold. Any regulatory provision that creates the kind of rights Keymarket seeks would clearly hinder the innovations needed to comport spectrum regulation today with the mandates of Section 307(b) by giving an incumbent veto power over application of this statutory mandate.

By encouraging innovative re-engineering solutions and discouraging insincere, speculative processes, the Commission can meet its mandate in light of 21st century realities. But the Commission will not accomplish this task by adopting a bright-line limit on station changes in individual allotment proceedings, as proposed in the NPRM. As noted, this will simply stymie much needed innovation. Rather, by removing the cost-free incentives to those who would waste Commission time and resources, the Commission can improve the efficiency of its system.

Broadcasting’s future depends on meeting new needs. The only way to do that is through innovation that makes the existing broadcast spectrum provide more service. Any proposal that stands in the way of this would violate Section 307(b). As a result, the Commission must not

¹³ See 47 U.S.C. § 307(b).

adopt such measures – including the ill-advised proposals outlined above.

Respectfully submitted,

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November 4, 2005