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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

In the Matter of )  
Amendment of Section 73.202(b), )  
Table of Allotments, )  
FM Broadcast Stations )  
(Roma, Texas) )  
(San Isidro, Texas) )

MB Docket No. 05-142  
RM-11220

RECEIVED

To: Marlene H. Dortch, FCC, Office of the Secretary  
Attention: The Commission

OCT 5 2006

APPLICATION FOR REVIEW

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

La Voz Latino ("LVL"), by counsel, hereby requests review of the *Memorandum Opinion and Order* (the "*September Order*")<sup>1</sup> in which the Audio Division declined to correct its earlier dismissal of LVL's *Comments and Counterproposal* (the "*Counterproposal*") in the above-captioned matter. LVL had timely submitted its *Counterproposal* and received a date-stamp from the Commission's contractor indicating as much. However, the agency's internal routing practices produced a delay in affixing to the *Counterproposal* a specific, further date-stamp that the Audio Division, for reasons that have no practical meaning in this context, had recently decided was needed. The staff then issued a *Report and Order* (the "*February Order*")<sup>2</sup> dismissing the *Counterproposal* based on an erroneous conclusion that the *Counterproposal* had not been filed in a timely manner. On reconsideration, rather than correcting this improvident conclusion, the Division demanded strict adherence to the earlier fiat requiring a label that presumably would have secured the specific date-stamp. ***Yet the Division failed to demonstrate that the actual routing of the Counterproposal was any different or slower than if the Counterproposal had borne the desired label***

1 *Roma, Texas*, DA 06-1756, released September 5, 2006.

2 *Roma, Texas*, DA 06-262, released February 10, 2006.

U.S. DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION  
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The substance of the FCC's requirements may not be changed without a notice and comment proceeding. The staff may not -- with the mere issuance of a Public Notice -- invent new procedural requirements that trump the plain meaning of its rules, where *substantial compliance with the Rules* actually occurred. Moreover, where a Public Notice intended to revise the Rules was ambiguously worded, the "death penalty" on a party's participation is inappropriate. Furthermore, an immaterial error in stamping does not free the Commission from its obligation to consider the merits of a timely filed Counterproposal. At the very least, the circumstances warranted a waiver so that the *Counterproposal* could be considered. Accordingly, the *Counterproposal* should be reinstated.

#### BACKGROUND

On March 23, 2005, the Audio Division released a *Notice of Proposed Rulemaking*<sup>3</sup> proposing the allotment of Channel 278A at Roma, Texas, and inviting Counterproposals to be filed with the Office of the Secretary no later than May 10, 2005. On that date, LVL timely submitted its *Counterproposal* in support of a proposed allotment of FM Channel 278A to the unserved community San Isidro, Texas. Counsel for LVL hand-delivered the *Counterproposal* directly to the Commission's filing location at 236 Massachusetts Avenue, N.E., Suite 110, Washington, DC 20002 (the "Filing Location"). There the Commission's contractor ("Natek") received a copy of the *Counterproposal* marked "stamp & return." The Natek employee affixed the FCC date-stamp "May 10, 2005." See LVL's *Petition for Reconsideration* at Exhibit (copy of the *Counterproposal* bearing this FCC date-stamp). The date-stamp indicates the *Counterproposal* was received by "Federal Communications Commission Bureau/Office" as of that date.

Notwithstanding the timeliness of the submission and the merits of LVL's planned a first lo-

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<sup>3</sup> *Roma, Texas*, Notice of Proposed Rule Making, 20 FCC Rcd 6202 (MB 2005).

cal service in San Isidro, the staff's February Order dismissed the Counterproposal. It did so premised entirely on the erroneous perception that the *Counterproposal* had been filed two days late.<sup>4</sup> In response to LVL's reconsideration request, the *September Order* merely cited a recently invented procedural change as justification for the dismissal.<sup>5</sup> The September Order claimed that parties were on notice that "any filing not addressed to 'Marlene H. Dortch, Federal Communications Commission, Office of the Secretary' will be treated as filed on the day it is received in the Office of the Secretary," and that "[i]ncorrectly addressed filings will be treated as having been filed on the receipt date shown on the official 'Office of the Secretary' date stamp."<sup>6</sup> Significantly, however, the cited language appeared in the portion of the NPRM covering pleadings that were submitted via mail "addressed" to 445 12<sup>th</sup> Street NW, Washington, DC, 20554. On its face, the language did not appear to affect parties who hand-delivered their filings directly to the Filing Location and who immediately received the Commission's date-stamp indicating a timely filing.

### QUESTIONS PRESENTED

- (1) Should the Audio Division have considered LVL's compliance with the filing deadline?
- (2) Should the Commission have initiated a rulemaking proceeding before changing procedural rules so as to override actual compliance with the Rules?
- (3) May the Audio Division foreclose a party's right to participate in a proceeding where the language of a new requirement is so ambiguous as to mislead reasonable parties

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<sup>4</sup> The *February Order* claimed that the counterproposal submitted by LVL "was received in the Office of Secretary on May 12, 2005, two days after the deadline for comments."

<sup>5</sup> *September Order* at ¶4, Notes 3 and 4, citing *Roma, Texas*, Notice of Proposed Rule Making, 20 FCC Red 6202, ¶4 (MB 2005), and *Filing Requirements in FM Allotment Rulemaking Proceedings*, Public Notice, 20 FCC Red 7502 (MB 2005) ("*FM Allotment Public Notice*"), respectively.

as to the breadth of the proposed change?

- (4) Where the actual internal routing practices of the FCC’s staff treat pleadings in docketed cases the same regardless of the instructions on the caption, is there a rational basis for refusing to consider the merits of a timely filed *Counterproposal*?
- (5) Amid these circumstances, is sound policy served by refusing consideration of the merits of a timely filed *Counterproposal*?

#### ARGUMENT

##### **I. LVL Substantially Complied with the Filing Deadline.**

It has been long recognized that substantial compliance with the Rules can overcome a perceived technical shortcoming in a submission.<sup>7</sup> In this context, the *September Order* avoids admitting that LVL substantially complied with the filing deadline. Indeed, the *September Order* distorted the nature of LVL’s argument on reconsideration. LVL never argued “documents directed to various bureaus and divisions within the Commission, *rather than to the Office of Secretary*” are to be treated as timely filed. *September Order* at ¶2 (emphasis added). Rather, we explained that at least with respect to hand-delivered filings, the Filing Location essentially **is** the Office of Secretary. After all, in the wake of the terrorist attacks of September 11, 2001, it is impossible to hand-deliver anything at the Commission itself and receive an official date-stamp. The Filing Location therefore has substantially replaced the old filing window of the Office of Secretary in the FCC’s “pre-9/11” manifestation.

Natek relays all papers in docketed cases to the headquarters Office of the Secretary at 445 12 Street in Washington, DC. Pleadings hand-delivered to the Commission at its Filing Location are

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<sup>6</sup> *Id.*

therefore not “directed” anywhere at the expense of the Office of Secretary. However, historically pleadings were marked to help the Office of Secretary, *after accepting the pleadings on behalf of the Commission*, know where to them. It was in this spirit that the legal community, including counsel for LVL, has captioned its hand-delivered pleadings. Thus, LVL’s *Counterproposal* actually was delivered straight to the Office of Secretary.

In its *September Order*, the Division nonetheless fails to mention that the *Counterproposal* was clearly received at the Filing Location on time, as evidenced by the “May 10, 2005” date stamp. Any date stamp from the Filing Location therefore amounts to a date-stamp from the Office of the Secretary. In fact, the Filing Location constitutes the *de facto* Office of Secretary. Thus, the timely submission of LVL’s *Counterproposal* at the Filing Location constituted substantial compliance with the FCC’s filing deadline and its procedural requirements.

Parties that are similarly situated, especially as to as to issues as trivial as date stamps, must be treated similarly in order to avoid arbitrary and capricious agency decision-making. As further evidence that LVL substantially complied with the filing deadline, LVL was treated differently from similarly situated applicants.<sup>8</sup> In other allotment proceedings, counsel for LVL has observed the precise same date-stamp employed as in this case but without the summary rejection of the submission. Specifically in *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Monument, Oregon)*, MB 05-10 (2005), a counterproposal was submitted by mail addressed to the Audio Division. Its date stamp showed it was received by “Bureau/Office” on March 21, 2005, which was in fact the due date. In *Monument*, no “Office of the Secretary” stamp was affixed until April 1, 2005, more than ten days after the deadline for counterproposals. Even though this Coun-

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<sup>7</sup> See *James River Broadcasting Corporation v. FCC*, 399 F.2d 581 (DC Cir. 1968), and *Radio Athens, Inc. (WATH) v. FCC*, 401 F.2d 398 (DC Cir. 1968).

<sup>8</sup> *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965).

terproposal evidently took far longer to reach someone wielding the Secretary's stamp, this delay did not prompt dismissal. On the contrary, the Counterproposal was accepted for filing and considered on the merits. See Report No. 2708, dated May 17, 2005, attached to the *Petition for Reconsideration* at Exhibit D. In light of the proper treatment of the counterproposal in MB 05-10, dismissal of the instant *Counterproposal* clearly fails the *Melody Music* standard. The *September Order*'s only response to this citation is to claim not that in Monument there had not been substantial compliance, but that substantial compliance would not be sufficient as of an arbitrary date in 2005.

The September Order ignored LVL's additional authority that substantial compliance had been accepted elsewhere with respect to proof of a timely filing. For example, the FCC has recognized the timely filing of a pleading where other evidence, such as that a law firm's standard and time-tested filing practices were followed, supports the conclusion that a given submission was timely.<sup>9</sup> The staff has also reconsidered a decision in light of evidence that the FCC mailroom provided a date-stamp before a deadline had expired.<sup>10</sup> The FCC has viewed as conclusive evidence of a timely filing the date-stamp of its remote filing location at Mellon Bank in Pittsburgh.<sup>11</sup> The staff has even accepted a copy of a filing with no legible date-stamp at all under circumstances where a fee appeared to have been paid on the date in question.<sup>12</sup> In other words, timely receipt by the Commission's agents has always been treated as timely receipt by the Commission itself. Here, the FCC's date stamp clearly indicates that the agents of the FCC's Secretary received the *Counterproposal* by

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<sup>9</sup> See *Communications Vending Corp. of Arizona, Inc.* 17 FCC Rcd 24201, ¶ 69 (2002).

<sup>10</sup> See *Skywave Electronics, Inc.* 16 FCC Rcd 5508, ¶ 2 (EB 2001); *Hughes-Moore Assoc., Inc.*, 6 FCC Rcd 889, ¶ 9 (Rev Bd 1991).

<sup>11</sup> *Nugget Broadcasting Company*, 6 FCC Rcd 2013 ¶¶ 2-3 (Rev Bd 1991).

<sup>12</sup> *Pioneer Telephone Cooperative, Inc.* 18 FCC Rcd 16677, Note 17 (WTB 2003).

the deadline. Moreover, that agent was instructed to deliver all papers in docketed cases straight to the Secretary's Office, and did so.

## **II. The FCC May Not Change the Substance of Its Requirements Without Initiating a Notice and Comment Proceeding.**

One of the fundamental limits on the broad authority that resides in the FCC is that no agency may change the substance of its Rules without initiating a notice and comment rulemaking proceeding.<sup>13</sup> Substantive rules are those that effect change in existing law or policy *or which affect individual rights and obligations*.<sup>14</sup>

As explained above, for the FCC now to treat as untimely a paper that was in the hands of the Secretary's agent on time would be a stark, and unwarranted, departure from Commission precedent. The Division claims to enjoy the ability to ignore timely submitted pleadings that do not comport with a newly announced labeling edict. The staff claims that the change was merely "procedural" and therefore could be made effective by the issuance of a Public Notice. However, the effect of this particular edict, as rigidly interpreted by the staff, was to require not only that parties file timely, but also that they receive from the Secretary's agent a particular date-stamp. This amounts to a substantive requirement in that parties who hand-delivered pleadings to the Commission previously did not need to check the date-stamp to determine whether a Natek employee had affixed the "Bureau/Office" or "Office of Secretary" stamp. Before the rule change, a hand delivered pleading was treated as timely filed if it was filed on time, i.e., no later than the specified filing deadline. After the rule change, we are now told, this is no longer the case. A pleading may be submitted to the filing location, receive an official date-stamp from the Natek employee, and nonetheless be considered "two days late." Such a sweeping substantive change cannot be made without affording an opportu-

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<sup>13</sup> See, e.g., *Paralyzed Veterans of America v. West*, 138 F.3d 1434 (1998).

nity for comment on the proposed change.

### **III. The Language Cited by the September Order Was Ambiguous and Misleading.**

The need for notice and comment is all the more apparent when one considers the ambiguous and misleading language cited by the staff. The *September Order* refers to “addressing” a submission and the “receipt” thereof in the Office of Secretary. However, it is by no means obvious that the requirement relied on would have any effect on parties who hand-deliver their pleadings to the Commission’s Filing Location. Not only has hand-delivery at the Filing Location historically been treated as simultaneous “receipt” of a pleading by the Office of Secretary, but such pleadings are not at all “addressed” as one might with respect to sending a pleading through the mail. Rather, the caption on the first page of a pleading that is hand-delivered to the FCC typically eliminates any need for a cover letter or any addressee at all. The presumed addressee for all hand-delivered pleadings is the “Federal Communications Commission,” and the Filing Location is the de facto Office of Secretary charged with receiving and distributing such pleadings. The language in the *NPRM* therefore does not support the notion that all parties had been adequately forewarned of a new procedural regime that could preclude consideration of a *Counterproposal*. To the contrary, the cited language seemed not to apply to hand-deliverers at all.

### **IV. Parties Before the FCC Should Not Be Prejudiced Due to Agency Internal Routing Problems.**

In the discharge of the FCC’s duties, the public interest is paramount. The FCC’s purpose is not to lay procedural traps that foreclose options that would serve the public interest better. Where agency error risks undue prejudice to the public interest or that of a party, the staff may make certain

allowances to preserve the integrity of its processes.<sup>15</sup>

Here, the Office of Secretary is the official custodian of the Commission's documents. 47 C.F.R. §0.11. The Audio Division has not gainsaid LVL's argument that Natek was hired to operate the Filing Location through the Office of the Secretary, and acts as its extension. As explained by the FCC's Internet site, the Secretary's Office is responsible for "processing all docketed and non-docketed filings that the Commission receives in paper, electronic, and alternative media formats." . The Secretary exercises complete control over operations at the Filing Location. LVL had no control over the actions of the Secretary's agent at the Filing Location. When LVL received a date-stamp confirming receipt by the "Federal Communications Commission Bureau/Office," there would be no reason to think that the "Office" in question was not the Office of the Secretary.

Reliance on a date-stamp indicating the filing was two days late is inappropriate where this is only a function of internal routing practices of the Commission. Since it is impossible to hand deliver a pleading without filing it the Secretary's adjunct Filing Location, the difference in labels here is a distinction without a real difference. Internal FCC stamping practices cannot be attributed to LVL. Thus, the interest of LVL in seeing a first local service for San Isidro may not be prejudiced merely because an inappropriate date-stamp was applied to LVL's *Counterproposal*. Indeed, no paper tendered to Natek at that time on May 10, 2005 could have logically been deemed received by the Secretary unless the Natek office really IS part of the Secretary's office for such purposes.

#### **V. The Circumstances Warranted Waiver Rather Than Strict Adherence.**

Waiver of procedural requirements is available to the Commission even absent strict compliance with a labeling requirement. 47 C.F.R. §1.925(b). Waivers are appropriate where the underlying purpose of a rule is served better by a waiver than by strict compliance. Here, the underlying

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<sup>15</sup> *Federal-State Board on Universal Service*, 20 FCC Rcd 19212, ¶¶17-18 (WCB 2005).

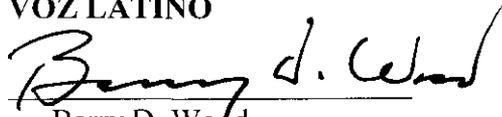
purpose is that the staff have before it at one time multiple options for the benefit of the public. That purpose is not served by limiting consideration of this frequency to one town that already has adequate service. For all the reasons set forth above, and in furtherance of the public interest in a proposed first local transmission service in San Isidro, the Commission should at least afford LVL waiver relief and consider the Counterproposal.

#### CONCLUSION

In view of the foregoing, LVL's *Counterproposal* was timely-filed and deserving of consideration. It would be improper to let a new procedural nicety trump such substantial compliance with the Rules, especially without first allowing for public comment on the change or even making the announcement in an unambiguous fashion. In addition, the staff did not provide sufficient clarity as to the scope of its tinkering with the historic procedural custom. Furthermore, imaginary delays in the FCC's internal routing practices should not prejudice the interests of parties before the Commission. In any event, the circumstances here support waiver to allow consideration of the proposal for a first local transmission service. Accordingly, the *Counterproposal* should be reinstated *nunc pro tunc* and the staff instructed to consider it on its merits.

Respectfully submitted,

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