

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

In the Matter of

Amendment of Section 73.202(b),)	MB Docket No. 08-85
Table of Allotments,)	RM-11427
FM Broadcast Stations.)	
(Needles, California, Ehrenberg and First)	
Mesa, Arizona))	

Directed to: Office of the Secretary
For transmission to: Chief, Media Bureau

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Federal Communications Commission
Office of the Secretary

REPLY COMMENTS

Grenax Broadcasting II, LLC ("Grenax"), licensee of KFLX(FM), Kachina Village, Arizona, by its attorneys, hereby respectfully submits its Consolidated Reply Comments with regard to the above-captioned proceeding and in response to the Commission's *Public Notice*, Report No. 2883, released March 10, 2009. With respect thereto, the following is stated:

As an initial matter, it must be noted that the instant proceeding should be terminated. This proceeding began with a petition for rulemaking filed by Michael Cusinato ("Cusinato") and seeking allotment of a channel to provide a fourth local transmission service to Needles, California, together with related changes to the FM Table of Allotments. The Commission duly issued a *Notice of Proposed Rule Making and Order to Show Cause*, DA 08-1713, released July 25, 2008 ("*NPRM*") in the proceeding. There is nothing to indicate, however, that Cusinato ever submitted any comments in support of his proposal. Accordingly, without an expression of interest in the proposed new Needles allotment from the proponent or any other party to this

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proceeding, the initial petition for rule making must be dismissed and the proceeding terminated.¹

The Commission's well-established policy is that it will not proceed forward with a rule making proceeding absent an expression of interest. *See, e.g., Bokchito and Clayton, Oklahoma*, MB Docket No. 07-107, DA 07-4505, released November 2, 2007; *Groveland, California*, MB Docket No. 05-13, DA 06-2062, released October 20, 2006; *Auxvasse, Missouri*, MB Docket No. 05-230, DA 06-1885, released September 22, 2006; *Coalinga, California*, MB Docket 04-275, DA 06-273, released February 6, 2008. Indeed, the *Notice of Proposed Rule Making and Order to Show Cause*, DA 08-1713, released July 25, 2008, in this very proceeding specifically states at Paragraph 12 that "a showing of continuing interest is required in Paragraph 2 of the Appendix before a channel will be allotted." Cusinato made no such showing with regard to the proposed Needles allotment.

Likewise, while both Rocket Radio, Inc. ("Rocket") and Univision Radio License Corporation ("Univision") made filings in this proceeding, neither of them expressed any interest in the proposed Needles allotment *per se*, nor did they file counterproposals. Rather, instead of filing anything in conflict with the Needles allotment, both of them filed separate Petitions for Rule Making to request changes *consistent with* the proposed Needles allotment. As their proposals were not in conflict with the Cusinato Petition for Rule Making, they may not be treated as counterproposals.

¹ While Grenax submitted a counterproposal, which urged a change in the reference coordinates of the proposed Needles allotment and made an alternative proposal for a channel substitution for its station KFLX only in the event that the revised reference co-ordinates were not adopted, without the addition of the Needles allotment and associated channel changes, Grenax has no interest at this time in changing to Channel 285C2 or any other channel.

Rocket filed Comments which simply referenced and attached a copy of a separate Petition for Rule Making which it filed simultaneously to seek the allotment of a new channel at Williams, Arizona. Rocket appeared to make its submission in this docket as a matter of information only and did not in any way indicate that its pleading entitled “Petition for Rule Making” should be treated as a counterproposal. Rather, Rocket itself recognized the lack of conflict with the channel changes proposed by the *NPRM*, as its Williams proposal is for a separate allotment proceeding, consistent with the changes proposed in this proceeding, which would just add on one more allotment. Although Rocket comments positively on the benefits of adding its own proposal to the changes proposed by Cusinato, it does not express any interest of its own in a Needles allotment. Furthermore, grant of the Cusinato petition is not a necessary pre-condition for Rocket’s petition to move forward, as it recognizes in separately requesting certain allotment changes in its own petition for rule making. *See* Rocket Petition for Rule Making at 4.

Thus, Rocket’s “Petition for Rule Making” is not a counterproposal which should be consolidated in this proceeding. Instead, it must proceed forward and be assessed on its own merits. Rocket itself demonstrated its agreement with this fact by filing its own separate petition. That petition must be afforded the same opportunities for comments and counterproposals that any other petition for rule making would be. The opportunity for a full and fair consideration of the merits of Rocket’s proposal and any counterproposal that might be filed must not be short-circuited by improperly considering Rocket’s petition in a docket to which it has no necessary connection.

The same rationale holds true with regard to the Univision filing. Univision’s submission in this proceeding consisted only of a response to the Order to Show Cause directed to it, in

which Univision indicated no objection to the proposed change in channel. While Univision also filed on September 15, 2008, a separate petition for rule making which proposes channel changes consistent with those proposed in the instant proceeding in order to allow Univision's station KHOV-FM to upgrade, that petition was not submitted in this docket and is procedurally on a separate path. Although Univision's proposals might well be consolidated with those of Rocket in a single docket, they may not properly be considered in this proceeding.

As with Rocket, Univision has correctly recognized that its own proposals must proceed separately by filing a petition for rule making. Univision's petition also must be provided with a full opportunity for comments and counterproposals. Any required orders to show cause must also be issued in the proceeding or proceedings begun by Rocket's and Univision's petitions. While the channel changes suggested by Univision might have co-ordinated nicely with the Cusinato petition, that petition has now apparently been abandoned, and in any event, co-ordination does not a counterproposal make. Nor does Univision's petition depend on the grant of Cusinato's, as its proposals may move forward independently. Therefore, whatever the merits or demerits of Univision's petition, it must be considered either on its own or consolidated with Rocket's petition, in a new and separate proceeding.

In sum, Cusinato's petition must be dismissed and this proceeding terminated due to lack of expressed interest in the allotment proposed in the *NPRM*. Cusinato has filed nothing to indicate any continuing interest in the proposed allotment. Grenax expressly indicated a desire to avoid a channel change for its station by suggesting a change in the proposed reference coordinates at Needles and alternatively suggested a different channel substitution only if other channel changes proposed by Cusinato were granted without the proposed revision in reference

co-ordinates. Therefore, no party continues to wish to move forward with either the proposal advanced in the *NPRM* or any other channel changes in conflict with the *NPRM*.

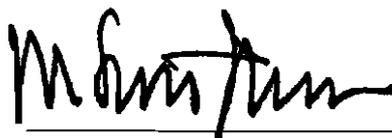
As noted above, Rocket and Univision each submitted a separate petition for rule making which harmonized with Cusinato's petition, but neither was a counterproposal nor was either dependent on grant of Cusinato's petition.² It is well settled that "a counterproposal is a proposal for an alternate and mutually exclusive allotment or set of allotments in the context of the proceeding in which the proposal is made." *Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments*, 5 FCC Rcd 931 n. 5 (1990). Both Rocket's and Univision's proposals lack the critical element of mutual exclusivity. Therefore, the Commission must do as requested by Rocket and Univision and commence a separate rule making proceeding or proceedings, with an opportunity for comments and counterproposals. The Commission may not take a shortcut by attempting to consolidate independent petitions for rule making into this proceeding and offer only a limited opportunity for reply comments. Rather, given the lack of any mutual exclusivity with the *NPRM* or any dependence on the outcome of the proposals advanced therein, the public and any interested party must be given an opportunity to advance initial comments and counterproposals in response to the new proposals advanced by Rocket and Univision. Their petitions must stand or fall on their own merits.

² Moreover, unlike a situation in which a counterproposal is initially submitted but then is amended to remove mutual exclusivity, neither Rocket's nor Univision's proposal was mutually exclusive with the Cusinato proposal from the beginning.

WHEREFORE, the premises considered, Grenax respectfully requests that Cusinato's petition for rule making be dismissed and that this proceeding be terminated.

Respectfully submitted,

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March 25, 2009

CERTIFICATE OF SERVICE

I, Deborah Lunt, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., hereby certify that on this 25th day of March, 2009, I caused copies of the foregoing "Consolidated Reply Comments" to be placed in the U.S. Postal Service, first class postage prepaid, or sent by email (as indicated below), addressed to the following persons:

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