



Federal Communications Commission
Washington, D.C. 20554
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In Reply Refer to:
1800B3-TSN

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In re: **MB Docket No. 08-3**

KCMI(FM), Terrytown, Nebraska
Facility ID No. 11069
File No. BLH-19881221KC

KIMX(FM), Nunn, Colorado
Facility ID No. 82007
File No. BPH-20070822AAL

**Order to Show Cause / Modification
of License
Application for Minor Modification of
Licensed Facilities**

Dear Counsel:

We have before us a Petition for Reconsideration ("Petition") of the staff's October 23, 2009,¹ decision granting the above-captioned application for modification of the license for FM broadcast station KIMX(FM) ("KIMX"),² filed by licensee Appaloosa Broadcasting Company, Inc. ("ABC"). For the reasons set forth below, we deny the Petition.

Background. ABC opened a hybrid allotment rulemaking and modification of license proceeding in August 2007. It proposed to modify the KIMX license to specify operation on Channel 254A (from Channel 244C2), and to change KIMX's community of license from Laramie, Wyoming, to Nunn, Colorado. In order to accomplish this, ABC filed the KIMX Application, and proposed amending the FM Table of Allotments³ by substituting Channel 286A for vacant Channel 247A at Wheatland,

¹ *Christian Media Incorporated*, Letter (MB Oct. 23, 2009) ("*Staff Decision*").

² File No. BPH-20070822AAL (the "KIMX Application").

³ 47 C.F.R. § 73.202.

Wyoming. Additionally, ABC proposed that FM Channel 246C1 be involuntarily substituted for Channel 245C1 at Terrytown, Nebraska, and that the license of station KCMI(FM) ("KCMI"), licensed to Christian Media Incorporated ("CMI"), be modified to specify operation on Channel 246C1 at Terrytown. The staff released a Notice of Proposed Rule Making with respect to the proposed changes to the Table of Allotments,⁴ and also served on CMI an Order to Show Cause why the license of KCMI should not be modified to specify operation on Channel 246C1.⁵

CMI did not file comments in response to the *Wheatland NPRM*, nor did it file an informal objection to, or a petition to deny the KIMX Application. However, CMI did file a Response to Order to Show Cause ("CMI Response"), objecting to the modification of KCMI's license to Channel 246C1. First, CMI stated that due to the relatively flat terrain in the vicinity of Terrytown, "many residents outside of the 60 dBμ contour of [KCMI] have grown to rely upon Station KCMI for its local programming."⁶ A change of frequency to Channel 246 would, according to CMI, subject such listeners to new co-channel interference from station KELN(FM), North Platte, Nebraska, and new first-adjacent channel interference from station KBCO(FM), Boulder, Colorado.⁷ CMI thus argued that the proposed modification was not in the public interest, owing to the "legitimate expectation that existing service will continue" to over 65,000 listeners outside of KCMI's 60 dBμ contour.⁸ CMI also stated that the proposed downgrade in KIMX's facilities from Class C2 to Class A, and the move to Nunn, Colorado, was not in the public interest because it would "abandon" rural service to Laramie in order to move into "the more urban areas of northern Colorado."⁹

After receiving and considering the CMI Response, the Audio Division, Media Bureau, released the October 23, 2009, *Staff Decision*, rejecting CMI's contentions, and finding the KIMX Application and related channel substitutions to be in the public interest.¹⁰ The staff found that KCMI's service is protected from interference only within the station's 60 dBμ contour, and that any service beyond that 60 dBμ protected contour is subject to interference from other stations. It further found that the change of KIMX's community of license from Laramie, Wyoming, to be the first local transmission service at Nunn, Colorado, was a preferential arrangement of allotments. Finally, the staff noted ABC's willingness to reimburse CMI for its reasonable costs incurred in connection with the proposed channel change.¹¹

⁴ See *Wheatland, Wyoming*, Notice of Proposed Rule Making, 23 FCC Rcd 75 (MB 2008) ("*Wheatland NPRM*").

⁵ *Christian Media Incorporated*, Letter (MB Dec. 17, 2007) ("KCMI OSC").

⁶ CMI Response at 2. In support of this contention, CMI attached eight letters and e-mails from listeners as Exhibit B to the CMI Response.

⁷ *Id.* at 2.

⁸ *Id.* at 3 (quoting *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, Memorandum Opinion and Order, 5 FCC Rcd 7094, 7097 (1990)).

⁹ CMI Response at 4.

¹⁰ See *supra* note 1.

¹¹ *Id.* at 2.

Thus, the staff granted the KIMX Application,¹² deleted the allotment on Channel 245C1 at Terrytown, Nebraska, added an allotment on Channel 246C1 at Terrytown,¹³ and modified the KCMi license to specify operation on Channel 246C1 instead of Channel 245C1.¹⁴

CMI timely filed the Petition on November 23, 2009. In the Petition, CMI reiterates its contention that a substantial population will lose KCMi service if it changes channels, and further argues, for the first time, that almost 2,000 people will be left with only one aural service, while over 1,100 people will lose their sole radio service.¹⁵ CMI also questions whether it was in the public interest to introduce “yet another radio station [KIMX] into the Fort Collins Urbanized area” as opposed to “maintaining existing service” by KCMi to rural areas of Nebraska and Wyoming.¹⁶ CMI thus characterizes the KIMX community of license change as a rural-to-urban move.¹⁷ Additionally, CMI questions why the staff did not require a showing by ABC under *Faye and Richard Tuck*,¹⁸ stating that “the proposed service area of Station KIMX would likely encompass more than 50% the (sic) Ft. Collins Urbanized area.”¹⁹ CMI concludes that the staff was in error in finding that it was in the public interest to allow KIMX to move from the Cheyenne, Wyoming, market to the much larger Fort Collins, Colorado, market.²⁰

In its Opposition to Petition for Reconsideration (“Opposition”), ABC first notes that CMI’s Petition is procedurally defective, in that its arguments regarding the alleged loss of service to its listeners versus KIMX’s service gains do not present new facts, changed circumstances, or material errors or omissions in the underlying decision.²¹ ABC likewise charges that CMI’s *Tuck* argument is procedurally flawed, as it is based on facts not previously presented to the staff but that did not occur since CMI’s last opportunity to present them.²² ABC goes on to state that, even if these arguments were to be considered, they should be rejected. It notes that the populations losing KCMi service are all outside of KCMi’s

¹² *Id.* at 3. The staff also noted that it was concurrently granting ABC’s Petition for Rule Making in MB Docket 08-3, substituting FM Channel 286A for vacant Channel 247A at Wheatland, Wyoming. See *Wheatland, Wyoming*, Report and Order, 24 FCC Rcd 12928 (MB 2009) (“*Wheatland R&O*”).

¹³ *Staff Decision* at 2.

¹⁴ *Id.*

¹⁵ Petition at 5 and Exhibit C.

¹⁶ *Id.* at 4.

¹⁷ *Id.* at 4-6.

¹⁸ Memorandum Opinion and Order, 3 FCC Rcd 5374 (1988) (“*Tuck*”).

¹⁹ Petition at 5.

²⁰ *Id.* at 6-7. CMI later notes, however, that KIMX has not been listed by Arbitron in the Cheyenne, Wyoming, Radio Metro since 2006. CMI Reply to Opposition to Petition at 4-5.

²¹ Opposition at 2 (citing *Sandab Communications Limited Partnership II*, Memorandum Opinion and Order, 13 FCC Rcd 14413, 14429 (1998)).

²² Opposition at 2-3 (citing 47 C.F.R. §§ 1.106(b)(2), (c)).

protected 60 dBμ contour, and thus should be disregarded under established Commission policy.²³ With regard to CMI's *Tuck* allegations, ABC states that a *Tuck* showing is only required when the new community is located within an Urbanized Area, or the station's 70 dBμ contour would cover more than 50 percent of an Urbanized Area.²⁴ Neither is the case with the proposed new KIMX facilities at Nunn.²⁵

In its December 18, 2009, Reply, CMI again stresses the fact that "over 65,000 people will lose service from Station KCMI," comparing this to the fact that ABC will gain over 90,000 more people in its 60 dBμ contour when KIMX completes its move, even though KIMX is downgrading its station class.²⁶

Discussion. A substantial number of pleadings were filed in this proceeding.²⁷ The volume of pleadings, however, can be attributed largely to protracted arguments between the parties over misstatements of existing law, or matters ancillary to the central issues in this case. The central issues are as follows: (1) whether the KCMI channel change will deprive "over 65,000 persons" of KCMI service; (2) whether the move of KIMX from Laramie to Nunn is against the public interest, and triggers the need for a showing under *Tuck*; and (3) whether grant of ABC's application must be rescinded and the pending application re-submitted to comply with the procedures set forth in the *Rural Second R&O*.²⁸ As discussed below, we find that the Staff Decision was correct, and thus that the Petition should be denied.

CMI's argument that the staff was in error in disregarding the number of KCMI listeners that will lose KCMI service due to interference from other stations on the new channel, is itself in error. CMI does not contend that it will receive interference within its protected 60 dBμ contour.²⁹ Rather, the listeners it

²³ Opposition at 3-4.

²⁴ *Id.* at 5-6.

²⁵ In its Opposition, ABC refutes CMI's characterization that the move of KIMX from Laramie to Nunn is a rural-to-urban move, claiming that it is, in fact, an "urban-to-rural community move," from the "Laramie, Wyoming Urbanized Area" to Nunn, which is located outside the Fort Collins, Colorado, Urbanized Area. *Id.* at 4. However, as CMI correctly points out at some length in its Reply, and as later conceded by ABC, there is no Laramie, Wyoming, Urbanized Area. Thus, the KIMX Application seeks a move between two communities, neither of which is located in an Urbanized Area.

²⁶ Reply at 4-7.

²⁷ In addition to the Petition, Opposition, and Reply, the following pleadings were filed: (1) ABC's January 4, 2010, Motion to Strike the Reply, on the grounds that the Reply was filed one day late, and that it was "outside the scope of both ABC's Opposition and current Commission policy" (Motion to Strike at 9); (2) CMI's January 19, 2010, Opposition to Motion to Strike; (3) ABC's January 27, 2010, Reply to Opposition to Motion to Strike; (4) CMI's May 6, 2011, "Statement for the Record and Request for Relief" ("CMI Statement"), arguing that because the grant of the KIMX Application was non-final, ABC should be required to submit a supplemental showing pursuant to *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Report and Order, 26 FCC Rcd 2556 (2011) ("*Rural Second R&O*"); (5) ABC's May 12, 2011, Opposition to Statement for the Record and Request for Relief; (6) CMI's May 23, 2011, Reply; and (7) ABC's May 25, 2011, Response to Reply. Based on our decision in this matter, we dismiss the Motion to Strike as moot. We discuss in the text the contentions set forth in the CMI Statement.

²⁸ See CMI Statement at 2-3.

²⁹ See 47 C.F.R. § 73.215(a)(1).

claims it will lose are all outside its protected contour. However, the very definition of a protected contour is that it is protected from interference from other stations.³⁰ Conversely, a licensee receives no interference protection outside of the protected contour.³¹ To allow CMI, or any other licensee, to claim protection from interference beyond its protected contour would wreak havoc with the system of FM station spacing set forth in our Rules. Using CMI's logic, it could petition to deny a facility modification of a nearby co- or adjacent-channel station that otherwise complied with our spacing requirements, merely because that station's proposed contour happened to cover persons outside of KCMI's protected contour that CMI nevertheless wished to claim as listeners.³² Thus, the staff's finding in this regard was correct.

Likewise, CMI errs in asserting that KIMX should not be considered a first local transmission service at Nunn, and that a *Tuck* showing should be required. As ABC correctly states, a *Tuck* showing is only required when either the community of license is located within an Urbanized Area, or when the proposed facility would place a principal community contour (70 dBμ) over more than 50 percent of the Urbanized Area.³³ Because KIMX does not propose to place a 70 dBμ contour over any part of the Fort Collins, Colorado, Urbanized Area, no *Tuck* showing is needed, and KIMX was properly considered as a first local transmission service at Nunn, Colorado.³⁴ As there are five commercial and five non-commercial educational radio services licensed at Laramie, Wyoming, not counting KIMX, the staff properly concluded that the change of KIMX's community of license represented a preferential arrangement of allotments. Moreover, CMI does not effectively refute ABC's claim that it would provide the first local transmission service at Nunn. Rather, CMI argues that the larger population that will receive protected service from the relocated KIMX should not outweigh the population receiving unprotected service from KCMI. As discussed above, service outside KCMI's protected contour is not pertinent to our consideration of the public interest merits of the KIMX Application and related allotment proceedings.

Finally, we reject CMI's contention that our decision must be vacated and ABC required to file a supplement demonstrating compliance with the *Rural Second R&O*. It is true that the Commission stated

³⁰ *Id.*

³¹ See, e.g., *Rebecca L. Dorch*, Letter, 9 FCC Rcd 2753, 2756 (MB 1994) (rejecting rule waiver to allow community of license that lay outside the station's protected contour; potentially, another station could be authorized that would interfere with such a station's service to its community of license, "since the Commission's rules do not protect any service outside the 54 dBμ protected contour.").

³² We further note that, even were we to consider the argument, raised for the first time in CMI's Petition, that a number of persons would lose first or second service due to KCMI's change of frequency, we would reject it for the same reasons stated in the text. The populations CMI claims would lose first or second service all lie outside KCMI's protected 60 dBμ contour. Thus, any KCMI service to such listeners is also subject to interference from other stations.

³³ See, e.g., *Headland, Alabama, and Chattahoochee, Florida*, Report and Order, 10 FCC Rcd 10352, 10354 (MB 1995).

³⁴ It is true that the standard set forth in the *Rural Second R&O* presumes that a station serves an urbanized area if it places a principal community signal over more than 50 percent of that urbanized area, or could be modified to provide such signal coverage. *Rural Second R&O*, 26 FCC Rcd at 2572. As discussed in the text below, however, it is immaterial whether such a modification could be effected (and it is not clear from the record whether this is the case in any event), because this application is not subject to the procedures set forth in the *Rural Second R&O*.

that the new procedures will apply to pending applications to change a station's community of license. However, the Commission made an exception for "any non-final FM allotment proceeding, including 'hybrid' coordinated application/allotment proceedings, in which the Commission has modified a radio station license or granted a construction permit."³⁵ In both the *Staff Decision* and the *Wheatland NPRM*, the staff characterized this as a contingent hybrid proceeding, involving as it does both an allotment proceeding and an application for minor modification to the licensed KIMX facilities. Thus, because a construction permit was issued to ABC, and the KCMI license modified, this proceeding falls under the cited exception to the *Rural Second R&O*. ABC is not required to supplement its application showing, and neither the *Staff Decision* nor the *Wheatland R&O* shall be vacated.

Conclusion. For the foregoing reasons, the Petition for Reconsideration filed by CMI IS DENIED.

Sincerely,



Peter H. Doyle *for*
Chief, Audio Division
Media Bureau

³⁵ *Rural Second R&O*, 26 FCC Rcd at 2576.