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In Reply Refer to:
1800B3-AJR

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In Re: KTIA-FM, Boone, Iowa
Facility ID No. 6417
File No: BPH-20121113AMW

Dear Counsel:

We have before us a December 24, 2013, letter (the "Letter") submitted by Truth Broadcasting Corp. ("Truth Broadcasting"), licensee of Station KTIA-FM, Boone, Iowa. The Letter seeks rescission of the staff's December 20, 2013, action¹ that dismissed the captioned application (the "Application")² and granted, to the extent indicated, an Informal Objection to the Application (the "Objection") filed on February 19, 2013, by Saga Communications, Inc. ("Saga"). The Letter also requests grant of the Application.³ For the reasons discussed below, we set aside on our own motion the *Dismissal Letter*, reinstate the Application, and dismiss the Motion to Strike as moot.

Background. The Application proposed to modify the license of Station KTIA-FM from Channel 257A at Boone, Iowa, to Channel 257A at Huxley, Iowa, and to relocate the station's transmitter site pursuant to Section 73.3573(g) of the Commission's Rules.⁴ Truth Broadcasting certified that the proposal should not be considered as a "move-in" to either the Des Moines or

¹ See James P. Riley, Esq., and Gary S. Smithwick, Esq., Letter, DA 13-2437 (Dec. 20, 2013) ("*Dismissal Letter*").

² See File No. BPH-20121113AMW.

³ Saga filed a Motion to Strike and Conditional Opposition and Comments on January 8, 2014, and Truth Broadcasting filed an Opposition to Motion to Strike and Reply to Conditional Opposition and Comments on January 9, 2014.

⁴ See 47 C.F.R. § 73.3573(g) (permitting an FM station to change its community of license without providing an opportunity for competing expressions of interest provided, *inter alia*, the reallocation would result in a preferential arrangement of allotments).

Ames, Iowa, urbanized areas under *Rural Radio*⁵ because there are no existing towers in the area from which Station KTIA-FM could be modified to cover 50 percent or more these urbanized areas.⁶ By letter dated June 6, 2013, the staff notified Truth Broadcasting that the Application was defective because KTIA-FM could be upgraded to Class C3 and provide coverage to 50 percent of an urbanized area from an existing tower.⁷ Accordingly, the staff provided a 30-day period for Truth Broadcasting to amend its Section 307(b) showing by rebutting the urbanized area service presumption.⁸

Truth Broadcasting sought reconsideration of the *Deficiency Letter*, arguing that no Class C3 upgrade was possible and no amendment was necessary.⁹ In the *Dismissal Letter*, the staff agreed that a Class C3 station at Huxley would not be possible because there was no fully spaced allotment site available as required by the Commission's Rules.¹⁰ However, upon further review, the staff determined that at a site previously suggested by Saga, ASR #1207229, KTIA-FM could operate on Channel 257A with a directional antenna and cover 50 percent of the Ames urbanized area with a 70 dBu signal, thereby making the Application subject to the urbanized area service presumption.¹¹ In the absence of a rebuttal to the presumption, the staff concluded that Truth Broadcasting was not entitled to a first local service preference for proposing a first local service at Huxley. Accordingly, the staff dismissed the Application.

In its Letter, Truth Broadcasting contends that the staff erred in finding that, by use of a directional antenna mounted on ASR #1207229, Station KTIA-FM could cover all of Huxley and 50 percent or more of the Ames urbanized area with a 70 dBu signal. In support of this position, Truth Broadcasting submits an engineering study, showing that the use of the facility specified by the staff is not rule-compliant because there would be prohibited overlap between Stations KTIA-

⁵ See *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Report and Order, First Order On Reconsideration, and Second Further Notice of Proposed Rule Making, 26 FCC Rcd 2556, 2567 (2011) (subsequent history omitted) ("*Rural Radio*") (establishing a rebuttable presumption "that, when the community proposed is located in an urbanized area or could through a minor modification application, cover 50 percent of an urbanized area, we will treat the application, for Section 307(b) purposes as proposing service to the entire urbanized area rather than the named community of license").

⁶ See File No. BPH-20121113AMW, Attachment 36, Section 307(b) Engineering Exhibit at 2. To accommodate the proposal, the Application requested, and we issued, an *Order to Show Cause* to the licensee of Station KPUL(FM), Winterset, Iowa, for an involuntary channel change from Channel 258A to Channel 269A. See *Letter to Positive Impact Media, Inc.*, Ref. 1800B3-EP, (Jan. 8, 2013) ("*OSC*").

⁷ See *Letter to James P. Riley, Esq. and Gary S. Smithwick, Esq.*, (MB, Jun. 6, 2013) at 3 ("*Deficiency Letter*"). In particular, the staff engineering analysis determined that at ASR #1017090, a directional antenna operating as a Class C3 facility would provide a 70 dBu signal over 50 percent of the Des Moines urbanized area.

⁸ The *Deficiency Letter* also denied in part the Objection filed by Saga, the licensee of six radio stations in the Des Moines, Iowa, radio market.

⁹ See Truth Broadcasting's Petition for Reconsideration, filed on July 8, 2013.

¹⁰ See *Dismissal Letter* at 4-5 and 47 C.F.R. § 73.203, Note.

¹¹ See *Dismissal Letter* at 5 and n.23.

FM and the maximum class facilities for Station KDAO-FM, Eldora, Idaho,¹² that would violate Section 73.215(a) of the Rules.¹³ Truth Broadcasting contends that, when this error is taken into account, there is no factual basis for invoking the rebuttable presumption or dismissing the Application. Accordingly, Truth Broadcasting requests that the staff should set aside the *Dismissal Letter* under Section 1.113(a) of the Rules¹⁴ and grant the Application.

Saga contends that Truth Broadcasting's Letter should be stricken without further consideration because by the terms of Section 1.113 (a) of the Rules, the staff may modify or set aside, on its own motion, an action taken under delegated authority but may not do so on the motion of an applicant.¹⁵ Rather, Saga asserts that, if Truth Broadcasting desires to challenge the *Dismissal Letter*, it still has the opportunity to file an application for review pursuant to Section 1.115 of the Rules. On the merits, Saga concedes that the *Dismissal Letter* does not properly protect Station KDAO-FM, Eldora, Iowa.¹⁶ However, Saga submits a new engineering study, purporting to show that a redesigned directional pattern at ASR 1207229 would enable KTIA-FM to protect properly KDAO-FM at maximum Class A facilities and serve more than 50 percent of the Ames urbanized area with a 70 dBu signal.¹⁷ Accordingly, Saga requests that the staff take no action to set aside the *Dismissal Letter*.

Truth Broadcasting replies that it is reasonable and permissible for an applicant to suggest the basis for modification or rescission of a staff action under Section 1.113(a) when a clear error is involved.¹⁸ While Truth Broadcasting acknowledges that it retains the option to file an application for review, providing evidence of error may obviate an unnecessary pleading process and preserve administrative resources. Further, Truth Broadcasting contends that the *Dismissal Letter* should be set aside because Saga agrees with Truth Broadcasting's position that the staff's analysis failed to protect properly Station KDAO-FM, Eldora, Iowa. Finally, Truth Broadcasting contends that Saga's latest directional antenna pattern from ASR 1207229 is not rule compliant because it violates Section 73.316(b)(2) of the Rules.¹⁹ Accordingly, Truth Broadcasting urges the staff to

¹² See Truth Broadcasting's Letter, Statement of William J. Getz ("Getz Statement"). Specifically, it shows that there would be overlap between Station KDAO-FM's maximum facility 54 dBu contour and KTIA-FM's 60 dBu service contour that would be generated by the antenna specified by the staff. See Getz Statement at 2 and Exhibit 1.

¹³ See 47 C.F.R. § 73.215(a) (allowing short-spacing only if service and interference contours of the affected stations do not overlap).

¹⁴ See 47 C.F.R. § 1.113(a) (permitting the staff to modify or set aside an action taken under delegated authority within 30 days of public notice of that action).

¹⁵ See Saga's Motion to Strike and Conditional Opposition and Comments at 2.

¹⁶ *Id.* at 3.

¹⁷ *Id.* and Engineering Report of Munn-Reese Inc.

¹⁸ See Truth Broadcasting's Opposition to Motion to Strike and Reply to Conditional Opposition and Comments at 1-2.

¹⁹ *Id.* at 2-3 and Engineering Statement of William J. Getz at 2 and n.2. Specifically, Truth Broadcasting alleges that Saga's directional antenna pattern tabulated in Exhibit 3.4 of its Engineering Report varies more than 2 dB per 10 degrees of azimuth in violation of Section 73.316(b)(2) of the Rules.

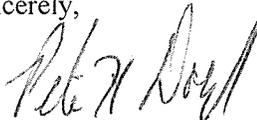
dismiss Saga's Motion to Strike, set aside the *Dismissal Letter*, and complete processing of its Application.

Discussion. Procedure. As a threshold matter, we address Saga's argument that the staff lacks the authority to modify or set aside an action, on its own motion, under Section 1.113(a) where an applicant or proponent has requested such an action. We disagree. The staff, as well as the Commission, have modified or set aside actions under Section 1.113(a) or Section 1.108 where evidence of error has been pointed out by parties.²⁰ Accordingly, we will consider Truth Broadcasting's Letter, as well as the responsive pleadings.

Section 73.215(a). Upon further review, Truth Broadcasting is correct that the staff's hypothetical technical facility for Station KTIA-FM fails to protect Station KDAO-FM, Eldora, Iowa, at maximum facilities and, thus, that such a facility would violate Section 73.215(a) of the Rules. Consequently, the staff's hypothetical facility cannot be relied upon to invoke the urbanized area service presumption. Accordingly, we set aside the *Dismissal Letter* pursuant to Section 1.113(a) of the Rules and reinstate the Application, pending further review of the technical matters raised herein.

Conclusion. IT IS ORDERED that the *Dismissal Letter* IS SET ASIDE and that the application, File No. BPH-20121113AMW, filed by Truth Broadcasting Corp., IS REINSTATED. IT IS FURTHER ORDERED that Saga Communications, Inc.'s Motion to Strike IS DISMISSED as moot.

Sincerely,



Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Positive Impact Media, Inc.

²⁰ See, e.g., *Alva, Mooreland, Tishomingo, et al.*, Oklahoma, Memorandum Opinion and Order, 17 FCC Rcd 14722 (MMB 2002) (staff modifying on its own motion a Report and Order based upon new information submitted in a pleading); *Pamplin Broadcasting*, 23 FCC Rcd 2571 (2008) (Commission setting aside on its own motion portions of a Report and Order because of factual error brought to Commission's attention); and *Royce International Broadcasting Company*, Memorandum Opinion and Order, 23 FCC Rcd 9010, 9014 (2008) (noting the staff's setting aside a procedural ruling following the filing of a petition for reconsideration and referring the matter to the full Commission for consideration).