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Washington, D.C. 20554

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In Reply Refer to:

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In Re: **KAHM(FM), Spring Valley, Arizona**
Facility ID Number: 61510
File No. BPH-20100813BHN

Petition for Reconsideration

Dear Counsel:

This letter refers to the Petition for Reconsideration ("the Petition") filed on February 4, 2013, by Kemp Communications, Inc. ("Kemp"), licensee of Station KVGG(FM), Salome, Arizona. The Petition seeks review of a January 18, 2013, staff action¹ that granted the referenced application (the "Application") filed by Southwest FM Broadcasting Co., Inc. ("Southwest"), licensee of Station KAHM(FM), Spring Valley, Arizona, ordered Kemp's Station KVGG(FM) to change channels, and denied an Informal Objection (the "Objection") to the Application filed by Kemp on December 14, 2010.² For the reasons discussed below, we deny the Petition and dismiss the Motion for Stay as moot.

Background. The Application proposed to modify the license of Station KAHM(FM) from Channel 271C at Prescott, Arizona, to Channel 271C at Spring Valley, Arizona, and to relocate the station's transmitter site pursuant to Section 73.3573(g) of the Commission's Rules.³ The proposal was an intra-urbanized area move because Station KAHM(FM) would continue to cover 100 percent of the

¹ See Lawrence N. Cohn, Esq., James A. Koerner, Esq., and Marvin Vosper, Letter, 28 FCC Rcd 148 (MB 2013) ("Letter Decision").

² Southwest filed an Opposition to Petition for Reconsideration on February 20, 2013 ("Opposition"); and Kemp filed a Reply to Opposition to Petition for Reconsideration on March 4, 2013 ("Reply"). Kemp also filed a Motion for Stay on February 4, 2013, and Southwest filed an Opposition on February 14, 2013.

³ 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).

Prescott, Arizona, urbanized area with a 70 dBu signal as either a Prescott or Spring Valley station. Southwest originally claimed that its Application was entitled to a first local service preference under Priority 3 of the FM Allotment Priorities.⁴ Southwest subsequently amended its proposal and alleged that the Application, as amended, would result in a preferential arrangement of allotments under Priority 4 because small service losses in its proposal would be outweighed by large service gains.⁵ In its Objection, as well as a supplement to the Objection, Kemp contended that Spring Valley is not a community for allotment purposes. It also claimed that the Application would create an impermissible “gray” loss area⁶ under Priority 2 and would result in the loss of third or fourth reception services to 3,367 persons under Priority 4.⁷

In the *Letter Decision*, the staff rejected Kemp’s argument that Spring Valley is not a community for allotment purposes because it is listed in the U.S. Census and has other indicia of community status.⁸ Similarly, the staff rejected Kemp’s argument that the Application would create an impermissible “gray” loss area, noting that the affected area is unpopulated.⁹ While the proposed Prescott move-out would impact underserved areas, the staff determined that Kemp’s loss calculations were incorrect and found instead that 319 persons would lose a third or fourth service. It concluded that this is far less than the 15 percent population benchmark established in *Rural Radio*¹⁰ for finding that the service losses would be contrary to the public interest.¹¹ Finally, the Letter Decision concluded that the relocation would serve the public interest because it would result in a net gain of 1,365,507 listeners.¹² Accordingly, the staff granted the Application and denied the Objection.

In its Petition, Kemp contends that the staff erred by (1) involuntarily modifying the Station KVGG(FM) license without considering its response to the OSC; (2) determining that Kemp’s gain and

⁴ The FM allotment priorities are: (1) first fulltime aural service; (2) second fulltime aural service; (3) first local service; and (4) other public interest matters. Co-equal weight is given to Priorities (2) and (3). See *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88, 90-93 (1982).

⁵ To accommodate the Spring Valley reallocation, the Application requested, and the staff issued, an *Order to Show Cause* to Kemp and Marvin Vosper, licensee of Station KBUX(FM), Quartzsite, Arizona, as to why Kemp’s Station KVGG(FM), Salome, Arizona, could not be modified from Channel 270A to Channel 231A and why Vosper’s Station KBUX(FM) could not be modified from Channel 232A to Channel 243A. See *Letter to Kemp Communications, Inc., and Marvin Vosper*, Ref. 1800B3-HC (Mar. 21, 2012) (“OSC”).

⁶ A “gray” area is an area in which there is only one fulltime aural reception service. See *Cheyenne, Wyoming, and Gering, Nebraska*, Report and Order, 15 FCC Rcd 7528, 7530 n.8 (MMB 2000) (“Cheyenne”).

⁷ See Kemp’s Comments and Informal Objection at 2-3 and Technical Exhibit at 2.

⁸ See *Letter Decision*, 28 FCC Rcd at 150.

⁹ *Id.*

¹⁰ 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, 2577 (2011) (subsequent history omitted) (“*Rural Radio*”) (disfavoring any change that would result in the net loss of third, fourth, or fifth reception service to more than 15 percent of the population within a station’s current protected contour).

¹¹ *Id.* at 150-51.

¹² *Id.* at 151.

loss figures were incorrect because the staff used a methodology that does not count daytime-only AM stations for determining “white” or “gray” areas under Priorities 1 and 2 but counts them under Priority 4; (3) permitting the creation of “gray” loss area in an unpopulated area where there is the potential for future population; and (4) failing to take into account the loss of service to well served populations as required by *Rural Radio*.¹³ Accordingly, Kemp concludes that the Application should be denied and the involuntary channel changes rescinded.

In its Opposition, Southwest contends that, following precedent, the staff was not required to conduct a more detailed (*i.e.*, service level by service level) analysis of all population gains and losses that would result from the proposed community of license change because there was no impermissible “gray” loss area and the loss of a third or fourth service in certain areas was *de minimis*. However, Southwest submits a detailed analysis of population gains and losses and contends that both unweighted and weighted assessments of the population gains and losses demonstrate that the Application would serve the public interest.¹⁴ Accordingly, Southwest concludes that the Petition should be denied.

In its Reply, Kemp argues that Southwest has failed to supply any non-quantitative rationale in support of its proposal. On the contrary, Kemp alleges that *Rural Radio* requires an explanation of reasons, not mere numerical differences, as to why the Application would result in a preferential arrangement of allotments. Kemp reiterates its contention that it would not serve the public interest because 99 percent of the population gaining an additional service already enjoys 21 services while a substantial number of listeners losing service presently receive ten or fewer services.¹⁵ Accordingly, Kemp urges that the Commission deny the Application.

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order, or raises additional facts, not known or existing at the time of the petitioner's last opportunity to present such matters.¹⁶ Kemp has not met this burden.

Involuntary Channel Changes. As a threshold matter, we acknowledge that the staff involuntarily modified the license of KVGG(FM) to specify Channel 231A in lieu of Channel 270A at Salome without considering Kemp's Response to Order to Show Cause (“Response”), which was timely filed at the Office of the Secretary on April 19, 2012. However, we find that this omission constitutes harmless error because the Response essentially reiterates arguments raised in Kemp's Objection.¹⁷ These arguments

¹³ In support of this position, Kemp alleges that 118,355 persons would lose a 20th or fewer service while 1,201,222 persons would gain a 21st or greater service. See Kemp's Informal Objection at 4.

¹⁴ Specifically, Southwest alleges that a “granular” or unweighted assessment of the gains outweighs the losses by a factor of 4.89 to 1 and that a weighted assessment of the gains outweighs the losses by a factor of 4.85 to 1. See Southwest's Opposition at 10 and Tables 4 and 5.

¹⁵ See Kemp's Reply to Opposition to Petition for Reconsideration at 2.

¹⁶ See 47 C.F.R. § 1.429(b). See also *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C.Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

¹⁷ Specifically, the Response contends that the Commission should not involuntarily change Station KVGG(FM)'s frequency because: (1) Spring Valley is not a community for allotment purposes; (2) the Application would create an impermissible “gray” loss area; and (3) the Application does not identify the number of services available to people within the gain area who are already well served. To the extent that the Response also contends that the Application would in effect be a move-in to the Phoenix-Mesa or Avondale, Arizona, urbanized areas, we disagree.

have been fully considered in the *Letter Decision* and herein. Accordingly, we conclude that this error was harmless.

Accuracy of Gain/Loss Figures. Kemp contends that the staff's engineering analysis, which was conducted using the methodology announced in the *Rural Radio* proceeding, is irrational because it does not count day-time only AM stations for purposes of determining "white"¹⁸ or "gray" areas under Priorities 1 and 2 but counts them as stations for purposes of determining areas and populations receiving three or four services under Priority 4.¹⁹ Kemp appears to believe that there needs to be a uniform treatment of daytime-only AM stations. We disagree. As stated in *Rural Radio*, day-time only AM stations are excluded from determining "white" or "gray" areas because Priorities 1 and 2 apply to first or second *full-time* services whereas Priority 4 is not restricted to full-time aural services.²⁰ Moreover, the staff's engineering analysis properly used authorized facilities and actual terrain to calculate gain and loss areas.²¹ Accordingly, Kemp has not demonstrated error regarding the accuracy of gain/loss calculations.

Impermissible "Gray" Area. It is well established that a petition for reconsideration, may not be used for the mere reargument of points previously advanced and rejected.²² Kemp has not cited any authority for the proposition that "gray" loss area calculations should include currently unpopulated areas. Thus we decline to reconsider this argument.

Preferential Arrangement of Allotments. Kemp contends that the Application would not result in a preferential arrangement of allotments because most of the gain area has 20 or more services and most of the loss area has fewer than 20 services. We disagree. This is an intra-urbanized area move. The Commission has previously held that the stricter *Rural Radio* processing standards do not apply to intra-urbanized area moves because in those situations stations are not migrating from rural to urban areas.²³ While we are mindful, as pointed out by Kemp, that *Rural Radio* requires applicants to explain how service level changes represent a preferential arrangement of allotments,²⁴ most portions of the loss area would continue to receive between 10 and 20 services, two to three times the five-service benchmark

As previously noted, the 70 dBu contour of Station KHAM(FM) would cover only 3.9 percent of the Phoenix-Mesa urbanized area and would not cover any of the Avondale urbanized area.

¹⁸ A "white" area is an area in which there are no full-time aural reception services. See *Cheyenne*, 15 FCC Rcd at 7530 n.8.

¹⁹ See Kemp's Petition for Reconsideration at 3.

²⁰ See *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Order on Reconsideration, 27 FCC Rcd 12829, 12838-39 (2012).

²¹ See *id.* at 12837.

²² See *Mandeville Broadcasting Corp. and Infinity Broacasting of Los Angeles*, Order, 3 FCC Rcd 1667 (1988).

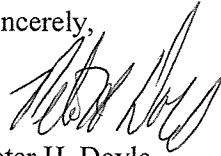
²³ See, e.g., *Gearhart, Madras, et al., Oregon*, Report and Order, 26 FCC Rcd 10259 (MB 2011) (declining to apply *Tuck* test or urbanized area service presumption to intra-urbanized moves).

²⁴ See *Rural Radio*, 26 FCC Rcd at 2564 (¶ 39).

defining a “well served” area. Accordingly, we affirm the prior determination that the benefits of providing an additional service to more than 1.3 million listeners outweigh the identified service losses.²⁵

Conclusion. IT IS ORDERED that the Petition for Reconsideration filed by Kemp Communications, Inc., IS DENIED. IT IS FURTHER ORDERED that the Motion for Stay filed by Kemp Communications, Inc., IS DISMISSED as moot.

Sincerely,



Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Marvin Vosper

²⁵ See, e.g., *Marissa G. Repp, Esq., and Gary S. Smithwick, Esq.*, Letter, 27 FCC Rcd 13090, 13094 (MB 2012) (approving an intra-urbanized area move as a preferential arrangement of allotments under Priority 4 where population gain in reception service outweighs population loss by approximately 260,000 persons).