



Federal Communications Commission  
Washington, D.C. 20554

July 13, 2017

*In Reply Refer to:*  
1800B3-CEG

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In re: **KYAP(FM), Nunn, Colorado**  
Facility ID No. 82007  
File No. BLH-20160217AAB

**Application for License to Cover  
Program Test Authority**

Dear Counsel:

We have before us the above-referenced application (KYAP License Application) filed on February 17, 2016, by Appaloosa Broadcasting Company, Inc. (ABC) for a license to cover a construction permit for Station KYAP(FM), Nunn, Colorado (KYAP) (formerly KIMX). We also have an informal objection to the Application, filed on February 29, 2016, by Christian Media, Inc. (CMI), licensee of station KCMI(FM), Terrytown, Nebraska (KCMI) (Informal Objection), and related pleadings.<sup>1</sup> As discussed below, we grant the Informal Objection to the extent indicated herein, deny it in all other respects, and direct ABC to reimburse CMI for any reasonable and prudent expenses incurred in implementing the KCMI channel change.

**Background.** On August 22, 2007, ABC opened a hybrid allotment rulemaking and modification of license proceeding, proposing to modify the KYAP license to specify operation on Channel 254A (from Channel 244C2) and to change KYAP's community of license from Laramie, Wyoming, to Nunn, Colorado.<sup>2</sup> To accomplish this, ABC proposed to amend the FM Table of Allotments<sup>3</sup> by substituting Channel 285A for vacant Channel 247A at Wheatland, Wyoming, and Channel 246C1 for Channel 245C1 at Terrytown, Nebraska. It also proposed, *inter alia*, that the KCMI license be involuntarily modified to specify operation on Channel 246C1 at Terrytown, Nebraska. In the KYAP Modification Application, ABC certified that it would reimburse CMI for all reasonable expenses incurred by the requested channel change, in accordance

<sup>1</sup> On March 3, 2016, ABC filed an opposition to the Informal Objection, with an erratum on March 9, 2016 (Objection). On April 7, 2016, CMI filed a reply to the Opposition (Reply).

<sup>2</sup> File No. BPH-20070822AAL (KYAP Modification Application). The KYAP Modification Application was granted October 23, 2009. *See Broadcast Actions*, Public Notice, Report No. 47100 (MB Oct. 28, 2009). This hybrid application and rulemaking proceeding was docketed as MB Docket No. 08-3.

<sup>3</sup> 47 CFR § 73.202.

with the Commission's *Circleville* policy.<sup>4</sup> By staff letter dated December 17, 2007, CMI was directed to show cause why its license should not be modified to specify Channel 246C1 at its authorized transmitter site.<sup>5</sup> On October 23, 2009, over CMI's objections, the Bureau granted the KYAP Modification Application and modified the KCMC license to specify Channel 246C1 (*KCMC Modification Order*), noting ABC's commitment to reimburse CMI for the cost of implementing the involuntary channel change.<sup>6</sup> On November 23, 2009, CMI filed a petition for reconsideration of the *KCMC Modification Order*, which the Bureau denied on May 3, 2012.<sup>7</sup> On June 19, 2015, CMI filed a modification application to change channels (KCMC Modification Application).<sup>8</sup> On February 17, 2016, ABC filed the KYAP License Application—against which CMI filed the Informal Objection—and concurrent request for program test authority (PTA Request). On May 25, 2016, CMI filed a license to cover the KCMC Modification Application, which was granted on June 2, 2016.<sup>9</sup> On August 19, 2016, Bureau staff granted the PTA Request, with the qualification that such grant “does not imply any judgment on the February 29, 2016, Informal Objection.”<sup>10</sup> Therefore, KYAP and KCMC are both currently operating on the substitute channels requested by ABC in the KYAP Modification Application.

In its Informal Objection and Reply, CMI states that it has not received reimbursement from ABC for the reasonable expenses associated with the KCMC channel change.<sup>11</sup> Accordingly, it requests that the Commission dismiss the KYAP License Application and associated request for program test authority (PTA) and rescind grant of the KYAP Modification Application.<sup>12</sup> In its Opposition, ABC claims that CMI is not entitled to “unilateral reimbursement” because it delayed carrying out the requested channel move and abused the Commission's processes by filing numerous “patently meritless” pleadings.<sup>13</sup> Therefore, ABC contends, CMI must compensate ABC for the alleged “economic injury” incurred by ABC in the process of the subject channel change.<sup>14</sup> ABC requests that the Commission adjudicate this “economic injury” by holding a full hearing at which “the parties can present their evidentiary cases.”<sup>15</sup>

**Discussion.** Under *Circleville* and subsequent cases, determination of what constitutes legitimate and prudent expenses for reimbursement is left to the expeditious good faith negotiation of the parties, subject to Commission adjudication only as a last resort if the parties are unable to reach agreement or to enter into binding arbitration.<sup>16</sup> In accordance with this policy, ABC expressly committed in the KYAP Modification Application to reimburse CMI for any reasonable and prudent expenses incurred in its channel change, which

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<sup>4</sup> KYAP Modification Application, Attachment 30 (Technical Statement and Related Exhibits); see *Circleville, Ohio*, Second Report and Order, 8 FCC 2d 159, 163 (1967) (*Circleville*) (requiring that whenever an existing station is ordered to change frequency to accommodate another station, the benefiting station must reimburse the affected station for its reasonable and prudent expenses).

<sup>5</sup> *Christian Media Incorporated*, Letter, Ref. No. 1800B3 (MB Dec. 17, 2007).

<sup>6</sup> *Christian Media Incorporated*, Letter, Ref. No. 1800B3-TB (MB Oct. 23, 2009).

<sup>7</sup> *Christian Media Incorporated*, Letter, Ref. No. 1800B3-TSN (MB May 3, 2012).

<sup>8</sup> File No. BPH-20150619AAT. The KCMC Modification Application was granted on January 6, 2016. *Broadcast Actions*, Public Notice, Report No. 48649 (Jan. 11, 2016).

<sup>9</sup> File No. BLH-20160525AAB; *Broadcast Actions*, Public Notice, Report No. 48750 (June 7, 2016).

<sup>10</sup> *Barry A. Friedman*, Letter Decision, Ref. No. 1800B3-HC (MB Aug. 19, 2017).

<sup>11</sup> Informal Objection at 5-7; Reply at 13.

<sup>12</sup> *Informal Objection* at 1-2, 7.

<sup>13</sup> Opposition at 8.

<sup>14</sup> *Id.* at 8.

<sup>15</sup> *Id.* at 9.

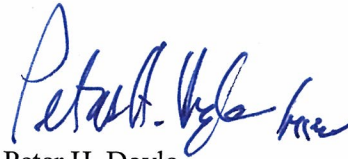
<sup>16</sup> See, e.g., *Peter Wayne Lechman*, Memorandum Opinion and Order, 8 FCC Rcd 3058, 3058 (MMB 1996) (*Lechman*); *Harold A. Jahnke*, Memorandum Opinion and Order, 74 FCC Rcd 265 (1975).

is now completed. Therefore, we require ABC to follow the protocol set out in *Circleville* and immediately enter into good faith negotiations to reimburse CMI for the reasonable and prudent expenses incurred in implementing the KCMI channel change. If the parties fail to come to an agreement and ABC has not fully reimbursed CMI in accordance with our *Circleville* policy within 30 days of the date of this letter decision, we will suspend KYAP's program test authority.<sup>17</sup> We defer action on the KYAP License Application pending resolution of this matter. ABC does not cite any applicable Commission rule or precedent supporting its contention that the Commission must adjudicate ABC's claim of economic injury in the context of a *Circleville* proceeding, and we reject its argument that we do so. Should ABC wish to pursue that position, such a claim is more appropriately brought before a state court of competent jurisdiction.<sup>18</sup>

**Conclusion/Actions.** For these reasons, IT IS ORDERED that the Informal Objection filed by CMI on February 29, 2016, is GRANTED to the extent indicated herein and DENIED in all other respects.

IT IS FURTHER ORDERED that ABC shall reimburse CMI within 30 days of the date of this letter decision for the reasonable and prudent expenses associated with the KCMI channel change.

Sincerely,



Peter H. Doyle  
Chief, Audio Division  
Media Bureau

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<sup>17</sup> The Commission "reserves the right to revoke, suspend, or modify program tests by any station without right of hearing for failure to comply adequately with all terms of the construction permit..." 47 CFR § 73.1620(b).

<sup>18</sup> See, e.g., *GB Enterprises Communications Corp., Assignor, and CATCO Communications, LLC, Assignee*, Order, 31 FCC Rcd 1985, 1990 (2016).