



**Federal Communications Commission
Washington, D.C. 20554**

August 23, 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

Petition for Reconsideration

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 before us a petition for reconsideration (Petition for Reconsideration) filed by ABC on August 14, 2017, seeking reconsideration of the Audio Division, Media Bureau (Bureau)'s July 13, 2017, letter decision ordering ABC to reimburse Christian Media, Inc. (CMI) for the reasonable and prudent expenses associated with the involuntary channel change of station KCMI(FM), Terrytown, Nebraska (KCMI) (*Reimbursement Order*).¹ For the reasons set forth below, we dismiss the Petition for Reconsideration and suspend program test authority (PTA) for KYAP pursuant to Section 73.1620(b) of the Rules.²

Background. This proceeding began in 2007 with a hybrid rulemaking petition and license modification application filed by ABC, proposing, *inter alia*, an involuntary channel change for KCMI to move from Channel 245C1 to Channel 246C1.³ As discussed in the *Reimbursement Order*, both ABC and

¹ Barry A. Friedman, Letter Decision, Ref. No. 1800B3-CEG (MB July 13, 2017).

² 47 CFR § 73.1620(b) ("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...").

³ 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. A more comprehensive account of prior events in this proceeding is provided in the *Reimbursement Order* at 1-2.

CMI are now operating on the substitute channels requested by ABC in the KYAP Modification Application.⁴ Specifically, on June 2, 2016, the Bureau authorized CMI to operate on Channel 246C1,⁵ and on August 19, 2016, the Bureau granted PTA for KYAP to commence operation on Channel 245A.⁶ However, ABC and CMI continued their longstanding dispute over reimbursement for the expenses involved in the KCMC channel change, with ABC refusing CMI's claims based on CMI's alleged construction delay and "meritless pleadings."⁷ In particular, ABC argued that reimbursement should not be "unilateral" and that the Commission should adjudicate the parties' competing economic claims.⁸

On July 13, 2017, the Bureau issued the *Reimbursement Order*, in which it rejected ABC's contention that the Commission should adjudicate competing economic claims and instead directed 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 KCMC channel change."⁹ The Bureau also warned that if such expenses were not reimbursed within 30 days, it would suspend PTA for station KYAP.¹⁰ Finally, the Bureau deferred action on the KYAP License Application pending resolution of the reimbursement matter.

On August 14, 2017, ABC filed the Petition for Reconsideration, reiterating its central argument that CMI's delay and opposition to the KCMC channel change amounted to an "abuse of process" that entitled ABC to a "reimbursement counterclaim" to be adjudicated by the Commission.¹¹ In addition, ABC contends that CMI violated the *ex parte* rules prior to 2008.¹² ABC also disputes certain reimbursement expenses—specifically, legal and engineering fees—apparently claimed by CMI.¹³ ABC states that it has offered to pay CMI's expenses for "non-professional services" and has also offered to enter into alternative dispute resolution.¹⁴ Finally, ABC claims that, in the *Reimbursement Order*, the Bureau failed to fully consider the arguments and evidence on record.¹⁵

On August 17, 2017, CMI filed an "Update on Status of Negotiations" (Status Update), in which it notifies the Bureau that it had not, to date, received any reimbursement from ABC. In the Status Update, CMI also alleges that ABC did not initiate reimbursement negotiations until "26 days into the 30-day period provided by the July 13, 2017 Letter Decision."¹⁶

Discussion. Reconsideration is warranted only if the petitioner shows an error of fact or law in the Commission's original order, or raises additional facts not known or existing at the time of the petitioner's last

⁴ *Reimbursement Order* at 2.

⁵ File No. BLH-20160525AAB; *Broadcast Actions*, Public Notice, Report No. 48750 (MB June 7, 2016).

⁶ *Barry A. Friedman*, Letter Decision, Ref. No. 1800B3-HC (MB Aug. 19, 2017) (*PTA Letter*). In the *PTA Letter*, the Bureau stated that grant of PTA did not "imply any judgment" on the pending informal to the KYAP License Application filed by CMI on February 29, 2016. *Id.* at 1.

⁷ *Reimbursement Order* at 2.

⁸ *Id.*

⁹ *Reimbursement Order* at 2-3 (citing *Circleville, Ohio*, Second Report and Order, 8 FCC 2d 159, 163 (1967) (*Circleville*) (holding 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)).

¹⁰ *Reimbursement Order* at 3.

¹¹ Petition for Reconsideration at 1-3.

¹² *Id.* at 4.

¹³ *Id.* at 5.

¹⁴ *Id.* at 7-8.

¹⁵ *Id.* at 6-7.

¹⁶ Status Update at 1.

opportunity to present such matters.¹⁷ It is axiomatic that reconsideration will not be granted for the purpose of debating matters on which the Commission has already deliberated and spoken.¹⁸

Here, ABC has failed to show an error of fact or law in the *Reimbursement Order*. The Bureau carefully considered the facts on record and properly relied on well-established *Circleville* precedent in ordering ABC to immediately negotiate appropriate reimbursement for CMI's reasonable and prudent expenses incurred in the KCMI channel change. All of ABC's objections on reconsideration either were or could have been presented earlier in the proceeding and thus are impermissibly raised on reconsideration. First, although we recognize—as exemplified by the present proceeding—that involuntary channel changes can be protracted and contentious, we have already considered and rejected ABC's suggestion that the Commission respond by adjudicating competing monetary claims.¹⁹ Second, ABC's arguments regarding alleged *ex parte* violations and reimbursement for specific legal and engineering service rely on facts in existence at its last opportunity to present such matters and therefore are impermissibly raised on reconsideration. For these reasons, we dismiss the Petition for Reconsideration for failure to meet the standard set out in Section 1.106 and affirm the *Reimbursement Order*, for the reasons stated therein.

Under Section 73.1620(b) of the Rules, 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 . . .” In *Circleville* and subsequent cases, the Commission unequivocally required reimbursement whenever an existing station is ordered to change frequency to accommodate another station.²⁰ Nonetheless, CMI states that it has not received any reimbursement from ABC for the reasonable expenses associated with the KCMI channel change, and it states that ABC made no overture to settle until 26 of the 30 days specified in the *Reimbursement Order* had passed.²¹ The holdings of the *Reimbursement Order* were effective upon release and were not stayed by the August 14, 2017, filing of a petition for reconsideration.²² Thus, the record indicates that ABC has failed to comply with the Bureau's orders to: (1) immediately enter into negotiations with CMI; and (2) complete the reimbursement process within 30 days. Moreover, because the KYAP Modification Application initially was granted expressly in reliance on ABC's representation that it would reimburse CMI for the reasonable costs incurred in implementing the proposed channel change pursuant to the *Circleville* policy,²³ and ABC has not done so, we find that ABC has failed to adhere to the terms of its construction permit. For these reasons, we suspend PTA pending resolution of the reimbursement matter. All operation of KYAP must cease immediately. No further PTA or licensing action will be considered until ABC has reimbursed CMI for reasonable expenses associated with the KCMI channel change, as directed.

¹⁷ 47 CFR § 1.106(c) and (d) (Section 1.106); *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964) (*WWIZ*).

¹⁸ See, e.g., *WWIZ*, 37 FCC 685 at 686; *Shaw Communications*, Letter Order, 27 FCC Rcd 6995, 6996, para. 5 (MB 2012).

¹⁹ *Reimbursement Order* at 2-3; Petition for Reconsideration at 4 (“ . . . ABC should be entitled to a reimbursement counterclaim . . .”); Opposition at 9 (arguing that the Commission should adjudicate the “economic injury” caused by delayed or contested channel changes by holding a full hearing at which “the parties can present their evidentiary cases”).

²⁰ See, e.g., *Harold A. Jahke*, Memorandum Opinion and Order (*Jahke*), 74 FCC 2d 265 (1979); *Peter Wayne Lechman*, Memorandum Opinion and Order, 8 FCC Rcd 3058 (MMB 1996) (*Lechman*); *Howard M. Weiss, Esq.*, Letter, 28 FCC Rcd 3234 (MB 2013) (*Perryton*).

²¹ Informal Objection at 5-7; Reply at 13; Status Update at 1.

²² See 47 CFR § 1.102(b)(1), (2).

²³ *Christian Media Incorporated*, Letter, Ref. No. 1800B3-TB (Oct. 23, 2009), at 2. ABC expressly acknowledged this requirement in its KYAP Modification Application, when it certified that it would “reimburse the licensee of KCMI for all reasonable expenses incurred by the required change of channels by KCMI.” KYAP Modification Application, Attachment 30 (Technical Statement and Related Exhibits).

We emphasize that the Commission has not recognized adjustments for reimbursement “counterclaims” in calculating reimbursement expenses. Rather, it has held that the benefiting station must reimburse the affected station for all of the reasonable and prudent expenses incurred in the channel change.²⁴ To aid the parties and their counsel in creating a complete itemized list of such reimbursable expenses, we refer them to the case law applying *Circleville*, such as (but not limited to) the *Jahke*, *Lechman*, and *Perryton* cases.²⁵ In particular, we note that the Commission has approved reimbursement for legal fees “incurred in the negotiation process” and for filing or responding to pleadings “reasonably related to the necessary change of channel.”²⁶

Conclusion/Actions. For these reasons, IT IS ORDERED that the Petition for Reconsideration filed by ABC on August 14, 2017, IS DISMISSED.

IT IS FURTHER ORDERED that program test authority for station KYAP(FM), Nunn, Colorado, IS SUSPENDED pursuant to Section 73.1620(b) of the Rules pending resolution of the reimbursement issue discussed herein. All broadcast operations on KYAP must cease immediately. Notwithstanding this order, it is imperative to the safety of air navigation that any prescribed painting and illumination of the station’s tower be maintained. Therefore, the owner of the tower where KYAP’s transmitting antenna is located must continue to maintain the tower in the manner prescribed by the Commission’s rules.²⁷

Sincerely,



Peter H. Doyle
Chief, Audio Division
Media Bureau

²⁴ See, e.g., *Perryton*, 28 FCC Rcd at 3235, n.6 (citing *Circleville, Ohio*, 8 FCC 2d at 163).

²⁵ See *supra* note 21.

²⁶ *Perryton*, 28 FCC Rcd at 3238 (citing *Jahnke*, 74 FCC 2d at 274).

²⁷ See 47 U.S.C. § 303(q) and 47 CFR § 17.6.