

FEDERAL COMMUNICATIONS COMMISSION

445 12th Street SW
WASHINGTON DC 20554

MEDIA BUREAU
AUDIO DIVISION
APPLICATION STATUS: (202) 418-2730
HOME PAGE: <http://www.fcc.gov/mb/audio/>

PROCESSING ENGINEER: Dale Bickel
TELEPHONE: (202) 418-2700
FAX: (202)-418-1411 MAIL STOP: 2-B450
INTERNET ADDRESS: dale.bickel@fcc.gov

November 19, 2007

Airen Broadcasting Company
455 Capitol Mall, Suite 210
Sacramento, CA 95814

State of Oregon Acting By and Through the
State Board of Higher Education
P.O. Box 3175
Eugene, OR 97403

William W. McCutchen III
1126 West Avenue
Richmond, VA 23220

In re: KZCC (FM), Trinidad, CA
Airen Broadcasting Company
Facility ID No. 164090
Application BMPH-20070523ADS

KNHT (FM), Rio Dell, CA
State of Oregon Acting By and Through the
State Board of Higher Education
Facility ID No. 17412
Application BPH-20070720ABF

KMDR (FM), McKinleyville, CA
William W. McCutcheon III
Facility ID No. 170994
Construction permit BNPH-20070502AFH

Dear Applicants:

This letter refers to the minor change applications of Airen Broadcasting Company ("Airen") for KZCC and the State of Oregon Acting By and Through the State Board of Higher Education ("State of Oregon") for its station KNHT, the construction permit issued to William W. McCutcheon III ("McCutcheon") for a new station in McKinleyville, CA (call sign KMDR), and the Show Cause letter issued by the staff on August 15, 2007 to McCutcheon and the State of Oregon. For the reasons set forth below, we dismiss McCutcheon's and the State of Oregon's pleadings (the State of Oregon's minor change application for KNHT, modify the license of KNHT to Channel 273C2, modify KMDR's unbuild construction permit at McKinleyville to Channel 299C3, and grant the application of Airen for KZCC.

Background. Airen is the permittee of a new unbuilt FM broadcast station in McCloud, CA on Channel 238C3.¹ On May 23, 2007, Airen filed a modification application under the file number BMPH-20070523ADS proposing to change the new station's community of license to Trinidad, CA and specifying a new transmitter site.² The modification also proposed the substitution of Channel 249C3 for KMDR at McKinleyville, CA.

Subsequently detecting a conflict with a prior filed proposal at Ferndale, CA, Airen amended its application on June 29, 2007 to propose the substitution of Channel 299C3 for Channel 236C3 for KMDR at McKinleyville.³ This proposed substitution would necessitate another substitution, specifically Channel 273C2 for Channel 297C2 for KNHT at Rio Dell, CA. Airen requested that the staff issue show cause letters to both KNHT and to McCutcheon, permittee of the new McKinleyville station, for the proposed channel substitutions.

On July 20, 2007, the State of Oregon filed minor change application BPH-20070502AFH to upgrade KNHT from Channel 297C2 to Channel 297C1 at the station's existing transmitter site.⁴ When this application was filed, the State of Oregon was clearly unaware of the June 29, 2007 amendment for KZCC by Airen.

On August 15, 2007, the staff issued a Show Cause letter to the State of Oregon affording that licensee a thirty day period in which it could file a written statement showing with particularity why KNHT's license should not be modified to Channel 273C2. The same letter also afforded McCutcheon an opportunity to file a written statement why KMDR's construction permit should not be modified for operation on Channel 299C3. All parties were afforded an opportunity to comment on KNHT's July 20, 2007 Class C1 modification application.

McCutcheon's comments. McCutcheon's argues that Airen's proposed move from McCloud to Trinidad, CA does not result in a preferential arrangement of allotments under Section 307(b) of the Communications Act. McCutcheon notes that the only other "service" to McCloud is an unbuilt noncommercial educational construction permit, and because it is not operational, it should not be counted as a second service. McCutcheon also argues that consideration of Airen's proposed channel substitutions will delay the commencement of service to McKinleyville, and that it is unrealistic to expect the new station (KMDR) to commence operations on one channel at McKinleyville only to have to change channel a few months later. McCutcheon asks the Commission to deny the Airen proposals.

State of Oregon's comments. The State of Oregon argues that both Airen and the Media Bureau have failed to meet the burdens of proof under Section 316 of the Communications Act for requiring a "forced relocation" of a longstanding licensee. The State of Oregon contends that the amendment filed by Airen's amendment seeking a channel change for KNHT was not filed until July 26, 2007, six days after the filing of the KNHT upgrade application. Under the Commission's first-come/first-served system for processing FM minor change construction permit application, the State of Oregon believes that its July 20, 2007 application for KNHT prevails over Airen's amendment for KZCC. Moreover, the State of Oregon concludes that it cannot implement Class C1 operation if Airen's proposal is granted.⁵ The State of Oregon concludes that Airen's proposal must be denied and KNHT's minor change application granted.

¹ Construction permit file number BNPH-20041223ABI.

² Application ID no. 1187107, filed May 23, 2007.

³ Application ID no. 1193091, filed June 29, 2007.

⁴ Application ID no. 1198858, filed July 20, 2007.

⁵ The State of Oregon provides extensive documentation about the expanded service and digital (HD) service which KNHT could not implement if Airen's proposal is granted, and about the State of Oregon's plans for the station. However, these arguments are mainly speculative, and in light of the reasons for our decision below, we need not reach consideration of such factors. Additionally, a simple change in channel will not change the size of KNHT's licensed 60 dBu service area, nor will it prevent the State of Oregon from digital operations within that area.

Airen's comments. In response to McCutcheon's and the State of Oregon's objections, Airen contends that it did timely file an amendment on June 29, 2007 (in advance of the minor change application for KNHT) which contained a proposal to change KNHT's channel to 273C2. Airen argues that its proposal complies with Section 307(b) of the Communications Act and will result in a preferential arrangement of allotments. Airen has also indicated that it would reimburse McCutcheon and the State of Oregon for the costs of changing channels as proposed. Airen believes that KNHT's minor change application must be dismissed, and KZCC's proposal granted.

Discussion. The matter before us is decided solely by application of the first-come/first served application processing system. Since 1985, processing of commercial band FM minor change applications has been on a first-come/first-served basis, with earlier filed applications taking precedence. Later filed applications are "held in queue" behind the first-filed or lead application. If the lead application is granted, the queue is dissolved and the queue applications are dismissed; if the lead application is dismissed, then the first queue application (the application filed closest in time after the lead application) is processed.

In the present instance, Airen is correct that its June 29, 2007 amendment was filed ahead of the State of Oregon's July 20, 2007 application.⁶ That amendment did request modification of KNHT's channel. In addition, we have considered Airen's proposal in light of Section 307(b) (considering the objectors' points at the same time), and conclude that Airen's proposal will result in a preferential arrangement of allotments. We find that Airen's proposed channel substitutions are compliant with Section 316(a) of the Communications Act, that Airen's application is acceptable for filing, and so its application will be granted.

Conclusion. Accordingly, the pleadings filed by McCutcheon and the State of Oregon, when treated as informal objections, ARE HEREBY DENIED. Airen's lead application BMPH-20070523ADS, being acceptable for filing, IS GRANTED. As a result, the first come/first served queue is dissolved. The State of Oregon's minor change for KNHT, application BPH-20070720ABF, as a part of that queue, IS DISMISSED.

Additionally, pursuant to the grant of Airen's construction permit and the authority found in Sections 4(i), 5(c)(1), 303 and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b), 0.283, 1.420, 73.203(b), and 73.3573 of the Commission's Rules, the assignment for Channel 236C3 at McKinleyville, CA is modified to Channel 299C3. And pursuant to Section 316(a) of the Communications Act, as amended, the construction permit BNPH-20070502AFH for KMDR in McKinleyville IS MODIFIED to specify operation on Channel 299C3 in lieu of Channel 236C3. A reissued construction permit for Channel 299C3 will be sent to McCutcheon, permittee of the new McKinleyville, CA station. The reissued permit will contain a condition that program tests for KMDR cannot commence on Channel 299C3 until program tests for KNHT commence on Channel 273C2, to permit an orderly implementation of service.

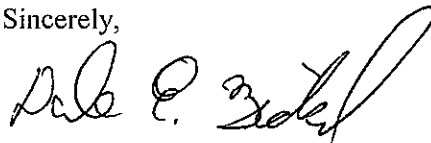
Lastly, pursuant to the grant of Airen's construction permit and the authority found in Sections 4(i), 5(c)(1), 303 and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b), 0.283, 1.420, 73.203(b), and 73.3573 of the Commission's Rules, the assignment for Channel 297C2 at Rio Dell, CA is modified to Channel 273C2. Pursuant to Section 316(a) of the Communications Act, the license for KNHT IS MODIFIED to specify operation on Channel 273C2. The State of Oregon shall file a minor change application on FCC Form 301 within 30 days of the date of this letter specifying operation on Channel 273C2.

⁶ The State of Oregon's confusion over the amendment dates apparently stems from the fact that minor change applications are automatically accepted for filing upon receipt in the CDBS database system, whereas amendments are not accepted for filing until the staff has reviewed them.

The July 26, 2007 amendment to the KZCC proposal (referred to by the State of Oregon) did not contain technical changes, and thus is of no decisional significance in this matter.

These actions are taken pursuant to Section 0.283 of the Commission's rules.

Sincerely,

A handwritten signature in black ink, appearing to read "Dale E. Bickel". The signature is fluid and cursive, with the first name "Dale" being the most prominent.

Dale E. Bickel
Senior Engineer
Audio Division
Media Bureau

cc: Suzanne E. Rogers, Esq.
Garvey Schubert Barer
Ernest T. Sanchez, Esq.