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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Application of)

APPALOOSA BROADCASTING COMPANY,)
INC.)

Nunn, Colorado)

For License to Cover Construction Permit)
For Station KYAP(FM))

File No. BLH-20160217AAB
FIN: 82007

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AUG 14 2017

Federal Communications Commission
Bureau / Office

To: The Chief
Attn: Media Bureau

PETITION FOR PARTIAL STAY

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August 14, 2017

SUMMARY

Appaloosa Broadcasting Company, Inc. ("ABC"), the licensee of Station KYAP(FM), Nunn, Colorado ("KYAP" or the "Station"), hereby petitions for partial stay of the Media Bureau's action opening the possibility that the Bureau could terminate the program test authority that has been issued to KYAP in order to allow it to commence the first broadcast transmission service to the community of Nunn, Colorado.

In determining whether to stay the effectiveness of one of its orders, the Commission considers the following four factors: (1) the petitioner's likelihood of success on the merits on appeal; (2) the irreparable harm the petitioner will suffer absent a stay; (3) whether a stay would cause substantial harm to other interested parties; (4) whether a stay is in the public interest. With respect to factor (1), as demonstrated herein, the Bureau's action in this proceeding is arbitrary and capricious and has no basis in fact or law. The Media Bureau's stated intention violates the Commission's policies and procedural rules as well as Section 307(b) of the Communications Act, which sets service to the public, and not compensation to a party that has a record of strike pleadings, rule violations, and application misrepresentations, as a priority. There is absolutely no reason why KYAP should not be allowed to continue to broadcast as the Commission gives full and fair considerations of the actions of the parties in this proceeding and determines whether an abuser of the Commission's rules is entitled to have its abusive actions funded by the victim of such abuse.

Factors (2)-(4) likewise support ABC's stay request. The Commission have recognized the irreparable harm that both broadcasters and the public suffer when a station is unable to provide service to its intended viewers, and have therefore provided appropriate relief. Further, no harm will befall any other interested parties if the Commission stays its proposed action, as

such a stay is in the public interest and would simply allow the Station, licensed to a party that has played by the rules in this proceeding and brought new transmission service to a community without such service, to continue broadcasting, thereby preserving the status quo.

Accordingly, ABC requests that the Commission stay the termination of KYAP's program test authority and permit ABC to continue operating the Station, in service to the public, while ABC, administratively and judicially appeals the Bureau's clearly erroneous decision.

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PETITION FOR PARTIAL STAY

Appaloosa Broadcasting Company, Inc. ("ABC"), the licensee of Station KYAP(FM), Nunn, Colorado ("Station"), by its attorneys and pursuant to Section 1.43, et al., of the Commission's Rules, hereby files this Petition for Partial Stay of the Media Bureau's decision, dated July 12, 2017,¹ granting, in part, the Informal Objection of Christian Media, Inc. ("CMI") to the above-referenced application for license to cover construction of facilities ("License Application"), as filed by ABC for KYAP. ABC requests a partial stay of the provision in the Letter Ruling declaring that: "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." Letter Ruling at p. 3. ABC, a small broadcaster serving rural markets, and the KYAP's listeners, receiving their first local broadcast transmission service, a principal goal of Section 307(b) of the Communications Act, will suffer

¹ *Letter to Barry A. Friedman, Esq. and Lee G. Petro, Esq.*, Ref. No. 1800B3-CEG (AD, July 13, 2017) ("Letter Ruling").

irreparable harm if the Station is forced to go off the air while the Commission considers the arguments in this matter. Accordingly, the Letter Ruling's suspension of program test authority should be stayed. In support thereof, ABC states as follows.

I. OVERVIEW

In determining whether to stay the effectiveness of one of its orders, the Commission considers the following four factors: (1) the petitioner's likelihood of success on the merits on appeal; (2) the irreparable harm the petitioner will suffer absent a stay; (3) whether a stay would cause substantial harm to other interested parties; and (4) whether a stay is in the public interest.²

With respect to factor (1), as demonstrated below, ABC's simultaneously filed Petition for Reconsideration in this proceeding is highly likely to succeed on the merits. Factors (2)-(4) likewise all support ABC's stay request.³ Congress and the Commission have recognized the irreparable harm that both broadcasters and the public suffer when a station is unable to provide service to its intended listeners, and provided appropriate relief.⁴ Further, no harm will befall any other interested parties if the Commission partially stays the Letter Ruling, as such a partial

² See *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified by, *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

³ *Brunson Communications, Inc.*, 15 FCC Rcd 12883, 12884 (CSB 2000) (recognizing that, although the likelihood of success on the merits is an important element in a petitioner's showing, a request for stay may also be granted if the petitioner makes a strong showing on the other three factors).

⁴ See 47 U.S.C. § 307(c)(3) ("Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405 [47 USC § 405], the Commission shall continue such license in effect"); *Pinelands, Inc.*, 7 FCC Rcd 6058, 6061 n.12 (1992) ("Generally, we permit a disqualified broadcast licensee to continue operation during judicial appeals to ensure service to the public until the court resolves the licensee's qualifications"). If a disqualified broadcast licensee is entitled to a stay, should not a qualified broadcast licensee be entitled to a stay?

stay is in the public interest and would simply allow the Station to continue broadcasting in service to the public, the principal duty of a broadcaster.

ABC considers each of these factors, in turn, below.

II. ABC IS LIKELY TO PREVAIL ON THE MERITS

On August 22, 2007, now almost ten years ago, ABC set out to relocate KYAP and filed an application, in FCC File No. BPH-20070822AAL, requesting Commission approval for a minor modification of its license and a change in certain FM allotments to achieve this result. This modification application sought a change in KYAP's community of license to Nunn, Colorado, along with attendant changes in output channel and facilities. The application was in accord with the Commission's rules. ABC looked forward to the prompt grant of its application and had crafted plans for KYAP to become the first station with a transmission service at Nunn, Colorado. The radio industry was on an upswing and ABC expected to serve promptly the unserved needs of this community and to benefit financially from the radio service it sought to bring to its new community of license.

What ABC did not consider, to its detriment, was that CMI, through its deliberate and unceasing abuse of Commission processes and rules, would do all it could to prevent KYAP from ever effecting its proposed allotment change and to delay as long as possible KCMI's own corresponding channel change to accommodate ABC's proposal as required under the Commission's Rules. Section 316(a) of the Communications Act specifically provides the Commission with the ability to modify a station's license or permit in order to further the public interest. Despite the provisions of Section 316(a), the long history of Commission decisions in which channels have been modified to accommodate the public interest, and the evidence

submitted by ABC in support of its request, on January 16, 2008, CMI submitted a Response to the Commission's Order to Show Cause that was nothing more than a strike pleading, the first of many meritless CMI submissions presented to the Commission in this proceeding.

After nearly two years of consideration, or the lack thereof, the Media Bureau denied CMI's Response and, in so doing, correctly concluded that: "Christian has not raised a substantial or material question of fact or demonstrated that Station KCMI would be harmed by modification of its license to specify operation on the alternate Class C1 channel." Letter to Christian Media Incorporated (AD October 23, 2009). In addition, the Media Bureau issued the following direction to CMI: "Within 30 days of the effective date of this letter, Christian shall submit to the Commission a minor change application for construction permit (Form 301)." Id. CMI failed to comply this direction, sought no stay of it, as required by Section 1.102(b)(2) of the Commission's rules,⁵ and the Commission has, to this date, ignored this egregious violation of its own rules.

CMI, unfazed by the Commission's judgment that its claims were wholly without merit, proceeded to file a Petition for Reconsideration that contained not a single actionable claim. CMI's objective has never been truth or merit, only impasse and delay, and in order to cause as much delay as possible in the consideration of its Petition, CMI fired off a series of pleadings, none of which were permitted under the Commission's Rules, but which were nevertheless received by the Commission without admonishment or objection.

⁵ Section 1.102(b) (2) provides, in pertinent part: "If a petition for reconsideration of a non-hearing action is filed, the designated authority may in its discretion stay the effect of its action pending disposition of the petition for reconsideration."

ABC was forced to expend time and treasure responding to CMI's cynical manipulations of Commission process. For example, ABC was required to respond to a CMI reply pleading that was well outside the scope of ABC's opposition pleading. CMI's self-styled "Statement for the Record and Request for Relief," was another pleading not permitted by Section 1.106 that the Commission nonetheless accepted. More time, labor, and expense was required on ABC's part to deal with, and more delay resulted.

While CMI's Petition for Reconsideration and related pleadings were laughable as a legal matter, they accomplished all CMI wanted them to: it took the Media Bureau another two and one-half years to address already-decided issues that could have been disposed of in a single paragraph (as the Letter Ruling suggests the Media Bureau is wont to do). It was not until May 3, 2012 that the Media Bureau acted on the meritless Petition. Letter to Christian Media Incorporated, Ref. No. 1800B3-TSN (MB May 3, 2012) ("2012 Decision"). Of course, the Media Bureau found no merit whatsoever in any of CMI's arguments and denied the Petition.

In addition to its barrage of strike pleadings, CMI further demonstrated its contempt for the integrity of Commission process by engaging in unauthorized ex parte contacts. In a decision rendered on June 28, 2011, the Office of the General Counsel reached the following conclusion:

The intentional solicitation of prohibited ex parte contacts by Mr. Staman, which CMI does not deny, constitutes a **serious violation** of the Commission's rules for which CMI is responsible as his employer. Accordingly, **we are referring this matter to the Commission's Enforcement Bureau (EB)** to determine whether a forfeiture is warranted (footnotes omitted) (emphasis added).

Now, six years later, the Enforcement Bureau has still not rendered the determination requested by the General Counsel. And, CMI did not make mention of the General Counsel's action in its renewal application in FCC File No. BRH-20130131APP, where it was required to

report what had been found to be a “serious violation.” Despite this misrepresentation, the Commission granted the renewal and never said a word about it despite ABC having raised this very subject in its pleadings. The Commission owes ABC an answer as to whether CMI’s failure to disclose constitutes a lack of candor or misrepresentation that should be dealt with in this proceeding or in a new one.

Another effect of the 2012 Decision was to convince CMI not to seek further administrative or judicial review – perhaps because the full Commission might recognize a strike pleading when it saw one and take action. But CMI still had not ended its delay tactics. It still did not file the long overdue modification of license application, which did not materialize until the middle of 2015 in File No. BPH-20150619AAT.

What did occur was a greenmail effort on CMI’s part. It attempted to negotiate a settlement of this matter even while there were no pending proceedings, using its unfiled modification of license application as a weapon. ABC was willing to engage in such discussions in order to obtain a timely channel change acceptable to ABC without having to rely the limited resources of the Commission. ABC feared that if it did not entertain CMI’s demands, KYAP’s proposed changes could disappear into the regulatory void. The Commission’s dilatory conduct in this proceeding have proven ABC’s fear well-founded.

Alas, the e-mail communications between the parties never even reached the stage of a letter of intent, let alone a draft agreement, as CMI was seeking over \$100,000.00 in greenmail from ABC. ABC walked away from discussions on July 25, 2014.

Even with the Form 301 filed for KCMI, this matter was not treated as a matter that had to be acted on instantaneously by the Media Bureau. It took the Bureau nearly seven months to

act on the application. In any event, CMI hid behind its construction permit in order to further delay compliance with the Commission's 2009 action in this matter. In a letter sent to the Commission on February 5, 2016, CMI relied on the three-year term of a construction permit as a reason why the Commission should not remove the Special Operating Condition to KYAP's construction permit, which would have allowed ABC to proceed with the construction of the KYAP facilities. Of course, had CMI not abused Commission process in withholding its application and then received a further seven month delay courtesy of the Commission, it would not have been able to make this frivolous claim. And, of course, ABC was forced to wait, even longer, for CMI to act.

Finally, having played most of its greatest hits – strike pleadings, unauthorized ex parte contacts, renewal application misrepresentation, attempted extortion, and frivolous time arguments – CMI turned to its final number: the claim that ABC has not reimbursed CMI for KCMI's channel change. All along, ABC has recognized and adhered to the Commission's *Circleville* policy, which places an obligation on the party seeking another's license modification to reimburse that party for certain expenses that are reasonable, prudent, and substantiated. *Circleville, Ohio*, 8 FCC 2d 159, 164-165 (1967). ABC made such a commitment when this process began, and ABC remains willing to honor its commitment, provided that, after CMI's shameless and unprecedented decade-long abuse of process in this proceeding, this is not a one-sided, one-way reimbursement process that fails to differentiate between reasonable and prudent expenses and unreasonable, extortionist, retaliatory ones.

In its reimbursement claims, which were before the Commission in connection with KYAP's license to cover application, CMI included bills for the work of its lawyer and

engineering consultant. Their claims raised a few questions about their honesty, their integrity, and/or their ability, to put it mildly. There were vague claims for engineering expenses, such as: “inv for 301 min for KCMI 061615-1155.” What, one wonders, does that mean? Among the legal expenses, CMI claimed that 2.3 hours were required to undertake a telephone call dealing with “channel change and possible equipment modification” and to “[I]nitiate minor change application and notify consulting engineer.” Such a time expenditure on such a modest amount of work is clearly suspect, evidencing, once again, a cynical intention on the part of CMI, its engineer and its lawyer to game Commission process and policy for private gain.

In its Opposition, ABC once again urged the Commission to recognize that a party cannot abuse the license modification process and then demand a unilateral right to carte blanche reimbursement. As Chairman Pai would say, this really amounts to “Chutzpah.” Based on the record evidence in this proceeding, the Media Bureau should have recognized that reimbursement offsets or counterclaims must be permitted where, as here, the affected licensee (CMI) repeatedly acted in violation of the Commission’s Rules to harm the requesting party (ABC). In an extraordinary case such as this, in addition to distinguishing between reasonable, prudent channel change expenses and unreasonable, bogus ones, the requesting party (ABC) should be allowed to present its own claims for economic injury to offset expenses the license modification party (CMI) has incurred. If the requesting party’s (ABC’s) expenditures exceed those of the affected party (CMI), the requesting party (ABC) should be fully and fairly reimbursed.

Instead of reasoned analysis, in the Letter Ruling, the Media Bureau dismissed ABC’s arguments in two sentences, one of which was a gratuitous comment about state court litigation.

No mention was made whatsoever of all of the many violations committed by CMI. If that was not enough, the same Media Bureau that never faulted CMI for violating the Commission's 30-day directive to file CMI's minor change application, ex parte violation, or renewal application misrepresentation, or expedited consideration of any pleading or application in this case, demanded that the victim pay its abuser, everything the abuser sought, in 30 days or the Bureau would revoke program test authority for a Station it took a decade for the Bureau to authorize in the first place, a Station operating in accordance with the Commission's rules and finally serving the public, which is what the FCC is all about. The Letter Ruling was a gift to CMI. After a decade of delay, suddenly a sense of urgency, for what? To ensure that CMI could be paid for the work it that its professionals undertook to delay and harm ABC at every turn. And more, the Letter Ruling granted CMI, a party with a documented propensity to exploit, violate, and delay Commission process for its own advantage, the power to shut down KYAP if, after a decade of CMI abuse and intransigence, ABC could not suddenly appease CMI in 30 days.

Considering all of the documented violations committed by CMI and the concrete harm suffered by ABC, the Letter Ruling's hasty and unreasoned disposal of this matter is arbitrary and capricious and contrary to law. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Am. Tel. and Tel. Co. v. FCC*, 974 F.2d 1341, 1354 (D.C. Cir. 1992) (agency acted arbitrarily and capriciously by failing to provide reasoned explanation supported by record). It is time for the Commission to give due consideration to this matter. Commission integrity and administrative fairness no less than sound policy and the facts on the record support the requested stay of the Letter Ruling's thoughtless gift to CMI: the power to persist in its

abusive, unreasonable, retaliatory conduct and thereby prevent an honest and play by the rules broadcaster from serving its new listeners, who had to wait a decade to be served.

III. THE REMAINING STAY FACTORS SUPPORT ABC'S REQUEST

The remaining stay factors – namely the irreparable harm the petitioner will suffer absent a stay (second factor), whether a stay would cause substantial harm to other interested parties (third factor), and whether a stay is in the public interest (fourth factor)⁶ – likewise support ABC's request.

As previously noted, Congress and the Commission have recognized the irreparable harm that both broadcasters and the public suffer when a station is unable to provide service to its intended listeners, and provided appropriate relief. Further, no harm will befall any other interested parties if the Commission partially stays the Letter Ruling, as such a stay is in the public interest and would simply allow the Station to continue broadcasting and serving the public. In any event, even where other parties are harmed, courts have determined that a stay is merited where such harm is outweighed by the irreparable harm to the petitioner.⁷ In this case, the only party that could be harmed is the public by being deprived of a broadcast service, and they should not have to suffer that result.

As ABC's analysis of factors (1)-(4) above demonstrates, the equities overwhelmingly favor the grant of a stay in this case.

⁶ See *Virginia Petroleum Jobbers, supra*, as modified by, *Washington Metropolitan Area Transit Commission, supra*.

⁷ See, e.g., *Population Institute v. McPherson*, 797 F.2d 1062, 1081 (D.C. Cir. 1986).

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, Appaloosa Broadcasting Company, Inc., the permittee of Station KYAP(FM), Nunn, Colorado, respectfully requests that the Media Bureau stay the Letter Ruling to the extent necessary to prevent the Media Bureau from terminating KYAP's program test authority and to allow the Station to continue to serve the public until all administrative and judicial review of this matter is finally resolved.

Respectfully submitted,

**APPALOOSA BROADCASTING
COMPANY, INC.**

By: 

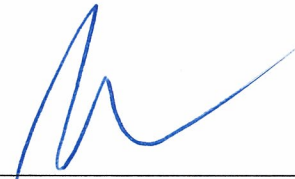
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Dated: August 14, 2017

CERTIFICATE OF SERVICE

I, Barry A. Friedman, hereby certify that I have served on this 14th day of August, 2017,
a copy of the foregoing **Petition for Partial Stay** on the following party by first-class mail,
postage pre-paid:

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Barry A. Friedman