



Federal Communications Commission  
Washington, D.C. 20554

January 4, 2018

*In Reply Refer to:*  
**1800B3-IB**

Dennis J. Kelly, Esq.  
Counsel to KZLZ, LLC  
P.O. Box 41177  
Washington, DC 20018-0577

Susan A. Marshall, Esq.  
Counsel to Cochise Broadcasting, LLC  
Fletcher Heald & Hildreth, PLC  
1300 N. 17<sup>th</sup> St, 11<sup>th</sup> Floor  
Arlington, VA 22209

In re: **KXZK(FM), Vail, AZ**  
Cochise Broadcasting, LLC  
Facility ID No. 164116  
File No. BPH-20170524AAF

**KWCX-FM, Tanque Verde, AZ**  
KZLZ, LLC  
Facility ID No. 72659  
File No. BPH-20170523ACE

**KZLZ(FM), Casas Adobes, AZ**  
KZLZ, LLC  
Facility ID No. 36022  
File No. BPH-20170524AAA

**Petition for Reconsideration**

Dear Counsel:

The Audio Division, Media Bureau (Bureau) has before it a Petition for Reconsideration (Petition) filed by KZLZ, Inc. (KZLZ) on July 26, 2017. KZLZ seeks reconsideration of a Bureau letter dated June 21, 2017 (Decision),<sup>1</sup> which: (1) dismissed its applications to make minor modifications to KWCX-FM, Tanque Verde, Arizona and KZLZ(FM), Casas Adobes, Arizona;<sup>2</sup> and (2) granted an application by Cochise Broadcasting, LLC (Cochise) to make a minor modification to KXZK(FM) Vail, Arizona.<sup>3</sup> For the reasons stated below, we deny the Petition.

---

<sup>1</sup> *Cochise Broadcasting, LLC*, Letter Order (MB June 21, 2017), reported in *Broadcast Actions*, Public Notice, Report No. 49014 (Jun. 26, 2017).

<sup>2</sup> File No. BPH-20170523ACE (filed May 23, 2017) (Tanque Verde Application); File No. BPH-20170524AAA (filed May 24, 2017) (Casas Adobes Application).

<sup>3</sup> File No. BPH-20170524AAF (filed May 24, 2017) (Vail Application). Also before us are responsive pleadings. See Cochise Opposition to Petition to Deny (filed Aug. 9, 2017) (Opposition); KZLZ Reply (filed Aug. 21, 2017) (Reply). Cochise contends that KZLZ did not object to the Vail Application prior to grant and, thus, is without standing to seek reconsideration. See Opposition at 1-2, citing 47 CFR § 1.106(b)(1). KZLZ responds that it is a party to the proceeding because the Tanque Verde and Vail Applications are “intertwined,” and argues that consideration of its arguments would serve the public interest. See Reply at 2-3, citing 47 CFR §§ 1.106(b)(2),

**Background.** This case arises from proposals by two Arizona FM licensees to move existing stations to the same channel. In 2010, the staff granted Cochise's application to modify KXZK(FM), Vail, Arizona from Channel 279A to Channel 283A. Cochise filed another application for identical Channel 283A facilities after the first construction permit expired.<sup>4</sup> Cochise never implemented the change, and its most recent permit expired at 3:00 a.m. on May 23, 2017. Later that day, KZLZ filed the Tanque Verde Application to modify Station KWCX-FM from Channel 285A at Tanque Verde to Channel 283A, also at Tanque Verde.<sup>5</sup> The Tanque Verde Application was part of a coordinated move to upgrade co-owned KZLZ(FM) from Channel 287C3 to Channel 287C2 at Casas Adobes. Commission records reflect that KZLZ filed the Casas Adobes Application at 12:37 a.m. Eastern Time on May 24, 2017. Also on May 24, Cochise filed the Vail Application, seeking a new permit to replace its expired permit. The Vail and Tanque Verde/Casas Adobes Applications are in technical conflict.

The Bureau determined that the Tanque Verde and Casas Adobes Applications were defective because KZLZ filed them on May 23 and May 24, respectively, whereas Section 73.3517(e) of the Commission's rules (Rules) requires that contingent applications "be filed on the same date."<sup>6</sup> The Bureau also noted two additional defects in the Tanque Verde Application: (1) it violated Section 73.207 by failing to protect the co-channel reserve assignment of Channel 283A at Vail; and (2) it violated Section 73.3573(g)(2) by proposing facilities for KWCX-FM that were not mutually exclusive with that station's last licensed facilities, as would be required for consideration as a "minor" modification.<sup>7</sup> Accordingly, the Bureau dismissed the Tanque Verde and Casas Adobes Applications. The Bureau then granted Cochise's Vail Application. KZLZ seeks rescission of the Vail grant and reinstatement of the Tanque Verde and Casas Adobes Applications.

KZLZ does not directly challenge the Bureau's finding that the Tanque Verde Application failed to protect the Channel 283A assignment at Vail. Rather, it argues that Cochise warehoused Channel 283A for over six years, did not construct, and should not receive yet additional time to implement the twice-authorized channel change.<sup>8</sup> With respect to its own applications, KZLZ claims to have met Section

---

1.1202(d)(1), 73.207(b)(1). We need not resolve this dispute because KZLZ's arguments would not be successful even if, *arguendo*, it were to demonstrate standing.

<sup>4</sup> The first permit ran from June 24, 2010 to June 24, 2013, but Cochise did not complete construction. See File No. BPH-20090406AKT (2010 Permit). The Bureau granted another permit for the same facilities running from May 23, 2014 through May 23, 2017, which also expired without construction. See File No. BPH-20130624AAH (2014 Permit).

<sup>5</sup> Although KWCX-FM is nominally identified with the community of Tanque Verde, it is not licensed at that location. The station's last license (File No. BLH-20001114AAD) specified Channel 285C2 at Willcox, Arizona. In 2009, the Bureau re-assigned Channel 285 from Willcox to Tanque Verde and downgraded the allotment from a Class C2 to a Class A facility at KZLZ's request. (File No. BPH-20080102ABU) (Tanque Verde Community of License Modification Application). KZLZ filed an application in 2012 to license Tanque Verde facilities on Channel 285A (File No. BLH-20120822ACE), but the Bureau dismissed that application in 2015 at KZLZ's request, following a Bureau inquiry into an alleged failure to build. Thus, Channel 285A at Tanque Verde is considered a reserved assignment (*i.e.*, no longer vacant and must be protected, but not yet permitted or licensed). See generally, *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212, 14222 (2006) (*Community of License Order*).

<sup>6</sup> Decision at 2; 47 CFR § 73.3517(e).

<sup>7</sup> Decision at 2, n.1, citing 47 CFR §§ 73.207, 73.3573(g)(2).

<sup>8</sup> Specifically, KZLZ argues that Cochise: (1) is unqualified because it failed to build at Vail and has been silent at other stations; (2) has received a total of nine years to build, whereas construction permits generally have a three-year limit under 47 CFR § 73.7398(a); and (3) acted contrary to the public interest and spirit of the Rules by failing to build at Vail. See Petition at 2-6. It also argues that spectrum warehousing is contrary to Commission policy. See Reply at 5 citing, *Radioactive, LLC*, Hearing Designation Order, 32 FCC Rcd 6392, 6394 (2017) (stating that

73.3517(e)'s "same date" requirement by electronically filing the Tanque Verde and Casas Adobes Applications from Colorado just before midnight, Mountain Time, on May 23, 2017.<sup>9</sup> KZLZ disputes the Commission's use of Eastern Time which, because it is two hours ahead, resulted in the electronic filing system assigning a filing date of May 23rd to one application and of May 24<sup>th</sup> to the other.<sup>10</sup>

KZLZ also challenges one of the Bureau's alternative grounds for dismissal of the Tanque Verde Application – *i.e.*, that the proposed facilities were not mutually exclusive with its last licensed KWCX-FM facilities at Willcox, Arizona and, thus, could not be processed as "minor" under Section 73.3573(g)(2). KZLZ argues that because the Bureau deleted the Willcox allotment in 2009, Willcox is no longer KWCX-FM's community of license, and the Bureau's analysis, thus, should not have relied upon Willcox facilities.<sup>11</sup> It believes that the Bureau's analysis of mutual exclusivity should, instead, have been based upon the reference coordinates for the Channel 285A allotment at Tanque Verde.

Cochise responds that the Petition lacks merit. It characterizes the arguments against the Vail Application as "irrelevant" and agrees with the Bureau that the Tanque Verde and Casas Adobes Applications were deficient with respect to: (1) timing; (2) protection of the Vail reserved assignment; and (3) mutual exclusivity between KWCX's existing and proposed facilities.<sup>12</sup> Cochise argues that KZLZ's suggestion that the Bureau should have based its analysis on the Tanque Verde allotment is contrary to the Rules and would circumvent Commission policy.<sup>13</sup>

**Discussion.** The Commission will consider a petition for reconsideration only if the petitioner shows a material error in the original order or raises additional facts not known or existing at the time of the petitioner's last opportunity to present such matters.<sup>14</sup> KZLZ alleges that the Bureau made three central errors: (1) treating the Tanque Verde and Casas Adobes Applications as not filed on the "same date;" (2) relying upon KWCX-FM's formerly licensed facility at Willcox to determine whether the Tanque Verde Application satisfied minor change filing requirements; and (3) failing to hold Cochise to a three-year construction period at Vail.

---

broadcast spectrum should not lay fallow and, thus, designating for hearing license renewal application of station that broadcast only intermittently).

<sup>9</sup> Petition at 6-7, Exh. G.

<sup>10</sup> KZLZ claims that the Commission should consider "the location where the filer was located," because sole use of Eastern Time is "harsh and discriminatory" to applicants in other time zones. *Id.* at 6. It argues that use of Mountain Time would not be prejudicial in the present case because KZLZ filed both of its applications before Cochise filed the Vail Application. *Id.* at 6, 9. KZLZ further contends that the Bureau treated it disparately by dismissing its applications for this allegedly "trivial" matter while granting Cochise's applications despite allegedly "serious and material public interest" issues. *Id.* at 4, 8-9, citing *Melody Music, Inc. v. FCC*, 345 F.2d 739 (D.C. Cir. 1965) (*Melody Music*). Additionally, KZLZ claims that it had no notice that contingent applications would be dismissed for noncompliance with the "same date" requirement. *Id.* at 7, citing *Salzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985) (the less forgiving the application processing standard, the more precise its requirements must be); *Bamford v. FCC*, 535 F.2d 78, 82 (D.C. Cir. 1976) (standards must apprise an applicant of what is expected).

<sup>11</sup> Petition at 7-8, citing *A. Wray Fitch, Esq.*, Letter Order, 31 FCC Rcd 10661, 10662-63, n.10 (MB 2016) (*Fitch*) (Bureau deleted Willcox assignment in 2009 upon grant of a KWCX-FM construction permit for Tanque Verde, and operation at Willcox is pursuant to an implied Special Temporary Authority). *See supra*, note 5.

<sup>12</sup> Petition at 2, 6. Cochise also suggests that applications inconsistent with Cochise's expired permit were due on May 24 and that applications filed on May 23, as KZLZ intended, would have been premature. *Id.* at 3.

<sup>13</sup> *Id.* at 5, citing *Community of License Order*, 21 FCC Rcd at 14212. Cochise also argues that KZLZ cannot logically claim the advantages of a Tanque Verde assignment despite expiration of KZLZ's construction permit for that community yet fail to protect Cochise's Vail assignment after a similar permit expiration. *Id.* at 5.

<sup>14</sup> *See* 47 CFR § 1.106(c), (d). *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).

The Bureau did not err in basing its analysis upon KWCX-FM's formerly licensed facilities at Willcox. Section 73.3573(g)(2) treats community of license changes as minor and, thus, not subject to filing windows, if the proposed facilities and "current facilities" are mutually exclusive.<sup>15</sup> The rule also provides an alternative analysis, based on the current allotment instead of current facilities, but only "in the case of a winning auction bidder or tentative selectee," *i.e.*, for stations that have never been licensed.<sup>16</sup> KZLZ contends that the Bureau should have used the alternative analysis, determined that the Channel 283A proposal at Tanque Verde was mutually exclusive with the assignment of Channel 285A at the same community, and classified the proposed modification as a minor. We disagree. Section 73.3573(g)(2) establishes a facilities-based definition of minor modifications for licensed stations. The rule's alternative definition for stations not yet licensed is inapplicable because KWCX-FM has been licensed for many years with its most recent license issued in 2000 for Channel 285C2 at Willcox (File No. BLH-20001114AAD). As noted earlier, the Bureau deleted the Willcox allotment in 2009 when it granted the Tanque Verde Community of License Modification Application. However, the Bureau never issued a license for any KWCX-FM facilities at Tanque Verde. Rather, KZLZ has continued to operate KWCX-FM's formerly licensed Willcox facilities pursuant to an implied STA.<sup>17</sup>

Until KWCX-FM is licensed for new facilities, any "minor" proposal to modify the station must be mutually exclusive with its last licensed facility at Willcox. Because there is no such mutual exclusivity between those Willcox facilities and the Tanque Verde Application, that proposal is a major change that cannot be considered outside of a filing window. The Commission bars applicants from relying upon unbuilt, unlicensed facilities to move to locations far removed from the original community of license.<sup>18</sup> The Bureau, as directed by the Commission, thus returns as unacceptable any non-window-filed proposal by a permittee that has not built its current permitted facilities, unless the move is mutually exclusive with either its built and operating facilities or its original allotment.<sup>19</sup> This policy prevents applicants from sidestepping the safeguards and competition provided by filing windows.<sup>20</sup> The Bureau correctly dismissed the Tanque Verde Application as a major change proposal. This defect alone would be fatal to the Tanque Verde Application as well as to the Casas Adobes Application, which is contingent upon a Tanque Verde grant.<sup>21</sup>

A second defect in the Tanque Verde Application—failure to protect Channel 283A at Vail in violation of Section 73.207—is similarly fatal. KZLZ's Petition neither addresses nor disputes this defect. Expiration

---

<sup>15</sup> See 47 CFR § 73.3573(g)(2).

<sup>16</sup> *Id.*

<sup>17</sup> See *supra*, notes 5, 11; *Fitch*, 31 FCC Rcd at 10662-63.

<sup>18</sup> See *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212, 14217-19 (2006) (*Community Changes*); *Alaska Ed. Radio System, Inc.*, Order and Notice of Apparent Liability, 24 FCC Rcd 14657, 14659-60 (MB 2009) (applicant's mutual exclusivity analysis "using STA facilities as the basis for a permanent community of license change runs contrary to the nature of STA" and did not justify a waiver of Section 73.3573(g)(2)).

<sup>19</sup> See *Community Changes*, 21 FCC Rcd at 14219.

<sup>20</sup> As Cochise rightfully observes, it would be possible under KZLZ's reasoning for applicants to circumvent Commission policy by achieving major moves simply by obtaining a construction permit for a minor community change, requesting permit cancellation, and then filing an application claiming mutual exclusivity with the cancelled permit. Opposition at 5. The Bureau has, in other services, rejected similar attempts to achieve major changes by successive minor moves. See *DTV America Corp.*, Order, \_\_\_ FCC Rcd \_\_\_ (MB rel. Oct. 31, 2017) (low power television); *John F. Garziglia, Esq.*, Letter, 26 FCC Rcd 12685, 12687-88 (MB 2011) (successive minor "hops" by FM translator were an abuse of process).

<sup>21</sup> See 47 CFR § 73.3517(e) (dismissal of any one of related contingent applications will result in dismissal of all related applications).

of a construction permit, such as Cochise's 2014 Permit for Vail, does not negate the underlying reserved assignment, such as that for Channel 283A at Vail.<sup>22</sup>

We further reject KZLZ's argument that the Bureau improperly dismissed the Tanque Verde and Casas Adobes Applications for not being filed on the "same date," as Section 73.3517(e) requires for contingent proposals. KZLZ provides no support for its view that Commission filing deadlines and processing standards must be individualized to the applicant's filing location, in this case Colorado (Mountain Time).<sup>23</sup> The Commission's electronic filing system assigns file numbers upon receipt at the FCC's Washington, D.C. headquarters (Eastern Time), a location mandated by the Act.<sup>24</sup> Because KZLZ submitted its applications on different dates (Eastern Time), the Bureau could not consider KZLZ's contingent applications without waiving Section 73.3517(e)'s "same date" requirement.<sup>25</sup> KZLZ did not request a waiver of that provision, which the Commission adopted as one of several safeguards needed for the expeditious consideration of complex, contingent proposals with limited staff.<sup>26</sup> If, *arguendo*, we nevertheless were to waive the "same date" requirement on our own motion,<sup>27</sup> the two other violations discussed above would prevent reinstatement of and favorable action on the applications.

With respect to grant of the Vail Application, we reject KZLZ's contention that the Bureau ignored Section 73.3598(a)'s three-year limit on construction permits.<sup>28</sup> No rule prohibits the filing of a "replacement" construction permit application. KZLZ mischaracterizes the Bureau's grant of a replacement application as having approved "a second three[-]year extension of a construction permit...which expired in 2013."<sup>29</sup> KZLZ does not provide any case-specific information from which

<sup>22</sup> See *supra*, note 5. To the extent that KZLZ questions Cochise's qualifications to remain a broadcast licensee, we note that the Bureau recently entered into a consent decree regarding some of Cochise's applications to renew licenses for other stations, requiring Cochise to donate some of its licenses and allowing it to retain others. See *Cochise Broad., LLC*, Order, 32 FCC Rcd 3932 (MB 2017).

<sup>23</sup> To the contrary, the Rules establish uniform processing standards, as needed for consideration of large numbers of applications and pleadings filed electronically from multiple time zones. Documents are considered filed upon receipt by the Commission and electronically-filed broadcast applications "must be received by the Commission's electronic filing system before midnight" on the filing date. 47 CFR § 1.4(f). Section 1.7 of the Rules provides that, unless otherwise provided, "pleadings and other documents are considered to be filed with the Commission upon their receipt at the location designated by the Commission." 47 CFR § 1.7. Lack of a specified time deadline based on receipt by the Commission's electronic filing system, would create incentives for parties to gain extra time artificially by routing electronic filings through servers in late time zones, such as the Hawaii-Aleutian time zone, and would interfere with the Commission's ability to shut the system down each night after midnight to conduct system maintenance on a predictable schedule.

<sup>24</sup> See 47 U.S.C. § 154(e).

<sup>25</sup> See 47 CFR § 73.3566(a) (patently defective applications not accepted unless accompanied by an appropriate waiver request). See generally *Albany County School Dist. 1, Laramie, WY*, Order, 17 FCC Rcd 9465, 9467, para. 5 (WCB 2002) (denying request for waiver by school district located in Mountain Time zone which did not understand that Eastern Time governed filing deadline for application to qualify for E-rate discount).

<sup>26</sup> See 1998 Biennial Regulatory Review – *Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, First Report and Order, 14 FCC Rcd 5272, 5283, para. 16 (1999) (*Technical Streamlining*). The Commission put applicants on notice at that time of the consequences of submitting contingent applications that did not meet the requirements, and we thus reject KZLZ's allegation that applicants have no such notice. *Id.*; See *supra*, note 10; see also 47 CFR § 73.3564.

<sup>27</sup> See *Marissa G. Repp, Esq.*, Letter, 28 FCC Rcd 3257, 3263 (MB 2013) (finding special circumstances warranting a waiver of Section 73.3517(e) but noting that the Bureau will not routinely waive that provision); *Last Bastion Station Trust, LLC*, Letter, 23 FCC Rcd 4941 (MB 2008).

<sup>28</sup> That rule provides for grants of broadcast construction permits three years in length, which can be tolled for limited encumbrances beyond the permittee's control. 47 CFR § 73.3598.

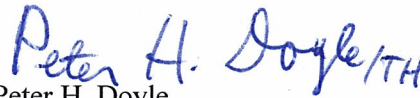
<sup>29</sup> Petition at i.

we could conclude that Cochise's filing of the Vail Application was an abuse of process or that the grant of that application was an error.

Finally, we reject KZLZ's allegation of disparate treatment. The Bureau must, as KZLZ notes, treat similarly-situated applicants in a like manner.<sup>30</sup> The KZLZ and Cochise applications, while proposing to use the same channel, were not otherwise similar. KZLZ's applications were contingent and, on their face, unacceptable. In contrast, the Vail Application was not contingent and was acceptable when filed.

**Conclusion/Actions.** Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by KZLZ, Inc. on July 26, 2017, with respect KXZK(FM), Vail, Arizona, KWCX-FM, Tanque Verde, Arizona, and KZKZ(FM), Casas Adobes, Arizona (File Nos. BPH-20170524AAF, BPH-20170523ACE, and BPH-20170524AAA) IS DENIED.

Sincerely,



Peter H. Doyle  
Chief, Audio Division  
Media Bureau

---

<sup>30</sup> See *Melody Music*, 354 F.2d at 733.