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April 24, 1996

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John A. Karousos, Chief, Allocations Branch
Policy and Rules Division, Mass Media Bureau
Federal Communications Commission
2000 M Street, N.W., Room 565
Washington, D.C. 20554 (Stop Code 1800D5)

Re: MM Docket No. 94-78
RM-8472, RM-8525

Dear Mr. Karousos:

The purpose of this letter is to make a record of the reason North Jefferson Broadcasting Company, Inc., licensee of Station WLBI(FM) in Warrior, Alabama, and Deep South Broadcasting Company, licensee of Station WBAM-FM in Montgomery, Alabama, are not this day filing minor change applications pursuant to the Report and Order in the above proceeding released on December 11, 1995 (10 FCC Rcd 13630).

The Report and Order amended the FM Table of Allotments in §73.202(b) of the Commission's Rules, effective January 25, 1996, to change the channel on which WLBI operates in Warrior to 254C1 and to change the channel on which WBAM-FM operates in Montgomery to 255C1. The Report and Order also modified the licenses of the two stations to specify operation on the new channels, subject to conditions that included the following:

"Within 90 days of the effective date of this Order, the licensees shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility."

Today is the 90th day after the effective date of the Order. However, prior to its becoming effective, one of the other participants in the docket proceeding filed, on January 11, a petition for reconsideration of the action taken. Under §1.420(f)

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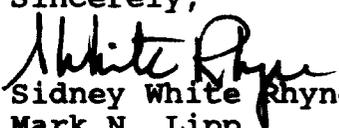
Mr. John A. Karousos, Chief
April 24, 1996
Page 2

of the Commission's Rules, the filing of that petition resulted in an automatic stay of the effect of the change in the rules pending action on the petition.

The licensees of WLBI and WBAM-FM have filed an opposition to the petition for reconsideration and also a motion for waiver of the automatic stay. However, they cannot file minor change applications for facilities to operate on Channels 254C1 and 255C1 because the effectiveness of the change in the rules to specify those channels has, under §1.420(f), been stayed. In fact it is our understanding that, if applications were filed, the Commission would return them and keep the filing fees of \$2,450 for each licensee.

Presumably, if the petition for reconsideration is denied and an application for review is not filed, or if the automatic stay is removed, the change in the channel allotment will become effective as of the date of Commission action and accordingly the licensees will have until 90 days thereafter within which to file their applications. If our understanding is not correct, please let us know.

If it is intended that the applicants file within some time period other than 90 days from the date the Commission action becomes effective, we ask that the Commission action on the petition for reconsideration or the motion for removal of the automatic stay make clear the period within which they must file. Finally, though it seems to us that a motion for extension of the filing period set in the Report and Order is inappropriate and should be unnecessary, for the reasons stated in this letter, if you will require a motion for extension please let us know.

Sincerely,

Sidney White Rhyne
Mark N. Lipp
Counsel in this Matter for the
Licensees of Both WLBI and WBAM-FM

SWR/wp
cc: Walton E. Williams III, Esq.
Lauren A. Colby, Esq.
Ms. Nancy Joyner, Allocations Branch

* * * HAND DELIVERED * * *

This delivery is not secured in an envelope because of the current security regulations imposed by the FCC.

TO:

**Ms. Myrtle D. Hastie
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.--Room 344
Washington, D.C. 20554**

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April 24, 1996

**MEMO FROM THE DESK OF
HOWARD A. TOPEL**

_____ To get this to you promptly, I am mailing it
without sending a cover letter.

_____ Per your request/our telephone conversation.

_____ For your information ... no action necessary.

_____ Please call me about this.

_____ Courtesy copy.

 X Dear Myrtle:

At Taft Snowden's suggestion, I am providing you in connection with the KIKC, Forsyth, Montana, application with a copy of the Commission order authorizing KYUS-TV under the television satellite policy.

Thank you for your consideration and courtesy.

Howard

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Big Horn Communications, Inc.
(Assignor) File No. BALCT-940314KF

and

KYUS Broadcasting Corporation
(Assignee)

For Assignment of License of
Station KYUS-TV, Channel 3
Miles City, Montana

MEMORANDUM OPINION AND ORDER

Adopted: February 15, 1995; Released: February 27, 1995

By the Commission:

1. The Commission has before it for consideration an application to assign the license of station KYUS-TV (ABC), Channel 3, Miles City, Montana, from Big Horn Communications, Inc. (Big Horn) to KYUS Broadcasting Corporation (KBC). Big Horn, the licensee of KYUS-TV, is currently authorized to operate the station "primarily as a satellite" of its commonly-owned station KSVI-TV (ABC), Channel 6, Billings, Montana. The sole stockholder of KBC, the proposed assignee, also controls the licensee of station KXGN-TV (CBS,NBC), Channel 5, Glendive, Montana. Because the predicted Grade B contours of KYUS-TV and KXGN-TV overlap, the proposed acquisition would violate the duopoly provision of Section 73.3555 of the Commission's Rules. However, KBC proposes to operate KYUS-TV as a satellite of KXGN-TV pursuant to the satellite exception contained in Note 5 to the Commission's multiple ownership rule. The assignment application and satellite proposal are unopposed.

2. Under our satellite policy, *Television Satellite Stations*, 6 FCC Rcd 4212 (1991) (petitions for partial stay and reconsideration pending),¹ applicants for television satellite status are entitled to a presumption that the proposed satellite operation is in the public interest, if the applicants meet the following three criteria: (1) there is no City Grade signal contour overlap between the parent and the satellite; (2) the proposed satellite would provide service to an underserved area; and (3) no alternative operator is ready and able to construct or to purchase and operate the

proposed satellite as a full-service station. *Id.* 4213-14. Applications that qualify for the presumption, and are un rebutted by an opposing party, will be viewed favorably by the Commission. *Id.* at 4214. For the reasons set forth below, we find that the proposed operation of KYUS-TV as a satellite station of KXGN-TV is consistent with our policy.

3. The applicant's engineering study demonstrates that there will be no overlap of the City Grade contours of KYUS-TV and KXGN-TV. Thus, the satellite proposal meets the first component of the presumption.

4. With respect to the second criterion, applicants can demonstrate that an area is underserved by using one of two tests. The first is a "transmission test," whereby a proposed satellite's community of license is considered underserved if there are two or fewer full-service stations already licensed to it.² Our records show that KYUS-TV is the only television station licensed to Miles City. Therefore, utilizing the "transmission test," the applicant has demonstrated that the proposed satellite station will provide service to an underserved area.

5. Finally, to qualify for the presumption, applicants must demonstrate that no alternative operator is ready and able to construct or to purchase and operate the television station as a full-service station. In this regard, KBC submitted an affidavit of Thomas Hendrickson, who has been President of Big Horn since July 1989. Mr. Hendrickson states that KYUS-TV has been operated as a satellite since its acquisition by Big Horn in 1986. Nevertheless, Mr. Hendrickson maintains that during his tenure as the licensee's president, he came close to shutting down the station on several occasions because the station never created enough revenue to pay its operating costs. Also, during his tenure, Mr. Hendrickson states that he had discussed the sale of KYUS-TV with many people in the broadcasting business, including three prominent nationally known media brokerage companies which declined to list the station. Statements from several of these contacts were also submitted by KBC. According to James W. Blackburn, Jr. of Blackburn & Company, Incorporated, the size and location of the Miles City market made KYUS-TV's operation as a full-service station "economically impossible." That opinion was also shared by Robert Harrison, an experienced broadcast consultant who had earlier conducted an on-site evaluation of Big Horn's operations in Montana. According to Neilsen's November 1993 audience estimates, Custer County, in which Miles City is located, has only 4,000 households and KYUS-TV reaches only 3,200 of them. Based on this data and the fact that Miles City is an isolated community located 70 miles from Glendive and 145 miles from Billings, KBC alleges that it is simply impossible for KYUS-TV to generate adequate advertising revenues from service to 3,200 homes to cover a significant portion of the costs that a full-service station would incur. Consequently, KBC concludes that no buyer will be found that would attempt or be able to operate KYUS as a full-service station. Based on the information provided, we believe that Big Horn has adequately dem-

¹ We note that there is an outstanding proceeding concerning television satellite stations which invites comment on whether satellites should be exempted from the 12-station limit set out in the multiple ownership rules. *Second Further Notice of Pro-*

posed Rulemaking in Docket No. 87-8, 6 FCC Rcd 5010 (1991). Grant of the application before us will not implicate the 12-station rule.

² We have also defined an "underserved area" in terms of a "reception test," but that test is not material here. See *Television Satellite Stations*, 6 FCC Rcd at 4215.

onstrated the unlikelihood of finding an alternative operator willing and able to operate KYUS-TV as a full-service station. See *Midwest Communications, Inc.*, 7 FCC Red 159, 161-62 (1991). Thus, we conclude that the applicant has satisfied the third criterion.

6. Therefore, the applicants have established the basis for presuming that continued satellite operation should be authorized, and we find no facts suggesting that the presumption not be followed in this case. Accordingly, we find that KBC's proposed satellite operation of KYUS-TV is in the public interest. In view of the foregoing, and having determined that the applicants are qualified in all other aspects, we find that a grant of the application would serve the public interest.

7. Accordingly, IT IS ORDERED, That the application (BALCT-940314KF) for consent to assign the license of station KYUS-TV, Miles City, Montana, from Big Horn Communications, Inc. to KYUS Broadcasting Corporation, IS GRANTED.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this Memorandum Opinion and Order to the applicants by Certified Mail -- Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary