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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of) MM Docket No. 96-104
)
SOUTHWESTERN BROADCASTING)
CORPORATION) File No. BRH-900315UC
)
For Renewal of License)
for Station KLZK(FM))
Brownfield, Texas)

To: Administrative Law Judge
Richard L. Sippel

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MASS MEDIA BUREAU'S COMMENTS IN OPPOSITION TO MOTION FOR
SUMMARY DECISION AND COUNTERMOTION FOR SUMMARY DECISION

1. On July 5, 1996, Southwestern Broadcasting Corporation ("Southwestern") filed its Motion for Summary Decision ("Motion") in this case. The Mass Media Bureau ("Bureau") hereby opposes Southwestern's motion and submits its own Countermotion for Summary Decision ("Countermotion").

Southwestern's Motion

2. In its motion, Southwestern seeks resolution in its favor of each of the issues contained in the HDO. These issues seek to determine whether Southwestern has the capability and intent to expeditiously resume the broadcast operations of Station KLZK(FM), Brownfield, Texas, consistent with the Commission's rules; and whether Southwestern has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules. See Hearing Designation Order ("HDO"), DA 96-657, released April 29, 1996. In designating these issues,

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the Bureau found that substantial questions had been raised by Southwestern's failure to return the station to the air in the almost six years since it acquired the facility in 1990. HDO at para. 5. Specifically, the Bureau noted Southwestern's failure to file a promised construction permit application simultaneously with a petition for rulemaking to resolve short-spacing problems involving Lamesa, Texas, FM Stations KMMX(FM) and KIOL-FM. Finally, the Bureau noted that Southwestern itself had cited financial considerations and its loss of a tower site as the reasons it had not returned to the air. HDO at para. 4.

3. Pursuant to Section 1.251 of the Commission's Rules, in order to warrant summary decision, a party must show that there is no genuine issue of fact for determination at the hearing. 47 C. F. R. Sec. 1.251. To sustain a motion for summary decision, it must be established that "the truth is clear," that "the basic facts are undisputed," and that "the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts." Big Country Radio, Inc., 50 FCC 2d 967 (Rev. Bd. 1975). Southwestern contends that it could not return Station KLZK(FM) to the air because authorizations issued by the Commission to KMMX(FM), Lamesa, Texas, KIOL-FM, Lamesa, Texas, and KKYN-FM, Plainview, Texas, prevented Southwestern from implementing an upgrade to Channel 282C2, or downgrading to Channel 282A, or restoring operation on its licensed frequency of Channel 280A. Southwestern's assertions, however, are not supported by the facts or the law. Consequently, the Bureau submits that its motion for summary decision in its favor must be denied.

4. Southwestern's allegation that it was precluded from resuming operations on its licensed frequency, Channel 280A, due to Commission "action and subsequent grant of an application to implement [Station] KKYN['s] changes" is a gross overstatement which ignores Southwestern's acquiescence in the Commission's issuance of the KKYN-FM authorization. Station KKYN-FM was authorized, effective December 1990, to change frequencies and upgrade from Channel 280A to Channel 280C1. This upgrade ultimately precluded KLZK(FM)'s resumption of service on its authorized Channel 280A.¹ The Report and Order, however, noting Station KLZK(FM)'s silence and its plan to vacate Channel 280A through its then-pending Channel 282C2 upgrade application, specifically provided that KLZK(FM) "could continue or reestablish operation" on Channel 280A at any time until the KKYN-FM upgrade construction permit (File No. BPH-901113IA) was issued. The Report and Order also contemplated that KLZK(FM) could thereafter alternatively pursue its Channel 282C2 upgrade or file an application to downgrade to Channel 282A in lieu of operating on Channel 280A. 4 FCC Rcd at 8788. Southwestern was therefore free to restore service on Channel 280A at any time from July 1990 until April 28, 1992, the date on which the KKYN-FM construction permit was issued, but it chose not to do so. Moreover, Southwestern was, thereafter, free to pursue a downgrade to Channel 282A, but never pursued that alternative. Of further significance is the fact that at the time KKYN-FM's construction permit was ultimately issued, KLZK(FM)'s Channel 282C2 upgrade application had been dismissed on March 17, 1992, by the Audio Services Division as technically deficient due to short-spacing problems. See Motion, Exhibit H. No appeal of that dismissal was taken, nor was a

¹Report and Order in MM Docket 88-571, 4 FCC Rcd 8788 (MMB 1989).

corrected Channel 282C2 upgrade application or alternative downgrade application for Channel 282A ever filed by Southwestern prior to designation of the instant license renewal application for hearing. Consequently, Southwestern's failure to take any affirmative remedial action during this period, to restore service on Channel 280A, or to timely ensure the viability of its Channel 282C2 upgrade proposal, or to pursue a downgrade to Channel 282A, reveals its lack of commitment to restoring broadcast service on Station KLZK(FM). It was this lack of commitment, and not the Commission's grant of the KKYN-FM application, that was responsible for Southwestern's failure to restore broadcast operations on Station KLZK(FM).

5. Southwestern also claims that the Commission's grant of special temporary operating authorities ("STAs") for both Lamesa Stations KMMX(FM) and KIOL-FM precluded it from implementing its Channel 282C2 upgrade proposal, or alternatively pursuing operation on Channel 282A. Again, Southwestern ignores the law, which favors upgrade proposals over modification applications and STAs. Section 73.1635(b) of the Commission's Rules provides that "STA[s] may be modified or cancelled by the FCC without prior notice or right to hearing." Here, upon discovering that the KIOL-FM and KMMX(FM) STAs were short-spaced with KLZK(FM)'s Channel 282C upgrade proposal, Southwestern, rather than requesting revocation of those STAs, proposed a facilities-exchange between KLZK(FM) and KMMX(FM). See Motion, Exhibit G. For the next three years Southwestern did nothing towards returning KLZK(FM) to operational status.² Finally, in a letter dated December 1,

²During that period, on December 3, 1992, the Commission's staff inquired specifically about KLZK(FM)'s operational status, and directed it to restore operation as a Class A facility or request further silent-authority in conjunction with the filing of an acceptable Channel 282C2 upgrade application. See Motion, Exhibit I. Although Southwestern sought further silent-authority, no Channel 282C2 upgrade application was

1993, the Commission's staff concluded that the short-spacing problems were not going to be expeditiously resolved by private negotiation, and cancelled the KMMX(FM) and KIOL-FM modification applications and associated STAs. In light of this action, Southwestern could have resumed broadcast operations on KLZK(FM) or pursued its Channel 282C2 upgrade without further delay, but it did not. See Motion, Exhibit A.³ Southwestern's failure to restore broadcast operations on KLZK(FM) for over three years prompted the staff to withhold action on Southwestern's further silent-authority request and license renewal application.

6. In response to the staff's December 1, 1993, letter, Southwestern, by letter dated February 21, 1994, informed the Commission that it would not restore Class A service on KLZK(FM) because "it would not be fiscally wise" to do so. See Motion, Exhibit M. Rather, Southwestern proposed to implement its Channel 282C2 upgrade. In its motion, Southwestern contends that the resumption of service by KLZK(FM) as a Class A facility was "not expected" by the Commission in light of Southwestern's ongoing negotiations with Stations KMMX(FM) and KIOL-FM, which resulted in a rulemaking for change of community of license filed by KIOL-FM,⁴ and the further extension of those stations' STAs.

ever filed during that period.

³The staff also noted that implementation of KLZK(FM)'s Channel 282C2 upgrade held higher priority than KMMX(FM)'s modification application and associated STA. See Motion, Exhibit A, pg. 3; see also Conflicts Between Applications and Petitions for Rulemaking, 7 FCC Rcd 4917, n.3 (1992) (noting that such priority has been Commission policy since the preparation of the original Table of FM Allotments in 1962).

⁴Station KIOL-FM's rulemaking to change community of license, upon implementation, resolved the short-spacing between KLZK(FM)'s Channel 282C2 upgrade and KMMX(FM). See Notice of Proposed Rulemaking, MM Docket 95-58, 10 FCC Rcd 4945 (MMB, released May 3, 1995); adopted 10 FCC Rcd 11,018 (MMB October 10, 1995). That rulemaking was filed after Southwestern entered into an agreement with the

Southwestern's claim, however, flies directly in the face of the Commission's repeated and specific finding that Southwestern had been dilatory in its efforts to restore broadcast operations as a Class A facility. Clearly, the Commission did expect Southwestern to either return to the air as a Class A facility or pursue its Channel 282C2 upgrade. Southwestern chose to do neither.

7. Southwestern correctly notes that the implementation of any Channel 282C2 upgrade filed after April 1994 could not occur until October 1995, after the KIOL-FM rulemaking was adopted. This, however, does not excuse Southwestern from its failure to file an acceptable Channel 282C2 upgrade, or an alternative Channel 282A downgrade application. Such a filing would have demonstrated an intent to restore broadcast operations to KLZK(FM). Finally, Southwestern's assertion that it has had no license or construction permit to operate a Class A facility since the time of the Channel 282C2 upgrade begs the issue. It was incumbent upon Southwestern to file for such a construction permit, which filing, if accepted, would have prompted the Commission to cancel any outstanding "conflicting" STAs. Southwestern's failure to file a construction permit application between October 1995 and April 29, 1996, when its renewal application was designated for hearing, is unexplained and inexcusable.

8. In a belated effort to save its license, on May 8, 1996, subsequent to the release of

licensees of the other affected stations on December 31, 1993. See Motion, Exhibit K. The Commission staff's further extension of the KMMX(FM) and KIOL-FM STAs during the pendency of that rulemaking was specifically based upon KLZK(FM)'s negotiated agreement with those stations.

the HDO in this case, Southwestern finally filed its long-promised Channel 282C2 upgrade application (File No. BPH-960508IA). In light of Southwestern's long record of dilatory conduct in returning KLZK(FM) to the air, the Bureau submits that there is no basis for concluding that if this application were granted, Southwestern would now expeditiously act to restore Station KLZK(FM) to operational status or that, even if it did so, its broadcast operations would be anything but temporary. For over five years, Southwestern has done nothing while the public interest in the resumption of broadcast service was unmet. This record belies any claim that reliance may be placed upon Southwestern's current proposals. Accordingly, Southwestern's motion for summary decision in its favor must be denied.

Counter-motion for Summary Decision

9. As indicated above, Section 1.251 of the Commission's Rules requires that in order to warrant summary decision, a party must show that there is no genuine fact for determination at the hearing. The Bureau submits that the facts of this case are not in dispute, but that only the legal significance which should be properly accorded those facts remains at issue. The Bureau submits that the extreme dilatoriness exhibited by Southwestern, as evidenced herein, warrants denial of Southwestern's application for license renewal for Station KLZK(FM). Accordingly, the Bureau requests that the Presiding Judge grant its Counter-motion for Summary Decision; find that Southwestern has failed to meet the issues as specified in the HDO -- that it has not demonstrated through its prior record that it has the capability and intent to expeditiously resume Station KLZK(FM)'s broadcast operations; and conclude that Southwestern violated Sections 73.1740 and/or 73.1750 of the Commission's

Rules for having allowed Station KLZK(FM) to remain silent without Commission authority since January 1989.⁵ In light of the foregoing, no material question of fact exists that grant of the license renewal application for Station KLZK(FM) (File No. BRH-900315UC) would not be in the public interest. Accordingly, KLZK(FM)'s license renewal application should be denied, and the station's license cancelled.

Respectfully submitted,
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⁵Station KLZK(FM) has been silent without authority since January 15, 1989. Southwestern did not request further extension of such authority until January 6, 1993, which request has been held in abeyance. See Motion, Exhibit A, n.4. Contrary to Southwestern's unsupported assertion, the provisions of 5 U.S.C. Sec. 558(c) have not been interpreted to "automatically extend" the term of STAs when a "timely and sufficient application for [their] renewal" has been requested. Compare Miami MDS v. FCC, 14 F.3d 658, 659 (D.C. Cir. 1994) (Court found provisions of 5 U.S.C. Sec. 558(c) applicable to timely and sufficient requests to extend construction permits). Even assuming, arguendo, that STAs are tolled by Section 558(c), KLZK(FM) was off the air for nearly four years without authority before Southwestern requested that its silent status be extended.

CERTIFICATE OF SERVICE

Natalie Moses, a secretary in the Hearing Branch, Mass Media Bureau, certifies that she has on this 19th day of July 1996, sent by regular United States mail, U.S. Government frank, copies of the foregoing "**Mass Media Bureau's Comments in Opposition to Motion for Summary Decision and Countermotion for Summary Decision**" to:

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