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February 28, 2001

**BY HAND DELIVERY**

Magalie R. Salas, Esquire  
 Secretary  
 Federal Communications Commission  
 Room TW-B204  
 445 12<sup>th</sup> Street, S.W.  
 Washington, DC 20554

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FEB 28 2001

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: Amendment of Section 73.202(b),  
 Table of Allotments, FM Broadcast Stations  
 (Alva, Mooreland, Tishomingo, Tuttle,  
 and Woodward, Oklahoma)  
MM Docket No. 98-155; RM-9082; RM-9133

Dear Ms. Salas:

Transmitted herewith on behalf of Chisholm Trail Broadcasting Co., Inc., are an original and four copies of its "Opposition to Petition for Reconsideration," filed in the above-referenced allotment rulemaking proceeding.

Should any questions arise concerning this matter, please communicate directly with the undersigned.

Very truly yours,

DICKSTEIN SHAPIRO MORIN  
& OSHINSKY LLP


Andrew S. Kersting  
 Counsel for  
 Chisholm Trail Broadcasting Co., Inc.

Enclosure

cc (w/ encl.): Certificate of Service (by hand & first-class mail)  
 Mr. Norman Goldstein (FCC) (by hand)

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

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and Woodward, Oklahoma) )

MM Docket No. 98-155  
RM-9082  
RM-9133

To: Chief, Mass Media Bureau

**OPPOSITION TO  
PETITION FOR RECONSIDERATION**

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February 28, 2001

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## SUMMARY

As demonstrated herein, the *Report and Order* properly denied Tyler's proposal to reallocate Channel 259C3 from Tishomingo to Tuttle, Oklahoma.

It is undisputed Station KAZC does not provide a city-grade signal to any portion of Tishomingo, and that only 23% of those people who currently receive service from Station KTSH are within KAZC's 60 dBu service contour. Accordingly, the Bureau properly found that the removal of KTSH from Tishomingo would violate the policy expressed in the *Change of Community* rulemaking orders in which the Commission announced that "the public has a legitimate expectation that existing service will continue." *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd 7094, 7097 (1990) (reconsideration order). Moreover, the proposed reallocation of KTSH from Tishomingo to Tuttle would further deprive a large underserved area of full-time service such that it would leave nearly 9,000 people with only two nighttime services. Thus, the Bureau properly concluded that Tyler's reallocation proposal would not result in a preferential arrangement of allocations.

Although Tyler initiated the filing of a KAZC modification application on the eve of the reconsideration deadline which seeks to upgrade the station to a Class C3 facility, it is well established that the Commission will not accept proposals that are contingent upon the final approval of changes involving other broadcast stations. Thus, the KAZC modification application provides no basis for reconsideration of the *Report and Order*. Furthermore, the circumstances surrounding the preparation and filing of the KAZC modification application, as well as the technical proposal set forth therein, provide a further illustration that Tyler is the real-party-in-interest in KAZC and that the station is nothing more than a pawn in his reallocation scheme. Therefore, even assuming, *arguendo*,

that the Commission elected to consider the KAZC modification application in connection with Tyler's reconsideration petition, the Commission would have no choice but to address the serious character allegations that have been raised against Tyler in this proceeding.

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

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(Alva, Mooreland, Tishomingo, Tuttle,	)	
and Woodward, Oklahoma)	)	

To: Chief, Mass Media Bureau

**OPPOSITION TO  
PETITION FOR RECONSIDERATION**

Chisholm Trail Broadcasting Co., Inc. (“Chisholm Trail”), licensee of Station KNID(FM), Alva, Oklahoma, by counsel, and pursuant to Section 1.429 of the Commission’s rules, hereby submits its opposition to the Petition for Reconsideration, filed January 29, 2001 (“Petition”), by Ralph Tyler (“Tyler”), which seeks reconsideration of the Allocations Branch’s *Report and Order*, DA 00-2885 (released December 22, 2000), in the above-captioned proceeding. In support of this opposition, the following is stated:<sup>1</sup>

**I. Introduction.**

On December 22, 2000, the Mass Media Bureau’s Allocations Branch (the “Bureau”) released the above-referenced *Report and Order*, which, *inter alia*, denied Tyler’s proposal to reallocate Channel 259C3 from Tishomingo, Oklahoma to Tuttle,

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<sup>1</sup> The filing of Tyler’s Petition was published in the Federal Register on February 12, 2001, which announced a deadline of February 27, 2001, for filing oppositions. See 66 Fed.Reg. 9849 (February 12, 2001). As indicated in Chisholm’s accompanying “Motion for Leave to Accept Opposition to Petition for Reconsideration,” Chisholm has requested leave to file its Opposition one day beyond the filing deadline.

Oklahoma. The Bureau properly found that Station KAZC's city-grade contour does not cover any portion of the Tishomingo community, and that only 23% of those people who currently receive service from Station KTSH are within KAZC's 60 dBu service contour. *Report and Order* at ¶16. Accordingly, the Bureau found that Station KAZC does not constitute a satisfactory replacement for KTSH at Tishomingo in accordance with *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989) ("Change of Community R&O"), *recon. granted in part*, 5 FCC Rcd 7094 (1990) ("Change of Community MO&O"). Therefore, the Bureau concluded that Tyler's proposed reallocation of Channel 259C3 from Tishomingo to Tuttle constituted a request to remove the community's sole existing service, and, thus, triggered the same allotment priority as his proposal to bring a first local service to Tuttle. *Report and Order* at ¶16. Based on its analysis of the respective communities of Tishomingo and Tuttle, the Bureau found that Tyler failed to present a sufficiently compelling public interest benefit to warrant the removal of Tishomingo's sole local aural service. *Id.* at ¶17.

## **II. The FCC Properly Concluded that Tyler's Reallocation Proposal Would Not Result in a Preferential Arrangement of Allotments.**

Tyler claims that the *Report and Order* is inconsistent with Commission precedent, citing *Everglades City, LaBelle, Estero, and Key West, Florida*, 15 FCC Rcd 9427 (A.B. 2000) ("*Estero*"). Petition, p. 4. However, the facts in *Estero* are substantially different from those concerning Tyler's reallocation proposal. Tyler seeks to remove a Class C3 facility from Tishomingo and leave the community with a noncommercial FM station which operates with only 1.75 kW of power. In *Estero*, on the other hand, both the

commercial and noncommercial station operated with Class A facilities.<sup>2</sup> Moreover, unlike KAZC, the noncommercial station in *Estero* did not provide an inferior signal such that it (i) failed to provide a city-grade signal to any portion of its community of license, and (ii) placed a 60 dBu contour over only 23% of those people who were receiving service from the commercial station. In addition, although the reallocation in *Estero* resulted in a loss of service to over 17,000 people, the loss of service did not warrant the denial of the proposal because the entire loss area would continue to be well served. 15 FCC Rcd at 9430-31. In this case, however, 25% of the area between the KTSH and KAZC service contours -- which encompasses 8,900 people -- would receive only two nighttime services.<sup>3</sup> Therefore, unlike the proposal in *Estero*, Tyler's reallocation proposal would further deprive a large underserved area of available nighttime service.

Furthermore, both the commercial and noncommercial stations in *Estero* were licensed facilities. Unlike KAZC, the noncommercial station in *Estero* did not make material misrepresentations in submitting its license application to the Commission, was not the subject of a pending Informal Objection,<sup>4</sup> and, thus, there was no issue concerning whether the station's program test authority would be revoked. Therefore, the facts in *Estero* are markedly different from those concerning Tyler's reallocation proposal.<sup>5</sup>

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<sup>2</sup> Although the commercial station in *Estero* was operating on a Class C3 allotment, it did not file an application to upgrade to a Class C3 facility until after the Report and Order was released. See File No. BPH-20000717ABN.

<sup>3</sup> See Tyler Petition, p. 6, n. 11; Attachment A, p. 1.

<sup>4</sup> Chisholm Trail filed an "Informal Objection and Request to Revoke Program Test Authority" ("Informal Objection") against the KAZC license application on December 21, 1998, which demonstrated that the license application contains numerous misrepresentations of material fact.

<sup>5</sup> Tyler also cites *Pauls Valley and Healdton, Oklahoma*, 14 FCC Rcd 3932 (A.B. 1999), in which the staff reallocated a Class C3 FM station and left the station's former community of license with a daytime-only AM station. Unlike KAZC, however, which provides no city-grade coverage to Tishomingo, the AM station provided a city-grade (footnote continued on next page)

### III. The *Report and Order* Is Consistent With Section 307(b) of the Communications Act, FCC Rules, and Commission Precedent.

#### A. Tyler's Arguments.

Prior to January 19, 2001, FM stations operating in the reserved band were not required to provide any level of signal strength over their community of license. However, in the *Second Report and Order* in MM Docket No. 98-93, the FCC modified its rules to require noncommercial FM stations to provide a minimum field strength signal of 60 dBu over at least 50% of the station's community of license, or 50% of the population within that community.<sup>6</sup> See 47 C.F.R. §73.515. Based on this change in the Commission's technical rules regarding noncommercial FM stations, Tyler draws the following conclusion:

The Commission has, therefore, specifically found that a NCE-FM station satisfies Section 307(b) by providing 60 dBu service to 50% of the area or population of its community.

Petition, p. 6. Because Station KAZC currently exceeds the Commission's new requirement by providing a 60 dBu signal to all of Tishomingo, Tyler claims that the *Report and Order* violates Section 307(b) of the Communications Act. Petition, pp. 6-7. Tyler also argues that the Bureau's decision contravenes the full Commission's decision in *Valley Broadcasters, Inc.*, 5 FCC Rcd 2785 (1990), because, according to Tyler, the Bureau excluded KAZC from its transmission service analysis. Petition, pp. 7-8.

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signal to its entire community of license. There also was no evidence in *Pauls Valley* that the AM station's 60 dBu contour would cover only 23% of those people who previously received service from the departing FM station. Further, unlike Tyler's reallocation proposal, there was no indication that the loss of the FM station would leave nearly 9,000 people with only two nighttime services. See Petition, Attachment A, p. 1.

<sup>6</sup> *Second Report and Order* in MM Docket No. 98-93, 1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules, FCC 00-368 (released November 1, 2000) (“*Streamlining Order*”). The changes in the Commission's technical rules became effective on January 19, 2001. See *Id.* at ¶49; 65 Fed.Reg. 79773 (December 20, 2000).

B. Change in the FCC's Technical Rules.

The fact that the FCC now requires noncommercial FM stations to provide a 60 dBu signal to 50% of their community of license or 50% of the community's population has little relevance in this proceeding because KAZC already exceeds that requirement. Thus, the change in the Commission's technical rules will have no impact on KAZC's coverage of Tishomingo.

Moreover, in the *Change of Community MO&O*, the Commission stated:

The public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from realloiting of a channel from one community to another, regardless of whether the service removed constitutes a transmission service a reception service or both.

5 FCC Rcd at 7097. The Bureau properly applied this standard in its analysis of Tyler's realloiment proposal. In comparing the relative coverage provided by Stations KTSH and KAZC to the Tishomingo community, the Bureau properly concluded that Tyler's realloiment proposal would violate the "legitimate expectation" of Tishomingo residents that the existing service they currently receive from KTSH will continue. Indeed, if Tyler's proposal were adopted, no Tishomingo resident would receive a city-grade signal from the community's only local radio station, and only 23% of those people who currently receive service from KTSH would be within KAZC's 60 dBu contour. *Report and Order* at ¶16.

C. Section 307(b).

Tyler's argument concerning Section 307(b) also lacks merit. Section 307(b) of the Communications Act of 1934, as amended (the "Act"), requires the FCC to "make such distribution of licenses . . . among the several states and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same. 47 U.S.C. §307(b). As the *Report and Order* and Tyler noted, prior to the *Streamlining Order* in which the Commission modified Section 73.515 of its rules, noncommercial FM stations

were not required to provide a minimum field strength signal to their communities of license.<sup>7</sup> The fact that a noncommercial FM station could be licensed to a particular community, and, yet, not provide a minimum level of signal strength to that community arguably did not comport with the “community” component of Section 307(b).

Nevertheless, the mere fact that the Commission established a requisite level of signal strength that noncommercial FM stations must provide to their community of license in order to promote the objectives of Section 307(b) does not eviscerate the Commission policy set forth in the *Change of Community MO&O*. In order to seek a reallocation of a station’s existing authorization pursuant to Section 1.420(i) of the Commission’s rules, the proposal must comply with the *Change of Community MO&O*, in which the Commission expressly stated that the public has a “legitimate expectation that existing service will continue.” 5 FCC Rcd at 7097. Thus, the Commission’s action requiring noncommercial FM stations to provide a minimum field strength signal to their community of license does not mean that a station which either meets or exceeds that signal-strength floor necessarily provides the requisite degree of service needed to ensure that the public’s “reasonable expectation” of continued service is satisfied. Indeed, Tyler’s proposal would dictate that all of the residents of Tishomingo would be deprived of city-grade service, and only 23% of those people who currently receive service from KTSH would reside within KAZC’s 60 dBu service contour. Furthermore, as stated above, 25% of the area between the KTSH and KAZC service contours, which encompasses 8,900 people, would be left with only two nighttime services. See Petition, Attachment A, p. 1. This result would clearly contravene the policy established in the *Change of Community MO&O*. Therefore, contrary to Tyler’s allegations, the *Report and Order* is not violative of Section

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<sup>7</sup> See *Report and Order* at ¶16; Tyler Petition, p. 5.

307(b), and is consistent with the *Change of Community* orders pursuant to which Section 1.420(i) was adopted.

D. Valley Broadcasters.

The *Report and Order* also is consistent with the full Commission's decision in *Valley Broadcasters*. *Valley* was a traditional Section 307(b) case which involved competing applications for new AM stations in different communities. The Commission was required to "look to the relative needs of the respective proposed service areas for a 'reception service' . . . and to the relative needs of the proposed community of license for a new 'transmission service' . . . ." *Valley Broadcasters*, 5 FCC Rcd at 2787, citing, *inter alia*, *Kent Ravenna Broadcasting Co.*, 44 FCC 2603 (1961). *Valley* did not involve a reallocation proposal filed pursuant to Section 1.420(i) of the Commission's rules. Thus, unlike this proceeding, there was no issue concerning whether the proposed reallocation of an existing station from one community to another would result in a preferential arrangement of allocations.

The Section 307(b) issue in *Valley* involved a noncommercial FM station operating with 18 watts, which had been authorized to increase power to 0.1 kW. 5 FCC Rcd at 2787-88. The Commission noted that it previously had amended its rules to, *inter alia*, encourage Class D educational FM stations to increase the power of their facilities to the minimum Class A power level of 100 watts.<sup>8</sup> The Commission also noted that it no longer accepts applications for Class D 10-watt stations. *Id.* In light of these and other developments concerning noncommercial FM stations, the Commission stated that there no longer was any question that all noncommercial FM stations had an obligation to serve

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<sup>8</sup> 5 FCC Rcd at 2788, citing *Second Report and Order, Noncommercial Educational FM Stations*, 44 RR 2d 235, 246 (1978).

the programming needs of their respective communities.<sup>9</sup> The Commission therefore held that:

[T]here is no legitimate public interest purpose served in exempting all noncommercial educational stations from transmission service analyses, and we specifically overturn those portions of *Kaldor*<sup>10</sup> . . . that hold otherwise.

5 FCC Rcd at 2788.

After noting that the grant of the power increase for the 18-watt noncommercial FM station to 0.1 kW was consistent with its current policy concerning noncommercial FM stations, the Commission concluded that the authorized power increase:

. . . raise[d] a question of fact as to whether *Valley's* proposal will bring a first competitive nighttime service to Mount Vernon. Because the ALJ closed the record without considering the existence of KSVR(FM)'s noncommercial service and before its increase in power, there is no evidence in the record as to what portion of Mount Vernon will be able to receive KSVR(FM) either day or night, or the effect, if any, of this service on the transmission service analysis in this case.

5 FCC Rcd at 2788 (emphasis added).

According to Tyler's interpretation of *Valley*, the 18-watt station in that case would constitute a sufficient transmission service at Tishomingo to permit KTSH to move to Tuttle so long as the noncommercial station complied with Section 73.515 of the FCC's rules by placing a 60 dBu signal over 50% of Tishomingo. Contrary to Tyler's position, however, the Commission in *Valley* did not hold that the mere existence of a noncommercial FM station operating with either 18 watts or 0.1 kW of power necessarily dictated that *Valley's* proposal would not bring a first competitive nighttime service to the proposed community. Indeed, *Valley* does not hold that any noncommercial FM station, regardless of operating power, constitutes a sufficient transmission service such that it

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<sup>9</sup> *Id.*, citing *Public Broadcasting*, 98 FCC 2d 746, 752 (1984).

<sup>10</sup> *Kaldor Communications, Inc.*, 98 FCC 2d 292 (Rev. Bd. 1984).

would provide a community such as Tishomingo with a sole local transmission service in accordance with the policy established in the *Change of Community MO&O*. Instead, the Commission made clear in *Valley* that the noncommercial FM station must be included in the transmission service analysis, and the authorized power increase raised a question of fact concerning whether Valley's proposal would bring a first competitive nighttime service to the proposed community. Because the ALJ closed the record without considering the noncommercial station or its authorized power increase in the transmission service analysis, the Commission could not determine what portion of the subject community would be able to receive the noncommercial station either day or night, "or the effect, if any, of this service on the transmission service analysis . . . ." 5 FCC Rcd at 2788.

Consistent with the Commission's decision in *Valley*, the Bureau did not exclude KAZC from its transmission service analysis, but expressly considered KAZC's coverage of the Tishomingo community relative to that of KTSH.<sup>11</sup> As stated above, the Bureau properly determined that, due to KAZC's limited coverage of the Tishomingo community (*i.e.*, KAZC does not provide a city-grade signal to any portion of Tishomingo and provides a 60 dBu signal to only 23% of those persons presently receiving service from KTSH),<sup>12</sup> KAZC does not constitute a satisfactory replacement for the loss of existing service provided by KTSH in a manner consistent with the *Change of Community MO&O*.

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<sup>11</sup> The Bureau expressly noted that service provided by noncommercial FM stations is to be considered in the transmission service analysis. *Report and Order* at ¶16, n.18, citing *Valley Broadcasters*.

<sup>12</sup> *Report and Order* at ¶16.

#### IV. The KAZC Modification Application Should Be Given No Consideration In This Allotment Proceeding.

In the next to the last paragraph of his Petition, Tyler notes that Station KAZC filed an application to upgrade to a Class C3 facility on January 26, 2001 (File No. BMPED-20010126ABC). Petition, p. 9. The KAZC modification application proposes to substitute a six-bay antenna for the station's existing single-bay antenna, and increase the station's effective radiated power to 25 kW. If the KAZC modification application is granted and the construction permit were to be implemented, KAZC would replicate 100% of KTSH's existing city-grade and service contours. As a result, Tyler claims that the KAZC modification application constitutes a change in circumstances that warrants reconsideration of the *Report and Order*.

It is well established that the Commission will not accept proposals that are contingent upon the final approval of changes involving other broadcast facilities. See *Littlefield, Wolfforth and Tahoka, Texas*, 12 FCC Rcd 3215, 3219 (A.B. 1997), citing *Cut and Shoot, Texas*, 11 FCC Rcd 16383 (Policy & Rules Div. 1996); see also *Carlisle, Irvine, and Morehead, Kentucky*, 12 FCC Rcd 13181, 13183 (A.B. 1997) (because some authorized facilities are never built and licensed, the Commission "cannot assume that such facilities are in existence for the purpose of resolving related rulemaking matters"). Furthermore, in the *Change of Community MO&O*, the Commission stated:

We specifically wish to clarify that replacement of an operating station with a vacant allotment or unconstructed permit, although a factor to be considered in favor of the proposal, does not adequately cure the disruption to "existing service" occasioned by removal of an operating station. From the public's perspective, the potential for service at some unspecified future date is a poor substitute for the signal of an operating station that can be accessed today simply by turning on a . . . radio set.

5 FCC Rcd at 7097.

In this case, the Commission can have no assurance that KAZC's modification application will be granted, and, even assuming, *arguendo*, that it is granted, that the modified facilities will ever be constructed. South Central Oklahoma Christian Broadcasting, Inc. ("South Central"), filed a license application for KAZC on October 2, 1998 (File No. BLED-19981002KA), which currently remains pending. The KAZC license application has not been granted because Chisholm Trail filed an Informal Objection against the application on December 21, 1998, which demonstrated that the application contains numerous misrepresentations of material fact. The Informal Objection also established that the only reason KAZC was able to commence program tests just three weeks before the October 19, 1998, comment deadline in this proceeding was that Tyler deliberately took KTSH off the air, lied to the Commission and an FCC field inspector regarding the status of KTSH's antenna system, and "donated" the "KTSH transmitter, transmission line, and studio equipment and the engineering services necessary to complete the KAZC installation."<sup>13</sup> In light of the substantial misrepresentations which were made to the FCC in connection with KAZC's commencement of program tests and the filing of its license application, there is a substantial question concerning whether KAZC's program test authority will be revoked and whether the station's modification application will be granted.

Moreover, even assuming, *arguendo*, that the KAZC modification application is granted, there is reason to question whether the construction permit would ever be

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<sup>13</sup> See Declaration of Ralph Tyler, dated December 11, 1998; Declaration of Randall C. Mullinax, dated December 10, 1998 (copies appended hereto as Appendix A). A complete analysis of the facts and circumstances by which KTSH was deliberately taken off the air and KAZC commenced program tests is set forth in Chisholm Trail's Reply Comments, which were filed in this proceeding on November 3, 1998 (hereinafter "Reply Comments").

implemented without Tyler “donating” KTSH’s existing transmission equipment. South Central previously held a construction permit for KTSH, but was never able to put the station on the air.<sup>14</sup> Indeed, the only reason that KAZC even exists is because Tyler needed to put the noncommercial station on the air in order to have any chance of moving KTSH from Tishomingo to Tuttle.<sup>15</sup> Therefore, because the Commission does not accept proposals that are contingent upon the final approval of changes involving other broadcast facilities, and “cannot assume that such facilities are in existence for the purpose of resolving related rulemaking matters,”<sup>16</sup> the KAZC modification application provides no basis for reconsideration of the *Report and Order*.

**V. The KAZC Modification Application Provides Further Evidence that Tyler is the Real-Party-in-Interest in KAZC.**

The timing of the filing of the KAZC modification application and the nature of KAZC’s technical proposal demonstrate, once again, that Tyler is the real-party-in-interest in KAZC and that he has complete control of the noncommercial station.

Tyler’s consulting engineer, William G. Brown, who provided the supporting engineering statement for Tyler’s Petition, also prepared the technical portion of the KAZC modification application.<sup>17</sup> Mr. Brown executed the technical portion of the KAZC modification application on January 18, 2001, one day prior to the effective date of a rule

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<sup>14</sup> South Central acquired the KTSH construction permit in September 1994. After filing an application to replace an expired permit for the station on September 21, 1994 (File No. BPH-940921JE), South Central later filed three applications to extend the KTSH permit, but never put the station on the air. See File Nos. BPH-950216JA, BMPH-951107JA, and BMPH-960218IC.

<sup>15</sup> See, e.g., Chisholm Trail’s Reply Comments, pp. 11-17.

<sup>16</sup> *Carlisle, Irvine, and Morehead, Kentucky*, 12 FCC Rcd at 18183, citing *Cut and Shoot, Texas*, 11 FCC Rcd 16383 (Policy & Rules Div. 1996).

<sup>17</sup> See Petition, Attachments A and B.

change in the *Streamlining Order* permitting KAZC to seek to upgrade to a Class C3 facility.<sup>18</sup> The modification application was filed on Friday, January 26, 2001, the last business day immediately prior to the deadline for filing Tyler's reconsideration petition. Although the KAZC modification application did not appear on an FCC public notice until nearly two weeks later (February 8, 2001),<sup>19</sup> Tyler was able to attach a copy of the application to his Petition which was filed on the first business day immediately following the filing of the KAZC modification application. The facts that (i) Tyler provided the engineering services necessary to prepare the KAZC modification application, (ii) Tyler directed his consulting engineer to prepare the engineering portion of the application even before the Commission's rule change in the *Streamlining Order* went into effect, (iii) Tyler was able to incorporate the KAZC modification application into his Petition despite the fact that the application was filed with the FCC just one business day prior to the reconsideration deadline, and (iv) the KAZC modification application did not appear on an FCC public notice until 13 days after the filing of Tyler's Petition; all make it abundantly clear that Tyler was the impetus behind the modification application.

Furthermore, the technical proposal set forth in the KAZC modification application does not reflect an arms-length business arrangement between two allegedly independent FM stations. The tower upon which the KTSH and KAZC antennas are mounted is approximately 411 meters above ground.<sup>20</sup> KTSH operates with a six-bay antenna on one side of the tower with its center of radiation at 76.93 meters above ground, while KAZC operates with a single-bay antenna on the opposite side of the tower with its

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<sup>18</sup> See 65 Fed.Reg. 79773 (December 20, 2000); 47 CFR §73.509.

<sup>19</sup> See *Public Notice*, Report No. 24918 (released February 8, 2001).

<sup>20</sup> This height excludes the television antenna mounted at the top of the tower. See KAZC Modification Application (Attachment B to Tyler's Petition), Exhibit I.

center of radiation at 77 meters above ground.<sup>21</sup> Although Tyler claims that KAZC's modification application proposes to "raise the KTSH antenna,"<sup>22</sup> the increase of approximately one meter in height in the center of radiation of KAZC's antenna is due only to the fact that KAZC proposes to replace its single-bay antenna with a six-bay antenna that is identical to the one currently being used by KTSH.<sup>23</sup>

Because KAZC proposes to mount its six-bay antenna on the same tower with only one meter separating the center of radiation of the KTSH and KAZC antennas, it is clear that the two Class C3 stations would cause intolerable interference to each other if they were to operate as proposed in the KAZC modification application. Although the application acknowledges the likelihood of such interference,<sup>24</sup> it raises the obvious question: Because the top of the supporting structure is over 411 meters above ground, and the only other antenna on the tower is mounted at the top of the supporting structure (*i.e.*, approximately 333 meters above KAZC's proposed antenna height), why would KAZC choose to mount its antenna at a height of only 78 meters above ground and within one meter of the KTSH antenna? As the Commission is well aware, if KAZC were to

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<sup>21</sup> *Id.*; see also KAZC construction permit (File No. BPED-19970227MD).

<sup>22</sup> Tyler Petition, p. 9. Tyler undoubtedly intended to refer to the KAZC antenna, and not the "KTSH antenna."

<sup>23</sup> See KAZC Modification Application, Section V-B, Question 12(b), and Exhibits 1 and 6 thereto.

<sup>24</sup> Tyler's consulting engineer states:

As is the current condition for KAZC, the proposed antenna will be located adjacent to KTSH . . . . We understand that the increase in power of KAZC may create or receive interference from being located near KTSH. In the event that it is determined that interference is created by this proposal, KAZC will ensure that the necessary filters are installed in both stations to eliminate interference in accordance with the Commission's Rules.

KAZC Modification Application, Technical Statement, p. 1.

mount its antenna slightly higher on the tower with an appropriate downward adjustment in its operating power, it still would be able to operate with maximum Class C3 facilities, and the potential for interference between KTSH and KAZC would be dramatically reduced.

The reason that the KAZC modification application proposes to locate the station's antenna within one meter of KTSH's six-bay antenna is abundantly clear. Tyler -- who was the impetus behind the filing of the KAZC modification application, and directed his consulting engineer to prepare the engineering portion of the application even before the rule changes in the *Streamlining Order* became effective to ensure that it was filed prior to the deadline for filing his Petition -- has no intention of KTSH and KAZC operating simultaneously from the same tower with KAZC operating as a Class C3 station. Assuming, *arguendo*, that the KAZC modification application is granted, the only means by which KAZC would implement its Class C3 construction permit would be if Tyler once again takes KTSH off the air and "donates" the KTSH antenna and transmission line to KAZC, and re-tunes KTSH's existing transmitter to operate on KAZC's noncommercial frequency.<sup>25</sup> In this regard, it is no coincidence that the KAZC modification application proposes that KAZC will operate with a "6-bay Jampro JMPC-6X antenna system," which just happens to be the same antenna system currently used by KTSH. *See* KAZC

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<sup>25</sup> As the Commission may recall, Tyler notified the FCC by letter dated October 1, 1998, that KTSH had "temporarily suspended" operations on September 28, 1998, "due to antenna failure." *See* Letter dated October 1, 1998, from Ralph Tyler to Magalie Roman Salas, Esquire (copy appended to Chisholm Trail's Reply Comments as Attachment C). KAZC commenced program tests on the following day, September 29, 1998. *See* "Comments of Ralph Tyler," filed October 19, 1998, Attachment. However, in Tyler's June 18, 1999, response to an inquiry letter from the FCC's Enforcement Bureau, Tyler admitted that "the KTSH facilities were not in need of repair after it had ceased broadcasting in September, 1998." *See* Letter dated June 18, 1999, from Ralph Tyler to Norman Goldstein, p. 6, item 19.

Modification Application, Exhibit 6. Indeed, Tyler's December 11, 1998, declaration establishes that "[i]t had always been my intent to donate [the KTSH transmission] equipment to KAZC, but because of the FCC [comment] deadline I decided to do it sooner than I had planned." See Appendix A. As Chisholm Trail has demonstrated throughout this proceeding, Tyler never intended for KTSH and KAZC to operate simultaneously, but, rather, sought to "donate" the KTSH transmission equipment to KAZC for the sole purpose of enabling KTSH to move from Tishomingo to the Oklahoma City bedroom community of Tuttle.

The facts outlined above establish that the KAZC modification application is an impermissible attempt on the part of Tyler to enhance his reallocation proposal long after the October 19, 1998, comment deadline. Tyler had every opportunity at the comment stage of this proceeding to propose a replacement service at Tishomingo to support his reallocation proposal. He made the voluntary decision, however, to forego such a proposal. Instead, Tyler chose to take KTSH off the air, "donate" the station's transmission and studio equipment to KAZC so the noncommercial station could go on the air by the comment deadline in this proceeding, and make a series of material misrepresentations to the Commission. Now that the FCC has issued a decision which denied Tyler's reallocation proposal, he should not be permitted to try and enhance his proposal years after the comment deadline by asking the Commission to consider the KAZC modification application as a replacement service at Tishomingo. See *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941) (a party may not "sit back and hope that a decision will be in its favor, and then, when it isn't, parry with an offer of more evidence. No judging process in any Bureau of government could operate efficiently or accurately if such a procedure were allowed" (footnote omitted)).

## VI. Conclusion.

As demonstrated herein, the Bureau properly determined that the proposed reallocation of Channel 259C3 from Tishomingo to Tuttle, Oklahoma, would be inconsistent with the policy established by the Commission in the *Change of Community MO&O*. Accordingly, the Bureau properly concluded that removing KTSH from Tishomingo would not result in a preferential arrangement of allotments. Furthermore, despite Tyler's control of Station KAZC and his continued efforts to use KAZC as a means to support his reallocation proposal, it is well established that the Commission will not accept proposals that are contingent upon the final approval of changes involving other stations. Therefore, the KAZC modification application should not be considered in this proceeding. Nevertheless, even assuming, *arguendo*, that the Commission elected to consider the KAZC modification application in connection with Tyler's Petition, the Commission would have no choice but to address the serious character allegations that have been raised against Tyler in this proceeding.

WHEREFORE, in light of the foregoing, Chisholm Trail Broadcasting Co., Inc. respectfully requests that the Petition for Reconsideration, filed January 29, 2001, by Ralph Tyler be DENIED.

Respectfully submitted,

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Attorneys for

CHISHOLM TRAIL  
BROADCASTING CO., INC.

By:   
Andrew S. Kersting

February 28, 2001

# APPENDIX A

Declarations of Ralph Tyler and Randall C. Mullinax

## DECLARATION OF RALPH TYLER

I, Ralph Tyler, declare under penalty of perjury that to the best of my knowledge and belief the following information is true and correct.

I am the owner of KTSH (FM) Tishomingo, Oklahoma. I am the party responsible for the actions of my employees and I am fully prepared to bear the consequences of their actions.

I have known Randall "Randy" C. Mullinax for over twenty years. Over the years I have come to rely on his good judgment and technical expertise. In 1976 I hired him to be chief engineer of a station I owned at the time. Randy Mullinax was the chief engineer of the station during the approximately eleven years that I held a majority interest in that station. After I sold my interest in the station I continued to have contact with Randy Mullinax through a radio tower business I own. If there were any technical problems concerning placement of antennas or potential interference I would refer them to Randy Mullinax. In February 1998 Randy Mullinax was hired by Tyler Media Group, a company owned by my sons. Through Tyler Media Group, I have contracted for Randy Mullinax's engineering services for KTSH (FM).

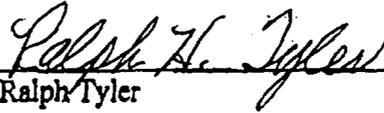
I am seeking FCC approval to relocate KTSH from Tishomingo to Tuttle, Oklahoma. Before KTSH can be moved to Tuttle at least one other station had to be licensed to Tishomingo, Oklahoma. There was an FCC rule making comment deadline approaching on October 19, 1998, and I felt the best way to answer certain questions posed by the FCC in the rule making proceeding was to assist noncommercial educational station KAZC to get on the air by donating the KTSH transmitter, transmission line, and studio equipment and the engineering services necessary to complete the KAZC installation. It had always been my intent to donate this equipment to KAZC, but because of the FCC deadline I decided to do it sooner than I had planned.

On October 1, 1998, Randy Mullinax presented me with a letter for my signature notifying the FCC that KTSH was off the air. I signed the letter without discussing it with him. On October 29, 1998, an FCC inspector visited KTSH's studio and transmission facility. During his inspection of the facility, the FCC inspector called me. The questions the FCC inspector was asking were technical in nature and I did not possess the expertise to be able to answer them. I asked Randy Mullinax to join the conversation. Randy Mullinax and the FCC inspector then spoke about the technical facilities of KTSH. I believed Randy Mullinax was answering the FCC inspector's questions truthfully and accurately. After the conversation was completed, Randy Mullinax advised me that he had misled the FCC inspector. I called my communications attorney and advised him of what had just happened.

I did not know that misstatements were made until after the conversation with the FCC inspector. My office is approximately 100 miles from Tishomingo and I did not personally supervise the engineering work done at KTSH. In making this declaration I am in no way seeking to deflect responsibility for what happened. KTSH is my station and I am the party ultimately responsible for its operation. I should have paid more attention to what was written in

the October 1, 1998 letter. I should have been better informed as to the technical state of the KTSH facility. Had I done a better job I could have prevented this problem.

Executed this 17<sup>th</sup> day of December, 1998.

  
Ralph Tyler

## **DECLARATION OF RANDALL C. MULLINAX**

I, Randall C. Mullinax, declare under penalty of perjury that to the best of my knowledge and belief the following information is true and correct.

Since 1969 I have been employed as an engineer at various radio and television stations and at Sprint PCS. In February 1998, I was hired by Tyler Media Group, Inc. as its director of engineering. Tyler Media Group has an agreement with Ralph Tyler pursuant to which I provide engineering services for Ralph Tyler's radio station, KTSH (FM), Tishomingo, Oklahoma.

Ralph Tyler wants to relocate KTSH (FM) from Tishomingo to Tuttle, Oklahoma. As I understand it, before KTSH (FM) could be moved to Tuttle, noncommercial educational station KAZC had to go on the air in Tishomingo. I also understand that it had always been Ralph Tyler's plan to donate the KTSH transmission line, transmitter and studio equipment to KAZC and to provide the engineering services necessary to complete the KAZC installation. Because of the FCC deadline this was being done sooner than originally planned.

In late September, 1998, the bottom bay of the KTSH antenna was removed and the KAZC antenna installed. The KAZC antenna was mounted at the KTSH location because at that time there was no tower lease agreement in place to permit KAZC to mount its antenna. This now has been rectified and the KAZC antenna has been mounted as specified in KAZC's construction permit.

I retuned the KTSH transmitter to KAZC's frequency and supervised the antenna crew that installed the KAZC antenna. On October 1, 1998 I drafted a letter for Ralph Tyler's signature advising the FCC that KTSH was off the air. Because one bay of the KTSH antenna was down and the antenna was not working to specifications, I wrote that KTSH was off the air due to antenna failure. I presented the letter to Ralph Tyler without discussing it with him.

On October 29, 1998, an FCC inspector visited the KTSH studio and transmitting facility. The FCC inspector called Ralph Tyler who asked me to participate in the telephone call. The FCC inspector wanted to know why KTSH was off the air. I told the FCC inspector that the bullet in the lower bay had failed and that as a result, I had called in a tower crew. I also told him that I had purchased a new bullet from a local surplus electronics dealer. The FCC inspector asked for the name and telephone number of the tower crew and the electronics dealer, which I provided.

After the telephone call with the FCC inspector, I called the tower company and the electronics dealer and asked them to verify what I had told the FCC inspector.

When the FCC inspector called I should have advised him of the true situation. Instead I panicked and perpetuated a false statement. I further compounded my mistake by calling the tower crew and the electronics dealer and asking them to verify a story I knew not to be true. I have been employed in the broadcast industry as an engineer for almost thirty years. I have

always been a good and conscientious employee and have never had any trouble with the FCC. In this one instance I failed to exercise the good judgement that has served me well during my career. I made a mistake that will never be repeated.

Executed this 10 day of December, 1998

  
Randall C. Mullinax

**CERTIFICATE OF SERVICE**

I hereby certify that on this 28<sup>th</sup> day of February, 2001, a copy of the foregoing  
OPPOSITION TO PETITION FOR RECONSIDERATION was sent by first-class mail,  
postage prepaid, to the following:

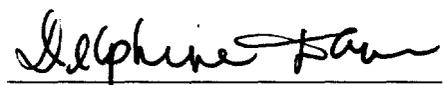
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Federal Communications Commission  
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