

Before the  
Federal Communications Commission  
Washington, DC 20554

MAR 14 2001

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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

To: Chief, Mass Media Bureau

**REPLY TO LATE FILED OPPOSITION TO  
PETITION FOR RECONSIDERATION**

Ralph Tyler ("Tyler"), by his attorneys, hereby replies to the "Opposition to Petition for Reconsideration" late-filed by Chisholm Trail Broadcasting Co., Inc. ("Chisholm Trail") on February 28, 2001 ("*Untimely Opposition*") in the above-captioned proceeding.

Contemporaneously herewith under separate cover, Tyler is also filing an opposition to Chisholm Trail's February 28, 2001, "Motion for Leave to Accept Opposition to Petition for Reconsideration." Because Chisholm Trail's *Untimely Opposition* was filed a day after the February 27, 2001, deadline, the *Untimely Opposition* should not be considered. See e.g. *Olive Branch, Mississippi*, 4 FCC Rcd 7884 at note 1, (Chief, Policy and Rules, 1989). Tyler's reconsideration petition should be deemed unopposed. However, in the unlikely event the Bureau considers Chisholm Trail's *Untimely Opposition* notwithstanding its late submission, this reply is submitted out of an abundance of caution.

In support hereof, the following is respectfully shown:

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## I. Background and Summary

Tyler, the licensee of KTSH, Tishomingo, OK, timely filed a Petition for Reconsideration (“*Petition*”) of action by the Chief, Allocations Branch, denying Tyler’s request to reallocate Channel 259C3 from Tishomingo to Tuttle, OK, and to modify the license of KTSH to operate at Tuttle. *Report and Order, Alva, Mooreland, Tishomingo, Tuttle and Woodward, Oklahoma*, DA 0-2885, released December 22, 2000 (65 Fed. Reg. 82296, published December 28, 2000) (herein “*R&O*”). In its *Untimely Opposition*, Chisholm Trail argues against grant of Tyler’s reconsideration petition on the grounds that (1) the reallocation proposal would not result in a preferential arrangement of allotments; (2) NCE FM station KAZC, Tishomingo, should not be considered a remaining local aural service at Tishomingo; (3) a pending application to modify KAZC to replicate the exact coverage of KTSH should not be considered; and (4) Tyler is the “real party in interest” in KAZC. Tyler shows herein that Chisholm Trail is wrong on all counts.

## II. Tyler’s Reallocation Proposal Would Result In A Preferential Arrangement of Allotments

In his *Petition*, Tyler cited *Everglades City, LaBelle, Estero and Key West, FL*, 15 FCC Rcd 9427 (Alloc. Br. 2000) (“*Estero*”) to show that KAZC, Tishomingo, should have been deemed a remaining Tishomingo service in determining whether reallocation of KTSH to Tuttle would constitute a “preferential arrangement of allotments.” In its *Untimely Opposition*, Chisholm Trail attempts to distinguish *Estero* from the instant case on the basis of minutiae.

Chisholm Trail notes that there is presently a power difference between the KTSH and KAZC operations, whereas in *Estero*, both stations were Class A facilities. However, Chisholm Trail cites no authority giving such power differences significance in community changes. In any event, KAZC’s outstanding modification application to exactly replicate the present KTSH signal would eliminate any power difference between the KTSH and KAZC.

Chisholm Trail also observes that 8,900 persons are predicted to receive only two nighttime services upon reallocation of KTSH. It should be noted, however, that the reallocation in *Estero* was predicted to remove a full-time service from 17,759 listeners. Moreover, reallocations have been granted even where no local nighttime service would remain. *See e.g. Ravenswood and Elizabeth, WV*, 10 FCC Rcd 3181 (1995); *Headland, AL and Chattahoochee, FL*, 10 FCC Rcd 10352 (1995); *Healdton, OK and Krum, TX; Pauls Valley and Healdton, OK*, 14 FCC Rcd 3932 (Alloc. Br. 1999).

What is more significant is that reallocation of KTSH to Tuttle will provide Tuttle (1990 U.S. Census population 2,807) with its first local transmission service and will provide new service to 731,219 persons, without removing Tishomingo's sole local service. On that basis, the proposed reallocation is a more preferential arrangement of allocations.

### **III. Section 307(b) Considerations**

Tyler noted in his *Petition* that the present 60 dBu contour of NCE FM station KAZC covers the entire area and population of Tishomingo. Tyler further noted that the KAZC modification application proposes to provide an even stronger 70 dBu signal to all of Tishomingo. Thus, both the present and proposed KAZC facilities exceed the recently adopted Section 73.515 requirement that a non-commercial education station provide a 60 dBu signal over at least 50% of its license community.

In adopting the new Section 73.515 coverage standard, the Commission held that the rule change "balances the Commission's mandate under Section 307(b) of the Act with the service, technical, and financial realities of operating NCE FM stations."<sup>1</sup> Of course, Section 307(b) of the Communications Act requires the Commission to distribute radio licenses in a "fair, efficient,

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<sup>1</sup> *Second Report and Order*, "Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules," MM Docket No. 98-93, FCC 00368 at paragraph 42 (released November 1, 2000).

and equitable” manner among communities. Thus, in adopting Section 73.515, the Commission found that 60 dBu coverage by a NCE FM station to at least 50% of its license community constitutes “fair, efficient and equitable” coverage to that community.

Chisholm Trail retorts that “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*” that the public has a “legitimate expectation that existing service will continue.”<sup>2</sup> Chisholm Trail's position cannot be reconciled with basic tenets of administrative law. A Commission policy cannot be held to override the Commission’s statutory mandate under Section 307(b) of the Communications Act.

Long-standing case precedent recognizes that concerns regarding loss areas can be overcome by other public interest factors favoring the proposed reallocation. *WKYR, Inc.*, 3 RR 2d 1 (Rev. Bd. 1964). As noted above, the proposed reallocation to Tuttle will provide first local service to Tuttle and new service to 731,219 persons. In balance, these factors outweigh the loss of a nighttime service to a small area that will continue to receive nighttime aural services from other sources.

Chisholm Trail also attacks Tyler’s reliance on *Valley Broadcasters*, 5 FCC Rcd 2785 (1990). *Valley* stands for the proposition that NCE FM stations have an obligation to serve the needs of their communities and thus are to be counted in the Commission’s Section 307(b) transmission service analysis. Consistent with *Valley*, KAZC should be recognized as a Tishomingo transmission service.

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<sup>2</sup>*Memorandum Opinion and Order, Amendment of the Commission’s Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd 7094 (1990).

#### **IV. The Proposed Minor Change to KAZC(FM) Is A “Changed Circumstance” Which Must Be Considered**

Pursuant to Section 1.429(b) of the Rules, Tyler’s *Petition* showed a change in a material circumstance since its last opportunity to present it to the Commission. Specifically, on January 26, 2001, South Central Oklahoma Broadcasters, Inc., permittee of KAZC, filed an application for minor modification of KAZC to exactly replicate the service presently provided by KTSH. A copy of the KAZC modification application was attached to Tyler’s *Petition* and incorporated therein by reference. Tyler’s Technical Statement demonstrated that, as modified, KAZC will provide a 70 dBu signal to 100% of Tishomingo, and that all persons who presently receive service from KTSH will receive the same level of service from KAZC.

Chisholm Trail argues that the Commission will not accept proposals that are contingent upon final approval of changes to other broadcast facilities. However, neither the KAZC modification application nor Tyler’s reallocation proposal are contingent. There is no condition precedent to grant of either or both. Moreover, even if there were a contingency, the policy stated in *Cut and Shoot, TX*, 11 FCC Rcd 16383 at paragraph 5 (Chief, Policy and Rules, 1996) (*dicta*) (*subsequent history omitted*), cited by Chisholm Trail is not without flexibility. Grant of a contingent proposal may be warranted where countervailing public interest considerations are shown. *Id.* at paragraph 5. In the instant case, grant of Tyler’s proposal would serve the strong public interest in bringing a first local service to Tuttle and new service to 731,219 persons.

In any event, it cannot be denied that the filing of the KAZC modification application is a relevant change in circumstances affecting this matter. Therefore, Tyler’s reporting of this new development is proper under Section 1.429(b) and essential to a complete record in this matter.

Chisholm Trail further argues that the “replacement of an operating station with a vacant allotment or unconstructed permit, although a factor to be considered in favor of [the

reallotment] proposal, does not adequately cure the disruption of 'existing service' occasioned by removal of an operating station." However, the instant case does not involve a vacant allotment or an unconstructed permit, but rather, an operating station that will remain in Tishomingo: KAZC. Indeed, an application for a license to cover completion of construction of KAZC was filed on October 2, 1998 (File No. BLED- 19981002KA) and remains pending only because Chisholm Trail filed an informal objection against the application!

Chisholm Trail also suggests that the proposed modification of KAZC will result in "intolerable interference." However, Chisholm Trail's claim rests solely upon a bare statement by its counsel, unsupported by any independent engineering data, and therefore should be given no weight. In any event, even if assuming *arguendo* there would be interference potential, KTSH presently has a pending application (FCC File No. BPH-20001218ADB) to relocate off the tower proposed in the KAZC modification application, which would allay any interference concern.

#### **V. Real-Party-In-Interest and Misrepresentation Allegations**

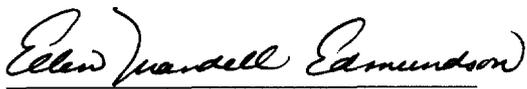
Chisholm Trail makes reference to the numerous as-yet unresolved pleadings Chisholm Trail has filed charging that misrepresentations were made in the KAZC license application and that Ralph Tyler is the "real-party in-interest" in KAZC. Chisholm Trail's allegations are nothing more than rank speculation unsupported by any probative evidence. Moreover, they are absolutely untrue. Furthermore, the *R&O* specifically declined to consider the merits of Chisholm Trail's allegations regarding these matters in the instant proceeding. Had Chisholm Trail wished to pursue these matters further in this proceeding, it should have filed a petition for reconsideration of the *R&O*. These arguments are not responsive to Tyler's *Petition* and should be disregarded.

## VI. Conclusion

In light of the foregoing, and Chisholm Trail's opposition should be dismissed for late filing and Tyler's *Petition* should be treated as unopposed. In the event Chisholm Trail's opposition is not dismissed, it is respectfully submitted that Chisholm Trail has shown no basis why Tyler's *Petition* should not be granted.

Respectfully submitted,

**RALPH TYLER**

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March 14, 2001

**CERTIFICATE OF SERVICE**

I, Angela Y. Powell, a paralegal in the law offices of Smithwick & Belendiuk, P.C., certify that on this 14th day of March, 2001, copies of the foregoing were mailed, postage prepaid, to the following:

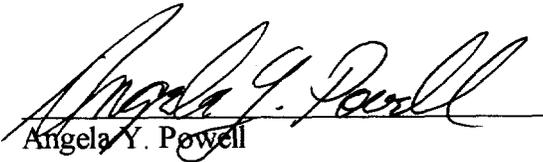
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