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February 1, 2002

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie R. Salas, Esq.
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: MM Docket No. 00-87
RM-9870, 9961
Opposition to Petition for Reconsideration

Dear Ms. Salas:

Transmitted herewith, on behalf of Madras Broadcasting, is an original and four (4) copies of its Opposition to Petition for Reconsideration in the above-referenced proceeding. Should any questions arise concerning this submission, kindly communicate with the undersigned.

Sincerely,

Lee J. Peltzman APS

Lee J. Peltzman
Counsel for
MADRAS BROADCASTING

Enclosure

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment to §73.202(b))	MM Docket No. 00-87
Table of Allotments)	RM-9870
FM Broadcast Stations)	RM-9961
(Brightwood, Madras, Bend and)	
Prineville, Oregon))	
To: Chief, Allocations Branch		
Policy and Rules Division		
Mass Media Bureau		

OPPOSITION TO PETITION FOR RECONSIDERATION

Madras Broadcasting (“Madras”), by its attorney, hereby files its Opposition to Petition for Reconsideration filed by Muddy Broadcasting Company (“Muddy”). In support of its position, Madras submits the following:

The genesis of this proceeding is the Commission’s issuance of the Notice of Proposed Rule Making, 15 FCC Rcd 8964 (2000), proposing the allotment of Channel 251C3 to Brightwood, Oregon. Madras filed a Counterproposal to the Brightwood proposal, in which it requested that the Commission make channel substitutions to existing allotments at Bend and Prineville, Oregon, and allot Channel 251C1 to the community of Madras, Oregon, as that community’s first aural service. The Brightwood Petitioner, Muddy, opposed the Madras Counterproposal throughout the next 15 months, contending that there were other alternate channels that could be allotted to Madras other than Channel 251C1. In the Report and Order, 16 FCC Rcd 18893 (2001), the Commission allotted Channel 251C1 to Madras while rejecting

Muddy's alternate channel argument. The Commission concluded that none of the alternate channels proposed by Muddy were feasible or equivalent to Madras' requested Channel 251C1. Only two equivalent channels were suggested by Muddy, Channels 291C1 and Channel 227C1, and neither could be used – Channel 291C1 because of massive terrain blocking and Channel 227C1 because it would have required the introduction of a new community, which was prohibited after the expiration of the rulemaking comment period. 16 FCC Rcd at 18895. The Commission then compared the communities of Brightwood and Madras to determine which was more deserving of the allotment and chose Madras.

Muddy has now filed a Petition for Reconsideration challenging the Commission decision. Muddy does not argue that the Commission erred in selecting Madras over Brightwood. Rather, it contends that there have been changed circumstances since the Commission decision which would permit the allotment of Channel 291C1 to the community of Madras. Specifically, Muddy asserts that, as a result of an FCC data entry error, Muddy was not aware throughout the proceeding that Station KSTE-FM, Vancouver, Washington, had received a grant of its application on August 24, 2000, two months prior to Muddy's filing of an Opposition to the Madras Counterproposal on October 5, 2000, and 14 months prior to the release of the Commission Report and Order allotting Channel 251C1 to Madras. Muddy argues that, were KSTE(FM) permanently downgraded to a Class C2 station, new areas would be open for allotment sites on Channel 291C1 to serve Madras and that those new allotment sites would not involve significant terrain obstruction. It, therefore, requests that the Commission reconsider its Report and Order and, instead, allot Channel 251C3 to Brightwood and Channel 291C1 to Madras.

Muddy's Petition for Reconsideration is procedurally defective and should be dismissed. Muddy seeks reconsideration of the Commission decision pursuant to Section 1.429(b) of the Commission's rules. That Section states that petitions for reconsideration relying on facts not previously presented to the Commission will be granted only if: (1) the facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present those facts to the Commission; (2) the facts relied on were unknown to petitioner until after the last opportunity to present them to the Commission and, the petitioner could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity; or (3) the Commission determines that consideration of the facts relied on is required in the public interest. See Littlefield, Arizona, 15 FCC Rcd 21547, 21548 (2000); Margarita, California, 4 FCC Rcd 7887 (1989).

Muddy's Petition for Reconsideration does not satisfy any of the three prongs of Section 1.429(b) of the Commission's rules. First, Muddy contends that it relied on an unofficial Commission database which failed to note that a KSTE-FM application had been granted over one year prior to the Commission decision in this proceeding. Clearly then, as Muddy itself acknowledges, the facts which it relies on relate to events or circumstances which have not changed since Muddy's last opportunity to present them to the Commission. The only fact relied on in Muddy's Petition for Reconsideration that changed after the date for filing Comments on the Madras Counterproposal was what Madras describes as a "correction" to the Commission unofficial database which occurred sometime between June 6, 2001 (four months prior to the Commission decision) and November 20, 2001. However, the question of when this mysterious "correction" took place is irrelevant to this proceeding since Muddy had no right to rely on an unofficial Commission database for anything. The Commission granted the KSTE-FM

application (BMPH-20000530ACA) on August 24, 2000. See attached permit. Public Notice was issued on August 29, 2000. From this notice interested parties were charged with constructive notice of the KSTE-FM application. See Forus FM Broadcasting of New York, Inc., 7 FCC Rcd 7880 (1992); High Country Communications, 4 FCC Rcd 6237, 6239 n. 2 (1989). Therefore, Muddy has not presented any material facts which relate to circumstances or events which have changed since its last opportunity to present them to the Commission.

Neither has Muddy satisfied the second prong of Section 1.429(b)(2). That subsection permits consideration of facts not previously presented only if the facts relied on were unknown to the petitioner after its last opportunity to present them to the Commission and the petitioner could not through the exercise of ordinary diligence have learned of the facts in question prior to that opportunity. If Muddy were unaware of the KSTE-FM grant, then it only has itself to blame. As noted, the application was placed on the August 29, 2000 Public Notice. With the exercise of reasonable diligence, Muddy or any other entity could have determined the facts relating to Station KSTE-FM. The Commission has long held that a party who fails to use ordinary diligence in collecting information cannot use its late discovery of that information as the basis of a successful petition for reconsideration. See Boalsburg, Pennsylvania, 7 FCC Rcd 7653, 7655 (1992); Lima, Ohio, 7 FCC Rcd 5933, 5934 (1992); Whidbey Broadcasting Service, Inc., 4 FCC Rcd 8726, 8727 (1989); Santa Margarita, California, supra, 4 FCC Rcd at 7889.

Finally, Muddy is not entitled to reconsideration under Section 1.429(b)(3). That subsection permits consideration of facts not previously presented only if consideration of the facts relied on would serve the public interest. It would scarcely be in the public interest to allow a party such as Muddy to sit back and hope that a Commission decision will initially be in its favor, and when not, to parry with additional submissions. No Commission process could

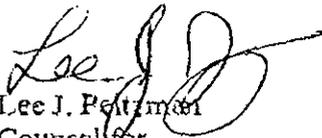
operate efficiently or expeditiously if such a procedure were allowed. See Colorado Radio Corp. v. FCC, 118 F.2d 24, 26 (D.C. Cir. 1941); Banks, Oregon, 16 FCC Rcd 2272, 2275 (2001).

Moreover, in this case Muddy's submission consists of information which is not relevant to the resolution of the paramount issue, which community should be allotted Channel 251C1.

Muddy's proposal to allot Channel 291C1 to Madras is premature. Contrary to Muddy's beliefs, the grant of the Station KSTE-FM application in August, 2000 did not amend the Commission FM Table of Allotments to downgrade KSTE from Channel 290C1 to Channel 290C2. On the other hand, the earlier permit (BMPH-19981117IE) was approved as a one-step upgrade and the FM Table of Allotments was amended in the permit to delete Channel 292C2 and add Channel 290C1 at Vancouver. See attached permit. The difference in treatment between the two permits is the Commission's policy on downgrade actions as set forth in the case of Winslow, Arizona, 16 FCC Rcd 9551 (2001). In that case the Commission stated "after grant of a construction permit to modify the facilities of an existing authorization to a lower class, we will continue to protect the authorized facilities until the modified facilities are licensed....Upon licensing we will amend the Table accordingly." Citing Revision of Section 73.3573(a)(1) of the Commission's Rules 4 FCC Rcd 2415 at ¶ 14. Here the Class C1 permit for KSTE was properly granted with an amendment of the FM Table of Allotments. Likewise the Class C2 permit for KSTE was properly granted without an amendment to the FM Table because KSTE is an authorized facility. Although it filed a license application, that application (BLH-20010402ADV) is still pending. Therefore, KSTE is not licensed as a Class C2 facility and its Class C1 authorization is required to be protected.

In view of Muddy's failure to satisfy the requirements of Section 1.429(b) of the rules with respect to the merits of the Commission Report and Order in this proceeding, its Petition for Reconsideration should be dismissed.

Respectfully submitted,



Lee J. Peitzman
Counsel for
MADRAS BROADCASTING



Federal Communications Commission

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Application Search Results

File Number	Paper/ Elect	Call Sign	Facility Id	Service	Status	Status Date	Details
BPH 20011228AAS	E	KSTE- FM	60640	FM	ACCEPTED FOR FILING	12/31/2001	Info Application
BXPH 20011213AAL	E	KSTE- FM	60640	FS	ACCEPTED FOR FILING	12/14/2001	Info Application
BLH 20010402ADV	E	KSTE- FM	60640	FM	ACCEPTED FOR FILING	04/12/2001	Info Application
BMPH 20000530ACA	P	KSTE- FM	60640	FM	GRANTED	08/24/2000	Info Application
BMPH 19981117IE	P	KSTE- FM	60640	FM	GRANTED	11/17/1999	Info Application
BPH 19890412MC	P	KSTE- FM	60640	FM	GRANTED	04/28/1998	Info Application



United States of America
FEDERAL COMMUNICATIONS COMMISSION
FM BROADCAST STATION CONSTRUCTION PERMIT

Official Mailing Address:

CITICASTERS LICENSES, INC. (NEW)
2625 S. MEMORIAL DRIVE, SUITE A
TULSA OK 74129

Facility ID: 60640

Call Sign: KSTE-FM

Permit File Number: BMPH-19981117IE

This Permit Modifies Permit No.: BPH-890412MG

Subject to the provisions of the Communications Act of 1934, as amended, subsequent acts and treaties, and all regulations heretofore or hereafter made by this Commission, and further subject to the conditions set forth in this permit, the permittee is hereby authorized to construct the radio transmitting apparatus herein described. Installation and adjustment of equipment not specifically set forth herein shall be in accordance with representations contained in the permittee's application for construction permit except for such modifications as are presently permitted, without application, by the Commission's Rules.

Commission rules which became effective on February 16, 1999, have a bearing on this construction permit. See Report & Order, Streamlining of Mass Media Applications, MM Docket No. 98-43, 13 FCC RCD 23056, Para. 77-90 (November 25, 1998); 63 Fed. Reg. 70039 (December 18, 1998). Pursuant to these rules, this construction permit will be subject to automatic forfeiture unless construction is complete and an application for license to cover is filed prior to expiration. See Section 73.3598.

Equipment and program tests shall be conducted only pursuant to Sections 73.1610 and 73.1620 of the Commission's Rules.

Name of Permittee: CITICASTERS LICENSES, INC. (NEW)

Station Location: WA-VANCOUVER

Frequency (MHz): 105.9

Channel: 290

Class: C1

Hours of Operation: Unlimited

Authorizing Official:

Edward P. De La Hunt
Assistant Chief
Audio Services Division
Mass Media Bureau

Grant Date: November 17, 1999

The authority granted herein has no effect on the expiration date of the underlying construction permit.

Transmitter: Type Accepted. See Sections 73.1660, 73.1665 and 73.1670 of the Commission's Rules.

Transmitter output power: As required to achieve authorized ERP.

Antenna type: (directional or non-directional): Non-Directional

Antenna Coordinates: North Latitude: 45 deg 27 min 13 sec
 West Longitude: 122 deg 32 min 45 sec

	Horizontally Polarized Antenna	Vertically Polarized Antenna
Effective radiated power in the Horizontal Plane (kW):	81	81
Height of radiation center above ground (Meters):	123	123
Height of radiation center above mean sea level (Meters):	427	427
Height of radiation center above average terrain (Meters):	329	329
Antenna structure registration number:	1018739	

Overall height of antenna structure above ground (including obstruction lighting if any) see the registration for this antenna structure.

Special operating conditions or restrictions:

1 During the installation of the antenna authorized herein, AM Station (s) listed below shall determine operating power by the indirect method and, if necessary, request temporary authority from the Commission in Washington to operate with parameters at variance in order to maintain monitoring point values within authorized limits. Upon completion of the installation, common point impedance measurements on the AM array shall be made and a partial proof of performance, as defined by Section 73.154(a) of the Commission's Rules, shall be conducted to establish that the AM array has not been adversely affected and, prior to or simultaneous with the filing of the application for license to cover this permit, the results submitted to the Commission (along with a tower sketch of the installation) in an application for the AM station to return to the direct method of power determination.
 (Revised January 28, 1983)
 KKPZ(AM), Portland, OR.

2 The permittee/licensee shall, upon completion of construction and during the equipment test period, make proper radiofrequency electromagnetic (RF) field strength measurements throughout the transmitter site area to determine if there are any areas that exceed the FCC guidelines for human exposure to RF fields. If necessary, a fence must be erected at such distances and in such a manner as to prevent the exposure of humans to RF fields in excess of the FCC Guidelines (OET Bulletin No. 65, Edition 97-01, August 1997). The fence must be a type which will preclude casual or inadvertent access, and must include warning signs at appropriate intervals which describe the nature of the hazard. Any areas within the fence found to exceed the recommended guidelines must be clearly marked with appropriate visual warning signs.

Special operating conditions or restrictions:

- 3 PROGRAM TESTS FOR KKLQ-FM WILL NOT COMMENCE ON CHANNEL 290C1 UNTIL PROGRAM TESTS FOR KLOO-FM COMMENCE ON CHANNEL 292C AND A LICENSE WILL NOT BE GRANTED FOR KKLQ-FM ON CHANNEL 290C1 UNTIL A LICENSE IS GRANTED FOR KLOO-FM ON CHANNEL 292C.

Pursuant to the grant of this construction permit and the authority found in Section 4(i), 5(c), 303 and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b), 0.283, 1.420, 73.203(b), and 73.3573 of the Commission's Rules, the FM Table of Allotments, 47 C.F.R. Section 73.202(b), IS AMENDED as follows:

Community	Channel
Vancouver, WA	Add 290C1
Delete 290C2	

- 4 The permittee/licensee in coordination with other users of the site must reduce power or cease operation as necessary to protect persons having access to the site, tower or antenna from radiofrequency electromagnetic fields in excess of FCC guidelines.

*** END OF AUTHORIZATION ***



United States of America
FEDERAL COMMUNICATIONS COMMISSION
FM BROADCAST STATION CONSTRUCTION PERMIT

Authorizing Official:

Official Mailing Address:

CITICASTERS LICENSES, INC. (NEW)
2625 S. MEMORIAL DRIVE, SUITE A
TULSA OK 74129

Brian J. Butler
Supervisory Engineer
Audio Services Division
Mass Media Bureau

Facility ID: 60640

Grant Date: August 24, 2000

Call Sign: KSTE-FM

The authority granted herein has no effect on the expiration date of the underlying construction permit.

Permit File Number: BMPH-20000530ACA

This Permit Modifies Permit No.: BPH-19890412MC
As Modified by Permit No.: BMPH-19981117IE

Subject to the provisions of the Communications Act of 1934, as amended, subsequent acts and treaties, and all regulations heretofore or hereafter made by this Commission, and further subject to the conditions set forth in this permit, the permittee is hereby authorized to construct the radio transmitting apparatus herein described. Installation and adjustment of equipment not specifically set forth herein shall be in accordance with representations contained in the permittee's application for construction permit except for such modifications as are presently permitted, without application, by the Commission's Rules.

Commission rules which became effective on February 16, 1999, have a bearing on this construction permit. See Report & Order, Streamlining of Mass Media Applications, MM Docket No. 98-43, 13 FCC RCD 23056, Para. 77-90 (November 25, 1998); 63 Fed. Reg. 70039 (December 18, 1998). Pursuant to these rules, this construction permit will be subject to automatic forfeiture unless construction is complete and an application for license to cover is filed prior to expiration. See Section 73.3598.

Equipment and program tests shall be conducted only pursuant to Sections 73.1610 and 73.1620 of the Commission's Rules.

Name of Permittee: CITICASTERS LICENSES, INC. (NEW)

Station Location: WA-VANCOUVER

Frequency (MHz): 105.9

Channel: 290

Class: C2

Hours of Operation: Unlimited

Transmitter: Type Accepted. See Sections 73.1660, 73.1665 and 73.1670 of the Commission's Rules.

Transmitter output power: As required to achieve authorized ERP.

Antenna type: (directional or non-directional): Non-Directional

Antenna Coordinates: North Latitude: 45 deg 31 min 21 sec
 West Longitude: 122 deg 44 min 45 sec

	Horizontally Polarized Antenna	Vertically Polarized Antenna
Effective radiated power in the Horizontal Plane (kW):	4.2	4.2
Maximum effective radiated power (kW):	4.4	4.4
Height of radiation center above ground (Meters):	219	219
Height of radiation center above mean sea level (Meters):	561	561
Height of radiation center above average terrain (Meters):	470	470

Antenna structure registration number: 1204059

Overall height of antenna structure above ground (including obstruction lighting if any) see the registration for this antenna structure.

Special operating conditions or restrictions:

- 1 Prior to construction of the tower authorized herein, permittee shall notify AM Station(s) listed below so that, if necessary, the AM station(s) may determine operating power by the indirect method and request temporary authority from the Commission in Washington, D.C. to operate with parameters at variance in order to maintain monitoring point field strengths within authorized limits. Permittee shall be responsible for the installation and continued maintenance of detuning apparatus necessary to prevent adverse effects upon the radiation pattern of the AM station(s). Both prior to construction of the tower and subsequent to the installation of all appurtenances thereon, a partial proof of performance, as defined by Section 73.154(a) of the Commission's Rules, shall be conducted to establish that the AM array has not been adversely affected and, prior to or simultaneous with the filing of the application for license to cover this permit, the results submitted to the Commission.
 (Revised March 14, 1983)
 KUPL(AM), Portland, OR

- 2 BEFORE PROGRAM TESTS COMMENCE, sufficient measurements shall be made to establish that the operation authorized in this construction permit is in compliance with the spurious emissions requirements of 47 C.F.R. Sections 73.317(b) through 73.317(d). All measurements must be made with all stations simultaneously utilizing the shared antenna. These measurements shall be submitted to the Commission along with the FCC Form 302-FM application for license.

Special operating conditions or restrictions:

- 3 PROGRAM TESTS FOR KKLQ WILL NOT COMMENCE ON CHANNEL 290C2 UNTIL PROGRAM TESTS FOR KLOO-FM COMMENCE ON CHANNEL 292C AND A LICENSE WILL NOT BE GRANTED FOR KKLQ ON CHANNEL 290C2 UNTIL A LICENSE IS GRANTED FOR KLOO-FM ON CHANNEL 292C.

- 4 The permittee shall submit a copy of the antenna's vertical plane pattern for the 1.0 degree beam tilt along with the FCC Form 302-FM application for license.

- 5 The permittee/licensee in coordination with other users of the site must reduce power or cease operation as necessary to protect persons having access to the site, tower or antenna from radiofrequency electromagnetic fields in excess of FCC guidelines.

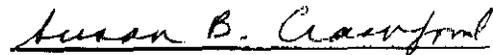
*** END OF AUTHORIZATION ***

CERTIFICATE OF SERVICE

I, Susan B. Crawford, a secretary in the law firm of Shainis & Peltzman, Chartered, do hereby certify that on this 1st day of February, 2002, copies of the foregoing document were sent via first-class United States Mail to the following:

Ms. Victoria M. McCauley
Federal Communications Commission
445 12th Street, S.W., Rm. 2-C222
Washington, D.C. 20554

Muddy Broadcasting Company
Attn: Thomas C. Holland
2780 SW Talbot Road
Portland, OR 97201


Susan B. Crawford