

ORIGINAL

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

RECEIVED - FCC  
JAN 20 2004  
Federal Communication Commission  
Bureau / Office

In the Matter of )  
)  
Amendment of Section 73.202(b) )  
Table of Allotments )  
FM Broadcast Stations )  
(McCook, Nebraska, Maxwell, Nebraska) )  
and Broken Bow, Nebraska )  
To: Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau - Mail Stop 1800D5

MM Docket No. 03-  
RM-  
RECEIVED  
JAN 28 2004  
Federal Communications Commission  
Office of the Secretary

AMENDMENT TO PETITION FOR RULEMAKING

McCook Radio Group, LLC ("MRG"), licensee of KRKU(FM), Channel 253C1 McCook, Nebraska, and Custer County Broadcasting, Inc. ("Custer," together with MRG, the "Petitioners"), licensee of KBBN-FM, Channel 252C3, Broken Bow, Nebraska, by their respective attorneys, hereby amend the above-referenced Petition for Rulemaking filed by MRG on April 24, 2003 ("Petition"), which requested authority to amend the FM Table of Allotments, Section 73 202(b) of the Commission's Rules, by reallocating Channel 253C1 from McCook, Nebraska, to Channel 253C1, Maxwell, Nebraska, and modifying KRKU's license accordingly. By this amendment, and in order to accommodate the minimum distance separation requirements necessary to effectuate the KRKU reallocation, the Petitioners wish to make the additional following change to the FM Table of Allotments, and to incorporate this change as part of the Petition.

| <u>Community</u> | <u>Present</u> | <u>Proposed</u> |
|------------------|----------------|-----------------|
| Broken Bow       | 252C3          | 237C2           |

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## BACKGROUND

In the Petition, MRG noted that the KRKU reallocation to Maxwell met all minimum distance separation requirements except for KBBN-FM. MRG found that the spacing could be resolved if KBBN-FM relocated its facilities to Channel 237C3 without changing its current transmitter site, in full compliance with the Commission's technical rules. MRG affirmed that it would reimburse Custer for all reasonable expenses incurred due to the KBBN-FM facilities change

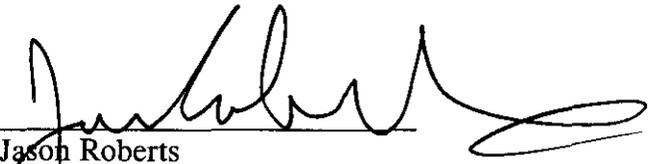
In compliance with Commission policy, the Petitioners have entered into a Facilities Modification Agreement, a copy of which is attached hereto as Exhibit A, whereby Custer has agreed to both move KBBN-FM's channel of operations to Channel 237C3 and to upgrade the facilities to a Class C2 (the "KBBN Upgrade"), contingent upon Commission approval of the above-referenced Petition. McCook will reimburse Custer for all reasonable and prudent costs associated with the KBBN Upgrade. Attached hereto as Exhibit B is a technical analysis showing the KBBN Upgrade can be made in compliance with the Commission's spacing rules and technical requirements.

If the proposals set forth in the Petition as amended are adopted, the Petitioners intend to file the FCC Form 301 applications specifying operation of KRKU on Channel 253C1 at Maxwell, Nebraska, and of KBBN-FM on Channel 237C2 at Broken Bow, Nebraska, as applicable, and will promptly construct or modify the facilities contemplated therein.

CONCLUSION

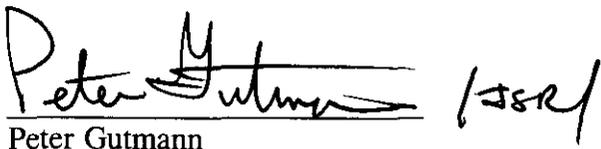
For the foregoing reasons, MRG and Custer hereby respectfully request that the Commission amend the above-referenced Petition, and promptly initiate the Rule Making requested herein to (i) reallocate Channel 253C1 from McCook, Nebraska to Channel 253C1, Maxwell, Nebraska, modifying the KRKU license accordingly, and (ii) modify the KBBN-FM facilities by substituting Channel 237C2 for Channel 252C3.

Respectfully submitted,

  
\_\_\_\_\_  
Jason Roberts  
Counsel for McCook Radio Group, LLC

Irwin, Campbell & Tannenwald, P.C.  
1730 Rhode Island Ave., NW  
Suite 200  
Washington, DC 20036-3101  
Tel 202-728-0400  
Fax 202-728-0354

Dated: January 20, 2004

  
\_\_\_\_\_  
Peter Gutmann  
Counsel for Custer County Broadcasting  
Co., Inc.

Womble, Carlyle Sandridge  
& Rice, PLLC  
1401 Eye Street, NW  
Suite 700  
Washington, DC 20005  
Tel 202-857-4532  
Fax 202-261-0032

Dated: January 20, 2004

## FACILITIES MODIFICATION AGREEMENT

144 This Facilities Modification Agreement ("Agreement") is made and entered into this day of January, 2004, by and between **McCook Radio Group, LLC** ("McCook") and **Custer County Broadcasting Co., Inc.** ("Custer").

WHEREAS, McCook is the Federal Communications Commission ("FCC") licensee of radio station KRKU(FM) (Facility Id No 86863), McCook, Nebraska, on FM Channel 253C1;

WHEREAS, Custer is the FCC licensee of radio station KBBN-FM (Facility Id No. 14769), Broken Bow, Nebraska on FM Channel 252C3;

WHEREAS, McCook has filed a petition for rulemaking (the "Petition") with the FCC to change the allotment for KRKU to Channel 253C1 at Maxwell, Nebraska (the "KRKU Change"), which requires the involuntary channel change of KBBN-FM from Channel 253C3 to Channel 237C3 at the current transmitter site of KBBN-FM (the "KBBN Change") and will afford Custer an opportunity to contest the KBBN Change following issuance of an order to show cause;

WHEREAS, Custer is willing to agree to accommodate the KRKU Change under conditions that Custer obtain an upgrade of its facilities for KBBN-FM to Channel 237C2 at its current transmitter site (the "KBBN Upgrade") and that McCook reimburse to Custer all of its reasonable and prudent costs of implementing the KBBN Upgrade, all in accordance with the terms of this Agreement;

WHEREAS, the parties believe that prompt implementation of the KRKU Change and the KBBN Upgrade will serve the public interest by enabling the stations to expand their coverage,

NOW THEREFORE, for good and valuable consideration, including the mutual covenants and agreements made herein, the sufficiency of which is hereby acknowledged, McCook and Custer, intending to be legally bound, hereby agree as follows:

1. Modification of the Petition. No later than January 15, 2004, McCook shall cause its Petition to be modified or supplemented in order to become a joint petition with Custer to request both the KRKU Change and the KBBN Upgrade, (the "Joint Petition"). Neither McCook nor Custer through this Agreement shall be restricted or hindered in any way from any further modifications or changes that it may make to KRKU or KBBN-FM, respectively, provided that any such change shall not directly conflict with, delay or otherwise prevent the grant of the Joint Petition or the relief sought by the parties therein.

2. Prosecution of the Joint Petition. McCook will prepare and file with the FCC at its expense all documents constituting the Joint Petition, including all engineering studies reasonably required in support thereof. Thereafter, the parties shall reasonably cooperate to

prosecute the Joint Petition such that it may be granted and that such grant shall become final (that is, no longer subject to administrative or judicial modification, reconsideration, review or appeal) as expeditiously as practicable. Neither party shall take any action nor fail to take any commercially reasonable action that would have the effect of hindering or delaying the relief sought in the Joint Petition. In the event for any reason the Joint Petition has not been granted within two years from the date hereof, then either party may seek to dismiss or withdraw the Joint Petition, and thereafter neither party shall have any liability to the other, provided, however, that the party seeking to terminate is not in default of its obligations under this Agreement.

3. Obligations. McCook's payment obligations hereunder and Custer's obligations under the KBBN Upgrade are conditioned upon the following: (a) the grant by the FCC of the Joint Petition that enables McCook to accomplish a change in community of license for KRKU and that enables Custer to accomplish the upgrade and channel change for KBBN; (b) that the FCC grant does not subject McCook or Custer to conditions or changes other than those normally set forth on such grants, unless such conditions or changes are accepted by either Custer or McCook as its reasonable sole discretion (the "Rule Making Order"), provided such conditions or changes do not impair the other party's construction and/or operation of its respective station; and (c) the Rule Making Order becomes final (that is, no longer subject to further administrative or judicial review under applicable law) ("Final Order"), unless such finality is waived by the party seeking relief at its sole discretion.

4. Termination Prior to Rule Making Order. Custer understands that up until the day the FCC releases the Rule Making Order, McCook may rescind and/or dismiss the Joint Petition and withdraw any documents filed in connection with the Joint Petition, returning both Custer and McCook to the status quo, whereby KRKU will remain allotted to McCook, Nebraska on Channel 253C1, and KBBN will remain allotted to Broken Bow, Nebraska on Channel 253C3. McCook shall have no liability to Custer as a result of such rescission or dismissal, provided, however, that McCook agrees to reimburse Custer for all reasonable and documented attorney and administrative costs associated with the negotiation and prosecution of the Joint Petition incurred by Custer up until the filing of such rescission and /or dismissal.

5. KBBN Change Procedure. Within five (5) business days of the Rule Making Order becoming a Final Order, Custer shall submit a Form 301 application specifying the KBBN Upgrade ("Form 301 Application"), and shall diligently prosecute the application for grant. Upon grant of the Form 301 Application, and weather permitting, Custer shall diligently undertake construction and initiation of operations under the KBBN Upgrade, and shall complete construction of the Station and initiate of operations within six (6) months from the date the Commission grants the Form 301 Application; provided that, at McCook's request, Custer shall complete construction and/or initiate operations pursuant to the KBBN Upgrade by such later date as reasonably requested by McCook in order to simultaneously implement any other station changes to be made pursuant to the Rule Making Order. Custer shall file with the FCC a license to cover application (the "KBBN License Application") within ten (10) days of initiation of operations under the KBBN Upgrade.

6. Consideration McCook agrees to pay to Custer as reimbursement for implementation of the KBBN Upgrade the total amount of FIFTY THOUSAND DOLLARS (\$ 50,000), The parties agree this amount will be delivered as follows. TEN THOUSAND DOLLARS (\$10,000) ("Initial Sum") shall be deposited in an escrow account with Irwin, Campbell & Tannenwald, P.C. ("Escrow Agent"), no later than five (5) business days after the Joint Petition is filed with the FCC, and said Initial Sum shall be disbursed pursuant to an escrow agreement in the form attached hereto as Exhibit A, no later than (5) business days from Final Order. FORTY THOUSAND DOLLARS (\$40,000) ("Remaining Sum") shall be deposited in an escrow account with Escrow Agent no later than five (5) business days from the Rule Making Order, and said Remaining Sum shall be disbursed pursuant to the escrow agreement to Custer no later than five (5) business days after Custer files the Form 301 Application. The payments by McCook to Custer pursuant to the terms of this Agreement are to cover the expected costs of the KBBN Upgrade, including engineering and legal fees, necessary equipment purchases and promotional costs. Notwithstanding anything to the contrary, if either the Initial Sum or the Remaining Sum are not timely deposited as required herein, then Custer may terminate this agreement, withdraw the Joint Petition, and have no further liability to McCook.

7. Remedies Upon Default. The parties acknowledge that the monetary value of the benefits contemplated by the Joint Petition cannot be readily established, and that each would be irreparably damaged by a loss of such benefits. Consequently, if either party is in material default of its obligations under this Agreement, the other party shall have the right to seek injunctive relief and/or specific performance. The defaulting party agrees to waive any defense as to the adequacy of the other party's remedies at law and to interpose no opposition, legal or otherwise, to the propriety of injunctive relief or specific performance as a remedy. Should any party default in the performance of any of the terms and conditions of this Agreement, which default results in the filing of any lawsuit or action, the prevailing party in such lawsuit or action shall be entitled to reasonable attorney's fees and costs as shall be determined by the court.

8. Representations and Warranties. Each of McCook and Custer represent and warrant to the other that it is legally qualified, empowered and able to enter into this Agreement; the execution and performance of this Agreement do not violate nor conflict with its organizational documents nor with any agreement, arrangement, understanding or restriction to which it is subject; that each is the authorized legal holder of the FCC authorizations for its respective station; that such authorizations are in full force and effect and not subject to any restrictions or limitations that would impair such party's ability to fully and timely perform its obligations under this Agreement; that to such party's knowledge and belief there are no pending or threatened proceedings or claims which could result in the adverse modification or such station authorizations or such party's ability to fully and timely perform its obligations under this Agreement; that such party is in compliance in all material respects with all laws, regulations and rules applicable to its respective station, and that such party is aware of no facts or circumstances that is reasonably likely to delay or hinder FCC grant of the Joint Petition.

9. Assignment or Successors. Each party shall be entitled to assign its interest in this Agreement or in its respective station to any person or entity only if the successor or assignee assumes the assignor's obligations under this Agreement. Thus, McCook may not assign the license of KRKU and Custer may not assign the license of KBBN-FM unless such party's assignee agrees in writing to assume and be bound to the terms hereof. Subject to the foregoing, this Agreement shall inure to the benefit of, and be binding upon, the successors, heirs and permitted assigns of the parties hereto.

10. Notice Any notice, consent, waiver or other communication hereunder shall be sent by certified, express or registered mail, return receipt requested, overnight air courier service, same day delivery service or facsimile with receipt confirmation to the address specified below:

If to McCook:

McCook Radio Group, LLC  
1811 West "O" Street  
McCook, Nebraska 69001  
Attn: David Stout, Manager

With a copy to:

Jason S. Roberts, Esquire  
Irwin Campbell & Tannenwald, PC  
1730 Rhode Island Avenue, NW, Suite 200  
Washington, DC 20036

If to Custer:

Custer County Broadcasting Co., Inc  
P.O. Box 409  
Broken Bow, Nebraska 68822  
Attn: David Birnie, President

With a copy to.

Peter Gutmann, Esq.  
Womble Carlyle Sandridge & Rice, PLLC  
1401 I Street, N.W., Suite 700  
Washington, DC 20005

11 Severability. If any term or provision of this Agreement is determined to be void, unenforceable or contrary to law, the remainder of Agreement shall continue in full force and effect provided that such continuation would not materially diminish the benefits of this Agreement for either party

12. Entire Agreement. This Agreement sets forth the entire understanding of the parties hereto at the time of execution and delivery hereof and may not be amended except by written amendment signed by both parties. All prior agreements between the parties with respect to the subject matter hereof shall be of no further force or effect. The undersigned each represent and warrant that each has the requisite authority to bind their respective parties to the terms and obligations of this Agreement.

13. Counterparts and Facsimile Signatures. This Agreement may be signed in counterparts with the same effect as if the signature on each counterpart were on the same instrument. Counterpart signatures to this Agreement delivered by facsimile shall be acceptable and binding

14. Governing Law. This Agreement shall be governed and construed according to the substantive law of the State of Nebraska, without regard to choice of law principles.

15. Disclosure Except to the extent required by law, neither McCook nor Custer shall disclose the existence of this Agreement or make known any of its terms to any person other than its attorneys, engineers, and representatives to whom disclosure is necessary to effectuate the purposes of this Agreement and who are similarly bound to hold the existence of this Agreement and its terms in confidence

IN WITNESS WHEREOF, the undersigned have executed this Agreement to be effective on the date written above

**MCCOOK RADIO GROUP, LLC**

By \_\_\_\_\_  
David Stout, Manager

**CUSTER COUNTY BROADCASTING CO., INC.**

By \_\_\_\_\_  
David Birnie, President

warrant that each has the requisite authority to bind their respective parties to the terms and obligations of this Agreement.

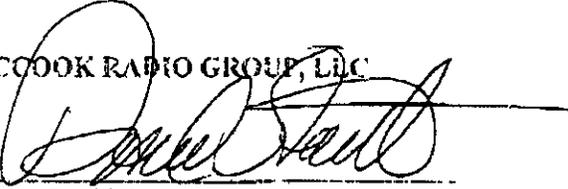
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David Birnie, President

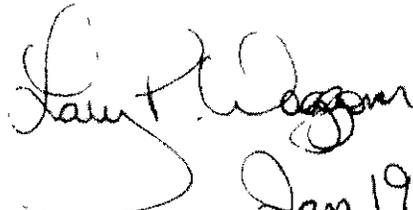
KBBN-FM CHANNEL #237C2 SPACING STUDY  
TECHNICAL REVIEW

KBBN-FM, Broken Bow, Nebraska, is licensed to operate Class C3 on Channel 253. Rule Making RM-20DD-102 proposes changing the Broken Bow channel 253C3 allocation to Channel 237C2.

The attached FM Class C2 spacing study was conducted on Channel 237 from the licensed KBBN-FM transmitter site. The closest spacing is toward KKAN-FM, Ch. 237A, licensed to Phillipsburg, Kansas. KKAN is located 179.8 kilometer distant, on a bearing of 172.2°. The 73.207 required spacing of co-channel Class A to Class C2 station is 166 kilometers. There is 13.8 kilometer of clearance between the KKAN and KBBN transmitter sites.

The study has shown that KBBN can operate as a Class C2 station on Channel #237 from its licensed site. The station would be in full compliance with the Commission's spacing requirements.

The attached study and technical review are both true and accurate to the best of my knowledge and ability.

  
Jan 19, 2004

**LARRY P. WAGGONER**  
*Broadcast Technical Consultant*

1712 VALLEYVIEW CT. • WICHITA, KS 67212 • (316) 722-3726

FM Study for KBBN  
 Location BROKEN BOW, NE

FCC Database Date. 1/16/2004  
 Channel Class: C2

41-23-49  
 99-37-02

[\*] by HAAT indicates calculated as missing in database.

| Call<br>Status                                 | City, State<br>Proponent   | Chan Cl<br>File Number | Freq<br>HAAT | kW   | Latitude<br>Longitude | Dist.<br>Azm | Required<br>Clear(km) | Site  |
|--|--|------------------------|--------------|------|-----------------------|--------------|-----------------------|-------|
| -----  |  |                        |              |      |                       |              |                       |       |
| >>>>>> Study For Channel 237 95.3 mHz <<<<<<<< |  |                        |              |      |                       |              |                       |       |
| ALLOCR<br>ADD                                  | BROKEN BOW, NE   | 237 C3                 | 95.3         |      | 41-23-49              | 0 0          | 177                   |       |
|  |  | RM-20DD-102            |              |      | 99-37-02              | 0.0          | -177.0                | SHORT |
|  | Change of community/substitution   |                        |              |      |                       |              |                       |       |
| KKANFM<br>LIC                                  | PHILLIPSBURG, KS   | 237 A                  | 95.3         | 3.00 | 39-47-32              | 179 8        | 166                   |       |
|  | Fac No 3982  | BLH-19840612CK         |              | 45   | 99-37-02              | 172 2        | 13 8                  | CLOSE |
| KJLTFM<br>LIC                                  | NORTH PLATTE, NE   | 235 C1                 | 94.9         | 100  | 40-59-49              | 114 8        | 79                    |       |
|  | Fac No 67761   | BMLED-19960327KE       |              | 230  | 100-52-47             | 247.7        | 35.8                  | CLEAR |
|  | Commercial channel operating educational   |                        |              |      |                       |              |                       |       |
| KROA<br>LIC                                    | GRAND ISLAND, NE   | 239 C1                 | 95.7         | 100  | 40-47-11              | 125 1        | 79                    |       |
|  | Fac No 24712   | BMLED-19971209KC       |              | 140  | 99-37-02              | 122 4        | 46 1                  | CLEAR |
|  | Non-commercial educational station operating on a commercial channel             |                        |              |      |                       |              |                       |       |
| ALLOC<br>VAC                                   | ECKLEY, CO   | 237 C1                 | 95.3         |      | 40-06-48              | 281.3        | 224                   |       |
|  | Fac No 95614   | Dockt-1997-109         |              |      | 102-29-18             | 240 5        | 57 3                  | CLEAR |
|  | A Filing Window for this Channel will be Addressed by the Commission in a - Subs |                        |              |      |                       |              |                       |       |