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June 25, 2003

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**By Hand**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
236 Massachusetts Avenue, N.E.  
Suite 110  
Washington, D.C. 20002

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. Dortch:

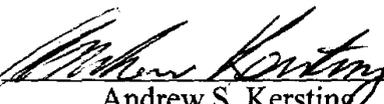
Transmitted herewith on behalf of Chisholm Trail Broadcasting Co., Inc., are an original and four copies of a "Supplement to Application for Review," filed in the above-referenced proceeding.

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

Very truly yours,

DICKSTEIN SHAPIRO MORIN  
& OSHINSKY LLP

Attorneys for  
Chisholm Trail Broadcasting Co., Inc.

By:   
Andrew S. Kersting

Enclosure

cc: Certificate of Service (w/ encl.) via hand & first class mail

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

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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: The Commission

**SUPPLEMENT TO**  
**APPLICATION FOR REVIEW**

Chisholm Trail Broadcasting Co., Inc. ("Chisholm Trail"), by counsel and pursuant to Section 1.115 of the Commission's rules, 47 C.F.R. §1.115, hereby supplements its pending Application for Review filed September 12, 2002, requesting Commission review of the Assistant Chief, Audio Division's *Memorandum Opinion and Order*, 17 FCC Rcd 14722 (Aud. Div. 2002) ("*Second MO&O*") in the above-captioned proceeding. In support of this supplement, the following is stated:

**I. Introduction.**

On May 26, 2004, the full Commission issued a decision in *Northwye, Cuba, Waynesville, Lake Ozark, and Eldon, Missouri*, FCC 04-116 (released May 26, 2004) ("*Eldon*"), which involved a set of facts substantially similar to those in this proceeding. *Eldon* involved an allotment proposal of a former Commission licensee who sought to upgrade the class of a station the license for which had been revoked. The Commission refused to process the upgrade proposal on the basis that only a licensee or permittee of an FM station may seek to modify a station's authorization. *Northwye, Cuba, Waynesville, Lake Ozark, and Eldon, Missouri*, 17

FCC Rcd 7585, 7587 (2002), *aff'd, Eldon*, FCC 04-116. The Commission also found that “public interest reasons” did not provide an alternative basis upon which to consider the proposal because there was no longer a “valid expression of interest” in the allotment proposal. 17 FCC Rcd at 7588, n.10.

This proceeding also involves (i) an allotment proponent who is no longer qualified to be a Commission licensee, (ii) a proposal for a station whose license has been revoked, and (iii) a proposal which is no longer supported by the requisite expression of interest. Due to the substantial similarity in the facts and procedural posture between this proceeding and *Eldon*, Chisholm Trail believes that the recently issued decision in *Eldon* will be helpful to the Commission in resolving the issues before it in this proceeding.

## II. *Eldon* Decision.

In *Eldon*, Lake Broadcasting, Inc. (“Lake”) sought to upgrade Station KBMX(FM), Eldon, Missouri from Channel 270A to Channel 270C1. Lake’s upgrade proposal was denied by the Chief, Allocations Branch, and Lake filed a petition for reconsideration.<sup>1</sup> The Allocations Branch subsequently dismissed Lake’s petitions for reconsideration in the *Eldon* proceeding and MM Docket No. 90-195 as moot because the Commission had, in the interim, revoked all of the stations licensed to Lake or controlled by its principal shareholder, Michael Rice.<sup>2</sup> The basis for the license revocations was that Michael Rice was convicted and incarcerated on a number of criminal felony charges. The Commission also concluded that the Rice-controlled licensees (including Lake) had made misrepresentations to, and lacked candor with, the Commission concerning Rice’s further involvement in the management and operation of Rice’s stations

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<sup>1</sup> Lake also filed a petition for reconsideration in MM Docket No. 90-195, arguing that action in that subsequent rulemaking proceeding prejudiced Lake’s petition for reconsideration in the *Eldon* proceeding.

<sup>2</sup> See *Initial Decision*, 12 FCC Rcd 14254 (ALJ 1997), *aff'd, Memorandum Opinion and Order*, 16 FCC Rcd 18394 (2001).

subsequent to his convictions. The U.S. Court of Appeals for the D.C. Circuit affirmed those actions and the U.S. Supreme Court denied *certiorari*. See *Contemporary Media Inc. v. Federal Communications Commission*, 214 F.3d 187 (D.C. Cir. 2000), *cert. denied*, \_\_ U.S. \_\_, 121 S.Ct. 1355 (2001). Those actions are now final.

Lake's latest reconsideration petition, which was filed in May 2002, argued that the Commission erred in dismissing its Eldon upgrade proposal on the basis that it was moot. At that time, Lake had two court appeals pending in which Lake was seeking equitable relief from the Commission's refusal to reopen the license revocation proceeding. Lake claimed that, until those appeals were decided, it was premature for the Commission to dismiss its reconsideration petition in *Eldon* as moot. Lake requested, instead, that the Commission hold that petition in abeyance pending the outcome of its court appeals.

Nevertheless, in March 2003, the U.S. Court of Appeals for the D.C. Circuit denied Lake's appeals and affirmed the Commission's determination that there was no basis upon which to reopen the record in the revocation proceeding. *Rice v. FCC*, 60 Fed.Appx. 332 (D.C. Cir. 2003). Therefore, the Commission dismissed Lake's latest reconsideration petition as moot and refused to process its upgrade proposal. *Eldon*, FCC 04-116.

### **III. Eldon Requires the Tuttle Allotment to be Rescinded.**

*Eldon* is instructive with respect to this proceeding because it involves substantially similar facts: (1) an FM allotment proposal which essentially seeks to upgrade an existing station -- in this case by changing the station's community of license and moving it from a remote rural area into a large radio market; (2) an allotment proponent who was disqualified for making misrepresentations to, and lacking candor with, the Commission; (3) the station which was the subject of this proceeding had its license surrendered to the Commission and

subsequently canceled; and (4) there is no longer an expression of interest in the proposed allotment.

The primary distinction between *Eldon* and this case is the point during the proceeding at which the former licensee's disqualification occurred. In *Eldon*, the Commission became aware of Michael Rice's felony convictions after the Allocations Branch initially denied Lake's upgrade proposal, but before the Commission's staff had an opportunity to act on Lake's initial reconsideration petition. As a result, the Commission never had to review the merits of Lake's upgrade proposal on reconsideration. Instead, the Commission denied Lake's reconsideration petition on the basis that it was moot because the license for KBMX, which was the subject of the upgrade proposal, had been revoked (as well as those for all of Rice's other stations) and Lake was no longer qualified to be a Commission licensee.

In this case, Tyler was not disqualified as a Commission licensee and the license for KTSH was not surrendered to the Commission and canceled until after the Audio Division had issued its *Second MO&O* (second reconsideration order) in which it adopted Tyler's reallocation proposal. That decision, however, is *not final*. Indeed, the *Second MO&O* is no more final than either of the two earlier decisions in which the former Allocations Branch had denied Tyler's allotment proposal. See *Report and Order*, 16 FCC Rcd 1525 (Mass Med. Bur. 2000) ("*Report and Order*"); *Memorandum Opinion and Order*, 16 FCC Rcd 7979 (Mass Med. Bur. 2001) ("*MO&O*"). Therefore, the Commission should follow the same principle that it did in *Eldon* and refuse to adopt an allotment proposal of a disqualified licensee for a station which has had its license canceled and no longer exists. This is especially true in this case because, just as in *Eldon*, there is no longer a "valid expression of interest" to support the pending allotment proposal. See *Northweye, Cuba, Waynesville, Lake Ozark, and Eldon, Missouri*, 17 FCC Rcd 7585, 7588 n.10, *aff'd, Eldon*, FCC 04-116.

Following the execution of the Enforcement Bureau's Consent Decree and issuance of the accompanying *Order* on August 11, 2003, 18 FCC Rcd 16241 (Enfor. Bur. 2003) ("*Order*"), Chisholm Trail filed a "Supplement to Application for Review" on September 26, 2003, in which it demonstrated that, pursuant to Section 307(b) of the Communications Act of 1934, as amended (the "Act"), and applicable Commission precedent, there must be a continuing "expression of interest" in a new allotment before the Commission will allot a new channel. There cannot be an abandonment of that interest during the reconsideration period. *See generally Santa Isabel, Puerto Rico and Christiansted, Virgin Islands*, 3 FCC Rcd 2336 (1988) ("the requirement of an expression of interest is reasonable and necessary to the efficient conduct of the agency's business, and the Commission has good reason to preserve the integrity of its processes by requiring adherence") (subsequent history omitted); *Wickenburg, Bagdad and Aguila, Arizona*, 16 FCC Rcd 15793 (Mass Media Bur. 2001) (subsequent history omitted); *Mount Pleasant and Bogata, Texas*, 16 FCC Rcd 7858 (Mass Media Bur. 2001) (Commission granted reconsideration petition requesting rescission of a new channel allotment at Bogata where the proponent withdrew its expression of interest). As demonstrated in Chisholm Trail's initial supplement, as a result of Tyler's disqualification, the cancellation of the KTSH license, and the withdrawal of all of his pleadings in this proceeding, there no longer is the requisite expression of interest in the allotment of Channel 259C3 at Tuttle in this proceeding. Therefore, the Commission no longer has the statutory authority upon which to allot Channel 259C3 to Tuttle.

With respect to the time at which Tyler's disqualification occurred, the Commission should be aware that the Audio Division (and its former Allocations Branch (collectively, the "Audio Division")) was fully apprised of the underlying facts concerning Tyler's disqualifying misconduct in this proceeding as of November 3, 1998. The record in this proceeding establishes that the material facts regarding Tyler's (admitted) violations of Sections 1.17 and

73.1015 of the Commission's rules, which ultimately culminated in the Enforcement Bureau's *Order* and accompanying Consent Decree, 18 FCC Rcd 16241 (Enforc. Bur. 2003), were first brought to Audio Division's attention on November 3, 1998, through the filing of Chisholm Trail's Reply Comments. Each of the subsequent filings that Chisholm Trail made with the Hearings and Investigations Division of the Enforcement Bureau concerning Tyler's misconduct also were served on the Audio Division. Thus, the Audio Division had actual notice of Tyler's disqualifying conduct in this proceeding even prior to the issuance of its *Report and Order* in this proceeding denying Tyler's allotment proposal. Inexplicably, the Audio Division chose to ignore Tyler's repeated misrepresentations and lack of candor and apparently refused to coordinate with the Enforcement Bureau, which obviously was investigating Tyler's misconduct.<sup>3</sup>

Despite the issuance of its *Report and Order* and *MO&O* denying Tyler's allotment proposal, the Audio Division neglected to hold this proceeding in abeyance pending the Enforcement Bureau's investigation of Tyler which would have been entirely consistent with *Eldon* where the Allocations Branch refused to process Lake's upgrade proposal after it had been initially denied. Instead, the Audio Division proceeded to issue a second reconsideration order reversing its two earlier decisions and reallocated Channel 259C3 to Tuttle even though Tyler had filed an Application for Review two months earlier.<sup>4</sup> The mere issuance of the *Second MO&O* was inconsistent with the Commission's rules because, upon the filing of Tyler's Application for Review, the Audio Division no longer had jurisdiction of this proceeding and Tyler's pleading should have been acted upon by the full Commission. 47 C.F.R. §1.115.

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<sup>3</sup> See, e.g., Letter dated May 7, 1999 from Norman Goldstein, Chief, Complaints and Political Programming Branch, Enforcement Division, Mass Media Bureau, to Ralph Tyler and South Central Oklahoma Christian Broadcasting, Inc. (copy appended hereto).

<sup>4</sup> See Application for Review filed May 31, 2001 by Ralph Tyler.

## Conclusion

Consistent with *Eldon*, the Commission should rescind the allotment of Channel 259C3 at Tuttle in the absence of a valid expression of interest. This proceeding is not final and the Commission should take the same action that it would have taken if the Enforcement Bureau's *Order* and accompanying Consent Decree had been issued, as in *Eldon*, immediately following the issuance of the initial *Report and Order* denying Tyler's allotment proposal. Indeed, this proceeding is no more "final" now than it was at that stage of this proceeding. Maintaining the allotment of Channel 259C3 at Tuttle cannot be reconciled with the full Commission's decision in *Eldon*, especially given that the Audio Division was fully aware of all of the underlying facts that resulted in Tyler's disqualification, the cancellation of the KTSH license, and the concomitant withdrawal of the only expression of interest in this proceeding.

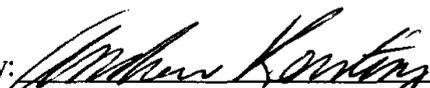
Furthermore, there is no Commission precedent to support the Audio Division's *Second MO&O* in the absence of a continuing expression of interest in the proposed allotment. Therefore, consistent with Section 307(b) of the Act, the allotment of Channel 259C3 at Tuttle should be rescinded in the absence of a valid expression of interest and the allotment should be returned to Tishomingo where it was prior to the commencement of this proceeding.

WHEREFORE, in light of the foregoing, Chisholm Trail respectfully requests that (1) its Application for Review filed September 12, 2002, as supplemented, be granted, and (2) that the *Second MO&O* be reversed or rescinded, and that the proposal to reallocate Channel 259C3 from Tishomingo to Tuttle, Oklahoma be dismissed or denied with prejudice.

Respectfully submitted,

CHISHOLM TRAIL  
BROADCASTING CO., INC.

Dickstein Shapiro Morin & Oshinsky LLP  
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Washington, DC 20037-1526  
(202) 955-6631

By:   
Andrew S. Kersting

and

Vinson & Elkins, LLP  
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(202) 639-6771

By:   
Mark N. Lipp

Its Counsel

June 25, 2004

**EXHIBIT**

**FCC Letter to Ralph Tyler and  
South Central Oklahoma Citizens Investigative**

FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

IN REPLY REFER TO:  
1800C1-JWS

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Ralph Tyler  
Licensee, KTSH(FM)  
5105 S. Shields Boulevard  
Oklahoma City, Oklahoma 73129

South Central Oklahoma Christian Broadcasting, Inc.  
Permittee, KAZC(FM)  
Route 5, Box 119  
Ada, Oklahoma 74820

Dear Licensee/Permittee:

The Commission has received information which raises questions about certain representations made by Ralph Tyler ("Tyler") with regard to Station KTSH(FM), Tishomingo, Oklahoma. Those representations and related circumstances, in turn, raise questions about a representation made in the application of South Central Oklahoma Christian Broadcasting, Inc. ("SCOCB") for the license to cover the construction of Station KAZC(FM), Tishomingo, Oklahoma. Finally, the representations of Tyler and SCOCB, when considered in conjunction with allegations from Chisholm Trail Broadcasting Co., raise questions about compliance with staffing requirements for KAZC's main studio.

The Commission has not reached any determination with respect to these matters. However, in order that we may be more fully informed, we request answers to the questions asked herein.

I. By letter dated October 1, 1998, Tyler represented to the Commission that "due to antenna failure on September 28, 1998, the operation of KTSH(FM) has been temporarily suspended." On October 29, 1998, KTSH engineer Randall C. Mullinax ("Mullinax") apparently informed an FCC inspector that the "bullet in the lower bay [of the antenna] had failed." Information submitted to the Commission indicates, however, that Mullinax deliberately took the station off the air and donated some of KTSH's equipment to KAZC with Tyler's knowledge and that none of the antenna bays for KTSH had been damaged prior to removal of the lowest bay by Mullinax. In view of the foregoing:

1. Who drafted the October 1, 1998, letter referenced above?

2. Who decided to temporarily suspend the operations of KTSH?
3. When was that decision made?
4. Who decided to donate KTSH equipment to KAZC?
5. What KTSH equipment was to be donated?
6. When was it decided that KTSH equipment was to be donated to KAZC?
7. When was the equipment actually donated?
8. When and how did KTSH communicate to KAZC that equipment was to be donated?
9. What understanding did anyone connected with KTSH have as to when KAZC was going to have a lease agreement for facilities at KAZC's specified tower site? Explain how such understanding was acquired, and identify the persons with the understanding.
10. Who authorized the retuning of KTSH's transmitter?
11. When was that decision made?
12. If Tyler did not make that decision, when was that decision communicated to Tyler?
13. Who authorized the removal of the bottom bay of KTSH's antenna?
14. When was that decision made?
15. If Tyler did not make that decision, when was that decision communicated to Tyler?
16. Did anyone connected with KTSH ever communicate to the Commission that the October 1, 1998, letter, did not completely and accurately relate why KTSH's operations were temporarily suspended? If yes, state when and how such information was communicated to the Commission. If not, explain why not.
17. Who is the FCC inspector referenced in the December 10, 1998, "Declaration of Randall C. Mullinax (which appears as an attachment to the December 14, 1998, "Response of Ralph Tyler")?
18. When and how was it communicated to the FCC that information given by Mullinax to the FCC inspector (as described in his December 10, 1998, Declaration) was inaccurate?
19. Who authorized the repair of KTSH's facilities after it had ceased broadcasting in September 1998?
20. When did such occur?
21. Describe the steps taken to restore KTSH's facilities.
22. When did KTSH resume broadcasting?
23. What program service did KTSH use upon resumption of broadcast operations?

II. The construction permit application for KAZC (File No. BPED-970127MD) represented that the center of radiation for KAZC's 3-bay antenna would be at the same height above ground as the center of radiation for KTSH's 6-bay antenna (*i.e.*, 77 meters). It further represented that the KAZC antenna would be located on the opposite side of the tower from the KTSH antenna. The permit authorized construction of the requested facilities. KAZC's license application (File No. BLED-981002KA) represented that there were no differences between the facilities authorized in the KAZC

construction permit and the constructed facilities. However, it appears that KAZC commenced operations on September 29, 1998, with a single bay antenna located on the same side as the KTSH antenna at a height lower than that authorized. In view of the foregoing:

1. Explain why the KAZC license application represented there were no differences between the authorized and the constructed facilities.
2. When did anyone on behalf of KAZC enter into a lease for that station for space at the station's designated tower site?
3. Who on behalf of KAZC negotiated for space at the station's designated site?
4. When did such negotiations commence?
5. Provide a copy of the lease agreement for KAZC.
6. With respect to the 3-bay antenna described in KAZC's construction permit application, what efforts were made by anyone on behalf of KAZC to obtain such an antenna prior to October 2, 1998? As to any efforts described, identify all persons referenced, including any title(s) they hold in SCOCB.
7. When did anyone connected with KAZC learn that the antenna initially used for the station was not the antenna described in the construction permit application?
8. When was the KAZC antenna mounted at the location authorized in the station's construction permit?

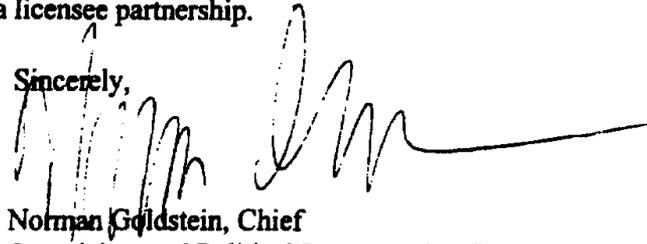
III. Information submitted to the Commission indicates that the individual(s) responsible for the operation of KTSH immediately prior to its shutdown on September 28, 1998, may have been the same as those responsible for KAZC's operation when it commenced broadcasting on September 29, 1998. Moreover, it appears that KAZC did not have a full-time employee at the station until as late as January 18, 1999, when Mike Huddleston ("Huddleston") became a full-time general manager. In view of the foregoing:

1. Describe how Station KAZC has complied with the main studio staffing requirements enunciated in *Jones Eastern of the Outer Banks, Inc.*, 7 FCC Rcd 7309 (1992); 10 FCC Rcd 3759 (1995) from September 29, 1998, to the date of this letter.

Pursuant to Section 73.1015 of the Commission's Rules, you are requested to respond to this inquiry. Please respond within thirty (30) days of the date of this letter. Failure to answer fully will constitute a violation under Section 73.1015 of our rules and may subject you to serious sanctions. Commission policy requires that responses to its

**inquiries be signed by the licensee (or permittee), an officer or director of a licensee corporation, or a general partner of a licensee partnership.**

Sincerely,

A handwritten signature in black ink, appearing to read 'Norman Goldstein', with a long horizontal flourish extending to the right.

**Norman Goldstein, Chief  
Complaints and Political Programming Branch  
Enforcement Division  
Mass Media Bureau**

cc: Gary S. Smithwick, Esq.  
William H. Crispin, Esq.  
Andrew S. Kersting, Esq.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 25th day of June, 2004, copies of the foregoing  
“Supplement to Application for Review” were hand-delivered or sent by first-class mail, postage  
prepaid, to the following:

The Honorable Michael Powell\*  
Chairman  
Federal Communications Commission  
The Portals II, Room 8-B201  
445 Twelfth Street, S.W.  
Washington, DC 20554

The Honorable Kathleen Abernathy\*  
Commissioner  
Federal Communications Commission  
The Portals II, Room 8-B115  
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The Honorable Michael Copps\*  
Commissioner  
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The Honorable Kevin Martin\*  
Commissioner  
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The Honorable Jonathan Adelstein\*  
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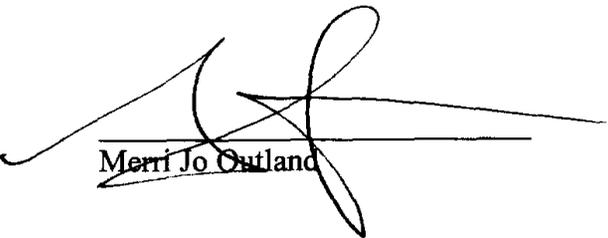
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Assistant Chief, Audio Division  
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(Counsel for Ralph Tyler)



Merri Jo Outland

\* Hand Delivered