

Before the
Federal Communications Commission
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of)	
)	
Amendment of Section 73.202(b),)	
Table of Allotments,)	MM Docket No. 01-151
)	RM-10167
FM Broadcast Stations.)	
(Eminence, Missouri))	
)	
Reclassification of License of FM Station KJEL)	MM Docket No. 05-1715
(Lebanon, MO))	RM 10567

To: The Office of the Secretary
Attn: Assistant Chief, Audio Division

**JOINT PETITION FOR APPROVAL OF
AGREEMENT AND FOR OTHER RELIEF**

KDAA-KMOZ, LLC ("KKL"), and Four Him Enterprises, L.L.C. ("Four Him") hereby file this "Joint Petition for Approval and for Other Relief" ("Joint Petition") to resolve the matters raised by KKL in its "Opposition to Petition for Reconsideration" and "Opposition to Joint Petition for Approval of Agreement and for Other Relief," filed August 10, 2005, by KKL in the above-captioned docket (Rulemaking proceedings Nos. RM-10167 and RM-10567). The Joint Petition withdraws KKL's opposition to the approval of the Agreement of Settlement between Four Him and Ozark Broadcasting, Inc. ("Ozark") and related pleadings.¹ As a result of a settlement agreement, a copy of which is attached hereto, Four Him would pay KKL \$112,500 in complete

¹ This Joint Petition for Approval is being filed concurrently with the Joint Petition for Approval of Agreement, by and between Jeraldine Anderson and Four Him, whereby Jeraldine Anderson withdraws her Expression of Interest in Channel 267C3 at Eminence, Missouri, filed with Commission on July 16, 2001. This Joint Petition for Approval of Agreement is, also, being filed in conjunction with the Joint Petition for Approval of Agreement by and between Ozark

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satisfaction of any obligations Four Him may have to reimburse KKL for any expenses of KKL related to changing the operating channel of KDAA or related to this rulemaking, and in exchange for KKL's agreement that it has no objection to the allotment and substitution of Channel 249C2 for Channel 249C3 for Four Him's station KJEL and will support that allotment and substitution.

By way of background, the Commission dismissed Four Him's petition for rulemaking in RM-10567 that proposed the substitution of Channel 249C2 for 249C3 at Potosi because Ozark objected to the downgrade of KJEL to Class C0. On August 23, 2003, Four Him filed a petition for reconsideration of the Commission's action, and Ozark opposed it. That petition was denied in *Memorandum Opinion and Order*, DA 05-1715, released June 24, 2005 ("MO&O"). On July 25, 2005, Four Him filed a Petition for Reconsideration of the MO&O.² The Audio Division found that Ozark had "a statutory right to be notified of the proposed modification of the Station KJEL license and an opportunity to file a response," citing *Fostering the Expanded Use of UHF Television Channels (Stockton and Modesto, California)*, 4 FCC Rcd 2d 839 (1966). Since the Commission did not provide Ozark with notice, Four Him's Petition for Rulemaking was dismissed.

Because the litigation was ongoing and the Commission had not acted, on July 12, 2004, KKL filed a "Statement for the Record and Request for Expedited Action on Application and Request to Update FM Data Base." Therein, KKL took no position on how the subject matter of the litigation should be resolved, but noted for the record that the pendency of the rulemaking petitions had prevented action on KKL's application (File No. BPH-20030701AMT) to relocate the antenna of KDAA, Rolla, MO, to the site shared by station KZNN, Rolla, MO, which is licensed to

Broadcasting, Inc. and Four Him, which was filed with the Commission on July 25, 2005.

an affiliate of KKL. KKL showed that either Channel 248A or Channel 276A could be utilized/operated from the site specified in the application meeting all minimum distance separation requirements, assuming the other changes proposed in the Four Him proposal are made. As a result, on June 14, 2005, the Audio Division granted KKL's application conditioned on the outcome of this proceeding. Any construction of the facility would be at KKL's risk.

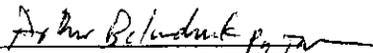
With the Audio Division's denial of Four Him's Petition for Reconsideration in the MO&O, KKL thought this matter was settled and that KDAA would not be required to change its operating channel. While KKL stated that it was willing to accept a construction permit for KDAA conditioned on the outcome of MB Docket 01-151, such statement did not amount to an abandonment of KKL's rights. KKL and Four Him have now resolved the matters, and KKL supports the modification of Four Him's license for KHCR, Potosi, MO. A copy of the settlement agreement containing the declarations required by Section 73.3525 is attached. The parties do not believe that the reimbursement of KKL's expenses are subject to Section 73.3525 of the Rules, but in an abundance of caution, this Joint Petition is being filed within the time limits set forth in the Commission's Public Notice, *Window Announced for Universal Settlements of Pending Rulemaking Proceedings to Amend FM Table of Allotments*, DA 05-1688, released June 20, 2005. Therein, the Commission stated that it would waive settlement reimbursement caps in rulemaking proceedings until September, 19, 2005.

In light of the foregoing, KKL respectfully requests the Audio Division to approve the attached Settlement Agreement, and modify the license of KHZR to operate on Channel 249C2 at Potosi, MO, and the license of KDAA to operate on Channel 276A at Rolla, MO.

² KKL is also withdrawing its opposition to this Petition for Reconsideration.

Respectfully submitted,

KDAA-KMOZ, LLC

By: 
Arthur Belendiuk
Its Attorney

Smithwick & Belendiuk, P. C.
5028 Wisconsin Avenue, NW, Suite 301
Washington, DC 20016
202-363-4559

FOUR HIM ENTERPRISES, L.L.C.


By: _____
A. Wray Fitch III
Timothy R. Obitts
Its Attorneys

Gammon & Grange, P.C.
8280 Greensboro Drive
7th Floor
McLean, VA 22102
703-761-5000

October 3, 2005

CERTIFICATE OF SERVICE

I, Stephanie Patton, do hereby certify that a copy of the foregoing **JOINT PETITION FOR APPROVAL OF AGREEMENT AND FOR OTHER RELIEF** was mailed by First Class U.S. Mail, postage prepaid (or hand delivery, as marked with an asterisk), this 3rd day of October, 2005, to the following:

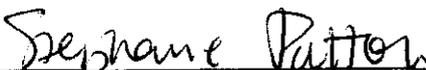
Gene A. Bechtel
Law Office of Gene Bechtel, P.C.
1050 17th Street, NW
Suite 600
Washington, D.C. 20036

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Gary S. Smithwick
Smithwick & Belendiuk, P.C.
5028 Wisconsin Avenue, NW
Suite 301
Washington, D.C. 20016


Stephanie Patton

SETTLEMENT AGREEMENT

[KHZR-KDAA]

THIS SETTLEMENT AGREEMENT is made and entered into effective as of the 3rd day of October, 2005, by and among KDAA-KMOZ, LLC ("KKL"), licensee of KDAA(FM), Rolla, MO, and Four Him Enterprises, L.L.C. ("Four Him"), licensee of KHZR(FM), Potosi, MO.

WITNESSETH:

WHEREAS, Four Him and Ozark Broadcasting, Inc. ("Ozark") have pending before the Federal Communications Commission ("FCC") a Joint Petition for Approval of Agreement and Other Relief," under the terms of which Four Him would pay Ozark for downgrading Station KJEL, Lebanon, MO, to Class C0 in order to allot Channel 249C2 at Potosi, MO and upgrade Station KHZR (the "KHZR Upgrade"). That would require, *inter alia*, the substitution of Channel 276A for Channel 248A at Rolla, MO and the modification of KDAA's license ("KDAA Channel Change").

WHEREAS, KKL, on August 10, 2005, objected to Four Him's proposal, and KKL is now willing to withdraw its objections;

NOW, THEREFORE, in consideration of the mutual covenants, agreements, conditions, representations and warranties contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereby agree as follows:

1. **Dismissal of Adverse Pleadings.** Concurrently herewith, KKL and Four Him shall file with the FCC jointly a Joint Request for Approval and for Other Relief ("Joint Request") of the dismissal of KKL's Opposition to Petition for Reconsideration and Opposition to Joint Request for Approval of Settlement Agreement and for Other Relief (collectively, "Adverse Pleadings"). KKL shall in good faith pursue approval by the FCC of the dismissal of the Adverse Pleadings and shall take whatever additional action is necessary or appropriate to obtain FCC approval of, and to effectuate, the dismissal of the Adverse Pleadings and the KHZR Upgrade..

2. **Affidavits.** Pursuant to Section 73.3525(a) of the Rules, by signing this agreement, KKL and Four Him declare under penalty of perjury, that this agreement is in the public interest because it will result in improved service to the residents of Potosi, MO; and will conserve Commission resources by resolving litigation over the amount of reimbursement to which KKL is entitled for the KDAA Channel Change.

3. **Consideration for SRC's Dismissal.** As consideration for dismissal of the Adverse Pleadings and the KDAA Channel Change, Four Him shall pay to KKL the sum of One Hundred Twelve Thousand Five Hundred Dollars (\$112,500.00) (the "Settlement Payment"), in complete satisfaction of any claim KKL may have for costs or reimbursement of costs associated with the KDAA Channel Change or any change in channel to accommodate the KHZR Upgrade. Said payment also represents a portion of the legitimate and prudent expenses incurred and to be incurred by KKL in connection with this litigation and the change of the operating channel of

KDAA. Within 20 business days (i.e., by October 17, 2005) following execution of this agreement, Four Him shall deposit in escrow in the form of a cashiers check or by wire transfer with KKL's counsel ("Escrow Agent") pursuant to an Escrow Agreement, attached hereto as Exhibit 1, the sum of Twenty Thousand Dollars (\$20,000.00); and by November 3, 2005, Four Him will deposit with Escrow Agent pursuant to the Escrow Agreement an irrevocable letter of credit ("ILC") from an FDIC-insured commercial bank in form satisfactory to KKL, said ILC to name as beneficiary KKL so that KKL may present the ILC to the issuing bank in order to pay KKL in readily available funds the balance due KKL of Ninety Two Thousand Five Hundred Dollars (\$92,500.00). Should Four Him fail to make the initial escrow deposit by October 17, 2005, or fail to deposit a satisfactory ILC by November 3, 2005, KKL, by written notice to Four Him, shall have the right to terminate the settlement agreement and so notify the Commission. The Settlement Payment shall be disbursed by the Escrow Agent to KKL within five (5) business days following the later of (i) the date the FCC's dismissal of the Adverse Pleadings shall have become a Final Order; (ii) the date upon which the order (or orders) of the FCC allotting Channel 249C2 to Postosi, MO, shall have become Final Order. Under this Agreement, "Final Order" shall mean action by the FCC (i) which has not been vacated, reversed, stayed, set aside, annulled or suspended; (ii) with respect to which no timely appeal, request for stay or petition for rehearing, reconsideration or review by any party or by the FCC on its own motion, is pending; and (iii) as to which the time for filing any such appeal, request, petition, or similar document or for the reconsideration or review by the FCC on its own motion under the Communications Act of 1934, as amended, and the rules and regulations of the FCC has expired. In the event this Settlement Agreement or the KHZR Upgrade is denied, this Agreement shall terminate and all funds and the ILC held in Escrow shall be immediately returned to Four Him.

4. **Authorization and Binding Obligation.** The parties represent to one another that they each have the power and authority to enter into and carry out this Settlement Agreement and that this Settlement Agreement constitutes the valid and binding obligation of each of them in accordance with its terms.

5. **Notices.** Any notice, consent, waiver or other communication hereunder shall be sent by nationally recognized overnight air courier service, so that delivery is made the next business day, to all parties and counsel at the addresses specified below (or at such other address which party shall specify to the other party in accordance herewith):

If to KKL:

KDAA-KMOZ, LLC
P. O. Box 4584
Springfield, MO 65808

with a copy to:

Gary S. Smithwick, Esq.
Smithwick & Belendiuk, P.C.
5028 Wisconsin Ave., N.W.
Suite 301

Washington, DC 20016

If to Four Him:

Four Him Enterprises, L.L.C.
4600 Executive Centre Parkway
Suite A
St. Peters, MO. 63376

With a Copy to:

Wray Fitch, III, Esquire
Gammon & Grange, P.C.
8280 Greensboro Drive, 7th Floor
McLean, Virginia 22102-3807

6. **Entire Agreement.** This Agreement constitutes the entire understanding of the parties. There are no other agreements, representations, warranties or understandings (oral or written) between them with respect to the subject matter hereof, and no other consideration, action or forbearance is contemplated or relied upon by them. This Agreement may not be altered, amended or modified except by a written instrument signed by all parties.

7. **Enforcement.** In the event that either party refuses to cooperate in seeking to effectuate this Settlement Agreement, the other party shall have available all remedies to which they are entitled under law or at equity, and the rules, regulations and policies of the Federal Communications Commission, including any and all rights to the remedy of specific performance. Notwithstanding other rights reserved to the parties pursuant to this Settlement Agreement, the parties agree that the failure of either party to perform its obligations and covenants under this Settlement Agreement is one for which there is no adequate remedy at law, and either party may seek injunctive relief and/or specific performance requiring the other party to perform its obligations hereunder. Should the parties engage in litigation arising out of this Settlement Agreement, the prevailing party in such litigation shall be entitled to reasonable attorneys' fees and costs as shall be determined by the court.

8. **Assignment and Binding Effect.** This Agreement shall inure to the benefit of, and shall be binding upon, the parties and their heirs, successors, executors, legal representatives and assigns, provided however that no party may voluntarily assign this Settlement Agreement without the express written consent of the other parties, such consent not to be unreasonably withheld.

9. **Construction.** The event that any of the provisions contained in this Settlement Agreement is held to be invalid, illegal or unenforceable shall not affect any other provision hereof, and this Settlement Agreement shall be construed as if such invalid, illegal or

unenforceable provisions had not been contained herein. Further, this Settlement Agreement is the product of negotiation and preparation by and between the parties, and their respective attorneys. Accordingly, the parties acknowledge and agree that this Settlement Agreement shall not be deemed prepared or drafted by one party or another (or the attorneys for one party or another) and shall be construed accordingly.

10. **Headings.** The headings herein are included for ease of reference only and shall not control or affect the meaning or construction of the provisions of this Agreement.

11. **Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of Missouri (without application of conflicts of laws principles), the Communications Act of 1934 (as amended) and the Rules and Regulations of the Federal Communications Commission. The parties agree to accept the jurisdiction of the courts of the State of Missouri for the resolution of any disputes under this Agreement.

12. **Counterparts.** This Settlement Agreement may be signed by the parties in any number of counterparts with the same effect as if the signature of each such counterpart were upon the same instrument, and each executed copy shall be an original for all purposes without accounting for the other copies. Copied and/or faxed signature pages may be deemed originals for the purposes of this Settlement Agreement (i.e., with the underlying original signature page to be supplied to the FCC upon request). This Settlement Agreement shall be effective as of the date on which the executed counterparts are exchanged by the parties.

[NEXT PAGE IS THE SIGNATURE PAGE ONLY]

IN WITNESS WHEREOF, the parties have executed this Settlement Agreement or have caused this Settlement Agreement to be executed on their behalf to be effective as of the date first set forth above. Where applicable, this agreement is executed under penalty of perjury.

KDAA-KMOZ, LLC

By: *JHR mp 10-3-05*

Four Him Enterprises, L.L.C.

By: _____

IN WITNESS WHEREOF, the parties have executed this Settlement Agreement or have caused this Settlement Agreement to be executed on their behalf to be effective as of the date first set forth above. Where applicable, this agreement is executed under penalty of perjury.

KDAA-KMOZ, LLC

By: _____

Four Him Enterprises, L.L.C.

By: *[Handwritten Signature]*