

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

FCC Mail Room

ORIGINAL

In the Matter of:)	
)	
Amendment of Section 73.202(b))	MB Docket No. 07-297
Table of Allotments,)	RM-11413
FM Broadcast Stations)	
(Pima and Pinetop, Arizona))	

To: The Secretary,
Office of the Secretary

Attention: Audio Division, Media Bureau

COMMENTS

KM Radio of St. Johns, L.L.C. ("KM"), licensee of commercial FM radio station KWKM(FM), St. Johns, Arizona (Facility ID No. 78436, "KWKM"), by its counsel, and pursuant to Sections 1.415 and 1.420 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.420, respectfully submits these Comments in opposition to the changes to the FM table of allotments proposed in the Notice of Proposed Rule Making¹ in the above-captioned proceeding.

1. **Introduction.** Since the Petition and NPRM consider a proposal to change the channel of three other FM authorizations on an involuntary basis,² which is impermissible under the

¹ See Notice of Proposed Rule Making, MB Docket No. 07-297, RM-11413, DA 08-68 (released January 11, 2008)(the "NPRM"). The NPRM was adopted in response to a Petition for Rule Making filed on January 19, 2007 (the "Petition") by Circle S Broadcasting Co., Inc. ("Circle S"), licensee of commercial FM radio broadcast station KSWG(FM), Wickenburg, Arizona (Facility ID No. 11216, "KSWG").

² KM notes that it will also have an opportunity to oppose the change in channel specifically proposed for KWKM in response to a later Order to Show Cause, see NPRM at n.5, but is taking this opportunity to raise several issues that are raised by the Petition and NPRM more broadly.

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Commission's rules or policies, the Petition must be dismissed or denied. The Petition should also be dismissed since the proposed channel changes conflict with KM's contractual obligation to change KWKM's channel to a different channel, or at a minimum the proponent(s) must specifically agree to bear any cost to KM associated with the breach of such contract, as part of KM's out-of-pocket costs to change channels as requested. Finally, the Petition must be dismissed since it may require an involuntary downgrade of KWKM from a Class C to a Class C0 station, which is not permitted under Commission rules or policies, or at a minimum, KM must be afforded the opportunity to maintain its full Class C status under the procedures specified in the Commission's rules, and with the costs of doing so borne by the proponent(s) of the KWKM channel change.

2. **Background.** The Petition and related contingent applications filed by Circle S and another party, Yavapai Broadcasting Corporation ("Yavapai"),³ collectively propose to upgrade Circle S's station KSWG from a Class C3 to a Class C station⁴ and change its antenna site, and to upgrade Yavapai's station KKLD from a Class C0 to a Class C station with a change in its community of license of Cottonwood to Clarkdale, Arizona. To accommodate the upgrades and station moves proposed by Circle S and Yavapai would require a change in the channels for four FM stations, authorizations or allotments - - three of which would be involuntary - - as follows: (i) the involuntary change of KWKM's channel from Channel 239 to Channel 243; (ii) an involuntary change in channel for FM radio station KRFM(FM), Show Low, Arizona (Facility ID No. 33692,

³ Yavapai is the licensee of KKLD(FM), Cottonwood, Arizona (Facility ID No. 51642, "KKLD"), among other stations.

⁴ Circle S previously held a construction permit to upgrade KSWG from a Class C3 to a Class C station (File No. BPH-20030327AEH), which construction permit expired earlier this month, on February 2, 2008.

“KRFM”), from Channel 243 to Channel 295; (iii) the involuntary change in channel for the construction permit for new FM radio station KWSK(FM), Pinetop, Arizona (File No. BPH-19951109MG, Facility ID No. 78413, “KWSK”), from Channel 294 to Channel 249; and (iv) a change in channel for the vacant FM allotment for Pima, Arizona, from Channel 296 to Channel 289.

3. **The Petition Impermissibly Requires Three Involuntary Channel Changes, And Therefore Must Be Dismissed.** In its recent proceeding revising the procedures for amending the FM table of allotments or changing a radio station’s community of license,⁵ the Commission retained its Columbus, Nebraska⁶ policy of limiting the number of involuntary channel changes in proceedings to change the FM table of allotments, including in “hybrid” proceedings, such as this one, that include both community of license change applications and petitions for rule making to amend the FM table of allotments that are contingent upon one another. See FM Change Order at ¶¶ 16-17 and n.68 (citing Columbus). Since the proposals in the Petition and its related contingent applications, as outlined in the NPRM, would exceed that limit by requiring *three* involuntary channel changes - - by KWKM, KRFM and KWSK - - the Petition must be dismissed or denied (and the related Circle S and Yavapai modification applications must be dismissed or denied as well).⁷

4. KM notes that although the NPRM refers to Channel 249C1 at Pinetop, Arizona as a “vacant” FM allotment, see NPRM at ¶ 1, the Pinetop allotment is no longer vacant, nor was it

⁵ See Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services, MB Docket No. 05-210, Report and Order, FCC 06-163, 21 FCC Rcd 14212 (2006)(the “FM Changes Order”).

⁶ See Columbus, Nebraska, 59 RR 2d 1184 (Mass Media Bureau 1984)(“Columbus”).

⁷ See FM Changes Order at ¶ 17 (dismissal or denial of one component of related “hybrid” petition(s) for rule making and/or modification application(s) proposal requires dismissal of all related contingent filings).

vacant at the time the NPRM was adopted, but rather a construction permit was granted on April 27, 2007 for new FM radio station KWSK to be constructed on the Pinetop Channel 249C1 allotment. Furthermore, the full Commission has expressly determined that a channel change for a construction permit for a new FM station, even if not yet constructed, is an involuntary channel change, and subject to the reimbursement requirements under the Circleville, Ohio⁸ line of cases.⁹ Although Commission staff level decisions prior to Texas Grace may not have considered channel changes for unbuilt construction permits to be involuntary changes,¹⁰ the more recent Texas Grace decision by the full Commission specifically treats channel changes for unbuilt construction permits as involuntary changes, subject to the reimbursement requirement as well as the two involuntary changes limitation, and should be the applicable precedent considered here. See Texas Grace at n.9 (“Whenever an existing licensee *or permittee* is ordered to *change frequencies involuntarily* to accommodate a new channel allotment, longstanding Commission policy requires the benefiting party or parties to reimburse the affected station for costs incurred”, citing Circleville)(emphasis added).

5. The plain language of the FM Changes Order also requires the same result; specifically, the FM Changes Order states that “[i]nvoluntary channel changes for *authorized* stations . . . will continue to be limited to two under the [Columbus] policy.” See FM Changes Order at ¶ 16 (emphasis added). The specific application of the two involuntary change policy to “authorized”

⁸ See Circleville, Ohio, 8 FCC 2d 159 (1967)(“Circleville”).

⁹ See, e.g., Texas Grace Communications, 16 FCC Rcd 19167, 24 CR 1307 at n.9 (2001)(“Texas Grace”).

¹⁰ See, e.g., Big Pine Key, 13 FCC Rcd 15542 at ¶ 8 (Allocations Branch, 1998).

stations clearly includes new FM stations - - such as KWSK - - that have been “authorized” by the grant of a construction permit, even if unbuilt; if the Commission wished to exclude unbuilt construction permits, it would have done so, by using a more specific term such as “licensed” or “existing” stations, rather than the more broad term “authorized” stations.

6. As a result, since the Petition impermissibly proposes involuntary channel changes for three “authorized” FM stations, the Petition must be dismissed or denied promptly, and the related and contingent Circle S and Yavapai modification applications must be dismissed or denied as well.

7. **KM Is Precluded By Contractual Obligations From Changing To Channel 243.**

Although the proposal in the Petition and the NPRM are contingent upon a proposal for KWKM to change channels to Channel 243, KM is precluded by a prior contractual obligation from changing KWKM to that channel. Specifically, KM is a party to a Channel Change Agreement dated October 17, 2005, with Superior Broadcasting of Lake Havasu, LLC (“Superior”); a copy of the Channel Change Agreement is attached hereto as Exhibit 1. Under the Channel Change Agreement, KM already has agreed to change KWKM’s channel to Channel 251. Even if the Commission chooses to ignore this prior contractual obligation and orders KM to change KWKM to Channel 243, the cost imposed upon KM due to any breach of the Channel Change Agreement - - whether from the damages that may be due to Superior, or the loss of the remaining \$900,000 due to KM upon completion of its performance under the Channel Change Agreement - - are costs which the proponent(s) of the channel change (i.e., Circle S and/or Yavapai) must commit to reimbursing to KM.

8. **KM May Not Be Forced To Downgrade KWKM To Class C0 Involuntarily.**

KWKM currently is licensed to operate with an antenna height above average terrain (“HAAT”) of 363.5 meters, see File No. BLH-20010418AAA, which is permitted to be below the current minimum antenna HAAT of 451 meters for Class A stations, see 47 C.F.R. § 73.211(a)(2), on a grandfathered basis. However, KM has been advised informally by the Commission staff that if KWKM is ordered to change channels to Channel 243, any Form 301 application for construction permit filed for the new channel must meet the 451 meters minimum antenna HAAT requirement, or else KWKM would be reclassified as a Class C0 station.

9. Under applicable Commission precedent, however, the Commission may not force an involuntary downgrade in station class on a station such as KWKM.¹¹ In any decision adopted in response to the NPRM, the Commission should clarify whether or not a Form 301 application to implement an involuntary channel change by a grandfathered Class C station must meet the new 451 meters minimum antenna HAAT, or whether instead the grandfathered full Class C status may be carried forward to any new channel. At a minimum, KM must be afforded the protection of the procedures required before a full Class C station may be downgraded to a Class C0 due to its antenna HAAT,¹² including an opportunity to file to modify KWKM’s facilities to meet the 451 meters antenna HAAT requirement of Section 73.211(a)(2).

10. In addition, since any such modification to KWKM would be due solely to the channel change proposed by Circle S and/or Yavapai in the Petition and their related modification applications, the cost of any such modification of KWKM’s facilities to retain its full Class C status

¹¹ See, e.g., Opal, 20 FCC Rcd 12994 at ¶ 4 (Audio Division, 2004)(“Opal”).

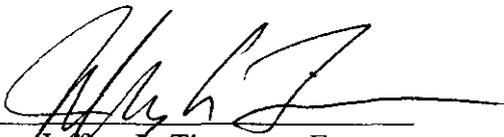
¹² See 47 C.F.R. § 73.3573, Note 4; see also, § 1.420(g), Note 2 to Paragraph (g).

upon an involuntary channel change must be reimbursed to KM, under Circleville.¹³ KM also notes that this same issue also arises with station KRFM; like KWKM, the current antenna HAAT of KRFM is only 303 meters, see File No. BMLH-19850325KT, also well below the 451 meters minimum antenna HAAT of Section 73.211(a)(2).

11. **Conclusion.** WHEREFORE, the above premises being considered, KM respectfully requests that the Commission dismiss or deny the Petition.

Respectfully submitted,

KM Radio of St. Johns, L.L.C.

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¹³ KM notes that this issue, of an involuntary channel change that could trigger the involuntary downgrade of a full Class C station to a Class C0, appears to be a case of first impression that would need to be resolved by the full Commission, including not only whether such a proposed involuntary change is even permissible in the first instance, but if so, verifying that any costs of modifying the station to maintain its full, grandfathered Class C status must be reimbursed under Circleville. KM requests that in the unlikely event that the Petition and NPRM proposals are allowed to proceed, that this issue be referred to the full Commission for resolution.

CHANNEL CHANGE AGREEMENT

This Agreement is made and entered into this 17th day of October, 2005, between Superior Broadcasting of Lake Havasu, LLC ("**Marathon**"), and KM Radio of St. Johns, L.L.C. ("**KM Radio**"), licensee of Station KWKM(FM), St. Johns, Arizona (the "**Station**").

WHEREAS, Marathon desires to prepare and submit to the Federal Communications Commission (the "**FCC**") a proposal for changes in the FM Table of Allotments to provide a first local services and related changes (the "**Marathon Proposal**").

WHEREAS, KM Radio agrees to accommodate the Marathon Proposal by changing the channel of the Station from Channel 239C to Channel 251C (the "**KWKM Change**").

WHEREAS, collectively, the foregoing actions will serve the public interest by providing better service to the public.

NOW THEREFORE, in consideration of the foregoing and the mutual covenants and agreements set forth herein, Marathon and KM Radio hereby agree as follows:

1. **KM Radio's Obligations.** At the request of Marathon, KM Radio shall execute for submission to the FCC its written consent to the KWKM Change in the form attached hereto as Exhibit A. KM Radio further agrees that (a) it shall cooperate with Marathon in connection with the Marathon Proposal and shall take no action to delay or prevent the grant of such proposal; (b) it shall file with the FCC a construction permit application for the KWKM Change (the "**KWKM Permit Application**") no later than ten (10) days after the later of (i) the effective date of the Marathon Proposal or (ii) the day the Marathon Proposal has become Final Order (as that term is defined below) (or finality is waived by Marathon in its sole discretion); (c) once the FCC issues such construction permit (the "**KWKM Change Permit**") KM Radio shall diligently undertake construction and initiation of operations under the KWKM Change Permit; and (d) KM Radio shall file with the FCC a license to cover application (the "**KWKM License Application**") within ten (10) days of initiation of operations under the KWKM Change Permit. For purposes of this Agreement, a **Final Order** shall mean an action of the FCC that is no longer subject to reconsideration, review, or appeal under applicable law before the FCC (including on the FCC's own motion) or before any court.

2. **Marathon's Obligations.**

(a) No later than one (1) day after execution of this Agreement, Marathon shall pay to KM Radio the non-refundable amount of One Hundred Thousand Dollars (\$100,000.00).

(b) No later than ten (10) business days after the Marathon Proposal, including the KWKM Change, is granted by Final Order, Marathon shall pay to KM Radio the non-refundable amount of Six Hundred Thousand Dollars (\$600,000.00).

(c) No later than ten (10) business days after the KM Radio files the KWKM License Application, Marathon shall pay to KM Radio the non-refundable amount of Three

Hundred Thousand Dollars (\$300,000.00), and Marathon shall reimburse to KM Radio the documented and reasonable out-of-pocket expenses incurred by KM Radio in constructing the channel change, including but not limited to all equipment costs and legal and engineering expenses.

3. **Miscellaneous.** Neither this Agreement nor any right created hereunder shall be assignable by the KM Radio or Marathon unless the other party consents in writing. If any provision of this Agreement is determined to be void, unenforceable, or contrary to law, the remainder of this Agreement shall continue in full force and effect, provided that such continuation would not materially diminish the benefit of this Agreement for either party. This Agreement sets forth the entire understanding of the parties hereto at the time of its execution and delivery with respect to the subject matter hereof and supersedes any and all prior agreements between the parties with respect to the subject matter hereof. This Agreement may not be amended except by written amendment signed by both parties. Each of the undersigned represents and warrants that he has the requisite power and authority to bind his respective party to the terms and obligations hereof. Each party represents and warrants that its entry into this Agreement does not and the satisfaction of its obligations hereunder will not constitute a breach or violation of any other agreement to which it is a party. If either party breaches this Agreement, the other party shall have the right to seek injunctive relief and/or specific performance in addition to any other remedy at law or equity, and the breaching party agrees to waive any defense as to the adequacy of the other party's remedies at law. This Agreement may be signed in counterparts, with the same effect as if the signature on each counterpart were on the same instrument. Delivery of a counterpart signature to this Agreement by facsimile or other electronic transmission shall be effective as delivery of an original counterpart signature. This Agreement shall be governed by and construed according to the laws of the State of Arizona, without regard to its conflict-of-laws provisions.

IN WITNESS WHEREOF, the parties hereto have executed this Channel Change Agreement as of the date first written above.

KM RADIO OF ST. JOHNS, L.L.C.

By: 
Name: Kevin Joel Bab
Title: Vice President and Secretary

SUPERIOR BROADCASTING OF LAKE
HAVASU, LLC

By: 
Name: Bruce Buzick
Title: Co-Manager

**Station KWKM(FM)
St. Johns, Arizona**

KM Radio of St. Johns, L.L.C. ("Licensee"), licensee of Station KWKM(FM), St. Johns, Arizona, hereby agrees to have KWKM(FM) change its channel to Channel 251C. Licensee will file an application to implement the changes consistent with the Commission's spacing rules should the Commission approve the amendment to the FM Table of Allotments. Licensee understands that this statement may be used in a filing with the Commission and hereby authorizes its use for that purpose.

I verify that this statement is true, complete and correct to the best of my knowledge and belief and is made in good faith.

KM RADIO OF ST. JOHNS, L.L.C.

By: 
Name: *Kevin Ege*
Title: *Vice President and Secretary*

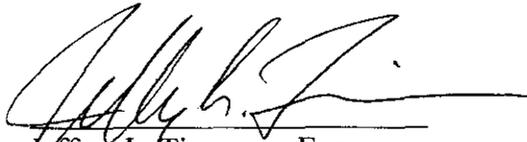
CERTIFICATE OF SERVICE

I, Jeffrey L. Timmons, hereby certify that on this 22nd day of February, 2008, copies of the foregoing "Comments" have been served either by Federal Express and then hand delivery (* denotes such delivery) or by United States first class or priority mail, postage prepaid and postmarked by the pleading filing date, upon the following:

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