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

In re Applications of	)	
	)	
Airen Broadcasting Company for a Minor Change to KZCC(FM), McCloud, California	)	File No. BMPH-20070523ADS Facility ID No. 164090
	)	
The State or Oregon Acting By and Through the State Board of Higher Education on Behalf of Southern Oregon University for a Minor Change to KNHT(FM), Rio Dell, California	)	File No. BPED-20070720ABF Facility ID No. 17412
	)	

MEMORANDUM OPINION AND ORDER

Adopted: December 11, 2014 **Released: December 11, 2014**

By the Commission:

1. We have before us an Application for Review ("AFR") filed by the State of Oregon Acting By and Through the State Board of Higher Education for the Benefit of Southern Oregon University ("Oregon") on January 8, 2009. Oregon seeks review of a Media Bureau ("Bureau") decision that denied its Petition for Reconsideration of an earlier Bureau decision.[1] Among other things, the earlier decision: (1) granted an application filed by Airen Broadcasting Company ("Airen") to change the community of license of its station – KZCC(FM) – from McCloud to Trinidad, California ("Airen Application"); (2) dismissed a conflicting application filed by Oregon to upgrade the facilities of its station – KNHT(FM), Rio Dell, California – from Class C2 to C1; (3) modified the license of KNHT(FM) to specify operation on a new channel in order to accommodate KZCC(FM)'s move; and (4) required Oregon to file a minor change application for KNHT(FM) specifying operation on this new channel.[2] We also have before us a Motion for Stay ("Motion") filed by Oregon on January 8, 2009. Oregon requests a stay of the Bureau's decision directing it to file a minor change application specifying operation of KNHT(FM) on its new channel "during the pendency of its Application for Review."[3]

2. Oregon argues that the Bureau erred in finding that grant of the Airen Application and the involuntary channel changes necessary to accommodate its grant would result in a preferential arrangement of allotments under Section 307(b) of the Communications Act of 1934, as amended.[4] Upon

[1] *KNHT(FM), Rio Dell, CA*, Letter, DA 08-2676 (MB 2008) ("*Reconsideration Decision*").

[2] *KZCC(FM), Trinidad, CA*, Letter (MB Nov. 19, 2007) ("*Letter Decision*"). In the *Reconsideration Decision*, the Bureau also dismissed an application filed by Airen for a license to cover the facilities specified in the construction permit that the Bureau granted Airen in the *Letter Decision*. *Reconsideration Decision* at 10. Oregon nevertheless argues in the AFR that the Bureau erred in failing to take into consideration its Informal Objection to the license application. AFR at 17-18. We decline to consider this argument as Airen does not seek to overturn this dismissal or request any other relief related to the Bureau's grant of this application.

[3] Motion at 9.

[4] AFR at 9-17. While Oregon challenges only the involuntary channel substitution that Airen proposed and the Bureau ordered for KNHT(FM), Airen actually proposed – and the Bureau ordered – two involuntary channel substitutions. *See Reconsideration Decision* at 2; *Letter Decision* at 2, 3.

review of the AFR and the entire record, we conclude that Oregon has failed to demonstrate that the Bureau erred in reaching this conclusion.[5] We thus uphold the Bureau's finding for the reasons set forth in the *Reconsideration Decision*.[6]

3. Oregon also asserts that the Bureau erred in rejecting an argument it made for the first time in a reply.[7] Oregon further argues that the Bureau "violate[d] due process and the Commission's own procedural rules" when it noted in the *Reconsideration Decision* that failure to file a construction permit application for KNHT(FM) specifying the station's new channel "may result in the issuance of a *Notice of Apparent Liability for Forfeiture*."[8] Oregon, however, does not offer any analysis or any citations to precedent supporting these arguments and thus fails to "specify with particularity" the grounds on which Commission review is warranted, as required by our rules.[9] Accordingly, we do not consider these arguments further.[10]

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[5] In addition, we reject Oregon's claim that the Airen Application was subject to a heightened scrutiny because it involved an unbuilt construction permit and/or because it proposed to remove the sole local transmission service from McCloud, California. AFR at 6-7, 9, 11 12. While the Commission has stated that "any application proposing a community of license change filed by a permittee that has not built its current permitted facilities and that is not mutually exclusive with either the applicant's built and operating facilities or its original allotment shall be returned as unacceptable for filing," Oregon has not alleged that the facilities proposed in the Airen Application lack mutual exclusivity. *Revision of Procedures Governing Amendments to FM Table of Allotments & Changes of Cmty. of License in the Radio Broad. Servs*., 21 FCC Rcd 14212, 14219 ¶ 11 (2006). Moreover, as the Bureau noted, the Commission's policy prohibiting the removal of a community's sole local transmission service applies where a station has commenced operations. *Reconsideration Decision* at 6. *See also Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Broadcast Services*, Report and Order, 21 FCC Rcd 14212, 14229 ¶ 32 (2006). Airen had not yet constructed its facility nor commenced operation at McCloud. Accordingly, the Bureau properly found that the policy did not apply here. *Reconsideration Decision* at 6.

[6] *Reconsideration Decision* at 5-8.

[7] Oregon had raised questions about the programming broadcast by Airen on KZCC(FM) for the first time in its Reply to Airen's Opposition to its Petition for Reconsideration. The Bureau found the argument procedurally barred under Section 1.45(c) of the Commission's rules, which specifies that replies are limited to matters raised in the opposition. *Reconsideration Decision* at 5, *citing* 47 C.F.R. § 1.45(c). *See also* 47 C.F.R. § 1.106(h). Oregon asserts that it could not have made the argument sooner. AFR at 8.

[8] AFR at 21-22, *citing Reconsideration Decision* at 8.

[9] 47 C.F.R. § 1.115(b)(2). Oregon does, however, claim that it is unable to submit the required construction permit application because it "is unable to certify that it has the financial ability to construct the proposed facilities." AFR at 21. Oregon is not required to make such a certification in its application. *See* FCC Form 301, Instructions, General Instructions, Item K ("Applicants are not required to certify as to their financial qualifications on FCC Form 301."). Moreover, Oregon may rely on Airen's commitment to reimburse it for the costs associated with KNHT(FM)'s channel change in certifying that it has the financial wherewithal to construct the facilities necessary to implement that change. We hereby put Oregon on notice that we will tolerate no further delays in its filing of the construction permit application specifying KNHT(FM)'s new channel. Finally, we confirm that this application should be filed on FCC Form 301 (Application for Construction Permit for Commercial Broadcast Station) in response to Oregon's question about whether the application should instead be filed on FCC Form 340 (Application for Construction Permit for Reserved Channel Noncommercial Educational Broadcast Station). AFR at 7, 9. While Oregon operates KNHT(FM) as a noncommercial educational FM station, the station operates on a channel outside of the portion of the FM band reserved for noncommercial use. As such, the station must comply with the engineering standards and rules applicable to commercial stations. Oregon is well aware of this, having filed the very upgrade application that conflicted with the Airen Application on FCC Form 301. *See* File No. BPED-20070720ABF.

[10] For similar reasons, we decline to consider Oregon's allegation that the Bureau "demonstrated a cavalier disregard of the long-standing Congressional public policy to promote public broadcasting and to encourage radio stations to

(continued….)

4. Finally, in the AFR, Oregon expresses for the first time its concerns that Airen lacks the funds to reimburse it for the costs associated with KNHT(FM)'s channel change,[11] and "the Commission lacks any enforcement mechanism that can truly compel Airen to reimburse" it.[12] It also alleges for the first time in the AFR that grant of the Airen Application will "extinguish[ ] service through K270AV to Mendocino," California.[13] Oregon did not raise its financial concerns or its concern about the loss of service to Mendocino in any of its earlier pleadings. Accordingly, we dismiss these portions of the AFR as procedurally barred.[14]

5. Turning to the Motion, we note that Oregon sought only that the Commission stay the effect of the *Reconsideration Decision* "during the pendency of its Application for Review."[15] Given our disposition of the AFR herein, we find the Motion moot and dismiss it as such.

6. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended,[16] and Sections 1.115(c) and (g) of the Commission's Rules,[17] the Application for Review filed by the State of Oregon Acting By and Through the State Board of Higher Education on Behalf of Southern Oregon University on January 8, 2009, IS DENIED in part and DISMISSED in part.

7. IT IS FURTHER ORDERED that the Motion for Stay filed by the State of Oregon Acting By and Through the State Board of Higher Education on Behalf of Southern Oregon University on January 8, 2009, IS DISMISSED AS MOOT.

8. IT IS FURTHER ORDERED that the State of Oregon Acting By and Through the State Board of Higher Education on Behalf of Southern Oregon University shall file a minor change application on FCC Form 301 within 30 days of the date of this Memorandum Opinion and Order specifying operation on Channel 273C2.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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convert to HD technology." AFR at 6. While this claim is set forth in the introduction to the AFR, it is not listed as one of the questions presented to the Commission nor is it addressed in the argument section of the AFR.

[11] AFR at 20-21.

[12] *Id.* at 19.

[13] *Id.* at 13.

[14] *See* 47 U.S.C. § 155(c)(5); 47 C.F.R. § 1.115(c). Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(c) of the Rules bar applications for review that rely "on questions of fact or law upon which the [designated authority issuing the decision] has been afforded no opportunity to pass."

[15] Motion at 9.

[16] 47 U.S.C. § 155(c)(5).

[17] 47 C.F.R. §§ 1.115 (c), (g).