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BEFORE THE
**FEDERAL COMMUNICATIONS COMMISSION**
WASHINGTON, D.C. 20554

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| In re | ) | |
| | ) | |
| Christian Media Incorporated<br>Licensee of Station KCMI(FM),<br>Terrytown, Nebraska | )<br>)<br>) | Facility ID No. 11069<br>BLH-19881221KC |
| | ) | |
| Appaloosa Broadcasting Company, Inc.<br>Licensee of Station KIMX(FM),<br>Nunn, Colorado<br>Application for Minor Change | )<br>)<br>)<br>)<br>)<br>) | Facility ID No. 82007<br>BPH-20070822AAL |

FILED/ACCEPTED
MAY 12 2011
Federal Communications Commission
Office of the Secretary

To: The Secretary
Attn: Chief, Audio Division

**OPPOSITION TO STATEMENT FOR THE RECORD AND REQUEST FOR RELIEF**

Appaloosa Broadcasting Company, Inc. ("ABC"), the licensee of Station KIMX(FM), Nunn, Colorado ("KIMX" or the "Station"), by its attorneys, hereby submits this Opposition to the Statement for the Record and Request for Relief ("Request"), filed by Christian Media Incorporated ("CMI"), the licensee of Station KCMI(FM), Terrytown, Nebraska ("KCMI"), in connection with ABC's above-referenced minor modification application ("Modification Application"), granted by the Commission on October 23, 2009.[1] In its Request, CMI asks the Commission to retroactively apply newly-adopted procedures to ABC's Modification Application. CMI's Request is contrary to the Commission's policy in this matter and must therefore be denied or dismissed. In support thereof, ABC states as follows.

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[1] *See Letter*, dated October 23, 2009, from Rodolfo F. Bonacci, Assistant Chief of the Audio Division, Media Bureau (granting ABC's Modification Application and ordering CMI to change the operating channel of KCMI from 245 to 246). CMI submitted a Petition for Reconsideration on November 23, 2009, which has not yet been acted upon.

According to CMI, the Commission should apply procedures adopted in the recently-issued rural radio order[2] to ABC's Modification Application. However, CMI's claim directly contradicts the plain statements of the Commission concerning the applicability of its new procedures to non-final FM allotment proceedings. In the Rural Radio Order, the Commission states as follows:

> These procedures shall not apply to any non-final FM allotment proceeding... in which the Commission has modified a radio station license or granted a construction permit. Although it is well settled that the Commission may apply modified rules to applications that are pending at the time of rule modification, substantial equitable considerations apply to these categories of proceedings. Affected licensees and permittees may have expended considerable sums or entered into agreements following such actions. Moreover, filings and licensing actions subsequent to a license modification could impose significant burdens on parties forced to take steps to protect formerly licensed facilities.[3]

ABC's Modification Application, granted by the Commission in October 2009 and subjected to CMI's Petition for Reconsideration in November 2009, constitutes a "non-final FM allotment proceeding...in which the Commission has modified a radio station license or granted a construction permit," a category of proceeding specifically exempted here by the Commission from its new procedures. Contrary to CMI's claims, the new procedures do not apply to ABC's Modification Application and an adjudicatory proceeding is not the forum for raising issues considered and resolved in a rulemaking proceeding.

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[2] *In the Matter of Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, 26 FCC Rcd 2556 (2011) ("Rural Radio Order").

[3] Rural Radio Order at ¶ 35. *See also* Rural Radio Order at ¶ 33 (declining to apply new procedures to pending AM applications ("We will not, however, apply these new procedures to pending applications for new AM stations and major modifications to AM facilities filed in the 2004 AM Auction 84 filing window. These applications have been pending for many years, and in most cases the applicants have invested considerable resources in technical studies, settlements and technical resolutions, and Section 307(b) showings. Recognizing the hardship that new procedures would place on these applicants, then, we will apply our new procedures only to those applications filed after the release date of this [Rural Radio Order)).

ABC should not be required to amend its Application to demonstrate compliance.

Likewise, ABC wishes to point out that CMI's argument fails to convince even its own counsel who are simultaneously making an entirely contradictory argument to the Commission. Attached hereto, as Exhibit A, is a Petition for Partial Reconsideration filed by CMI's attorneys in the Rural Radio Order proceeding. CMI's attorneys present a cogent analysis as to why applying the Rural Radio Order proceeding's requirements to cases, such as KIMX's, is inherently unfair and unwise (Petition a p. 4-5):

> It must be remembered that at the time the pending community change applications were filed, considerable time, effort, and planning had been invested to make sure that the applications were in accordance with then-current Commission rules and policies. Many, if not most of them, met those standards. The applications were necessarily prepared in reliance upon the Commission's standards as they stood at the time of filing, a date which for many applications is well in the past. It is unreasonable to tell community change applicants that they must toss away all of the time, energy, and funds invested in making sure that a community change application would work and then in preparing and filing it, while other applicants are not required to do the same thing. The disruption that would be caused far outweighs any benefit that could be realized.

ABC totally agrees with this reasoning[4] of CMI's attorneys and why it makes no sense to force parties, such as ABC, to undertake a total revision of their applications. Applying this reasoning, ABC urges the Commission to rely on the arguments presented rejecting the claim made by CMI that the grant of KIMX's application be rescinded and that ABC be required to engage in a new filing meeting that is subject to the terms of the Rural Radio Order.

WHEREFORE, for the foregoing reasons, Appaloosa Broadcasting Company, Inc., licensee of Station KIMX(FM), Nunn, Colorado, respectfully requests that the Media Bureau dismiss or deny the Statement for the Record and Request for Relief filed by Christian Media

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[4] CMI's attorneys go on to argue that the Rural Radio Order should not even apply to applications for community of license changes pending at the time the Rural Radio Order was released. While Appaloosa does not oppose such a result, Appaloosa believes that it is best considered in the context of the Commission's reconsideration of the Rural Radio Order.

Incorporated, licensee of Station KCMI(FM), Terrytown, Nebraska, and affirm its decision granting KIMX's relocation to Nunn, Colorado and ordering Christian Media to change KCMI's operating channel from 245 to 246.

Respectfully submitted,

**APPALOOSA BROADCASTING COMPANY, INC.**

By: _____

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May 12, 2011

EXHIBIT A

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

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Policies to Promote Rural Radio Service | ) | MB Docket No. 09-52 |
| and to Streamline Allotment and | ) | RM-11528 |
| Assignment Procedures | ) | |

Directed to: Office of the Secretary
Attention: The Commission

**PETITION FOR PARTIAL RECONSIDERATION**

M&M Broadcasters, Ltd. ("M&M"), by its attorneys, hereby respectfully seeks partial reconsideration of the *Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rule Making*, FCC 11-28, released March 3, 2011 (the "*Second R&O*"), in the above-referenced proceeding. With respect thereto, the following is submitted:

1. M&M is currently the licensee of ten radio stations, most of which are licensed to largely rural areas of Texas, and it has been the licensee of other radio stations in the past. Throughout its time as licensee, M&M has sought to improve the facilities of its stations in order to provide more and better service to the public. In some instances, such modifications have required a change in transmitter site location, in others a change in channel or increase in power, and occasionally, a change in community of license. Those proposals for which the Commission's staff has completed processing were found to serve the public interest and were granted.

2. Now, however, the Commission has made substantial changes to the factors it will consider in determining whether a particular proposal will serve the public interest. While M&M believes that many of the changes in policy adopted in the *Second R&O* are unwise and

will have a negative effect on the viability of many rural radio stations, it primarily seeks reconsideration of the Commission's decision to impose its new procedures on all applications to change community of license that were pending as of the release date of the *Second R&O*. *Second R&O* at ¶39. This determination to change the rules in the middle of the game for applications that propose community of license changes is basically unfair to those applicants that spent considerable time, effort, and money to craft a proposal that would be found to serve the public interest under the Commission's prior criteria, only to be told months or years later that a new and more restrictive set of rules will apply. Moreover, the decision to apply to rules to pending community change applications, *in medias res*, is in marked contrast with the Commission's decision not to apply the new procedures to pending new and major change AM applications and non-final FM allotment proceedings in which the Commission has modified a radio station license or granted a construction permit. *Second R&O* at ¶¶ 33, 35.

3. With regard to applications for new AM stations or major changes to existing stations, the Commission sated that it would not apply its new procedures to pending applications, as "[t]hese applications have been pending for many years, and in most cases the applicants have invested considerable resources in technical studies, settlements and technical resolutions, and Section 307(b) showings." This rationale applies equally to many community change applications, however. For example, M&M currently has pending a community change application, File No. BPH-20091211AFR, which has been pending for nearly one-and-one half years.[1] Prior to filing, M&M necessarily had to invest substantial resources in a technical study and a Section 307(b) showing. Further, its currently pending proposal required another station to change its authorized channel. While in this instance, that other station was owned by M&M,

[1] While some of the time the application has been pending was caused by a technical issue that was discovered and which required the specification of a new community, the consultations with the preparation of the amendment, which included a new Section 307(b) showing, simply added to the investment in the application.

that process still required an application for construction permit, which has been granted. The new facilities have now been constructed, and license application has been filed. All of these action represent a further investment in the application. Other applicants for community changes find it necessary to enter into agreements with other stations for modification of their facilities, along with the filing of co-ordinated applications. Many community change applications remain pending significantly longer than other minor modification applications due to the need for Federal Register public notice. These investments of substantial time and resources are at least as great as those of an AM applicant that simply prepared its initial application and has been waiting for it to be processed ever since.

4. Furthermore, with regard to FM allotments, the Commission stated that "[t]hese procedures shall not apply to any non-final FM allotment proceeding, including 'hybrid' coordinated application/allotment proceedings, in which the Commission has modified a radio station license or granted a construction permit." *Second R&O* at 35. In reaching this conclusion, the Commission reasoned that "substantial equitable considerations apply to these categories of proceedings. Affected licensees and permittees may have expended considerable sums or entered into agreements following such actions. Moreover, filings and licensing actions subsequent to a license modification could impose significant burdens on parties forced to take steps to protect formerly licensed facilities." *Id.* As laudable as these considerations may be, the same could be said of pending community change applications as well. As noted above, many community change applications involve changes to other stations as well. Some involve agreements to make permanent allotment changes that otherwise would not have been made in return for payments contingent upon grant of a community change application. Those licensees would be faced with the need to take further action to go back to a previous allotment, which

might not be possible due to additional intervening changes, or stay where they are without realizing the benefit of their agreement. Thus, the same equitable considerations apply to community change applications that apply to allotment proceedings.

5. It is well-settled that the failure to treat similarly situated applicants similarly is of the essence of arbitrary and capricious action. Here, all of the concerns about investments of time and capital in reliance on Commission policies apply equally to pending community change applications, AM applications, and non-final allotment proceedings. Therefore, just as the new policies and procedures are not applied to AM applications and certain allotment proceedings, they should not be applied to pending community change applications. It is entirely arbitrary for the Commission to find a particular set of circumstances a compelling reason to avoid retroactive application of its new policies to some applicants but not to others at least equally subject to the same circumstances.

6. While the Commission has long asserted the right to apply modified rules retroactively to pending applications, it still remains the case that in taking such an action, an agency must consider "harmful, secondarily retroactive effects...." See, e.g. *Yakima Valley Cablevision, Inc. v. FCC*, 794 F2d 737,745 (DC Cir. 1986). Likewise, "retroactive modification or rescission of a regulation can cause great mischief. An agency must balance this mischief against the salutary effects, if any, of retroactivity." *Bergerco Canada v. U.S. Treasury Dep't*, 129 F3d 189, 192-93 (DC Cir 1997). In this instance, the substantial mischief of disrupting existing agreements and interlocking allotment changes far outweigh any benefit to be gained from retroactive application of the new policies.

7. It must be remembered that at the time the pending community change applications were filed, considerable time, effort, and planning had been invested to make sure that the

applications were in accordance with then-current Commission rules and policies. Many, if not most of them, met those standards. The applications were necessarily prepared in reliance upon the Commission's standards as they stood at the time of filing, a date which for many applications is well in the past. It is unreasonable to tell community change applicants that they must toss away all of the time, energy, and funds invested in making sure that a community change application would work and then in preparing and filing it, while other applicants are not required to do the same thing. The disruption that would be caused far outweighs any benefit that could be realized. Therefore, the Commission's policies regarding community change applications should be applied only to applications filed after the release date of the *Second R&O*, just as those policies are applied to new and major change AM applications.

WHEREFORE, the premises considered, M&M respectfully requests that the Commission reconsider and rescind its decision to apply retroactively its new policies adopted in the *Second R&O* to pending community change applications.

Respectfully submitted,

M&M BROADCASTERS LTD.

By: Anne Goodwin Crump
Anne Goodwin Crump

Its Attorney

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May 6, 2011

## CERTIFICATE OF SERVICE

I, Barry A. Friedman, hereby certify that I have served on this 12th day of May, 2011, a copy of the foregoing **OPPOSITION TO STATEMENT FOR THE RECORD AND REQUEST FOR RELIEF** on the following parties by first-class mail, postage pre-paid:

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*By Hand