

MUTUAL UPGRADE AGREEMENT

This **MUTUAL UPGRADE AGREEMENT** ("**Agreement**") is made and entered into this 30 day of November, 2001, by and between **ASSOCIATED STUDENTS OF MONTANA TECH** ("**Tech**") and **IDAHO BROADCASTING CONSORTIUM, INC.** ("**IBC**").

RECITALS

A. Tech operates the non-commercial student FM broadcast station KMSM-FM, Butte, Montana, which is licensed to operate on FM Channel 295A with a maximum effective radiated power of 0.74 kilowatts at -62 meters above average terrain from a transmitter site located at North Latitude 46° 0' 44" and West Longitude 112° 33' 26";

B. IBC is the licensee of FM broadcast station KSXZ(FM), McCall, Idaho ("**KSXZ**"), which is licensed to operate on FM Channel 294C2 with an effective radiated power of 1.3 kilowatts at 577 meters above average terrain from a transmitter site located at North Latitude 45° 0' 37" and West Longitude 116° 07' 55";

~~C. Subject to this Agreement, Tech shall prepare and file with the Federal Communications Commission ("**FCC**") an application for a construction permit to migrate from FM Channel 295 to Channel 296 via a one-step application, and to otherwise improve the facilities of KMSM-FM;~~

D. Subject to this Agreement, KSXZ shall prepare and file with the FCC an application for a construction permit to modify existing KSXZ facilities authorization to implement that certain Report and Order of the FCC (DA-01-229; MM Docket No. 01-93; RM 10076), released September 28, 2001, authorizing IBC to change the community of license for KSXZ from McCall, Idaho, to Pinesdale, Montana;

E. The intent of the Parties is to improve the respective authorized facilities for both KMSM-FM and KSXZ, and to maximize to the greatest extent permitted by the Commission's rules and the Parties' resources, the operations of the respective stations.

F. Neither Party, hereto, has any objection to the processing and immediate grant of the other's proposed application(s) or facilities modification, consistent with this Agreement;

G. Tech believes the public interest will be served by the improvement of KMSM-FM service to residents of Butte and other parts of Montana not presently reached by the KMSM-FM signal;

H. IBC believes that the public interest will be served by the improvement of KSXZ service to residents of Pinesdale, Montana and other parts of Montana and Idaho that would not otherwise be served by the KSXZ signal;

I. The Parties believe that the FCC's Rules, and the public interest will be served by the respective, mutual increases in the facilities for KMSM-FM and KSXZ.

NOW, THEREFORE, in consideration of these premises, each of which is material to the Parties entering into this Agreement, and the mutual covenants herein contained, the Parties intending to be legally bound agree as follows:

1. **Application(s) Submission and Processing Consent.** Each Party hereto agrees that it has no objection to and does consent to the FCC's prompt processing and grant of the above modification application of the other Party that is prepared and submitted consistent with this Agreement, or any other application filed by such other Party proposing broadcast facilities which do not otherwise interfere with the reasonable facilities described by the Parties on Attachment A, hereto.

2. **Continuing Assistance.** The Parties acknowledge and agree that this Agreement shall be filed in connection with the applications submitted by the respective Parties to improve the respective facilities for the Stations. In the event one Party, whose application is on file, determines at any point during the processing of its application that the assistance of the other Party is necessary and appropriate, such other Party shall provide reasonable assistance; *provided*, that the Party requesting such assistance shall bear all of the other Party's reasonable and necessary out-of-pocket expenses in providing such assistance.

3. **Communication with FCC.** Neither Party has any objection to the FCC processing the other Party's application and neither Party objects to the other Party communicating with the FCC and its staff in an effort to obtain a speedy grant of the applications.

3 1. **Additional Modifications.** Nothing in this Agreement shall prohibit either Party from subsequently seeking to modify or otherwise change its respective broadcast facilities and FCC authorized operating parameters for its respective Station, so long as the result (actual or proposed) of such modification(s) or change(s) is (are) not inconsistent with the terms, tenor or general intent of this Agreement.

4. **Reimbursement.** IBC agrees to promptly reimburse Tech in accordance with the compensation outlined on Exhibit 1, hereto, relative to Tech's reasonable and necessary expenses incurred in connection with the modification of the KMSM-FM facilities and as consideration for Tech's willingness to enter into this Agreement. Furthermore, IBC shall furnish, or cause to be furnished, the necessary engineering services necessary for the preparation of the technical-engineering portion of the KMSM-FM modification application (FCC Form 301 or 340, as the case may be), referenced above, or alternatively shall pay or promptly reimburse Tech for the reasonable and necessary engineering expenses incurred by Tech respecting the preparation of the technical-engineering portion of said application. In addition, should the Agreement be terminated pursuant to Paragraph 6 below, including any Paragraph 6 subpart, IBC agrees to pay in full all reasonable legal and engineering fees and expenses incurred by Tech up to and including the date of said termination.

5. **No Additional Consideration.** No consideration of any kind whatsoever has been offered, paid or given, or promised to be offered, paid or given, directly or indirectly, by or to Tech or its principals or agents, or by or to KSXZ or its principals or agents, except as set forth herein and in Exhibit 1.

6. **Termination.** This Agreement may be terminated, by written notice given by either Party (provided such Party is not in material breach of any of its obligations, representations, warranties or duties hereunder) to the other Party hereto, as follows:

6.1. **Mutual Consent.** By mutual written consent of the Parties; or

6.2. **Administrative or Judicial Intervention.** By either Party, if a court of competent jurisdiction or governmental, regulatory or administrative agency or commission having jurisdiction over the Parties and the Agreement shall have issued a valid order, decree or ruling or taken any other valid action, in each case permanently restraining, enjoining or otherwise prohibiting the transaction contemplated by this Agreement and such valid order, decree, ruling or other action shall have become final and nonappealable; or

6.3. **Application Denial.** By either Party, if the FCC denies either or both of the above-referenced applications, and such denial becomes final and nonappealable; or

6.4. **Hearing Designation.** By either Party should its application, as provided for by this Agreement, be set for evidentiary hearing (other than a hearing at which only oral argument is to be presented) by the Commission for any reason; or

6.5. **Delay.** By either Party, if the FCC's grant of either of the applications, referenced above, has not occurred by the third (3rd) anniversary of the FCC Public Notice acknowledging the receipt for filing of the respective applications, unless such period is extended or postponed by mutual written assent of the Parties, as provided in this Agreement.

7. **Frequency Change Timing.** The Parties agree to time the frequency changes contemplated by this Agreement to minimize the amount of time that KMSM-FM may not be able to broadcast; and under no circumstance will KMSM-FM be required to remain off the air for more than four (4) hours total because of any obligation imposed on Tech by this Agreement or any other aspect thereof.

8. **Good Standing.** Each Party hereto is duly organized, validly existing and in good standing under the laws of its state of organization and, as applicable, the state or commonwealth of their incorporation or organization, and has full power and authority to carry on the business now being conducted by it.

8.1. **Authorization.** Each Party hereto has full power and authority to enter into this Agreement; and the execution, delivery and consummation of this Agreement have been duly authorized by all necessary action on its part. This Agreement constitutes a valid and binding obligation of each of the Parties hereto.

8.2. **Competency.** Each of the signatories hereto represents that the signatory is competent and authorized to enter into this Agreement on behalf of the Party for whom the signatory purports to sign; and each agrees to indemnify and hold harmless each other Party hereto against all claims, suits, actions and demands, including necessary expenses of investigation and reasonable attorneys' fees and costs, in which it may be asserted that the signatory was not competent or so authorized to execute this Agreement and to receive the consideration therefore.

9. **Representations.** Each party represents to the other Party that (a) it is not under any restrictions, contractual or otherwise, that may be inconsistent with this Agreement or that would

prevent or preclude such Party from entering into this Agreement or from performing such Party's obligations hereunder; and (b) this Agreement is a legally binding obligation of such Party and is enforceable against such Party in accordance with its terms.

10. **Entire Agreement.** This Agreement contains the entire understanding of the Parties with respect to the subject matter and is governed by the laws of the State of Montana (without regard to the conflict of laws provisions thereof) and may not be modified or terminated except in writing signed by Tech and IBC.

11. **Binding Agreement.** This Agreement shall be binding on Tech and IBC and their successors and assigns in perpetuity.

12. **Headings.** The headings of the paragraphs of this Agreement are for the convenience of reference only, and do not form a part hereof, and in no way define, limit, describe, modify, interpret or construe the meanings of the Parties, the scope of this Agreement or the intent of any paragraph hereof.

13. **Counterpart Signatures.** This Agreement may be signed in one or more counterparts, each of which shall be deemed a duplicate original, binding on the Parties hereto; notwithstanding that the Parties are not signatory to the original or the same counterpart. This Agreement shall be effective as of the date first set forth above.

14. **Notice.** Any notice required hereunder shall be in writing and any payment, notice or other communications shall be delivered personally, or mailed by certified mail, postage prepaid, with return receipt requested, or delivered to FedEx (Federal Express), or any other nationally recognized overnight delivery service, in each case addressed to the persons, parties or entities identified below:

As to Tech **David Aronofsky, Esq.**
General Counsel
University of Montana
133 Main Hall
Missoula, MT 59812
Fax: 406-243-2797

with copies **Wayne Coy, Jr., Esq.**
to: **Cohn & Marks**
1920 N Street, N.W., Suite 300
Washington, DC 20036-1622
Fax: 202-293-4827

AND
General Manager, KMSM-FM
Montana Tech of The University
of Montana
1300 West Park Street
Butte, MT 59701
Fax: 406-496-4702

As to IBC: **Frederic W. Constant**
President
Idaho Broadcasting Consortium, Inc.
2121 Diamond Mountain Road
Calistoga, CA 94515
Fax: 707-942-0249

with copies **Lee W. Shubert, Esq.**
to: **Rosenman & Colin, LLP**
805 Fifteenth Street, N.W., 9th Floor
Washington, DC 20005-2212
Fax: 202-216-4700

14.1. ***Alternate Addressees.*** Notice, as provided by this Section, may be given to any other person or party, as any Party hereto may in the future designate in writing, upon due notice to the other Party(ies).

14.2. ***Date of Notice, Action.*** The date of personal delivery or the delivery date (or

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14.1. **Alternate Addressees.** Notice, as provided by this Section, may be given to any other person or party, as any Party hereto may in the future designate in writing, upon due notice to the other Party(ies).

14.2. **Date of Notice, Action.** The date of personal delivery or the delivery date (or date of attempted delivery and refusal by the addressee) specified on any receipt from the U.S. Mail or courier service specified herein shall establish the date of such notification or communication. If any notification, communication or action is required or permitted to be given or taken within a certain period of time and the last date for doing so falls on a Saturday, Sunday, a federal legal holiday or legal holiday by law in the State of Montana, the last day for such notification, communication or action shall be extended to the first day thereafter which is not a Saturday, Sunday or such legal holiday.

15. **Interpretation.** This Agreement shall be construed and interpreted under the laws of the State of Montana, without reference to or application of any conflicts of law, and by the applicable rules and regulations of the FCC. Venue for any action brought under this Agreement may be either Butte, Montana, or for matters pertaining to the FCC, Washington, D.C. Venue for citizenship diversity matters shall be any legally suitable forum.

16. **Severability.** It is the intent of the Parties that the transactions contemplated by this Agreement be consummated. The event that any of the provisions contained in this Agreement are held to be invalid, illegal or unenforceable shall not affect any other provision hereof, and this Agreement shall be construed as if such invalid, illegal or unenforceable provisions had not been contained herein and in a manner to fulfill the intent of the Parties to the maximum extent possible.

17. **Number and Gender.** Whenever required by the context, the singular number shall include the plural and the masculine or neuter gender shall include all genders.

18. **Further Assurances.** After the execution of this Agreement, each of the Parties, upon the reasonable request of the other, will take such reasonable actions or deliver or execute such further documents, materials, signatures, or information as may be reasonably necessary to assure compliance with, or effectuation of, the terms and conditions to this Agreement and the *bona fide* good faith intentions of the Parties hereto.

19. **Confidentiality.** Subject to the requirements of applicable law, Tech and IBC shall each keep confidential all information obtained by it with respect to the other Party hereto in connection with this Agreement and the negotiations preceding this Agreement, and will use such information solely in connection with the transactions contemplated by this Agreement, and if the transactions contemplated hereby are not consummated for any reason, each shall return to each other Party hereto, without retaining a copy thereof, any schedules, documents or other written information obtained from such other Party in connection with this Agreement and the transactions contemplated hereby. Notwithstanding the foregoing, no Party shall be required to keep confidential or return any information which is: (i) known or available through other lawful sources, not bound by a confidentiality agreement with the disclosing Party; (ii) or becomes publicly known through no fault of the receiving Party or its agents; (iii) required to be disclosed pursuant to an order or request of a judicial or governmental authority (provided the disclosing

Party is given reasonable prior notice of the order or request and the purpose of the disclosure); or (iv) developed by the receiving Party independently of the disclosure by the disclosing Party.

20. **Construction of Agreement.** This Agreement is the product of negotiation and preparation by, between and among Tech and IBC and their respective attorneys. Accordingly, the Parties hereto acknowledge and agree that this 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.

21. **Waiver.** Unless otherwise specifically agreed by the Parties in writing to the contrary, (i) the failure of either Party at any time to require performance by the other of any provision of this Agreement shall not affect such Party's right thereafter to enforce the same; (ii) no waiver by either Party of any default by the other shall be taken or held to be a waiver by such Party of any preceding or subsequent default; (iii) no extension of time granted by either Party for the performance of any obligation or act by the other Party shall be deemed to be an extension of time for the performance of any other obligation or act hereunder; and (iv) no waiver shall be effective against any Party unless it is in writing signed by that Party.

22. **Explication.** Unless the context of this Agreement clearly requires otherwise, references to the plural include the singular and to the singular include the plural, references to any gender include any other gender, the part includes the whole, the term "including" is not limiting, and the term "or" has, except where otherwise indicated, the inclusive meaning represented by the phrase "and/or." The words "hereof," "herein," "hereby," "hereunder," and similar terms in this Agreement refer to this Agreement as a whole and not to any particular provision of this Agreement. Article, section, subsection, clause, exhibit and schedule references are to this Agreement, unless otherwise specified. Any reference in or to this Agreement or any of the Ancillary Agreements includes any and all permitted alterations, amendments, changes, extensions, modifications, renewals, or supplements thereto or thereof, as applicable.

23. **Essence of Time.** Time is of the essence in this Agreement.

24. **Schedules and Exhibits.** All schedules, exhibits and riders attached to this Agreement shall be deemed part of this Agreement and incorporated herein, where applicable, as if set forth in full herein.

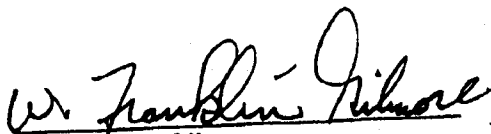
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This Agreement may be signed in counterparts with the same effect as if the signatures to each were upon the same instrument.

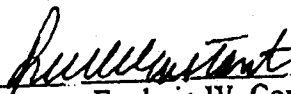
MONTANA TECH OF THE
UNIVERSITY OF MONTANA

IDAHO BROADCASTING CONSORTIUM,
INC.



Dr. Frank Gilmore
Chancellor

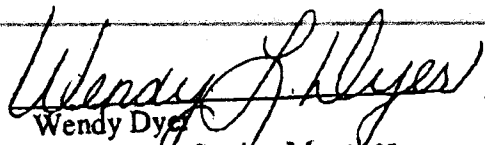
By: _____
Name: _____
Title: _____



Frederic W. Constant
President

KMSM-FM

ASSOCIATED STUDENTS OF MONTANA
TECH



Wendy Dyer
KMSM-FM Station Manager

By: _____
Name: _____
Title: _____



Shawn R. Isakson
President

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EXHIBIT 1

In consideration for Tech's willingness to agree to the proposed frequency change for KMSM-FM, IBC shall pay the Associated Students of Montana Tech the amount of \$40,000.00 plus all reasonable attorney and engineering costs incurred by Tech as follows:

1. Within seven (7) days following execution of the Mutual Upgrade Agreement, the sum of \$11,766.71, which reflects a \$10,000.00 advance on the overall \$40,000.00 payment noted above plus \$1,766.71 in legal and engineering fees and costs incurred by Tech through October 31, 2001 in connection with the proposed frequency change.
2. Payment in full of all invoices for legal or engineering fees and costs incurred by Tech in connection with the proposed frequency change, within thirty (30) days following receipt of any such invoice by IBC.
3. Within seven (7) days following FCC approval of the frequency changes proposed by Tech and IBC, the sum of \$20,000.00.
4. Within seven (7) days following the initial broadcasts by Tech and IBC, respectively, on their new frequencies, the sum of \$10,000.00.
5. All other sums mutually agreed to by the Parties following execution of the Mutual Upgrade Agreement.

ATTACHMENT A

FACILITIES PROPOSALS

KMSM: The facilities for Radio Station KMSM-FM, Butte, Montana (FCC Facility ID No. 3042) shall be substantially as follows:

Facility: FM Channel 296A at Butte, Montana;

Transmitter Site Location: 46°0'44" NL; 112°33'26" WL (NAD 27)

HAAT: -60 Meters (H&V)

ERP: 0.74 kW (H&V)

KSXZ: The facilities for Radio Station KSXZ(FM), Pinesdale, Montana (FCC Facility ID No. 89040) shall be substantially as follows:

Facility: FM Channel 294C at Pinesdale, Montana;

Transmitter Site Location: 46°48'09" NL; 113°58'21" WL. (NAD 27)

HAAT: 636 Meters (H&V)

ERP: 87 kW (H&V)