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In re: Alex Media, Inc.
KRCF(FM), Lead, South Dakota
Facility ID No. 190403
Application File No. BNPH-20120509AFG

Mt. Rushmore Broadcasting, Inc.
KZMX-FM, Hot Springs, South Dakota
Facility ID No. 46712

Dear Counsel:

For the reasons discussed below, we delete Special Operating Condition No. 2 from the construction permit for a new FM station—KRCF(FM)—on Channel 244C at Lead, South Dakota.¹ We also notify Mt. Rushmore Broadcasting, Inc. (MRBI) that, if it is still operating KZMX-FM, Hot Springs, South Dakota, on Channel 244A on June 11, 2022, we will cancel the implied special temporary authority (STA) that has allowed it to do so, and order it to cease such operations.

Background. In FM Auction 93 (held between March 27, and April 5, 2012), Alex Media, Inc. (AMI) bid on and won the allotment for Channel 232C at Lead, South Dakota.² When AMI filed its long-form application, it proposed to substitute Channel 244C for Channel 232C. To accommodate this channel substitution, AMI proposed to substitute Channel 242A for Channel 244A at Hot Springs, South Dakota, and to modify MRBI's license for KZMX-FM to specify operation on Channel 242A.

¹ Application File No. BNPH-20120509AFG.

² *Auction of FM Broadcast Construction Permits Closes; Winning Bidders Announced for Auction 93*, Public Notice, 27 FCC Rcd 4056 (MB 2012).

After issuing an Order to Show Cause to MRBI regarding the proposed channel change for KZMX-FM, and considering MRBI's response to that order, on December 8, 2014, we modified the license of Station KZMX-FM to specify operation on Channel 242A at Hot Springs, South Dakota, directed MRBI to file a minor change application for a construction permit specifying operation on Channel 242A within 30 days (*i.e.*, by January 7, 2015), and granted AMI's application for a construction permit for a new FM station on Channel 244C at Lead, South Dakota.³ The KRCF(FM) Permit specified an expiration date of December 8, 2017, and included a special operating condition (Special Operating Condition No. 2) prohibiting AMI from commencing program tests for (or being licensed to operate) KRCF(FM) on Channel 244C until KZMX-FM commenced program tests (or was licensed to operate) on Channel 242A.

Because MRBI had not implemented (or applied for a construction permit authorizing it to implement) the KZMX-FM channel change, and Special Operating Condition No. 2 thus prevented KRCF(FM) from commencing program tests (or being licensed), in 2017, AMI requested that we toll the construction period for KRCF(FM). We granted this request on April 18, 2017. Subsequently, AMI requested—and we granted—tolling extensions based on the fact that circumstances had not changed.

At this time, MRBI still has not filed an application for a construction permit to implement the KZMX-FM channel change, and Special Operating Condition No. 2 remains in place.

Discussion. *Deletion of Special Operating Condition.* We find that deletion of Special Operating Condition No. 2 is in the public interest. As noted above, MRBI was instructed to file an application for a construction permit to implement the KZMX-FM channel change no later than January 7, 2015. More than 7 years later, it still has not done so. Its failure to implement the KZMX-FM channel change is preventing AMI from constructing KRCF(FM), which will provide a new radio service to Lead, South Dakota, and the surrounding area.⁴

We note that, since the letter order modifying its license became final, MRBI has been operating KZMX-FM on Channel 244A pursuant to an implied STA.⁵ Like all STAs, implied STAs are not within

³ *Alex Media, Inc.*, Letter Order, File No. BNPH-20120509AFG (MB Dec. 8, 2014).

⁴ MRBI's failure to implement the KZMX-FM channel change also may constitute a violation of section 503 of the Communications Act of 1934, as amended. 47 U.S.C. § 503(b)(1)(B) ("Any person who is determined by the Commission ... to have ... willfully or repeatedly failed to comply with any ... order issued by the Commission ... shall be liable to the United States for a forfeiture penalty."). While we will not—at this time—undertake enforcement action with respect to this matter, we caution MRBI that we will do so if it continues to ignore our order directing it to file an application for a construction permit to implement the KZMX-FM channel change.

⁵ *1998 Biennial Regulatory Review, Streamlining of Mass Media Applications, Rules, and Processes*, Notice of Proposed Rule Making, 13 FCC Rcd 14849, 14855, n.22 (1998) (*1998 Streamlining Notice*) (discussing scenario where Commission modified an existing commercial FM station's license to specify a new channel, and explaining that, "[d]uring the construction permit period, the licensee may continue to operate the previously authorized facilities on an interim or 'implied Special Temporary Authority' basis"). See also *Entravision Holdings, LLC*, Memorandum Opinion and Order, FCC 22-4, at para. 24 (rel. Jan. 25, 2022) (*Entravision*) (explaining that, where an existing full-service non-reserved band FM station's license has been modified to specify a new channel, and the modification is final, the station is not licensed to its old channel but is allowed to continue operating its previously authorized facilities under an implied STA); *Wendolyn Tellez*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 33 FCC Rcd 112, 114, para. 7 (MB 2018) (*Tellez*) (same); *KZLZ, LLC*, Letter Order, 31 FCC Rcd 10661, 10663, n.10 (MB 2016) (*KZLZ*) (noting that grant of request to downgrade a station's

the scope of assignments and allotments which receive protection under the FM non-reserved band technical rules. Thus, KZMX-FM's operation on Channel 244A is not entitled to protection from operating stations, construction permits, pending applications, or subsequently-filed applications.⁶ This, in turn, means that deletion of Special Operating Condition No. 2 does not constitute a modification of the KZMX-FM license subject to the protest procedures set forth in section 316(a) of the Communications Act of 1934, as amended.⁷

KRCF(FM) Construction Period. Because we delete Special Operating Condition No. 2, there is no longer a Commission-imposed condition precedent preventing AMI from constructing and operating KRCF(FM) on Channel 244C. Accordingly, we terminate our tolling of the construction period for KRCF(FM) upon issuance of this letter. We remind AMI that, as of the date of this letter, it has 6 months and 19 days (*i.e.*, until July 30, 2022) to complete construction of KRCF(FM).

KZMX-FM Implied STA. Based on our review of the record, we find that, if MRBI fails to construct KZMX-FM's new facilities and initiate program tests on Channel 242A by June 11, 2022, we will cancel its implied STA to continue to operate KZMX-FM on Channel 244A. In reaching this decision, we have considered that (1) MRBI has not taken a single action to implement the KZMX-FM channel change in over seven years, (2) MRBI accepted the construction and licensing obligations arising from the finality of the letter order modifying the KZMX-FM license to specify Channel 242A, and (3) MRBI's failure to construct new facilities for KZMX-FM on Channel 242A has thwarted AMI's efforts to construct its new FM station. We find that continued warehousing of this spectrum by MRBI in the face of AMI's longstanding competing demand is plainly contrary to the public interest. We will not cancel MRBI's implied STA at this time because that would require KZMX-FM to cease operation. However, we will not allow MRBI to indefinitely delay construction and operation of KRCF(FM) either. Accordingly, we will give MRBI an additional 120 days to construct KZMX-FM's new facilities and commence program tests on Channel 242A. If it has not done so within 120 days, we will cancel MRBI's

class and change its community of license resulted in a "mandatory move," and explaining that operation of the station at its old community of license was pursuant to implied STA).

⁶ 1998 *Streamlining Notice*, 13 FCC Rcd at 14855, n.22 (discussing scenario where Commission's grant of a "one-step FM commercial station application to change channel or station class" modified a station's license to specify a new channel, and explaining that "the formerly authorized facilities are no longer protected from subsequently filed applications"). See also *Entravision* at para. 24 (explaining that, where an existing full-service non-reserved band FM station's license has been modified to specify a new channel, and the modification is final, the station is not entitled to any protection based on its formerly licensed facilities); *Tellez*, 33 FCC Rcd at 114, para. 7 (where request to change an existing full-service non-reserved band FM station's channel had been granted, operations on the old channel were "not entitled to any protection"); *KZLZ*, 31 FCC Rcd 10663, n.10 (noting that grant of request to downgrade a station's class and change its community of license resulted in a "mandatory move," and explaining that operation of the station at its old community of license was "not protected against new station or modification application filings"); *Arso*, 27 FCC Rcd at 13218 (MB 2012) (holding that licensee of existing full-service non-reserved band FM station "lost all protection rights for [stations] formerly licensed channel" when order modifying station's license to specify a new channel became final); *Liberian Broad. of Dallas*, Letter Order, 25 FCC Rcd 4765, 4767 (MB 2010) (*Liberian*) (indicating that existing full-service non-reserved band FM radio station's "continued operation on its old channel received no protection under the Commissions technical rules"); *Cumberland, Kentucky, Weber City, Glade Spring, and Marion, Virginia*, Report and Order, 21 FCC Rcd 6431, 6432, para. 4 (MB 2006) (*Cumberland*) (noting that existing full-service non-reserved band FM station's license had been modified to specify a new channel, and that modification was final, and explaining that the station was not "entitled to any protection based on its formerly licensed facilities").

⁷ 47 U.S.C. § 316(a).

implied STA to operate KZMX-FM on Channel 244A, and order MRBI to cease operation of the station on that channel.

Conclusion/Ordering Clauses. Accordingly, IT IS ORDERED that Special Operation Condition No. 2 IS DELETED from the outstanding construction permit (Application File No. BNPH-20120509AFG) for KRCF(FM), Lead, South Dakota, effective February 11, 2022.

IT IS FURTHER ORDERED that the tolling of the construction permit period for KRCF(FM), Lead, South Dakota, HAS ENDED, and the construction permit (Application File No. BNPH-20120509AFG) EXPIRES on July 30, 2022.

Sincerely,

Albert Shuldiner,
Chief, Audio Division
Media Bureau