



Federal Communications Commission
Washington, D.C. 20554

May 12, 2015

In Reply Refer to:
1800B3

Marnie K. Sarver, Esq.
Wiley Rein LLP
1776 K Street, N.W.
Washington, DC 20006

In re: KXBG(FM) (Formerly KIGN(FM)),¹
Cheyenne, WY
Facility ID No. 7693
Permit No. BPH-19981207IC
License Application No. BLH-
20020529AAV

Dear Ms. Sarver:

This letter concerns the constructed facility and pending covering license application ("License Application") for Station KXBG(FM), Cheyenne, Wyoming, filed on behalf of Citicasters Licenses, Inc. ("Citicasters"). For the reasons set forth below, we request that Citicasters provide additional information as specified below.

Background. Citicasters applied in December of 1998 to relocate and modify the facilities of station KXBG(FM).² The proposal called for a 494-foot guyed tower on a reclaimed strip mine site.³ Both the original December 1998 application and an April 14, 1999, amendment, filed at the request of staff,⁴ certified that the grant of the application would not have a "significant environmental impact" because the proposal was "categorically excluded" from environmental processing.⁵ The staff granted the amended application on June 1, 1999. Citicasters completed construction of the modified KXBG(FM) facilities and commenced operation in May of 2002, submitting the License Application on May 29, 2002.

¹ When the subject application was filed on May 29, 2002, the Station's call sign was KIGN(FM). The call sign has been changed several times since then, most recently on January 17, 2008, to KXBG(FM). For administrative convenience, we will use the Station's current call sign.

² See Application No. 19981207IC.

³ The site was described by local zoning authorities as "in Section 26, Township 11 North, Range 70 West of the Sixth P.M., approximately two (2) miles west of County Road 23." *Development Agreement Between The Board of County Commissioners of Larimer County, Colorado and Clear Channel Broadcasting of Colorado, Inc.*, appended to Citicasters' April 26, 2002, response letter.

⁴ *Letter to Citicasters Co.*, reference 1800B3 (Audio Services Division, Mass Media Bureau, March 15, 1999).

⁵ See Application No. BPH-19981207IC and April 14, 1999, amendment, FCC Form 301, Page 21, Item 22.

As the KXBG(FM) tower was being constructed, Mr. Derek Roberts (“Roberts”) and a group named Citizens for Responsible Progress and Preservation (“CRPP”) filed objections. We will treat these filing as informal objections to the License Application⁶ and briefly summarize those contentions here:

October 15, 2001: Roberts, a CRPP member, submits a letter objecting to the proximity of the KXBG(FM) tower to his property, the “Roberts Ranch,” which he claims is “rich in historic artifacts” and “other historic treasures” such as Native American tipi rings and shelters, a “Folsom man” remains, petrified trees, and fossilized dinosaur tracks.

January 9, 2002: CRPP submits a letter stating its concern regarding the effect of the KXBG(FM) tower on the Roberts Ranch, a “prime candidate” for inclusion in the National Register of Historic Places and the “Laramie Foothills Project,” which CRPP claims is a “formally designated preservation area sponsored in part by Larimer County, Colorado and the Nature Conservancy.” The letter also claims that the Colorado Historical Society (the state’s office of historic preservation) had not been contacted about the project.

January 23, 2002: CRPP submits another letter concerning the effect of the tower on the Roberts Ranch and the Laramie Foothills Project, attaching several newspaper articles describing the local controversy.

April 18, 2002: Mr. Jon Geller, another CRPP member, submits a letter asserting that Citicasters must submit an environmental assessment (“EA”) for the KXBG(FM) tower under Section 1.1307 of the Commission’s Rules (the “Rules”).⁷ The KXBG(FM) tower, states Mr. Geller, “will have a significant impact on many of the listed areas,” including:

1. Impact on threatened or endangered species such as Golden Eagles;
2. Impact on sites significant in American history, such as Signature Rock, the Overland Trail, and a stage coach stop denoted with a historical marker;
3. Impact on sites significant in American history, such as 1550-year-old human remains, Native American shelters and artifacts, fire sites, tipi rings, a “buffalo jump,” and paleontological sites; and
4. Impact on sites eligible for listing in the National Register of Historic Places. Mr. Geller included with his letter a March 20, 2002 letter from the Colorado Historical Society confirming that no review or consultation with its office occurred.

June 3, 2002: CRPP submits a letter stating that the KXBG(FM) tower (by then constructed) would have an adverse effect on property values⁸ and announcing that the property owners were “in discussion with their attorneys” concerning possible litigation against Citicasters’ corporate parent Clear Channel, the site owner, and the Larimer County Commissioners.

⁶ See 47 C.F.R. § 73.3587.

⁷ 47 C.F.R. § 1.1307.

⁸ CRPP members’ concerns about the effects of the KXBG(FM) tower on their property values do not constitute a valid ground for challenging the tower on environmental grounds. *Canyon Area Residents for the Environment, Memorandum Opinion and Order*, 14 FCC Rcd 8152, 8156 (1999) (“We find no merit to CARE’s claim that area residents’ . . . concern over property values are environmental factors that should be considered by the Commission”) Accordingly, we will discuss not consider this issue further.

Citicasters, in response to two informal staff inquiries, submitted responses to the Roberts/Geller/CRPP allegations. First, on April 26, 2002, Citicasters submitted documentation regarding the approval of its tower proposal by the Board of County Commissioners of Larimer County, Colorado, noting that “the Commission generally defers to local zoning authorities on matter of local land use.” Citicasters also indicated in this response that it had the KXBG(FM) tower project reviewed by the Colorado Division of Wildlife, the Colorado State University Department of Fish and Wildlife Biology, and EDM, an environmental firm based in Fort Collins. As a result of this consultation, Citicasters indicates that it would undertake a three-year study to determine the actual effect of the KXBG(FM) tower on migratory and raptor birds.⁹ It submits documentation supporting this assertion, including a letter from the District Wildlife Manager of the Colorado Department of Natural Resources that “in general, this project should not have any negative effect on wildlife or its habitat.”¹⁰

Additionally, on May 31, 2002, Citicasters submitted a declaration from the KXBG(FM) tower project manager, Scott E. Giles of T*Rex Architex. Mr. Giles asserts that he consulted the National Register of Historic Places (“National Register”) and determined that no such sites were located near the tower. He also noted that the tower location on a reclaimed strip mine was chosen, in part, to minimize the visual impact of the tower, as it is “remote and offers no public access to a minimum distance of three miles.” Finally, Mr. Giles notes that the KXBG(FM) tower was designed not to have an adverse visual impact on any nearby properties, as it is a “narrow, galvanized guyed tower with a white strobe-lighting system” that from most viewing areas “will be non-distinct to the naked eye.”

Discussion. As noted by Mr. Geller, the Commission’s environmental rules require an applicant initially to determine whether its proposed facility may significantly affect the environment and, if so, submit an EA.¹¹ We emphasize that it is a broadcast applicant’s responsibility to ensure the accuracy of its certifications.¹²

Based on the current record, we are unable to determine: (1) whether the environmental certification in the construction permit application here was made with a reasonable basis for its accuracy,¹³ and (2) whether, based on the submitted information, Citicasters must now prepare an EA. For example, its showing is inadequate regarding the effect of the tower on “districts, sites, buildings, structures, or objects, significant in American history, architecture, archeology, engineering or culture, that are listed *or are eligible for listing*, in the National Register of Historic Places,” or Indian religious

⁹ See “STUDY PLAN, Potential Impacts of a communication tower on avian species in Larimer County,” March 5, 2002, appended to April 26, 2002, Citicasters response letter.

¹⁰ Letter to Eric Wood from Nancy Howard, District Wildlife Manager, Division of Wildlife, Colorado Department of Natural Resources, July 25, 2000, appended to April 26, 2002, Citicasters response letter.

¹¹ 47 C.F.R. § 1.1307(a), 1.1311.

¹² See, e.g., 1998 Biennial Review – Streamlining of Mass Media Applications, Rules and Processes, Report and Order, 13 FCC Rcd 23056, 23066 (1998) (one of the Commission’s “fundamental goals” in streamlining the broadcast application forms is to ensure the accuracy of certifications, we adopt commenters’ suggestion to include an “explanation” checkbox beside the “yes” or “no” checkboxes on certain questions on the application form. As detailed in application instructions to each form, applicants may only affirmatively certify or respond to questions where they are certain that the response is correct).

¹³ See, e.g., *Citicasters Licenses, L.P.*, Memorandum Opinion and Order and Notice of Apparent Liability, 22 FCC Rcd 19324 (MB 2007) (applicant’s affirmative certification was “demonstrably false” when there was no reasonable basis for making it).

sites.¹⁴ Citicasters has presented no statement from Colorado's state historic preservation officer regarding sites eligible for listing in the National Register. Its discussion of the Larimer County zoning approval process and manual inspection of the National Register are insufficient for this purpose, and it is not clear from the record whether Citicasters consulted with the Colorado Historical Society prior to constructing the KXBG(FM) tower. It also is unclear from Citicasters' prior responses the steps it took to contact Indian tribes for input on the impact of the tower on sacred sites. We therefore cannot conclude that Citicasters has complied with Section 106 of the National Historic Preservation Act.¹⁵ Similarly, the materials presented in the April 26 response relate to dealings with the Colorado Department of Natural resources and do not appear to address the issue of whether there are any federally listed endangered or threatened species that may be impacted by the tower, as required by Section 1.1307(a)(3) of the Rules.¹⁶

Accordingly, we request that Citicasters provide the specific factual foundation for each of its conclusions concerning each of the environmental factors listed in Section 1.1307(a)(1)-(a)(7) when the original construction permit application was filed in 1998. Citicasters should describe the review undertaken for **each factor** and, if no review took place for a particular category, provide its reasons, if any, for failing to do so. For each factor, Citicasters should provide all documentation upon which it relied to reach its conclusion that the proposals would not significantly affect the environment.

Additionally, to the extent that the documentation provided pursuant to the preceding paragraph is insufficient to determine whether an EA is warranted, we request that Citicasters compile and file as an amendment to the pending covering license application the material listed in the attached "EA Checklist" for each environmental factor. Additionally, we request that Citicasters specifically address the predicted impact of the KXBG(FM) tower on migratory birds.¹⁷

Finally, we note that, specifically with respect to the matters enumerated in Sections 1.1307(a)(4) and 1.1307(a)(5) of the Rules, the Commission has adopted procedures to facilitate and standardize the evaluation of the effects of communication towers on historic properties and Native American religious sites.¹⁸ We request that, in responding to this request, Citicasters utilize those procedures to initiate contact with the Colorado Historical Society and any Tribes with an interest in the site area.

¹⁴ 47 C.F.R. § 1.1307(a)(4)(5) (emphasis supplied).

¹⁵ 54 U.S.C. § 300101 *et seq.* The tower used by KXBG(FM) falls into the category commonly referred to as "twilight towers," towers built between March 16, 2001 and March 7, 2005, that did not complete the Section 106 historic preservation review process. Although the Commission has taken steps with relevant government and non-governmental stakeholders to develop a process for "clearing" existing towers that were not subject to Section 106 historic preservation review prior to construction, *see, e.g., In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Seventeenth Report, 29 FCC Rcd 15311, 15370 and n. 253 (WTB 2014), that process is not complete.

¹⁶ 47 C.F.R. § 1.1307(a)(3).

¹⁷ As part of this response, we request that Citicasters provide either the results (published or unpublished) of the proposed avian study referenced and described in its April 26, 2002, letter or, if such study has not been undertaken, provide status on plans to do so.

¹⁸ *See Nationwide Programmatic Agreement Regarding the Section 106 Historic Preservation Act Review Process*, 47 C.F.R. Part 1, Appendix C, and the Commission's Tower Construction Notification System ("TCNS"), http://wireless.fcc.gov/outreach/index.htm?job=tower_notification.

We will withhold action on the pending license application (BLH-20020529AAV) until the environmental matters discussed in this letter are resolved.

Sincerely,


Peter H. Doyle
Chief, Audio Division
Media Bureau

Enclosure

cc: Citicasters Licenses, Inc.
Citizens for Responsible Progress and Preservation
Mr. Derek David L. Roberts

FCC ENVIRONMENTAL ASSESSMENT

Applicant: _____ FCC File No.: _____

The Spectrum and Competition Policy Division, Wireless Telecommunications Bureau sends “deficiency letters” to individual licensees and applicants, including tower owners, who have submitted environmental assessments (EAs) with applications (*i.e.*, a filed FCC Form 601 or FCC Form 854) when the EA submitted is insufficient or lacks necessary documentation.

The following checklist is now used by the staff as an attachment to each deficiency letter to inform the licensee, applicant, or tower owner (collectively, “Applicant”) concerning compliance with 47 C.F.R. § 1.1307 of the Commission’s rules. In addition to compiling this information, Applicants are required to comply with all of the Commission’s environmental rules, including 47 C.F.R. § 1.1311 (*i.e.*, “environmental information to be included in the environmental assessment (EA)”), to determine whether a proposed facility may have significant effect on the environment.

Pursuant to 47 C.F.R. § 1.1307, this EA provides insufficient information regarding the proposed facility’s compliance with the following NEPA requirements:

_____ **(a)(1) will be located in an officially designated wilderness area**

Applicant provided insufficient information for the Commission’s staff to determine whether the proposed facility satisfies § 1.1307(a)(1).

If the proposed facility would not be located in an officially designated wilderness area, provide an explanation of how the applicant determined that the proposed facility would not be located in an officially designated wilderness area. Applicant should cite specifically to the sections of the relevant databases, maps, references, or information from the relevant government agencies (*e.g.*, Department of the Interior).

If the proposed facility would be located in an officially designated wilderness area, provide copies of all approvals, permits, or grants from the relevant government agencies approving the proposed antenna structure (*e.g.* Department of the Interior).

_____ **(a)(2) will be located in an officially designated wildlife preserve**

Applicant provided insufficient information for the Commission’s staff to determine whether the proposed facility satisfies § 1.1307(a)(2).

If the proposed facility would not be located in an officially designated wildlife preserve, provide an explanation of how the applicant determined that the proposed facility would not be located in an officially designated wildlife preserve. Applicant should cite specifically to the sections of the relevant databases, maps, references, or information from the relevant government agencies (*e.g.* Department of the Interior).

If the proposed facility would be located in an officially designated wildlife preserve, provide copies of all approvals, permits, or grants from the relevant government agencies approving the proposed antenna structure (e.g. Department of the Interior).

_____ **(a)(3) may affect listed threatened or endangered species or designated critical habitats; or is likely to jeopardize the continued existence of any proposed endangered or threatened species or likely to result in the destruction or adverse modification of proposed critical habitats**

Applicant provided insufficient information for the Commission's staff to determine whether the proposed facility satisfies § 1.1307(a)(3).¹

_____ **If no listed² or proposed³ threatened or endangered species or designated or proposed critical habitats⁴ are present in the county or counties where the "action area"⁵ is located:** Explain the basis for the applicant's determination that there are no listed or proposed threatened or endangered species or designated or proposed critical habitats within the county (or counties) of the project's action area and that there would be no effect on listed or proposed threatened or endangered species or designated or proposed critical habitats within the county (or counties) of the project's action area. Provide the materials (with citations) that formed the basis for this determination (e.g., maps or lists from relevant U.S. Department of the Interior, Fish and Wildlife Service (FWS) databases). If the applicant received a letter from FWS indicating that there would be no effect, provide a copy of the FWS letter so indicating.

_____ **If listed or proposed threatened or endangered species or designated or proposed critical habitats are present in the county or counties where the "action area" is located and would not be affected by the proposed antenna structure:** Explain how the applicant determined that there would be no effect on listed or proposed threatened or endangered species or designated or proposed critical habitats within the county (or counties) of the project's action area. Provide the materials (with citations) that formed the basis for this determination (e.g., maps or lists from relevant U.S. Department of the Interior, Fish and Wildlife Service (FWS) databases).

If the applicant received a letter from FWS indicating that there would be no effect, provide a copy of the FWS letter so indicating.

¹ Applicants who need to consult with the United States Fish & Wildlife Service regarding these matters should be aware that they are consulting with that agency pursuant to Section 7 of the Endangered Species Act. Furthermore, the applicant is pursuing such consultation as a "designated non-Federal entity." Additional, important information about this process may be found at: http://endangered.fws.gov/consultations/sec7_faq.html.

² "Listed species" are defined as any species of fish, wildlife or plant which has been determined to be endangered or threatened under section 4 of the Endangered Species Act.

³ "Proposed species" are defined as any species of fish, wildlife or plant that has been proposed in the Federal Register to be listed under section 4 of the Act.

⁴ "Critical habitat" is defined in Section 3 of the Endangered Species Act.

⁵ U.S. Fish & Wildlife Service defines an action area as "all areas to be affected, directly or indirectly, by the federal action and not merely the immediate area involved in the action." See 50 C.F.R. §402.02(d). For example, an action area would include the site of the proposed antenna structure, its immediate vicinity, and any roads to be constructed to the tower site.

If the applicant did not receive a letter from FWS indicating that there would be no effect, provide a copy of any informal biological assessment prepared by a biologist supporting the applicant's "no effect" determination. Provide the name(s) and qualifications of the biologist(s) who prepared the biological assessment along with any FWS staff who may be familiar with its contents.⁶

_____ **If the proposed antenna structure may affect, but is not likely to adversely affect, listed or proposed threatened or endangered species or designated or proposed critical habitats in the action area:** Provide a letter from FWS concurring with the applicant's informal biological assessment. If any measures are proposed to mitigate any effects on species or habitats, the assessment must outline those measures with FWS concurrence.

_____ **If the proposed antenna structure may affect, and is likely to adversely affect, listed or proposed threatened or endangered species or listed or proposed designated critical habitats in the action area:** Prepare a formal biological assessment as outlined in 50 C.F.R. § 402.01 *et seq.* The applicant should provide the formal biological assessment to the Federal Communications Commission for formal consultation with the FWS.

_____ **(a)(4) may affect districts, sites, buildings, structures or objects significant in American history, architecture, archeology, engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places**

_____ **For proposed facilities that would have no effect or no adverse effect on historic properties,** provide a letter from the relevant State Historic Preservation Officer (SHPO) to the applicant or its consultant regarding whether the proposed antenna structure may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed, or are eligible, for listing, in the National Register of Historic Places (historic properties).

If you do not have a letter from the SHPO, provide documentation showing that the applicant complied with the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission (NPA), 20 FCC Rcd 1073 (2004), *See* 47 C.F.R. §1.1307(a)(4), **Part 1 Appendix B.** *See also* <http://wireless.fcc.gov/siting/npa.html>.

If the proposed facility would come within an Exclusion under Section III of the NPA, provide a statement describing why the facility is excluded.

If the proposed facility would have no effect on historic properties, provide the date the Applicant filed its FCC Form 620 or FCC Form 621 with the SHPO, showing that the 30-day period outlined in Section VII.B.2. of the NPA has expired.

If the proposed facility would have no adverse effect on historic properties, provide the date the Applicant filed its FCC Form 620 or FCC Form 621

⁶ If available, provide information about post-high school formal education including degrees held, area(s) of expertise, years of experience, and membership in any relevant professional accreditation organizations.

with the SHPO, showing that the 30-day period outlined in Section VII of the NPA has expired. The Applicant should also document the date it submitted the FCC Form 620 or FCC Form 621 to the FCC for a 15-day review period (for material submitted electronically) or a 25-day review period (for material submitted by other means), pursuant to Section VII.C.2. of the NPA.

_____ **If the proposed facility would have an adverse effect on historic properties,** provide a copy of the Memorandum of Agreement (MOA) executed by the Applicant, the Federal Communications Commission, the SHPO, and the Advisory Council on Historic Preservation, if applicable, pursuant to Section VII. D.4. of the NPA.

_____ **For all proposed facilities,** in addition to the SHPO letter, other documentation of compliance with the NPA, or MOA, provide a copy of the Applicant's notification to potentially affected Indian tribes through the FCC Tower Construction Notification System (TCNS) or documentation of other reasonable and good faith efforts to identify and contact federally recognized Indian tribes and Native Hawaiian organizations, and a statement showing compliance with the procedures outlined in Clarification of Procedures for Participation of Federally-recognized Indian Tribes and Native Hawaiian Organizations Under the Nationwide Programmatic Agreement, *Declaratory Ruling*, FCC 05-176, released October 5, 2005. See <http://wireless.fcc.gov/siting/>.

_____ **(a)(5) may affect Indian religious sites**

Applicant provided insufficient information for the Commission's staff to determine whether the proposed facility satisfies § 1.1307(a)(5).

Provide an explanation of how the applicant determined that the proposed facility would not affect Indian religious sites. Provide documentation of the applicant's good faith efforts to determine whether the proposed antenna structure may affect any Indian religious sites, including any archeological effects on Indian burial mounds. Attach copies of any letters or studies completed by archeologists for the proposed antenna structure. Include reference to any databases, maps, or other sources consulted to identify Indian Tribes whose religious sites might be affected. Attach copies of all correspondence the applicant or its consultant sent to or received from an Indian Tribe regarding the proposed antenna structure, other than correspondence that the Tribe has asked to maintain confidential.

The FCC recognizes that Indian Tribes, as domestic dependent nations, exercise inherent sovereign powers over their members and territory. Applicants consulting with tribal authorities are acting as delegates of the FCC, which has a government-to-government relationship with tribes. Tribal authorities may request FCC participation in consultation on any matter at any time. Any information regarding historic properties or religious or sacred sites to which an Indian Tribe attributes significance may be highly confidential, private, and sensitive, and applicants should respect the wishes of the Tribe with respect to the treatment of such information.

(a)(6) will be located in a floodplain

Applicant provided insufficient information for the Commission's staff to determine whether the proposed facility satisfies § 1.1307(a)(6).

If the proposed facility would not be located in a flood plain, provide a copy of the section of the relevant map from the Federal Emergency Management Agency (FEMA) showing that the proposed antenna structure will not be located in a flood plain.

If the proposed facility would be located in a flood plain, provide a copy of the section of the relevant map from the Federal Emergency Management Agency (FEMA) showing the location of the proposed antenna structure. In addition, provide a copy of the building permit from the local jurisdiction where the proposed antenna structure will be located that shows the proposed structure is at least one foot above the flood plain. If the local jurisdiction does not issue building permits, provide independent verification that shows the proposed structure is at least one foot above the flood plain.

(a)(7) construction will involve significant change in surface features (e.g., wetland fill, deforestation or water diversion)

Applicant provided insufficient information for the Commission's staff to determine whether the proposed facility satisfies § 1.1307(a)(7).

If the proposed facility would not be located in a wetland, provide a copy of the section of a map showing that the proposed antenna structure will not be located in a wetland.

If the proposed facility would be located in a wetland, provide a copy of the permit the applicant or its consultant received from the U.S. Army Corps of Engineers permitting the construction of the proposed antenna structure.

(a)(8) will be equipped with high intensity white lights which are to be located in residential neighborhoods, as defined by the applicable zoning law

Applicant provided insufficient information for the Commission's staff to determine whether the proposed facility satisfies § 1.1307(a)(8).

Provide documentation that the proposed antenna structure will not be located in a residential neighborhood, as defined by the applicable zoning law (relevant only where high intensity white lights are required by the Federal Aviation Administration (FAA)).

(b) would cause human exposure to levels of radiofrequency radiation in excess of Commission-adopted guidelines

Applicant provided insufficient information for the Commission's staff to determine whether the proposed facility satisfies § 1.1307(b).