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September 22, 2014

VIA HAND DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, DC 20554
Attn: *Evan Morris, Attorney Advisor*
Video Division, Media Bureau

ACCEPTED/FILED

SEP 22 2014

Federal Communications Commission
Office of the Secretary

Re: KYUS-TV Broadcasting Corporation
KYUS-TV, Miles City, MT
Facility ID No. 5237
NAL/Acct No.: 201441420015
FRN: 0003749967
Response to Staff Letter Dated September 5, 2014

Dear Ms. Dortch:

On behalf of KYUS-TV Broadcasting Corporation ("KBC"), the licensee of KYUS-TV, Miles City, Montana, this letter is filed in response to the September 5, 2014 letter from Barbara A. Kreisman, Chief of the Media Bureau's Video Division (the "Staff Letter"), concerning KBC's June 12, 2014 response (the "KBC Response") to a *Notice of Apparent Liability* ("NAL") issued on May 13, 2014.¹ Among other things, the KBC Response requested a reduction or cancellation of the NAL's proposed forfeiture due to the licensee's documented inability to pay.²

The Staff Letter suggests that the information contained in the KBC Response "could not represent the full financial information of a full power television station serving as a network affiliate."³ KBC submits that this statement represents a fundamental misunderstanding of KYUS's financial and legal status.

¹ *KYUS Broadcasting Corp.*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 5053 (Chief, Vid. Div., MB rel. May 13, 2014) ("NAL"). The Staff Letter requested a response within 10 days of the date of the letter. KBC sought and obtained an extension of time, to and including September 22, 2014, to submit its response. Thus, this response is being timely filed.

² NAL Response at 5-6 & Exh. A.

³ Staff Letter, at 1.

As an initial matter, KYUS is not itself a network affiliate. Rather, it is the 100% rebroadcast of a network affiliate, KULR-TV, which is the NBC affiliate in the Billings DMA and is separately owned.⁴ The arrangement between KULR-TV and KBC is essentially a month-to-month rebroadcast consent agreement, pursuant to which KULR-TV pays no money or remuneration of any kind to KBC. KULR-TV's owner retains all advertising revenue derived from any increased audience that it recognizes from the carriage of its programming on KYUS. The only benefit to KBC from this arrangement is that KULR-TV supplies programming to KYUS that would otherwise be unavailable, so that viewers in Miles City have at least one over-the-air broadcast signal. Because KBC earns no revenue from the station and must pay for its ongoing operating expenses, the station necessarily operates at a loss every year, as KBC demonstrated in the KBC Response.⁵

In addition, the Commission has previously recognized the precarious financial situation that KYUS faces. Specifically, when the Commission authorized KYUS as a satellite station of KXGN-TV,⁶ it recognized that:

Custer County, in which Miles City is located, has only 4,000 households and KYUS-TV reaches only 3,200 of them. Based on this data and the fact that Miles City is an isolated community located 70 miles from Glendive and 145 miles from Billings, KBC alleges that it is simply impossible for KYUS-TV to generate adequate advertising revenues from service to 3,200 homes to cover a significant portion of the costs that a full-service station would incur. . . . Based on the information provided, we believe that Big Horn [the assignor] has adequately demonstrated the unlikelihood of finding an alternative operator willing and able to operate KYUS-TV as a full-service station.”⁷

KYUS's situation has only become worse since the release of that decision in 1995. Network compensation is no longer common – in fact, the opposite is true, with reverse compensation from affiliates to networks being the norm. KYUS receives no revenue from granting retransmission consent to multichannel video programming providers, and has no other form of revenue other than the sustainability funding that Stephen A. Marks provides. In short, KYUS has no revenue from any external source, and it has provided Commission staff with three years of KBC's tax returns showing a significant loss in each of the last three years. It is difficult

⁴ Cowles Montana Media Company is the current licensee of KULR-TV.

⁵ This was not always the arrangement. Prior to the Great Recession, the previous licensee of KULR-TV paid monthly fees to KBC pursuant to a Local Marketing Agreement. When that agreement expired in approximately 2009, the owner of KULR-TV agreed to continue the arrangement but would only reimburse KBC for KYUS's operating expenses. In 2010, the agreement was again extended informally, but KULR-TV's owner refused to pay anything to KBC under the new arrangement. That arrangement continues.

⁶ *Application of Big Horn Communications, Inc. (Assignor) and KYUS Broadcasting Corporation (Assignee)*, Memorandum Opinion and Order, 10 FCC Rcd 2176 (1995). KXGN-TV is assigned to a different DMA (Glendive, MT) than KYUS (Billings, MT). KXGN-TV is licensed to Glendive Broadcasting Corp., a separate corporate entity from KBC. KYUS now rebroadcasts KULR-TV.

⁷ *Id.* at 2176-77.

to see what additional information could be offered to justify the financial hardship of this particular licensee.

In the past, a previous licensee of KULR-TV had provided some compensation to KBC for the carriage of its programming on the station. However, as noted in Footnote 5 *supra*, that compensation ended in May 2010. Since then, KBC has continued to operate the station at a loss, so as to not deprive the viewers in the Miles City area of an over-the-air television service, while KBC evaluates its options for the long-term operation of the station. Many licensees would have simply terminated the regular operation of the station while making such an assessment, but KBC's owners believed that it was important for the station to continue to serve its viewers for as long as possible. Thus, the station has been operating at a financial loss, but it still provides service to the residents of its service area. The proposed forfeiture only makes it more difficult for KBC to justify that operation, as it increases the financial losses suffered while it continues its service to the public.

The Staff Letter suggests that the financial information for other broadcast properties owned by Stephen A. Marks should have been included in the KBC Response. Specifically, the Staff Letter states that a determination of the ability to pay a forfeiture “depends on whether the Licensee is financially capable of paying based on its consolidated revenues, not just an inchoate snapshot of those revenues.”⁸ If that is the standard that the FCC has chosen to apply in this case, then KBC will not be able to sustain its contention that the proposed forfeiture would present a financial hardship to it – no matter that the forfeiture would indeed contribute to the losses for a licensee that is currently contemplating the future of the broadcast station at issue.

In its request for a reduction of the proposed forfeiture, KBC provided the Licensee’s federal tax returns for the most recent three-year period, as directed in the *NAL*.⁹ KBC does not consolidate its revenues (or lack thereof) with any other entity owned by Stephen A. Marks. KBC is a separate licensee, it is a separate corporation, is treated as a legal person, is solely responsible for the debts that it incurs, and insulates the owners of the corporation from separate liability.¹⁰ Commission precedent cited in the Staff Letter notwithstanding,¹¹ KBC is unaware of any judicial decision upholding the Commission’s decisions to ignore corporate personhood by looking beyond an individual corporate licensee’s finances in order to assess the licensee’s financial ability to pay a forfeiture.¹² Moreover, the precedent is inconsistent with the treatment

⁸ Staff Letter, at 1.

⁹ *NAL*, 29 FCC Rcd at 5055.

¹⁰ See, e.g., *First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 625 (1983) (“Separate legal personality has been described as ‘an almost indispensable aspect of the public corporation’”) (superseded by statute on other grounds); *Anderson v. Abbott*, 321 U.S. 349, 362 (1944) (“Limited liability is the rule, not the exception”); *Burnet v. Clark*, 287 U.S. 410, 415 (1932) (“A corporation and its stockholders are generally to be treated as separate entities.”).

¹¹ *KM LPTV of Chicago-13, LLC*, Memorandum Opinion and Order, 29 FCC Rcd 5741 (Vid. Div. MB rel. May 28, 2014) (Application for Review pending); see also *SM Radio, Inc.*, Order on Review, 23 FCC Rcd 2429, 2431 (2008).

¹² The only case that appears to have addressed the substance of the Commission’s “inability to pay” policy is *United States v. Neely*, 595 F. Supp. 2d 662 (D.S.C. 2009). That decision, which was an appeal of *Frank Neely*, (continued)...

of other licensees who are not owned by other FCC licensees. The Commission has never, to the knowledge of the undersigned, required that licensees not affiliated with other FCC licensees to submit the financial statements of all of their equity owners, even though, in some cases, those owners may have the financial ability to meet the FCC obligations. Nor has the Commission made it a regular practice to pierce the corporate veil of a company on which it proposes to levy a forfeiture. In fact, the Commission has suggested that a review of the financial condition of affiliated companies is not necessarily make that review mandatory. Instead, the Commission suggests that such a review will be conducted “in appropriate circumstances.”¹³

Here, the circumstances do not dictate that there should be such a review of affiliated companies or shareholder revenue. The KBC situation appears to be different from most of the cases cited by the Staff Letter. It appears that, in most if not all of those cases, the entity at issue had some consolidated operations in connection with the other affiliated companies. In some cases, the affiliated companies appeared to share staff or programming, so that the operation of the company at issue in some way provided a benefit to the affiliated entities. Here, that is not the case, as there is no joint operation of KBC with the other commonly owned properties of Mr. Marks. At this point, it is KULR-TV and the residents of the Miles City area who receive all the benefits of KBC’s continued operation of the station, not KBC’s owner or any affiliated company.

While the cases appear to suggest that the Commission’s review of the finances of affiliates and shareholders may be optional rather than mandatory, if Commission staff intends to cite the character policy statement for the proposition that the consolidated revenues of a licensee *must* be reported when claiming an inability to pay a forfeiture, and that the reporting of only the licensee’s revenues may be deemed insufficient (or worse, a misrepresentation), the staff should at the very least amend its standard language in notices of apparent liability in order to provide licensees with sufficient notice that such consolidated information is requested. Nowhere in the *NAL* does the Commission staff allude to the fact that consolidated revenue information is required. The *NAL* simply states:

The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three year period; (2) financial statements prepared according to generally accepted accounting practices (“GAAP”); or (3) some other reliable and objective documentation that accurately reflects the respondent’s current

Memorandum Opinion and Order, 22 FCC Rcd 1434 (EB 2007) (a case referenced in the Staff Letter, at 1), involved an individual who *was the licensee*. It therefore may have been appropriate in those circumstances to examine the financial records of the individual, given that the individual was the licensee. Here, KBC is a corporation, and its shareholders reasonably expect to be shielded from liability, absent a legitimate piercing of the corporate veil which is not justified here. In any event, the court in *Neely* did not reach the merits of Mr. Neely’s claim because the court determined that it was “unable to make a finding regarding his financial ability to pay” due to an insufficient record. *Neely*, 595 F. Supp. 2d at 667.

¹³ See, e.g., *SM Radio, Inc.*, 23 FCC Rcd at 2432.

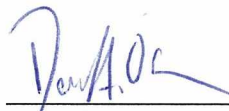
financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.¹⁴

Commission staff could, for example, include an additional statement such as, “Licensees making such a claim must report consolidated revenues for the licensee and any parent company or subsidiary, not just an inchoate snapshot of those revenues.” Such a statement would provide licensees with the ascertainable notice that the D.C. Circuit Court of Appeals has mandated before an agency can impose a forfeiture.¹⁵ Such notice is lacking in the *NAL*. Thus, to the extent that Commission staff requires that KBC report the consolidated revenues of KBC and the revenues of other stations owned by Stephen A. Marks, and will not consider KBC’s tax returns and other financial information in isolation, KBC respectfully withdraws that aspect of the KBC Response.

Please direct any questions concerning this matter to the undersigned.

Respectfully submitted,

WILKINSON BARKER KNAUER, LLP

By: 
David D. Oxenford
David A. O’Connor
Counsel for KYUS-TV Broadcasting
Corporation

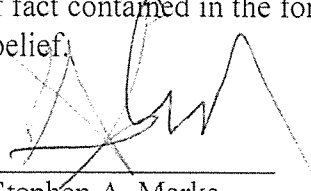
cc: Evan Morris (via email)

¹⁴ *NAL* ¶ 12. KBC fully complied with this request and therefore denies that any misrepresentation occurred or that it lacked candor before the agency.

¹⁵ See, e.g., *Trinity Broad. of Florida, Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) (a regulated party acting in good faith must be able to identify, with “ascertainable certainty, the standards with which the agency expects parties to conform.”); *Affum v. United States*, 566 F.3d 1150, 1163 (D.C. Cir. 2009) (citing *Trinity*).

DECLARATION

I, Stephen A. Marks, the President of KYUS Broadcasting Corporation, hereby declare under penalty of perjury that the statements of fact contained in the foregoing response are true and correct to the best of my knowledge and belief.



Stephen A. Marks

Dated: September 22, 2014