

WAIVER REQUEST

The instant application seeks to change the community of license of KDKL(FM) from Coalinga, California to Huron, California. This application is being filed concurrently with and is contingent upon the application of KZLA(FM) to change its community of license from Huron, California to Riverdale, California.

This application is being filed pursuant to *Revision of Procedures Governing Amendments to FM Table of Allotments*, 21 FCC Rcd 14212 (FCC 2006) (the “Report and Order”). In the Report and Order the Commission states that 30 days after publication of the Report and Order in the Federal Register, parties may file coordinated contingent minor change applications to and that all rule changes in Appendix A of the Report and Order will be effective 30 days after publication in the Federal Register.¹ As a result, the abovementioned coordinated applications are concurrently being filed on the first date such applications were permitted – January 19, 2007.

However, due to the Commission’s decision to defer the effective date of the Report and Order as it relates solely to the filing of noncommercial educational (“NCE”) community of license change applications until public notice of OMB approval of a new FCC Form 340², the applicant is requesting a waiver to allow submission of the instant application and to preserve the applicant’s rights. Applicant is also a party to a petition for reconsideration of the Report and Order that is being filed simultaneously herewith to address this issue.

A waiver is appropriate in this instance, as the applicant would otherwise be deprived of its “first-in-time” cut-off protection should other similarly situated parties file mutually exclusive proposals, solely on Forms 301, today or at any time before the new Form 340 is available. This waiver seeks to prevent the anomalous situation in which similarly situated applicants receive disparate treatment for otherwise similar applications. The waiver seeks to make it possible to gain equal cut-off protection with any applicant filing today – January 19, 2007, the first filing day possible after publication of the Report and Order in the Federal Register. Pursuant to Section 1.3 of the Commission’s Rules, the Commission may suspend, revoke, amend, or waive any of its rules upon a showing of good cause and where grant of the extension will serve the public interest. 47 C.F.R. § 1.3; *see also*, WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

A waiver would prevent a violation of fundamental due process arising from disparate treatment. The Court of Appeals has clearly instructed the Commission that it may not treat similarly situated parties disparately without substantive justification. *See Melody Music v. FCC*, 345 F.2d 730 (D.C. Cir. 1965). As the applicant here would be similarly situated to any other party proposing to relocate to the same community, it should not be deprived of an opportunity to file an application, when other similarly situated parties may do so, simply because the Commission lacks a currently updated form. Requiring deferred filing here would also violate the fundamentals of broadcast regulation that require comparative consideration of two mutually exclusive applications. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). It is

¹ See Report and Order at ¶35 and ¶42.

² Id. at ¶38.

axiomatic that when the Commission bars some applications and accepts others from similarly situated parties that are mutually exclusive (as is true here), the Commission violates *Ashbacker*. As in *Kessler v FCC*, 326 F.2d 673 (D.C. Cir. 1963), the Commission is accepting some applications (those involving commercial stations exclusively) while barring others (those from NCE stations and those with contingencies involving NCE stations). And, as in *Kessler*, the Commission would thereby violate *Ashbacker* rights by excluding the instant application and the coordinated contingent KZLA application, when both are entitled to comparative consideration.

To address the additional information gathering needs reflected in the updated Form 301, but not appearing in the yet-to-be updated Form 340, this application includes additional exhibits. Functionally, then, the coordinated contingent applications at issue here comport with the Report and Order as applied to NCE applicants and provide all necessary information. To the extent the revised and approved Form 340 requests information that has not been submitted herewith, the applicant will amend this application to ensure compliance and provide all necessary additional information.

As the applicant would be similarly situated to other parties not barred from filing on January 19, 2007 and the Commission's administrative information-gathering needs are met by alternative means, no substantive reason exists to put either the applicant, or its coordinated contingent applicant, at risk of losing cut-off protection. Therefore, applicant respectfully requests that the Commission grant this waiver, accept for filing and process both this application and its coordinated contingent application.