

**TERMS, CONDITIONS AND OBLIGATIONS OF CONSTRUCTION PERMIT
AND
REQUEST FOR REMOVAL OF
SPECIAL OPERATING CONDITION AND RESTRICTION**

The construction permit (File Number BMPH-20070523ADS) (the "Permit") for which this application seeks a covering license is presently tolled,¹ therefore this application is timely filed. Applicant Airen Broadcasting Company ("Airen") has met all but Condition No. 4 of the Permit and makes the following showing to request removal of that condition.

On behalf of station KBAE(FM) (formerly KZCC(FM)), Trinidad, California ("KBAE" or "Station"), Airen hereby respectfully requests that the fourth of the "[s]pecial operating conditions or restrictions" included in the Station's Permit be waived so that this application for license to cover the Permit can be granted. Condition No. 4 states that (1) program tests for KBAE on the specified facilities for Channel 238C3 at Trinidad, California, may not commence until program tests for KMDR on Channel 299C3 at McKinleyville, California, commence, and (2) a license for KBAE on Channel 238C3 will not be granted until a license for KMDR on Channel 299C3 is granted. Additionally, the December 9, 2008 *Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau, FCC, to Ernest T. Sanchez, Esq., et al.*, DA 08-2676 ("2008 Letter Decision"), by which Condition No. 4 was added to the Permit to accommodate the reissuance of the KMDR permit back to its original Channel 236C3, conditions KMDR's commencement of Channel 299C3 operations, on KNHT's commencement of program tests for 273C2, Rio Dell, California.²

¹ See December 17, 2008 *Letter from Suzanne E. Rogers, President, Airen Broadcasting Company, to Ms. Marlene H. Dortch, Secretary, Office of the Secretary, Federal Communications Commission*, requesting tolling of the KZCC (now KBAE) Construction Permit ("Tolling Request"); the December 18, 2008, May 11, 2009, December 10, 2009, November 3, 2010, May 4, 2011, November 7, 2011, May 17, 2012, and November 20, 2012 E-mails from Irene Bleiweiss, Audio Division, FCC, and the May 8, 2013, November 6, 2013, and May 29, 2014 E-mails from Victoria McCauley, Audio Division, FCC, to Suzanne Rogers, granting and continuing tolling.

² 2008 *Letter Decision* at 2. The 2008 *Letter Decision* was issued as a result of KNHT's Petition for Reconsideration of the November 19, 2007 *Letter from Dale E. Bickel, Senior Engineer, Audio Division, Media Bureau, FCC, to Airen Broadcasting Company* ("2007 Letter Decision") by which the Commission (a) initially granted Airen's application to modify the city of license for KBAE from McCloud, California, to Trinidad, California (File No. BMPH-20070523ADS), (b) re-issued the KMDR permit to specify Channel 299C3, McKinleyville, California, instead of the Channel 236C3 as originally requested by KMDR, and (c) ordered KNHT to file within 30 days an application to modify its operations from Channel 297C2 to Channel 273C2, Rio Del, California. See 2007 *Letter Decision* at 3. The 2008 *Letter Decision* also addressed KMDR's December 20, 2007 Motion for Stay and March 20, 2008 Motion for Special Temporary authority or Other Relief, and responsive pleadings filed by all parties. As to KBAE, the material actions of the 2008 *Letter Decision* include (a) confirming the staff's determination in the 2007 *Letter Decision* that the change in community for KBAE, from McCloud, California, to Trinidad, California, "would result in a preferential arrangements of allotments" (At 8); (b) granting and re-issuing the Permit as of December 9, 2008, tolling the Permit between November 19, 2007, and December 9,

Removal of Condition No. 4 is justified because KNHT has refused for over six and a half years to take even the first step toward its channel change by tendering the ordered Channel 273C2 modification application.³ By virtue of Condition No. 4, unless and until KNHT begins operations on Channel 273C2, KMDR cannot commence operations on Channel 299C3 at McKinleyville, and, in turn, KBAE, cannot file an application for license to cover its Permit. KNHT continues to hold KBAE hostage, operating on Channel 297C2 at Rio Del, without an FM allotment, and without a construction permit or application for its allotted channel 273C2.⁴ On the other hand, KBAE, whose permit is tolled awaiting satisfaction of Condition No. 4,⁵ built

2008, and thus revising the Permit's expiration date to March 13, 2009 (At 10-11); (c) modifying the KBAE construction permit to contain Condition No. 4 (At 11); and (d) granting Special Temporary Authority "to Airen Broadcasting Corporation [sic] to permit KBAE(FM) to operate with the facilities specified in its construction permit, File No. BMPH-20070523ADS, until such time as KMDR(FM) is ready to initiate program tests on Channel 236C3, or 180 days from the date of this letter has elapsed, whichever occurs first[.]" but with additional special temporary authority contemplated (At 11). With respect to KMDR, the *2008 Letter Decision* re-issued its permit to specify Channel 236C3 with a new expiration date of July 22, 2011 (At 11), and affirmed the *2007 Letter Decision's* requirement that KMDR move to Channel 299C3 once SOU implements the KNHT channel change (At 9). Regarding KNHT, the *2008 Letter Decision* required it to file within 30 days an application to modify its operations from Channel 297C2 to Channel 273C2 at Rio Del, California (At 11).

³ Despite KNHT's January 8, 2009 filing of an Application for Review and Other Relief (the "Application") and a Motion for Stay of the Commission's *2008 Letter Decision*, neither of which has been addressed by the Commission, KNHT was given just 30 days in which to file a minor change application to specify operation on Channel 273C2 (*2007 Letter Decision* at 3; *2008 Letter Decision* at 11.). As set forth in the *2008 Letter Decision*, "The filing of a petition for reconsideration, application for review, or any other challenge to this letter decision shall not relieve SOU of its obligation to file the required minor change application." (At 8.) The *2008 Letter Decision* also points out that Section 1.106(n) of the rules states, "without special order of the Commission, the filing of a petition for reconsideration will not excuse any person from complying with any decision, order, or requirement of the Commission . . ."; and that Section 1.115(h)(2) states, "[i]n the event the Commission orders further proceedings, it may stay the effect of the order from which review is sought." (At 8, n 38. Emphasis added.) Finally, the *2008 Letter Decision* cites *A-O Broadcasting Corporation*, 23 FCC Rcd 603, 615 n. 74 (2008) "(the filing of a petition for reconsideration 'had no impact' on the effectiveness of the actions);" and *Committee to Save WEAM v. FCC*, 808 F.2d 113 (D.C. Cir. 1986) "(the filing of a petition for reconsideration or application for review does not stay or postpone the effectiveness of the dismissal of an application unless the designated authority or Commission, in its own discretion, grants a stay)." (At 8, n 38.) KNHT is in violation of Section 73.203(b) of the Commission's rules by refusing to take any action toward the ordered implementation of service on Channel 273C2 (and should have stated so in its application for renewal (File No. BRED-20130730AOO)).

⁴ Under well-established Commission law, KNHT is currently operating pursuant to an "implied STA" at its existing site on its existing channel. By definition, that STA is temporary and can be revoked if it "is unnecessarily impeding [KMDR's] ability to move or commence operations" and should SOU not build and operate on its revised channel assignment of 273C2. *Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules and Processes*, 14 FCC Rcd 17525, 17540, n.55 (1999); *Gunnison, Colorado*, 20 FCC Rcd 5908, 5912 (Chief Audio Division 2005).

⁵ See *supra* note 1.

the Channel 238C3 facilities specified in its Permit in December of 2007, and has been operating those facilities pursuant special temporary authority⁶ since before the 2008 *Letter Decision*. Likewise, KMDR, prevented from moving to its eventual Channel 299C3 by KNHT's failure to act, presently operates Channel 236C3 at McKinleyville, California. Fortunately, any interference between KMDR and KBAE is entirely confined to unpopulated areas immediately surrounding the stations' isolated, uninhabited transmitter sites, as approved by the current KBAE STA.⁷ To overcome KNHT's delay tactics and their effect of interfering with the Commission's required channel assignments,⁸ Airen asserts that the removal of Condition No. 4 from the Permit is both justified and necessary.

On several recent matters the Commission has granted relief similar to that sought herein. In the *Letter re Station WPRM-FM, San Juan, Puerto Rico, et. al.*, DA 12-1688, October 22, 2012 ("WPRM"), the Commission granted requests for deletion of special operating conditions associated with license applications and permits where one party "thwart[ed] five stations' efforts to implement their facility modifications" by its "refusal to complete the authorized modification of WPRM."⁹ In *Letter re Station KXIT-FM, Dalhart, Texas*, October 19, 2011 ("KXIT"), the Commission concluded "that deletion of Special Operating condition No. 1 is in the public interest[]" and it granted the applied-for license where for over four years a licensee failed to change channels.¹⁰ Similarly the Commission found that deletion of a construction permit's special operating condition and grant of the associated license application was in the public interest where a licensee had avoided changing channels for more than three years

⁶ For the 180 days following the 2008 *Letter Decision's* issuance KBAE operated pursuant to the special temporary authority granted therein. Thereafter KBAE was granted special temporary authority by the August 17, 2009, April 30, 2010, and October 25, 2010 *Letters from Charles N. Miller, Engineer, Audio Division, Media Bureau, FCC, to Suzanne E. Rogers*. An extension of the October 25, 2010 grant of STA has been requested in application File No. BELSTA-20110414ABK.

⁷ *Letter from Charles N. Miller, Engineer, Audio Division, Media Bureau, FCC, to Suzanne E. Rogers, President, Airen Broadcasting Co.*, October 25, 2010 ("STA Grant"); extension requested in application File No. BELSTA-20110414ABK. The *STA Grant* acknowledges that no interference to any populated area is likely to result from operation of KMDR and KBAE simultaneously. (At 2.) See also Technical Comments, Application for Legal STA, File No. BLSTA-20101022ACQ.

⁸ Airen remains willing to negotiate in good faith to reimburse KMDR and KNHT for the required reimbursable expenses of their channel changes in accordance with *Circleville, Ohio*, Second Report and Order, 8 FCC 2d 159 (1967). See *Circleville* at 164.

⁹ *WPRM* at 6.

¹⁰ *KXIT* at 2.

following the order to do so.¹¹ The Commission further stated in that case that the continued construction delays amounted to warehousing of spectrum “plainly contrary to the public interest.”¹² And in *Letter re KNOR(FM), Krum, Texas*, May 7, 2010, DA 10-787 (“*KNOR*”), the Commission stated that warehousing of spectrum “in the face of [] long-standing competing demand is plainly contrary to the public interest[.]” and went on to delete the special operating condition in the permit of the requesting station.¹³

For the reasons stated herein, KBAE respectfully requests that the Commission remove the Permit’s Special Operating Condition No. 4, and grant this license application. Thereupon, KBAE will be able to continue as a licensee, confidently serving its new community of license, Trinidad, California, with the facilities authorized in Construction Permit No. BMPH-20070523ADS, and thus best serve the public interest. As the 2007 Letter Decision held, and the 2008 Letter Decision upheld, KBAE’s first service to Trinidad constitutes a preferable arrangement of allotments which is consistent with the underlying principles of Section 307(b) of the Act.¹⁴ Removal of Condition No. 4, while temporarily resulting in non-interfering second adjacent co-channel licensing of KMDR and KBAE, will advance the goals of the Commission in achieving the 2008 *Letter Decision*’s delineated preferential arrangement of allotments.

¹¹ *Letter re WRWM, Lawrence, Indiana*, May 13, 2011 (“*WRWM*”), at 2.

¹² *Id.*

¹³ *KNOR* at 4.

¹⁴ 2007 *Letter Decision* at 3; 2008 *Letter Decision* at 7.