

**FEDERAL COMMUNICATIONS COMMISSION**  
**445 12<sup>th</sup> STREET, S.W.**  
**WASHINGTON, DC 20554**

November 9, 2004

*In Reply Refer to:*  
1800B3-MFW  
**DA 04-3554**

Marissa G. Repp, Esq.  
Hogan & Hartson  
555 13<sup>th</sup> Street, N.W.  
Washington, DC 20004-1109

In re: KFMD(FM), Denver, Colorado  
Facility ID No. 48967  
File No. BPH-20030424AAN  
Citcasters Licenses, L.P.

KRFX(FM), Denver, Colorado  
Facility ID No. 29731  
File No. BPH-20030424AAO  
Jacor Broadcasting of Colorado, Inc.

KBPI(FM), Denver, Colorado  
Facility ID No. 29739  
File No. BPH-20030424AAP  
File No. BXPB-20040511ABL  
Jacor Broadcasting of Colorado, Inc.

Dear Ms. Repp:

The staff has before it (1) the captioned applications of Citicasters Licenses, L.P. (“Citicasters”) and Jacor Broadcasting of Colorado, Inc. (“Jacor”) for minor change of the licensed facilities of stations KFMD(FM), KRFX(FM), and KBPI(FM), all licensed to Denver, Colorado;<sup>1</sup> and (2) the captioned application of Jacor for an auxiliary facility for station KBPI(FM). We have received informal objections to the grant of the minor modification applications filed by Canyon Area Residents for the Environment (“CARE”) on May 8, 2003; Meadowlark Group, Inc. (“Meadowlark”) on May 20, 2003;<sup>2</sup> Mr. Alfred Hislop on June 9, 2003; Akron Broadcasting Company (“Akron”), also on June 9, 2003 (against the KRFX(FM) and

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<sup>1</sup> The staff originally granted the KRFX(FM) and KFMD applications on May 19, 2003, and the KBPI(FM) application on May 20, 2003. However upon discovering that Canyon Area Residents for the Environment and Meadowlark Group, Inc. had filed informal objections to the applications on May 8, 2003, and May 20, 2003, respectively, the staff rescinded the grant of the applications on May 29, 2003. *See Public Notice*, Report No. 25498 (June 3, 2003.)

<sup>2</sup> Meadowlark filed a Supplement to its Informal Objection on June 3, 2003, and a Further Supplement on July 15, 2003.

KFMD(FM) applications) and on May 21, 2004 (against the KBPI(FM) application);<sup>3</sup> Western Slope Communications, LLC (“Western”) on July 9, 2003; AGM-Rocky Mountain Broadcasting I, LLC (“AGM”) and NRC Broadcasting (“NRC”) on August 15, 2003; and Mr. Dana J. Puopolo (“Puopolo”) on March 2, 2004; we have also received related responsive pleadings.<sup>4</sup> Additionally, on April 25, 2003, Citicasters and Jacor filed “Requests for Expedited Action” on the KFMD(FM) and KRFX(FM) applications.<sup>5</sup> For the reasons set forth below, we will dismiss the subject minor modification applications and grant the KBPI(FM) auxiliary application.

*Technical proposals.* The KRFX and KFMD applications specify a diplexed antenna at the licensed KFMD site on Lookout Mountain in Jefferson County, Colorado; KRFX proposes to move to the KFMD site from its current location, and the stations propose use of a diplexed antenna with a center of radiation 49 meters above ground level.<sup>6</sup> However, Citicasters has dismantled the existing KFMD tower (which, it claims, had “structural concerns”)<sup>7</sup> and replaced it with a new tower having the same location and overall height as the old tower. Station KBPI(FM) currently operates from a tower at Lookout Mountain owned by KWGN, Inc., licensee of KWGN-TV in Denver. The instant KBPI application specifies operation from a diplexed antenna – to be shared with station KALC(FM), Denver – at KALC(FM)’s current position on the KWGN-TV tower, slightly lower than KBPI(FM)’s current position on the tower.<sup>8</sup> The tower will be “reinforced” to accommodate this diplexed antenna as well as KWGN-TV’s digital antenna.<sup>9</sup> The applications, “noting the long-recognized method of calculating [HAAT] for similarly-situated stations, request waivers of Section 73.313(d) of the

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<sup>3</sup> On July 15, 2003, counsel for Akron filed a “Statement in Support” from certain residents of Akron, Colorado.

<sup>4</sup> Citicasters and Jacor filed a “Response” to CARE’s objection on June 27, 2003. They also filed a single “Response” to the Meadowlark, Hislop, Akron, Western, and AGM-NRC on December 9, 2003. Western filed a “Reply” on December 17, 2003; and Meadowlark and Akron each filed a “Reply” on December 19, 2003.

<sup>5</sup> The request states that KRFX(FM)’s lease was due to expire on June 10, 2004, and its landlord has given the station notice that it should vacate at that time so it can construct its own digital television facilities. Citicasters and Jacor reiterated that request on March 17, 2004, and it was opposed by Meadowlark on March 23, 2004. The landlord is currently permitting KRFX(FM) to remain at the site on a month-to-month basis until the tower is dismantled.

<sup>6</sup> KRFX(FM) is currently licensed to operate with an effective radiated power (“ERP”) of 100 kW and an antenna height above average terrain (“HAAT”) of 320 meters. Its modification application specifies an ERP of 100 kW and an HAAT of 487 meters at the KFMD site. KFMD is licensed for an ERP of 100 kW (horizontal), 64 kW (vertical) with an HAAT of 490 meters. It proposed operation with 100 kW (horizontal and vertical) at an HAAT of 487 meters on its new replacement tower. The KRFX(FM) application indicates that it was filed in response to an *Order to Show* contemplating that KRFX(FM) be downgraded to a Class C0 facility to accommodate Akron’s Petition for Rule Making to amend the FM Table of Allotment by allotting Channel 279C1 to Akron, Colorado, as that community’s first local broadcast service. *Reclassification of License of Station KRFX(FM), Denver, Colorado*, 18 FCC Rcd 2330 (MB 2003) (“*KRFX(FM) Show Cause Order*”). See Application No. BPH-20030424AAO, Exhibit B-16A.

<sup>7</sup> See Jacor/Citicasters’ June 27, 2003 Response to CARE Objection at 5.

<sup>8</sup> KBPI(FM) is licensed with an ERP of 100 kW at an HAAT of 301 meters. It proposes to operate with an ERP of 100 kW at an HAAT of 524 meters from WWGN-TV’s tower.

<sup>9</sup> The KWGN-TV digital antenna will be positioned on the tower at the slot currently occupied by KBPI(FM).

Commission's Rules to exclude from the antenna HAAT calculation the four radials extending over the Rocky Mountains."<sup>10</sup>

## Background

*CARE objection.* CARE objects to the subject applications on three grounds: (1) asserted non-compliance with the requirements of the National Environmental Policy Act of 1969 ("NEPA");<sup>11</sup> (2) an alleged inadequate analysis of what it terms non-ionizing electromagnetic radiation ("NIER"), known in the Commission's rules as radiofrequency radiation ("RFR"); and (3) asserted non-compliance with the requirements of the National Historic Preservation Act of 1966 ("NHPA").<sup>12</sup> CARE alludes to and purports to incorporate by reference a complaint it filed with the Commission's Enforcement Bureau regarding the two towers specified in the applications, *i.e.*, the KFMD(FM) and KWGN-TV towers.<sup>13</sup> Because we are dismissing the three modification applications, we need not address CARE's substantive allegations, and we will dismiss its objection as moot.<sup>14</sup>

*Denver waiver.* As noted above, each of the subject applications requests waiver of Section 73.313(d) of the Commission's rules to exclude from the antenna HAAT calculation the four radials extending over the Rocky Mountains. Jacor and Citicasters cite previous staff actions granting allegedly similar waiver requests to Denver stations, including KFMD(FM)

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<sup>10</sup> See Section 3(c) of the Engineering Report appended to each of the applications; *see also* Jacor/Citicasters' December 9, 2003 Response to Informal Objections at 3.

<sup>11</sup> 42 U.S.C. § 4231-4335.

<sup>12</sup> 16 U.S.C. § 470(f).

<sup>13</sup> It references a filing styled "Canyon Area Residents for the Environment (CARE) Complaint Regarding Registration of Citicasters/Clear Channel Tower and KWGN Channel 2 Auxiliary Tower" ("Tower Complaint") dated September 24, 2002. CARE also argues that "interference levels violate the public interest," *see* CARE Objection at 4, and references previous complaints about existing interference to businesses on Lookout Mountain.

<sup>14</sup> We do not reach the issue of the technical acceptability of the three modification applications. Nevertheless, we believe it would be helpful to comment briefly on CARE's objections in the event that these applications are refiled. First, with the exception of RFR exposure standards, CARE's NEPA objection fails to contain any specific factual allegations regarding how the three modification application fail to meet NEPA requirements. *See Area Christian Television, Inc.*, 60 RR 2d 862, 864 (1986). Second, with respect to CARE's argument regarding RFR exposure, we have evaluated each of the subject proposals and find that each complies with the Commission's current RFR exposure rules. *See* 47 C.F.R. §§ 1.1307(b), 1.1311. Finally, with respect to CARE's NHPA-based objection regarding the effects of the towers on the historic Lariat Trail and the National Register-listed Buffalo Bill's Grave and Museum and the Pahaska Teepee, we believe that the instant proposals do implicate the NHPA. We are unaware of any current authority supporting the contention that the replacement of an existing structure is not an "undertaking." However, construction of a replacement tower that does not "substantially increase the size of the existing tower" within stated parameters, that construction may be excluded from review under Section 106 of the National Historic Preservation Act. *See Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission*, Section III.C., adopted in *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, FCC 04-222, 19 FCC Rcd \_\_\_ (Rel. Oct. 5, 2004). Any resubmission would, of course, be subject to the environmental assessment requirements of Sections 1.1307 and 1.1311 of the Commission's Rules, as amended by the Programmatic Agreement.

(then KPKE(FM)). Meadowlark, Hislop, Western Slope, Aspen, AGM, NRC, and Puopolo each has objected to the various waiver requests.

Meadowlark Objection. Meadowlark objects only to the KRFX(FM) proposal. Meadowlark filed a counterproposal in the allotment proceeding for MM Docket No. 03-57<sup>15</sup> to allot Channel 248C to Creede, Colorado as that community's first local broadcast service. This counterproposal would be possible only if, *inter alia*, KRFX(FM) was downgraded to Class C0 status. However, KRFX(FM) filed the subject application in response to the Meadowlark counterproposal, an action that ultimately resulted in the dismissal of Meadowlark's counterproposal.<sup>16</sup> Meadowlark argues that KRFX(FM) claims an antenna HAAT of 487 meters, but would achieve a true HAAT of only 237.75 meters using all eight radials as required by Section 73.313 of the rules. KRFX(FM), states Meadowlark, has had 30 years to upgrade to full Class C facilities; furthermore Meadowlark argues that KRFX(FM) cannot possibly achieve true Class C status at its present site, as zoning restrictions on Lookout Mountain prevent the erection of the tall towers needed for a true Class C facility. Finally, Meadowlark indicates that not all of the Denver area stations have "Denver Waivers," as, for example, Stations KUVU(FM) and KVOD(FM) on Lookout Mountain actually have a greater HAAT (computed based on the standard 8-radial method of calculation) than KRFX(FM), as does KJCD(FM), Longmont, Colorado; each of these stations is classified and protected as a Class C1 facility. Continuing to protect KRFX(FM) as a Class C facility, concludes, Meadowlark, makes no sense and "serves to frustrate meritorious proposals such as the one advanced by [Meadowlark] in Docket No 03-57 – a proposal which will not only provide a first local service to a deserving community but will provide a first broadcast service to a substantial populated area which currently lacks any reception service."<sup>17</sup>

In its June 3, 2003 Supplement to its Informal Objection, Meadowlark lists 22 stations in Colorado, Wyoming, and Idaho subject to possible downgrading. All but two, it observes, could achieve Full Class C Status by excluding one or more radials. Meadowlark states that the "Denver Waiver" therefore amounts to a *de facto* reclassification program and promotes warehousing of spectrum. Finally, in its July 15, 2003, Further Supplement, Meadowlark argues that in fact KRFX(FM)'s proposal actually amounts to a downgrade of the station's facilities, because KRFX(FM)'s current HAAT, using the standard eight-radial methodology, is 319 meters, while the proposed HAAT using the standard methodology is only 238 meters.<sup>18</sup>

Hislop Objection. Mr. Hislop objects to each of the subject applications essentially on spectrum efficiency grounds. He argues that the requested waivers will occupy spectrum and

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<sup>15</sup> See Notice of Proposed Rule Making (*Ft. Collins, Westcliffe, and Wheat Ridge, Colorado*), 18 FCC Rcd 4461 (MB 2003).

<sup>16</sup> Report and Order (*Ft. Collins, Westcliffe, and Wheat Ridge, Colorado*), 19 FCC Rcd 4821 (MB 2004).

<sup>17</sup> Meadowlark Objection, at 3.

<sup>18</sup> Meadowlark also states that the area and KRFX(FM)'s area and population coverage will shrink from 16,210 square kilometers and 2,710,518 persons (using 2000 Census data) with its license facilities to 12,730 square kilometers and 2,596,399 persons with the instant proposal.

preclude additional, smaller, “drop-in” services in the most rugged part of the country where additional service is badly needed. The required protection of stations benefiting from Denver Waivers to the west and south will likely create a “dead zone” where the required spacings protect an area that in reality, due to terrain features, will be devoid of any signal at all. Such result is not in the public interest, he argues.

Akron Objections. On June 9, 2003, Akron filed an informal objection against the KRFX(FM) and KFMD(FM) applications. Akron states that, on May 24, 2002, it filed a petition for rule making asking the Commission to allot Channel 279C1 to Akron, Colorado as that station’s first local service; the proposal would theoretically enable 40,000 people to receive radio service. The proposal is contingent on the downgrade of KRFX(FM) to Class C0 status. In response to that petition, the staff issued the *KRFX Show Cause Order* on March 3, 2004. Favorable action on KRFX(FM)’s application and waiver request would, obviously, preclude grant of Akron’s petition for rule making. Akron states that Jacor has failed to provide any detailed justification for waiver of Section 73.313(d). It also argues that any past justification for granting Denver Waivers has eroded with the passage of time and in any event do not apply to KRFX(FM), because: (1) the situation in Denver is not as anomalous as the Commission thought it was, as there are many stations that might be subject to downgrading unless one or more radials are omitted;<sup>19</sup> (2) the “relative flatness” to the east of Denver that allegedly demonstrates the uniqueness of the Denver Waiver stations is misconceived, as the terrain variations east of Denver are themselves significant enough to meet the requirement for “excessive” terrain roughness established by the Audio Division in evaluating the propriety of alternative contour-prediction methodologies;<sup>20</sup> (3) the public would receive significantly superior service if KRFX(FM) were required to construct full Class C facilities;<sup>21</sup> (4) The effect of granting a waiver would be to deny service to underserved areas, because KRFX(FM)’s signal approximates the expected coverage of a Class C0 station in most directions, and waiver will provide it with “artificial protection,” that would preclude such proposals as Akron’s.

Western Slope Objection. Western Slope states that on July 2, 2003, it filed a “one-step” application to upgrade its station, KRVG(FM), Glenwood Springs, Colorado, from Class C3 to Class C2.<sup>22</sup> Western Slope observes that grant of the KFMD(FM) Denver Waiver request is

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<sup>19</sup> Akron cites the figures in Meadowlark’s Supplement, *viz.*, that of 97 FM stations in Colorado, Wyoming, and Idaho licensed as Class C facilities, 22 have heights below the minimum HAAT for Class C facilities (450 meters), and 17 of those could be deemed operating with full Class C facilities if one or more radials was omitted. These numbers amount to more than an “anomaly,” in Akron’s estimation.

<sup>20</sup> Akron cites *Letter to Mark Lipp, Esq.* BPH-20000316ACF, Reference 1800B3 (Associate Chief, Audio Div., Aug. 8, 2002).

<sup>21</sup> Akron alleges that, even if zoning restrictions at Lookout Mountain prohibit construction of a full Class C facility, Squaw Mountain and Eldorado Mountain permit such construction, and “Jacor has failed to make any demonstration that operation of KRFX(FM) from those two locations would result in any diminution of service.” Akron objection at 7.

<sup>22</sup> See Application No. BPH-20030702AAK. The proposal is contingent on the reclassification of two stations not currently operating with full Class C facilities, KKNN-FM, Delta, Colorado and KSTR-FM, Montrose, Colorado. The staff released a letter ordering those two stations to show cause why they should not be downgraded to Class C0 status on November 6, 2003. The KRVG(FM) proposal remains pending at this time.

inappropriate because Section 73.313(d) permits the exclusion of radials extending over foreign territories and over water but does not exclude radials over mountainous terrain. Additionally, Western Slope argues that grant of the KFMD(FM) waiver would create two barriers to KRVG-FM's upgrade: First, it would prevent KRVG(FM) from further upgrading to Class C1 status;<sup>23</sup> second, KKNN-FM and KSTR-FM could use the KFMD(FM) waiver here to propose an upgrade to full Class C status with no change in facilities, avoiding reclassification and frustrating Western Slope's plan to upgrade KRVG(FM).

AGM/NRC Objection. AGM and NRC oppose only the KFMD(FM) application. AGM and NRC are the licensee and assignee, respectively, of station KIDN-FM, Hayden, Colorado.<sup>24</sup> They also point out that the Commission's rules do not permit the omission from the HAAT calculation of radials over mountainous areas, and note that Commission rules can be waived only if "good cause" is shown and that waiver proponents face a "high hurdle" in demonstrating that the waiver would not undermine the policy objectives of the rule.<sup>25</sup> They state that Citicasters' sole justification for the waiver here is that the Commission has granted such waivers, including one to KFMD(FM), in the past. They contend, however, that these prior waivers have disserved the public by thwarting opportunities for additional service. AGM and NRC assert that, should the Commission properly reclassify KFMD(FM) as a Class C1 facility, KIDN-FM can and will apply to upgrade from Class C3 to Class C1 facilities, taking advantage of "a significant terrain feature" and provide service to 2.5 times its current population.<sup>26</sup> Continuation of the waiver, on the other hand, will require maintenance of artificial protection to KFMD(FM) and prevent nearby stations from upgrading and bringing new service to surrounding rural areas.

Puopolo Objection. Mr. Puopolo objects only to the KRFX(FM) proposal. He summarizes previous objections of Meadowlark and Hislop, and argues that the Commission has "an implicit duty to preserve spectrum that might give rise to FM allotments for future auctions."<sup>27</sup> He then argues that, if KRFX(FM)'s waiver request is denied and the station is "treated appropriately" under Section 73.313(d), he will petition the Commission to allot Channel 278C1 to Craig, Colorado, as that community's fourth FM service. He states that he will apply for, bid for, and, if successful, promptly build and construct that facility, which would provide additional service to 18,589 persons in Colorado and Wyoming. By comparison, he states, grant of the KRFX(FM) waiver will result in no additional service.

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<sup>23</sup> Western Slope avers that, if KFMD(FM) is properly reclassified as a Class C0 station, it will apply to upgrade KRVG(FM) to Class C1 status.

<sup>24</sup> See Application No. BALH-20030530BLR. Cool Radio, LLC filed a petition to deny this application (and other applications in the transaction) on July 10, 2003. The application was granted May 28, 2004 and consummated July 9, 2004.

<sup>25</sup> AGM and NRC cite 47 C.F.R. § 1.3 and *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

<sup>26</sup> The Class C1 KIDN-FM facility envisioned by AGM and NRC would increase the station's population coverage from 13,482 to 31,159 (2000 Census data).

<sup>27</sup> Puopolo objection at 3.

Jacor/Citicasters Response. Jacor and Citicasters filed a consolidated response to the Meadowlark, Hislop, Akron, Western Slope, and AGM-NRC objections on December 9, 2003. In this filing, Jacor and Citicasters argue that, because the staff granted similar waiver requests for Denver Waivers, it must do so here.<sup>28</sup> These include a waiver for KFMD(FM), one of the stations involved here, and for KALC(FM), Denver, which received a Denver Waiver while specifying facilities identical to those specified by KBPI(FM) here. They argue that the prior staff Denver Waivers were cited with approval by the Commission in the Technical Streamlining rule making proceeding,<sup>29</sup> and the basic facts underlying those waivers – the Rocky Mountains to the west, the “relatively flat terrain toward the population centers to the east” – has not changed since the original Denver Waivers were granted in 1986. Objectors’ claims that “the floodgates would be opened” by grant of the requested waivers is belied by the fact that, in the 18 years since the original three Denver Waivers were granted, only three other stations have been granted similar waivers. Jacor and Citicasters contend that in any event the staff can determine on a case-by-case basis whether other waivers are warranted. If other stations do demonstrate similar circumstances, they should be accorded similar treatment. Finally, Jacor and Citicasters state that they need not show a lack of alternative sites or any additional public interest factors to justify a waiver. A Denver Waiver, they state, simply rectifies the anomaly that would occur from the inclusion in HAAT calculations of radials which would unreasonably skew the result; it is the “unwavering inclusion,” not the omission, of aberrant radials in the antenna HAAT calculation that would be wrong and contrary to the public interest.

### **Discussion**

On July 17, 1985, Westinghouse Broadcasting and Cable (“Westinghouse”) filed a Petition for Waiver of Section 73.211 of the rules to permit the continued classification of stations KOSI(FM) and KPKE(FM) (now KFMD(FM), one of the stations involved here), Denver, Colorado as Class C stations notwithstanding antenna HAATs below the general minimum for Class C stations specified in Section 73.211 of the Rules. Westinghouse proposed to locate its station in the foothills of the Rocky Mountains, with the Denver metropolitan area to the east and the mountains rising sharply to the west. It argued that, due to the “highly unusual” terrain in the Denver area, the usual HAAT measurement technique was inappropriate. It further stated that “the actual coverage of KOSI and KPKE to the east in the direction of Denver approximates that of a maximum Class C facility,” computed using only those radials in the direction of Denver to the east. These terrain conditions, Westinghouse argued, are “unique to the Denver area and not duplicated elsewhere except for a few smaller communities to the North of Denver also situated along the edge of the Rocky Mountain Range.” Finally, Westinghouse argued that protection required for the National Bureau of Standards’ nearby Table Mountain Receiving Zone placed “unique practical constraints” on the ability of KOSI and KPKE to increase antenna height.

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<sup>28</sup> Jacor and Citicasters cite *Melody Music*, 345 F.2d 730 (D.C. Cir. 1965).

<sup>29</sup> *Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission’s Rules*, 15 FCC Rcd 21649, 21667 (2000) (“*Streamlining of Radio Technical Rules*”).

On January 14, 1986, the staff denied the request to waive Section 73.211.<sup>30</sup> However, it agreed with Westinghouse's claim that, but for the anomalous terrain to the west, both stations would have HAATs well above the Class C minimum. The staff also stated that it would not be in the public interest to have the licensees shift their transmitter sites to the east such that the HAAT would exceed the Class C minimum but the service provided by the station would be degraded. However, the staff observed that the computation of HAAT pursuant to Section 73.313(d) required the exclusion of radials where the 3-to-16-kilometer portion of the radial extended over large bodies of water or foreign territories. The staff stated that the rationale for such exclusion was "to prevent what can be deemed to be nontypical or unimportant radials or portions thereof from inappropriately skewing the calculated value of HAAT."<sup>31</sup> Accordingly, the staff on its own motion waived Section 73.313(d) such that the terrain radials extending primarily over the Rocky Mountains were not to be included in the calculation of the stations' HAAT.<sup>32</sup>

The staff subsequently granted "Denver Waivers" to several other stations in the area, KPBI(FM) in Denver<sup>33</sup> and KRXY-FM in Lakewood, Colorado.<sup>34</sup> In 2000, the Commission adopted a new Class of FM station, Class C0, for stations with HAATs of less than 451 meters. Class C stations that did not meet the new HAAT minimum were not automatically downgraded. The Commission, however, adopted procedures to downgrade stations which chose not to pursue the new minimum antenna HAAT when a "triggering" application or rule making petition was filed.<sup>35</sup> The Commission examined the Denver Waiver issue in that proceeding. While it declined to adopt a blanket exception to permit the use of fewer than eight radials to meet Class C HAAT requirements, it acknowledged the Denver Waiver policy, stating that "[t]he staff will give careful consideration to any requests for waiver of Section 73.313(d) submitted by Class C stations subject to reclassification that are located in mountainous areas, on a case-by-case basis."<sup>36</sup> Subsequently, as noted by Jacor and Citicasters, the staff has granted unopposed Denver Waivers to Denver stations KOSI(FM) and KQMT(FM) for diplexed facilities on

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<sup>30</sup> *Letter to Ramsey L. Woodworth, Esq. and John Wells King, Esq.*, Reference 8920-MA (Aud. Serv. Div. Jan. 14, 1986) ("*Woodworth Letter*").

<sup>31</sup> *Id.* at 2.

<sup>32</sup> Using that HAAT computation methodology, KOSI(FM) was considered to have an HAAT of 495 meters, and KPKE(FM) was considered to have an HAAT of 490 meters, each of which met the Class C minimum.

<sup>33</sup> *Letter to Marilyn M. Strailman, Esq. and N. William Jarvis, Esq.*, Reference 8920-AED/KS (Aud. Serv. Div. June 10, 1987).

<sup>34</sup> *Letter to Malrite Radio & Television, Inc.*, Reference 8920-AED (Aud. Serv. Div. June 11, 1987) ("*Malrite Letter*").

<sup>35</sup> *Streamlining of Radio Technical Rules*, 15 FCC Rcd 21649, 21661-63 (2000) ("*Second Streamlining Order*").

<sup>36</sup> *Second Streamlining Order*, 15 FCC Rcd at 21667, citing *Crain Broadcasting, Inc.*, 8 FCC Rcd 4406, 4407 (1993) and the *Woodworth* and *Malrite Letters*.



Lookout Mountain, using four radials in the HAAT calculation,<sup>37</sup> and to Denver station KALC(FM), which also used four radials in computing its HAAT.<sup>38</sup>

We find that the proposed waivers of Section 73.313(d) of the Commission's rules are unwarranted. Two related considerations compel this result. First, the demand for FM spectrum has increased dramatically in the United States since 1986. This is particularly true in the Denver area, which has witnessed significant population growth in many sparsely populated areas during this period. As the record in this proceeding demonstrates, new service to more recently populated sections west of Denver would be precluded by the additional protection afforded by the Class C designation. Moreover, the Commission has specifically concluded that Class C stations operating with antenna heights substantially below class maximums should no longer enjoy the excessive protection afforded by the rules in the face of competing expressions of interest for new and/or expanded service. Granting the requested waivers in this case would undermine this policy goal.

This case, in fact, highlights the manner in which lesser Class C technical facilities can frustrate the expansion of radio service to the listening public. In 2000 the Commission addressed this problem. The *Second Report and Order* in the technical streamlining proceeding created the Class C0 designation and involuntary downgrade procedures to enhance the efficiency of the FM technical rules. Each of these changes is relevant here. The new C0 classification ensures that downgrades will be effected whenever modifications are sought that do not meet the new, more stringent Class C antenna height requirements. The involuntary downgrade procedures, triggered by the conflicting rulemaking or application filings, establishes the Commission's clear preference for new outlets over the continuation of protection levels far in excess of actual licensed station parameters. In reaching this balance between protection rights and the potential for additional service, the Commission quoted with approval its prior consideration of this same issue in Docket 80-90.

As discussed above, the *Second Streamlining Order* indicated that we would consider any requests for waiver of Section 73.313(d) submitted by Class C stations subject to reclassification that are located in mountainous areas, on a case-by-case basis. In this case, in light of the *bona fide* expressions of interest in new and expanded facilities, as well as opposition by interested and directly affected parties, we believe that continuation of the Denver waivers for KFMD(FM), KRFX(FM), and KPBI(FM) is not warranted. To grant such waivers would plainly frustrate the policy goals which led to the adoption of the new Class C0 designation.

The fact that the HAATs vary dramatically along different radials of the captioned applications does not warrant a different result. We believe that the prior staff characterization of the radials to the west of Denver as either "nontypical" or "unimportant" are no longer tenable. As Meadowlark and Akron, demonstrate, many stations could seek class upgrades to

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<sup>37</sup> See Application Nos. BPH-20010214ABZ and BPH-20010214ACA, respectively. The applications were granted without letters on May 8, 2001.

<sup>38</sup> See Application Nos. BPH-20020409AAF, granted without letter on June 12, 2002, and BMPH-20020927AAT, granted without letter on September 17, 2003. This latter application, as noted above, authorized facilities identical to those proposed by KBPI(FM) here.

gain additional protection by excluding one or several radials. Similar HAAT differentials are not uncommon in other mountainous areas, in coastal areas which feature rugged terrain, or where valleys are situated near mountainous areas. We have not accepted the *ad hoc* approach urged by Citicasters and Jacor in these similar situations where service areas may exceed class maximums in certain directions. The impossibility of making meaningful distinctions among these factual situations argues for strict adherence to HAAT averaging methodology, which provides a fair and workable means to establish protection rights. The inclusion of radials that lie over the Rocky Mountains is certainly important – not unimportant – to those communities to the west which are denied new and/or improved service as a result of the technically unsupportable protection rights afforded by full Class C designations. We conclude that the consistent application of our FM class rules provides the best way of fairly protecting stations that operate effectively as Class A stations in certain directions and Class C stations in others. We will therefore deny the waiver requests and dismiss the subject modification applications.

*KBPI(FM) Auxiliary Facilities Application.* In its May 11, 2004, application, Jacor requests authority for auxiliary (main back-up) facilities for KPBI(FM) on the new KFMD(FM) tower. The KBPI(FM) auxiliary operation would share the diplexed antenna proposed as the KRFX(FM) and KFMD(FM) main facilities. Jacor requested waiver of Section 73.313(d) to exclude the radials from the HAAT calculation of the auxiliary facility, and it also (on May 18, 2004) requested expedited processing of that application.<sup>39</sup> Akron and Meadowlark filed informal objections to the auxiliary facility application on May 21, 2004 and May 24, 2004, respectively, on grounds similar to those on which they challenged the modification applications – that continuation of a “Denver waiver” was not justified.<sup>40</sup>

When evaluating an auxiliary antenna proposal for an FM station, our primary concern is that the service contour of the auxiliary proposal not extend beyond the 1 mV/m (60 dB $\mu$ ) contour of the main facility.<sup>41</sup> The “class” of the auxiliary facility is not a relevant consideration so long as that requirement is met. The proposed auxiliary facility complies with this requirement.<sup>42</sup> We will therefore dismiss Jacor’s request for waiver. Additionally, because the objections were premised on Jacor’s request for waiver, we will dismiss the objections as moot. Finally, because the KBPI(FM) auxiliary facility application complies with Section 73.1670(a) and all other pertinent technical requirements – including RFR exposure guidelines – we will grant that application.

### **Conclusions/Actions**

For the reasons set forth above, the captioned applications of Citicasters Licenses, L.P. and Jacor Broadcasting of Colorado, Inc. for minor change of the licensed facilities of stations

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<sup>39</sup> On May 21, 2004, Meadowlark opposed the request for expedited consideration.

<sup>40</sup> Meadowlark indicates that it has no objection to grant of the KBPI(FM) auxiliary application at the actual HAAT calculated in accordance with Section 73.313 of the rules.

<sup>41</sup> 47 C.F.R. §73.1670(a).

<sup>42</sup> The application also indicates that the auxiliary facility does not extend beyond the protected service contour proposed in the KPBI(FM) modification application.

KFMD(FM) (File No. BPH-20030424AAN), KRFX(FM) (File No. BPH-20030424AAO), and KBPI(FM) (File No. BPH-20030424AAP), all licensed to Denver, Colorado ARE DISMISSED. Additionally, the Informal Objections filed by Canyon Area Residents for the Environment, Meadowlark Group, Inc., Mr. Alfred Hislop, Akron Broadcasting Company, Western Slope Communications, LLC, AGM-Rocky Mountain Broadcasting I, LLC and NRC Broadcasting, and Mr. Dana J. Puopolo, as well as the April 25, 2003, Requests for Expedited Action filed by Jacor and Citicasters, ARE DISMISSED AS MOOT. Finally, the Informal Objections to the KBPI(FM) auxiliary facilities application (File No. BXPB-20040511ABL) filed on May 21, 2004, and May 24, 2004, by Akron Broadcasting Company and Meadowlark Group, Inc., respectively, ARE DISMISSED AS MOOT, the KBPI(FM) auxiliary facilities application IS GRANTED, and the May 18, 2004, Request for Expedited Action by Jacor Broadcasting of Colorado, Inc, IS DISMISSED AS MOOT.

Sincerely,

Peter H. Doyle, Chief  
Audio Division  
Media Bureau

cc: Canyon Area Residents for the Environment (*via counsel*)  
Meadowlark Group, Inc. (*via counsel*)  
Mr. Alfred Hislop  
Western Slope Communications, LLC (*via counsel*)  
John M. Pelkey, Esq.  
Akron Broadcasting Company (*via counsel*)  
AGM-Rocky Mountain Broadcasting I, LLC (*via counsel*)  
NRC Broadcasting (*via counsel*)  
Jacor Broadcasting of Colorado, Inc.  
Citicasters Licenses, L.P.  
Mr. Dana J. Puopolo  
KWGN, Inc. (*via counsel*)