



**Federal Communications Commission
Washington, D.C. 20554**

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In Reply Refer to:

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In re: KNHT(FM), Rio Dell, CA
Facility ID No. 17412
State of Oregon Acting By and Through
The State Board of Higher Education on Behalf
of Southern Oregon University
Dismissed Construction Permit Application
BPED-20070720ABF

Petition for Reconsideration

KMDR(FM), McKinleyville, CA
Facility ID No. 170994
William W. McCutchen III
Construction permit BNPH-20070502AFH
Modification application BMPH-20071123ADQ
and Petition for Reconsideration

Motion for Stay

Request for Special Temporary Authority

KZCC(FM), Trinidad, CA
Facility ID No.164090
Airen Broadcasting Company
Construction Permit BMPH-20070523ADS
License Application BLH-20071231AFD

Dear Applicants:

This letter decision addresses petitions for reconsideration and related filings concerning the grant of a modification of construction permit application of Airen Broadcasting Company (“Airen”) for Station KZCC(FM), Trinidad, California (the “KZCC Application”),¹ as well as the involuntary channel changes ordered for licensed Station KNHT(FM), Rio Dell, California, and the unbuilt construction permit for KMDR(FM), McKinleyville, California, as set forth in the staff’s letter of November 19, 2007.² Specifically, we have before us the Petition for Reconsideration (“Petition”) of the *Letter Decision* filed by the State of Oregon Acting by and Through the State Board of Higher Education on Behalf of Southern Oregon University (“SOU”), licensee of Station KNHT(FM), and the December 20, 2007, Motion for Stay (“Motion”) and the March 20, 2008, Motion for Special Temporary Authority or Other Relief (“STA Request”) filed by William W. McCutchen III (“McCutchen”), licensee of Station KMDR(FM).³ We also have before us a May 5, 2008, Petition for Reconsideration of the staff’s dismissal of McCutchen’s application to upgrade KMDR(FM) from Class C3 to Class C0 status.⁴

For the reasons set forth below, we: (1) grant in part and deny in all other respects SOU’s Petition; (2) rescind the grant of the KZCC(FM) construction permit application and reissue that permit, as modified herein; (3) dismiss the KZCC(FM) license application; (3) affirm the involuntary channel changes established for SOU’s Station KNHT(FM) and McCutchen’s Station KMDR(FM); and (4) rescind the reissuance of KMDR(FM)’s construction permit on its new channel. We also deny McCutchen’s Motion and deny his STA Request. Finally, we deny reconsideration of the dismissal of McCutchen’s Class C0 Application.

Background. The KZCC Application sought to change the community of license for unbuilt Station KZCC(FM) on Channel 238C3 from McCloud, California, to Trinidad, California.⁵ Both the McCloud construction permit and the KZCC Application specify Channel 238C3. This change required two involuntary channel substitutions.⁶ First, the SOU license for Station KNHT(FM) would be modified

¹ File No. BMPH-20070523ADS. Airen completed construction of the KZCC(FM) modified facilities and filed an application for covering license on December 31, 2007. See File No. BLH-20071231AFD.

² See *Letter to Airen Broadcasting Company, State of Oregon Acting By and Through the State Board of Higher Education, and William W. McCutchen III from Dale E. Bickel, Senior Engineer, Audio Division, Media Bureau*, Reference 1800B3 (Nov. 19, 2007) (“*Letter Decision*”).

³ Additionally before us is SOU’s Reply to Opposition to Petition for Reconsideration (“Reply”) and Airen’s Opposition to Motion for Stay.

⁴ File No. BMPH-20071123ADQ (the “McCutchen Class C0 Application”).

⁵ See *Revision of Procedures Governing Amendments to FM Table of Allotment and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212 (2006) (“*2006 Community of License Order*”).

⁶ Initially, Airen proposed only the substitution of Channel 249C3 for Channel 236C3 at McKinleyville for McCutchen’s construction permit. However, based on a conflict with a prior-filed proposal at Ferndale, California, Airen amended its Application on June 29, 2007, to propose channel substitutions for both McCutchen’s McKinleyville construction permit and SOU’s KNHT(FM). On July 26, 2007, Airen amended its Application to state that, if its proposal was granted, it would reimburse SOU and McCutchen for the reasonable costs associated with their channel changes.

from Channel 297C2 to Channel 273C2. Second, McCutchen's unbuilt construction permit for KMDR(FM) would be modified from Channel 236C3 to Channel 299C3. In compliance with the 2006 *Community of License Order*, the KZCC Application included "a detailed exhibit demonstrating that the proposed change constitutes a preferential arrangement of allotments under the Section 307(b) [of the Communications Act of 1934, as amended] priorities and policies [the Commission has] used since 1982."⁷

The staff issued a letter to both SOU and McCutchen on August 15, 2007, regarding the proposed channel substitutions, directing them to show cause why those channel substitutions should not be made.⁸ The letter also asked the parties to comment on the potential impact of a subsequently filed SOU application for Class C1 operations on SOU's existing Channel 297C1.⁹

In response to the *Show Cause Letter*, McCutchen argued that the channel substitutions proposed by Airen did not result in a preferential arrangement of allotments and could unduly restrict the commencement of operations by his Station KMDR(FM) at McKinleyville. McCutchen contended that it would not be "realistic" to expect KMDR(FM) to commence operations on its original channel and then to move to its new channel a few months later. Similarly, SOU argued that Airen had not met the burden of proof required by Section 316 of the Communications Act of 1934, as amended (the "Act") for a "forced relocation" of a longstanding licensee. SOU also asserted that its Class C1 upgrade application, filed July 20, 2007, had been filed six days before an Airen July 26, 2007, amendment. SOU contended that the Commission should treat this Airen amendment as the filing which established the cut-off rights for the proposed involuntary KNHT(FM) channel change to Channel 273C2. Accordingly, SOU contended that its upgrade application cuts off Airen's later-filed amendment and was therefore eligible for prior processing under the Commission's "first-come/first-served" processing system for minor change applications.

The *Letter Decision* concluded that SOU's contention was meritless. There is no dispute that the Airen amendment proposing KNHT's involuntary channel change to Channel 273C2 was filed on June 29, 2007, prior to the July 20, 2007, filing of SOU's Class C1 upgrade application.¹⁰ Under the "first-come/first-served" processing system, Airen's amended proposal is considered first, and if found acceptable, would be granted. At that point, subsequently filed applications in "queue" – here SOU's Class C1 upgrade application – would be dismissed without further consideration.¹¹ The staff found that Airen's "lead application" was acceptable. It concluded that Airen's proposal would result in a

⁷ KZCC(FM) Application, Attachment 32. See 2006 *Community of License Order*, 21 FCC Rcd at 14218. See also 47 U.S.C. § 307(b); *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1982).

⁸ Letter to State of Oregon Acting By and Through the State Board of Higher Education and William W. McCutchen III, Reference 1800B3 (MB Aug. 15, 2007) (the "*Show Cause Letter*").

⁹ File No. BPH-20070720ABF (the "SOU C1 Application").

¹⁰ BPED-20070720ABF.

¹¹ *Letter Decision* at 3. See also 47 C.F.R. § 73.3573(f).

preferential arrangement of allotments.¹² The staff granted Airen's application, modified McCutchen's unbuilt construction permit to specify Channel 299C3, and reissued the KMDR(FM) construction permit to reflect this channel change. The *Letter Decision* also modified the KNHT(FM) license to specify Channel 273C2 in lieu of Channel 297C2. It also required that SOU file an application on FCC Form 301 within 30 days, specifying operation on Channel 273C2.¹³ Finally, the *Letter Decision* conditioned the initiation of program tests for KMDR(FM) on Channel 299C3 upon the commencement of KNHT(FM) operations on Channel 273C2. Airen was ordered to reimburse McCutchen and SOU for the reasonable costs for the involuntary channel changes of Stations KMDR(FM) and KNHT(FM), respectively.

In its Petition, SOU, *inter alia*, challenges the staff's conclusion that the Airen amendment is entitled to "first-come/first-served" processing rights over the later-filed SOU application. SOU also claims that grant of Airen's application imperils proposed KNHT(FM) digital operations, and challenges the finding that grant of Airen's proposal would result in a preferential arrangement of allotments.

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order or raises additional facts not known or existing at the time of petitioner's last opportunity to present such matters.¹⁴ As more fully set forth below, SOU has not met this test.

SOU Petition. SOU's Class C1 upgrade application File No. BPED-20070720ABF for Station KNHT(FM). As indicated above, the *Letter Decision* determined that SOU's minor change application was filed subsequent to Airen's June 29, 2007, amendment to the application BMPH-20070523ADS, resulting in the KNHT(FM) application being second in queue and therefore properly dismissed upon grant of the earlier filed proposal. On reconsideration, SOU disputes the staff's strict application of the "first-come/first-served" system as "mechanical," suggesting that Airen was attempting to "game" the processing system and that the "public interest factors" inherent in SOU's proposal should be considered.

We agree with SOU's description of the "first-come/first-served" process as "mechanical." In 1985, the Commission first adopted this processing policy for FM non-reserved band minor change applications.¹⁵ This system replaced the earlier "A/B" cutoff system, in which prior-filed applications were subject to competing facility proposals. The Commission decided that the public interest would be better served by a system that afforded applicants certainty and facilitated efficient application

¹² The *Letter Decision* did not, however, provide a reasoned basis for this conclusion. As discussed in detail below, we grant reconsideration of the *Letter Decision* for the limited purpose of providing a more detailed explanation of the basis on which the staff found that grant of the KZCC Application is consistent with Section 307(b) of the Act.

¹³ *Letter Decision* at 3.

¹⁴ 47 C.F.R. § 1.106, and *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom.*, *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

¹⁵ *See Amendment of Sections 73.3572 and 73.3573 Relating to Processing of FM and TV Broadcast Applications*, Report and Order, 50 FR 19936 (May 13, 1985) ("1985 Processing Order"). All FM commercial minor change applications filed after the close of the "universal window" (June 13, 1985 to July 12, 1985) are treated on a first come/first served basis. The first come/first served system was later extended to include allotment rulemakings. *Conflicts Between Applications and Petition for Rulemaking to Amend the FM Table of Allotments*, Report and Order, FCC 92-329, 7 FCC Rcd 4917 (1992).

processing.¹⁶ SOU fails to explain why its Class C1 upgrade proposal should be uniquely exempt from a processing policy that the Commission has consistently applied to thousands of applications for more than two decades, a processing policy that SOU itself inconsistently argued should apply to its July 20, 2007, application, based on SOU's erroneous characterization of the July 26, 2007, Airen amendment. Consequently, the staff's dismissal of Station KNHT(FM)'s upgrade application (File No. BPED-20070720ABF) was correct.¹⁷

HD Radio Technology. SOU suggests that the grant of the KZCC(FM) Application imperils KNHT(FM)'s initiation of HD digital radio service, and that such service must be considered as a public interest factor in support of SOU's Petition.¹⁸ It is clear from the pleadings that Station KNHT(FM) has not implemented digital operation on its old channel (297C2) and has offered no timetable for doing so. Moreover, HD radio is designed to work on any channel. SOU has not presented any evidence that would suggest the implementation of HD radio on its new channel (273C2) would be technically less feasible and/or more expensive.¹⁹ Consequently, this argument is not persuasive.

SOU's characterization of KZCC(FM)'s programming. SOU alleges that KZCC(FM) commenced operations by rebroadcasting the signal of Educational Media Foundation station KLVG(FM), Garberville, California, rather than by originating any programming specifically targeted to Trinidad residents. It demands that Airen "disclose any and all contracts, understandings and financial arrangements which exist between Airen and Educational Media Foundation."²⁰ SOU presented these arguments for the first time in its Reply. Because replies are limited to matters raised in the opposition,²¹ we need not further consider these assertions.²²

Preferential Arrangement of Allotments. SOU next contends that the staff erred in concluding that grant of the KZCC(FM) Application and the related channel changes for Stations KMDR(FM) and KNHT(FM) would result in a preferential arrangement of allotments. Specifically, SOU contends that the decision would result in the loss of a community's sole local service, contravene the Commission's policy

¹⁶ *1985 Processing Order*, 50 FR at 19938 ¶ 11.

¹⁷ In its responsive pleadings, Airen suggests that KNHT(FM) could upgrade to Class C1 on its new Channel 273, while SOU counters that such an upgrade would require use of a directional antenna, thereby increasing the costs to SOU. As we have no viable Class C1 application for Station KNHT(FM) before us, we conclude that these arguments are speculative and have no bearing on the present matter.

¹⁸ Petition at 16-17.

¹⁹ As Station KNHT(FM) has already been ordered to move from Channel 297C2 to 273C2, any implementation of digital operations on the old channel will be at SOU's sole risk.

²⁰ Reply at 6.

²¹ *See* 47 C.F.R. § 1.45(c).

²² *See, e.g., Ponce Television Corporation*, Memorandum Opinion and Order, 1 FCC Rcd 1167 n.42 (1986). Moreover, Airen counters that SOU's personnel and engineer were not hearing KZCC(FM) but were actually monitoring a translator station – K238AD operating out of Eureka, CA – which is licensed to Educational Media Foundation and which retransmits the programming of KLVG(FM). Airen states that it is not responsible for translator station K238AD operations. *Letter to Marlene H. Dortch from Suzanne E. Rogers, Esq.* (rec'd Feb. 6, 2008).

against relocations that deprive a larger community of a first local service, and disrupt existing services provided by SOU and McCutchen. SOU claims that the *Letter Decision* does not constitute a reasoned analysis. We grant reconsideration for the limited purpose of providing a more detailed explanation of the basis on which the staff found that grant of the KZCC Application is consistent with Section 307(b) of the Act.

SOU's claim that grant of the KZCC Application would contravene the policy prohibiting the relocation of a station that provides a community's sole local radio service is without merit. As an initial matter, the involuntary channel changes for Stations KNHT(FM) and KMDR(FM) are not at issue here. The Bureau has long held that one fully spaced channel is equivalent to another.²³ Station KZCC(FM) had neither constructed its facility nor commenced operation at McCloud, California. Unbuilt stations are not considered to be "existing services" under Section 307(b).²⁴ As a result, the Commission has not treated such reallocations as constituting the loss of a community's sole local service.²⁵ We reach this conclusion without taking into account potential future service by SOU, which holds a construction permit for a new NCE FM station in McCloud, California.²⁶

We also affirm the staff's determination that the KZCC(FM) application proposed a preferential arrangement of allotments. In the KZCC Application,²⁷ Airen states that the relocation of KZCC(FM) from McCloud to Trinidad would constitute a preferential arrangement of allotments because: (1) McCloud (2000 Census population 1,343) currently has two issued construction permits, while Trinidad (2000 Census population 343)²⁸ has none; (2) the relocation would bring the latter community its first local transmission service under Priority 3 of the Commission's FM Allotment priorities;²⁹ and (3) the

²³ See, e.g., *Randolph and Brandon, Vermont*, Report and Order, 7 FCC Rcd 1760, 1762 (MMB 1991) ("[w]hile we recognize that no two channels are ever entirely identical, we consider channels to be equivalent if they are of the same class, would comply with the minimum distance separation requirements, and would enable a station to provide city-grade coverage to the community where the allotment would be made.")

²⁴ *Humbolt and Pawnee City, Nebraska and Valley Falls, Kansas*, Notice of Proposed Rule Making, 20 FCC Rcd 17940, 17941 (MB 2005), citing *Pelham and Meigs, Georgia*, Report and Order, 18 FCC Rcd 12187 (MB 2003).

²⁵ See, e.g., *Richard Dean Hodson and Shamrock Communications, Inc.*, Letter, 23 FCC Rcd 8767 (MB 2008) ("*Hodson & Shamrock Letter*") (commercial FM auction winner permitted to relocate unbuilt station); *Vernon Center and Eagle Lake, Minnesota*, Report and Order, 21 FCC Rcd 14714, 14715 (MB 2007) (reallocation of unbuilt station does not constitute removal of community's sole local service).

²⁶ See File No. BPED-19950210MA, granted on March 27, 2007, pursuant to *Comparative Consideration of 76 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 22 FCC Rcd 6101, 6125-29 (2007).

²⁷ See KZCC Application, Attachment 32, "Preferential Arrangement and Community Study Under Section 307(b).

²⁸ Airen states that Trinidad is an incorporated municipality listed in the U.S. Census, and therefore it is entitled to an allocation. It also states that cities similar in size to Trinidad are qualified for, and deserving of, allotments, citing *Christine, Texas*, Report and Order, 22 FCC Rcd 7604 (MB 2007) (channel allotted to Christine, Texas, 2000 Census population 436).

²⁹ The four priorities are: (1) first fulltime aural service; (2) second fulltime aural service; (3) first local service; and (4) other public interest matters. *Revision of FM Assignment Priorities and Procedures*, Second Report and Order, 90 FCC 2d 88 (1982) "*FM Allotment Priorities*").

relocation will leave McCloud with an authorized broadcast service. Airen argues that providing Trinidad with its first local transmission service under Priority 3 serves the public interest under Section 307(b) better than maintaining two authorized services in McCloud under Priority 4.³⁰

In considering a reallocation proposal, we compare the existing allotment to the proposed allotment to determine whether the reallocation will result in a preferential arrangement of allotments for the reasons set forth by Airen. We find that the reallocation would serve the public interest because it would provide Trinidad with its first local service under Priority 3, while the loss of a second McCloud construction permit would implicate only Priority 4.³¹

In its Petition, SOU argues that its unbuilt McCloud permit should not be considered a “local service” to McCloud, because: (1) it was granted authority to operate as a “satellite” facility of parent station and it will not be offering a “local” service but merely transmitting its network program service;³² and (2) Airen’s claim that SOU can “take over its responsibilities” to McCloud “disregards the possibility that the State of Oregon’s expansion plans may have changed since 1995, when it first applied for McCloud, or that circumstances might prevent it from building on its [construction permit] for that facility.”³³ Moreover, we note that SOU’s McCloud facility has been built and assigned call sign KLDD(FM). It commenced operation on or about October 9, 2008, and its license application is pending (File No. BLED-20081009AEO). Thus, SOU now does have an operational station at McCloud.³⁴ SOU’s claim that, as a “satellite,” it will not be providing a local service to McCloud indicates a grave misunderstanding of its obligations as a broadcast licensee. “Satellite” stations, no less than those originating local programs, are required to serve the needs and interests of their communities of license.³⁵

³⁰ Airen cites *Arapaho, Edmond, Oklahoma City, Ponca City, Stillwater, The Village, and Woodward, Oklahoma*, Report and Order, 22 FCC Rcd 9120 (MB 2007) (“*Arapaho*”).

³¹ See *Santee Cooper Broadcasting Company of Hilton Head, Inc.*, Decision, 99 FCC 2d 781 (Rev. Bd. 1984) *recon. den.* Memorandum Opinion and Order, 100 FCC2d 469 (1985), *citing Daytona Broadcasting Co., Inc.*, Decision, 55 RR2d 1326, 1336, n 29 (Rev. Bd. 1984) (construction permits are cognizable as reception services for purposes of Section 307(b) of the Communications Act of 1934, as amended); *see also Greenup, Kentucky and Athens, Ohio*, Report and Order, 2 FCC Rcd 4319 (MMB 1987); *aff’d in relevant part*, Memorandum Opinion and Order, 4 FCC Rcd 3843 (MMB 1989); *aff’d in relevant part*, Memorandum Opinion and Order, 6 Rcd 1493 (1991); *appeal dismissed sub nom. WATH, Inc. v. FCC*, D.C. Cir. No. 91-1268 (Sept. 16, 1991) (vacant allotment is considered an existing service for purposes of first and second aural service analysis under Section 307(b) of the Act). That Trinidad has only 311 persons as opposed to McCloud’s 1,343 persons is not a relevant concern. One of the primary objectives of the Commission’s FM allotment priorities is to provide service of local origin to as many communities as possible. *FM Allotment Priorities*, 90 FCC 2d at 88. Trinidad, an incorporated municipality, is a licenseable community. *Id.* at 101 (“it is sufficient that the community is incorporated or is listed in the census”).

³² Petition at 9.

³³ Petition at 8.

³⁴ We also note that SOU’s arguments about its future plans for the McCloud permit are unpersuasive. *See, e.g., Baker v. FCC*, 834 F.2d 181 (D.C. Cir. 1987) (broadcasting company’s construction permit to build AM radio station in community that did not have station required that the station be attributed to that community for purposes of statute requiring equitable distribution of radio service, although broadcasting company stated that it did not intend to construct station with frequency indicated on permit and, in fact, had attempted to abandon the permit).

³⁵ *See, e.g., Delmarva Educational Association*, Memorandum Opinion and Order, 19 FCC Rcd 6793, 6798 (2004).

In light of the above discussion, we conclude that the staff correctly determined that the change in community would result in a preferential arrangement of allotments.³⁶ Therefore, we direct SOU to file a construction permit application specifying Channel 273C2 without delay and no later than 30 days from the date of this Letter. Failure to do so may result in the issuance of a *Notice of Apparent Liability for Forfeiture* to SOU.³⁷ 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.³⁸ Airen has committed itself to reimbursing both McCutchen and SOU for the costs of changing channels, as is required for involuntary channel change proposals. We expect that SOU and McCutchen will negotiate with Airen in good faith for the reasonable costs of changing channels.³⁹

McCutchen's Motion for Stay and STA Request. On December 20, 2007, McCutchen filed the Motion, requesting that the effectiveness of the *Letter Decision* be stayed. McCutchen subsequently filed a request for Special Temporary Authority ("STA") on March 20, 2008, asking the staff to grant an STA to allow it to operate on Channel 273 until SOU completes its channel modification. McCutchen points out that Station KNHT(FM)'s continued operation on Channel 297C2 precludes the commencement of Station KMDR(FM)'s operations on Channel 299C3. McCutchen complains that he has paid the U.S. Treasury \$283,000 for the McKinleyville allotment in an FCC auction, and through no fault of his own, now has *no* channel on which the station can be operated pending the outcome of SOU's appeal. McCutchen argues that a stay or STA would allow it to construct Station KMDR(FM) and initiate operations. Additionally, McCutchen was informed by letter dated October 2, 2007, (*i.e.*, prior to the *Letter Decision*) that Airen's proposal to change the channels of Stations KMDR(FM) and KNHT(FM) would not constitute a tolling event and, accordingly, does not prevent the KMDR(FM) construction permit from expiring on July 3, 2010, at the end of the three-year construction period.⁴⁰

³⁶ In challenging the relocation, SOU also argues that "Airen has also ignored, and the Audio Division has disregarded, the Commission's recent re-interpretation of the 'fair distribution' principles of Section 307(b) in the context of NCE stations." Petition at 9. SOU cites 47 C.F.R. § 73.7002(b), under which, to be credited, a first local NCE service must serve at least 2000 persons and, if a competitor also will provide a first NCE service, the winner must propose to cover at least 5000 more persons than its rivals to receive a dispositive preference. SOU is incorrect. The standards adopted to implement Section 307(b) in the context of mutually exclusive applications for noncommercial educational FM stations in the reserved band have no bearing in this proceeding. *See Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000).

³⁷ 47 C.F.R. § 1.80 establishes a base forfeiture amount of \$3,000 for failure to file a required form or information. *See* 47 C.F.R. § 1.80(a)(4).

³⁸ *See, e.g.*, 47 C.F.R. §§ 1.106(n) ("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 . . ."); 1.115(h)(2) (if the Commission grants an application for review and orders further proceedings, it may stay the effect of the order from which review is sought). *See also A-O Broadcasting Corporation*, Memorandum Opinion and Order 23 FCC Rcd 603, 615 n. 74 (2008) (the filing of a petition for reconsideration "had no impact" on the effectiveness of the actions); *Committee to Save WEAM v. FCC*, 808 F.3d 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).

³⁹ *See Circleville, Ohio*, Second Report and Order, 8 FCC 2d 159 (1967).

⁴⁰ *Letter from Peter H. Doyle, Chief, Audio Division to John M. Pelkey, Esq.*, dated Oct. 2, 2007.

For the reasons set forth below, we are rescinding the reissued KMDR(FM) Channel 299C3 construction permit. Although ultimately KMDR(FM) will be required to operate on Channel 299, as a result of our action in this letter, McCutchen retains a valid authorization for the Station on Channel 236C3, and he may complete construction and commence operation of KMDR(FM) on that frequency. Moreover, we will, on our own motion, extend the date of expiration on construction permit File No. BNPH-20070502AFH to cover the period between November 19, 2007, and the date of this letter, corresponding to the period during which McCutchen held an authorization for Channel 299C3. Thus, McCutchen will not suffer irreparable harm absent a stay.⁴¹ Accordingly, the *raison d'être* for McCutchen's request for stay has been satisfied, and we will deny McCutchen's request on this basis.

Other Matters. Although we reject the substantive arguments raised in SOU's Petition and McCutchen's Motion for Stay, we will on our own motion reconsider certain aspects of the *Letter Decision*.⁴²

McCutchen's Existing Construction Permit for KMDR(FM). We conclude that, although the staff was correct in modifying the allotment for KMDR(FM) from Channel 236C3 to Channel 299C3, it impermissibly reissued the construction permit of KMDR(FM) to reflect this channel change. Under Section 308(a) of the Act, the Commission may issue a construction permit "only upon written application therefor"⁴³ Consequently, we are rescinding the unlawfully issued KMDR(FM) Channel 299C3 construction permit.⁴⁴ Thus, McCutchen now holds the originally issued Channel 236C3 construction permit. As noted above, we are extending the date of expiration on the KMDR(FM) construction permit to cover the period between November 19, 2007, and the date of this letter, corresponding to the period during which McCutchen held an authorization for Channel 299C3. By this action, we restore McCutchen's ability to construct immediately on Channel 236C3 as originally authorized, without waiting for SOU to implement the KNHT(FM) channel change.⁴⁵

⁴¹ See *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (1977). See also *Alvin Lou Media, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 806, 812 n.44 (2004).

⁴² See, e.g., *DTV Consumer Education Initiative*, Order on Reconsideration and Further Notice of Proposed Rule Making, 23 FCC Rcd 7272 (2008) (issuing *sua sponte* reconsideration order 50 days after initial decision in that proceeding); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Declaratory Ruling on Reconsideration, 21 FCC Rcd 5692 (CGB 2006). See also *Hispanic Information and Telecommunications Network, Inc.*, Memorandum Opinion and Order, 20 FCC Rcd 5471, 5477-78 (2005) ("In the absence of a timely petition for reconsideration . . . the Commission may not independently revisit the grant of the . . . Modification Application on our own motion").

⁴³ See 47 U.S.C. § 308(a) ("The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefore").

⁴⁴ See, e.g., *Citizens for Jazz on WRVR, Inc. v. FCC*, 445 F.2d 392 (D.C. Cir. 1987) (Commission failed to follow the statutory standard in denying a petition to deny alleging misrepresentation); *Way of Life Television Network, Inc. v. FCC*, 593 F.2d 1356, 1359 (D. C. Cir. 1979) ("an agency's failure to follow its own regulations is fatal to the deviant action").

⁴⁵ Ultimately, KMDR(FM) will be required to operate on Channel 299, and Airen will be responsible for all reasonable expenses incurred in changing to Channel 299.

The McCutchen Class C0 Application. On November 23, 2007, McCutchen filed an application to modify the KMDR(FM) construction permit, seeking to upgrade KMDR(FM) from Class C3 to Class C0 on Channel 299. The staff dismissed that application by letter dated April 3, 2008, because the specified Class C0 reference site failed to provide the required 100 percent coverage of the entire community of license with a 70 dB μ (3.16 mV/m) strength signal.⁴⁶ In his petition for reconsideration filed on May 5, 2008, McCutchen provides supplemental information conclusively establishing that the boundaries of the community of license did not extend as far as the staff's analysis showed, such that all of the community of license (McKinleyville, CA) would be covered by the proposed 70 dB μ signal.

Notwithstanding this showing, we conclude that the McCutchen C0 Application would not be found to be acceptable for filing and, thus, would remain subject to dismissal. As stated above, we are rescinding the reissuance of KMDR(FM)'s construction permit on Channel 299C3 and reinstating the permit on its original channel, 236C3. In this situation, the McCutchen C0 application proposes a non-adjacent channel upgrade, *i.e.*, from Channel 263C3 to Channel 299C0, for KMDR(FM). Such a request, however, must be proposed in accordance with our FM allotment rulemaking procedures.⁴⁷ We therefore will deny McCutchen's May 5, 2008, Petition for Reconsideration.⁴⁸

The KZCC Application and the subsequent covering license application (BLH-20071231AFD) for KZCC(FM). On the basis of the previous discussion regarding McCutchen's construction permit (and reissuance thereof on Channel 236C3), we conclude that the staff's November 19, 2007, grant of the KZCC Application also was erroneous. Specifically, grant of the KZCC Application should have contained a condition prohibiting that station from commencing program test operations until KMDR(FM) had commenced operations on Channel 299C3.

To rectify this omission, we must reissue the KZCC(FM) construction permit and include the necessary condition. Therefore, the November 19, 2007, grant of the KZCC(FM) Application will be set aside. That application will be granted and reissued as of the date of this letter with a condition precluding KZCC(FM) from commencing operations on Channel 238C3 until program test operations have commenced for KMDR(FM) on Channel 299C3. As a result of these actions, KZCC(FM)'s pending license application, File No. BLH-20071231AFD, which was filed to cover this construction permit, must be dismissed, as KZCC(FM) cannot comply with the revised terms and conditions of the reissued KZCC(FM) construction permit. Additionally, we will toll the construction period of the KZCC(FM)

⁴⁶ *Letter to William W. McCutchen III from James D. Bradshaw, Deputy Chief, Audio Division, Media Bureau, reference 1800BE (Apr. 3, 2008).*

⁴⁷ *See Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services, Report and Order, 21 FCC Rcd 14212, 14222 ¶ 15 (2006)* ("we will permit an FM non-reserved band permittee or licensee to use notice and comment procedures to modify its current assignment to specify a non-adjacent class upgrade or downgrade in the same community of license"). *See also* Note 1 to 47 C.F.R. § 73.3573(a).

⁴⁸ Any modification of the KMDR(FM) construction permit will necessarily have to specify Channel 299C3, as the allotment for KMDR(FM) has been changed to that channel by the *Letter Decision*. When KMDR(FM) has been constructed and filed a license application covering Channel 299C3 operations, McCutchen may immediately file an application requesting Class C0 facilities on Channel 299. *See, e.g., Media Bureau Offers Examples to Clarify the Treatment of Applications and Rulemaking Petitions Proposing Community of License Changes, Channel Substitutions, and New FM Allotments, Public Notice, 22 FCC Rcd 6852, 6853 (MB 2007), Example 5 (Licensed Station Proposing a Non-adjacent Channel Upgrade).*

construction permit to account for the period between November 19, 2007, and the present date, corresponding to the period during which the construction permit was incorrectly issued.

Finally, we note that KZCC(FM) has completed construction and commenced operations with the facilities specified in the KZCC Application. In order to minimize disruption of service, we will not require that KZCC(FM) immediately suspend operation, but will instead grant Special Temporary Authority (“STA”) allowing KZCC(FM) to continue operations on Channel 238C3 for a period of 180 days from the date of this letter.⁴⁹ We will also entertain an STA request from Airen specifying operation of KZCC(FM) on an alternate channel to the extent such STA facilities would not interfere with the operation of any other station.

Conclusions/Actions. Based on the foregoing, IT IS ORDERED, that the December 19, 2007, Petition for Reconsideration filed by the State of Oregon Acting By and Through the State Board of Higher Education on Behalf of Southern Oregon University IS GRANTED to the extent indicated above and IS DENIED in all other respects. SOU must file a construction permit application on FCC Form 301 specifying operation of KNHT(FM), Rio Dell, California, on Channel 273C2 within 30 days of the date of this letter.

IT IS FURTHER ORDERED, that the December 20, 2007, Motion for Stay and March 21, 2008, Motion for Special Temporary Authority or Other Relief filed by William W. McCutchen III ARE DENIED.

IT IS FURTHER ORDERED, that the reissuance of KMDR(FM)’s construction permit, File No. BNPH-20070502AFH, on Channel 299C3 is rescinded, and the permit reverts to specify the original channel and station class, 236C3, with a revised expiration date of July 22, 2011.

IT IS FURTHER ORDERED, that William W. McCutchen’s May 5, 2008, petition for reconsideration relating to construction permit, File No. BNPH-20070502AFH, IS DENIED.

IT IS FURTHER ORDERED, that Airen Broadcasting Corporation’s license application, File No. BLH-20071231AFD, IS DISMISSED, that the November 19, 2008, grant of its construction permit, File No. BMPH-20070523ADS, IS SET ASIDE, and that construction permit application, File No. BMPH-20070523ADS, IS GRANTED as of the date of this letter, with the inclusion of a condition precluding KZCC(FM) from commencing program tests with the facilities authorized in its construction permit until program tests commence for KMDR(FM) on Channel 299C3.

IT IS FURTHER ORDERED, that Special Temporary Authority IS GRANTED to Airen Broadcasting Corporation to permit KZCC(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.

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau

⁴⁹ Airen may request extension of this Special Temporary Authority, as necessary and appropriate.

cc: Airen Broadcasting Company
State of Oregon Acting By and Through the State Board
of Higher Education on Behalf of Southern Oregon University
William W. McCutchen III