



Federal Communications Commission  
Washington, D.C. 20554

March 25, 2013

DA 13-544  
In Reply Refer to:  
1800B3-AJR  
Released: March 25, 2013

Howard M. Weiss, Esq.  
Fletcher, Heald & Hildreth  
1300 North 17th Street, 11th Floor  
Arlington, VA 22209

Christopher D. Imlay, Esq.  
Booth, Freret, Imlay & Tepper, P.C.  
14356 Cape May Road  
Silver Spring, MD 20904

In re: **KBEX(FM), Dalhart, Texas**<sup>1</sup>  
Facility ID No. 15018

**KEYE-FM, Perryton, Texas**  
Facility ID No. 52329

**Reimbursement of Expenses  
for Channel Modification**

Dear Counsel:

We have before us a letter request (“Request”) from counsel to Perryton Radio, Inc. (“PRI”), licensee of Station KEYE-FM, Perryton, Texas,<sup>2</sup> seeking Commission adjudication of a dispute between PRI and Radio Dalhart (“RD”), licensee of Station KBEX(FM), Dalhart, Texas, over the reimbursement of legitimate and prudent expenses incurred by Station KEYE-FM in involuntarily changing channels to accommodate Station KBEX(FM).<sup>3</sup> For the reasons discussed below, we order RD to remit to PRI within 30 days of the date of this letter the sum of \$73,553.73.

**Background.** Six years ago and at RD’s request, the staff modified the license for Station KBEX(FM) to specify Channel 241C1 in lieu of Channel 242C1.<sup>4</sup> To accommodate this channel change, the *Dalhart R&O* involuntarily modified the license of Station KEYE-FM to specify Channel

<sup>1</sup> The station’s call sign was changed from KXIT-FM on February 20, 2013.

<sup>2</sup> See Letter from Howard M. Weiss, Esq., to the Commission (rec’d Jun. 26, 2012) (“Request”).

<sup>3</sup> Counsel to RD responded in a Letter from Christopher D. Imlay, Esq. to the Commission (dated Jul. 26, 2012) (“Response”), and counsel to PRI replied in a Letter from Howard M. Weiss, Esq., to the Commission (rec’d Aug. 14, 2012) (“Reply”).

<sup>4</sup> See *Dalhart and Perryton, Texas*, Report and Order, 22 FCC Red 4201, 4203 (MB 2007) (“*Dalhart R&O*”).

248C3 in lieu of Channel 241C3.<sup>5</sup> Pursuant to Commission policy, RD pledged to reimburse PRI for the reasonable costs associated with changing to Channel 248C3.<sup>6</sup>

In the Request, PRI states that Station KEYE-FM has changed channels and constructed modified facilities.<sup>7</sup> It also states that on June 11, 2012, it requested in writing that RD reimburse it for the following itemized expenses:

1. New Antenna	\$13,192.61
2. Stand by Antenna	\$1,047.85
3. Removal and Installation of Antenna	\$4,384.00
4. Printing	\$3,002.73
5. Banner	\$86.11
6. Electrical Parts	\$613.64
7. Electrical Parts	\$269.77
8. Broadcast Equipment	\$883.41
9. Engineering Firm #1 – Retune and test transmitter	\$10,749.51
10. Engineering Firm #2 – Project manager for channel modification	\$2,750.00
11. Legal Fees	\$30,000.00
12. Changing KEYE-FM logo and call letters on gazebo cover	\$1,130.00
13. Engineering Firm #3 – Application preparation and technical comments	\$4,150.00
14. Voice Over	\$125.00
15. Engineering Firm #4 – Assistant Engineer for retuning transmitter	\$1,169.10
Total	\$73,553.73

Thereafter, PRI alleges that counsel to Station KBEX(FM) telephoned counsel to Station KEYE-FM and advised that Station KBEX(FM) would not reimburse Station KEYE-FM for these itemized expenses.<sup>8</sup> PRI contends that Station KBEX(FM)'s response conflicts with its *Circleville* obligation to negotiate in good faith reimbursement issues. Under these circumstances, PRI requests that the Commission review the itemized expenses and issue an order to Station KBEX(FM) requiring prompt payment of monies owed to Station KEYE-FM.

In its Response, RD contends that (1) although it has never refused to meet its *Circleville* obligations, PRI is no longer entitled to reimbursement because it modified KEYE-FM to operate on a different channel than that specified in the *Dalhart R&O*; (2) if there is a remaining reimbursement obligation, it should be limited to those expenses that would have been incurred in changing to Channel

<sup>5</sup> *Id.*

<sup>6</sup> See *Circleville, Ohio*, Second Report and Order, 8 FCC 2d 159, 163 (1967) (requiring that, whenever an existing station is ordered to change frequency to accommodate another station, the benefiting station must reimburse the affected station for its reasonable and prudent expenses and establishing guidelines for determining reimbursement) (“*Circleville*”).

<sup>7</sup> Although the *Dalhart R&O* ordered Station KEYE-FM to change to Channel 248C3, PRI instead filed an application for a construction permit (File No. BPH-20101203AAX) to specify Channel 229C3, which was granted on January 25, 2011. A license application (File No. BLH-20120321ADG) to cover the construction permit was granted on April 11, 2012. See *Broadcast Actions*; Report No. 47717, April 16, 2012.

<sup>8</sup> Letter from Howard M. Weiss, Esq., to the Commission (rec'd Jun. 26, 2012), at 2.

248C3 rather than 229C3; and (3) PRI's request for reimbursement is excessive<sup>9</sup> and any reimbursement should be approximately \$19,000 to \$20,000.<sup>10</sup>

In reply, PRI argues that it has not waived the right to reimbursement by moving to an FM channel other than specified by the *Dalhart R&O* because RD obtained the relief it sought -- PRI vacating Channel 241 and making it available for RD.<sup>11</sup> PRI also asserts that its actual incurred expenses are not excessive. In support of this position, PRI alleges that (1) the decision to use a replacement antenna to keep the station on the air during the channel change was reasonable; (2) the purchase of a new antenna was appropriate because RD has previously agreed to it as a reasonable expense; (3) the cost of changing channels in this case was not affected by the move to Channel 229C3 as opposed to Channel 248C3; and (4) although there were a few minor legal expenses unrelated to the channel change that were inadvertently included in the narrative description on the bills, these expenses were not included in the current reimbursement request.<sup>12</sup> Accordingly, PRI believes that its itemized list of expenses incurred is reasonable and should be approved.

**Discussion.** As a threshold matter, under our *Circleville* policy, parties are expected to negotiate expeditiously and in good faith, and the Commission will involve itself only as a last resort.<sup>13</sup> In this case, the parties have not been able to reach an agreement over a six-year period.<sup>14</sup> Although we hold

<sup>9</sup> Specifically, RD contends that, while there were discussions between the parties about the relative costs of retuning the existing antenna versus buying a new one, a replacement antenna was not necessary. Likewise, RD alleges that the legal fees are inflated because they include costs for preparation of pleadings initiated by PRI in an effort to obtain advance reimbursement and for a second construction permit for Channel 229C3 after a tolling request for its first construction permit was denied. See Letter from Christopher D. Imlay, Esq. to the Commission (dated Jul. 26, 2012), at 6.

<sup>10</sup> RD itemizes these estimated expenses as follows:

1. Retune of antenna	\$7,300.00
2. Shipping for antenna	\$750.00
3. Parts for retuning transmitter	\$2,221.00
4. Engineering services to retune transmitter	\$1,000.00
5. Tower services	\$5,000.00
6. Advertising	\$500.00
7. Promotional	\$500.00
8. Office supplies	\$500.00
9. Filing fees	\$900.00
10. Legal	\$1,000.00
Total:	\$19,671.00

See *id.* at 5.

<sup>11</sup> See Letter from Howard M. Weiss, Esq. to the Commission (rec'd Aug. 14, 2012), at 1-2.

<sup>12</sup> *Id.* at 5.

<sup>13</sup> See *Peter Wayne Lechman*, Memorandum Opinion and Order, 8 FCC Rcd 3058 (MMB 1993), *rev. denied*, Memorandum Opinion and Order, 11 FCC Rcd 4104 (1996), *appeal denied sub nom. Lechman v. FCC*, 107 F.3d (D.C. Cir. 1997) (Table), *rehearing denied* (Mar. 4, 1997) ("*Lechman*").

<sup>14</sup> See, e.g., *Letter to Christopher D. Imlay, Esq. and Howard M. Weiss, Esq.*, Ref. 1800B3 (MB Oct. 19, 2011) (noting that KEYE had not changed channels due to a disagreement over reimbursement and deleting a condition

both parties responsible for the unnecessary expenditure of limited Commission resources to resolve these straight forward matters, we will adjudicate this dispute.

First, we consider the impact of KEYE-FM's move to an alternate channel. The Commission has allowed reimbursement for a change to a different channel where there is a benefit to the reimbursing station and where the reimbursement is for the move to an equivalent, as opposed to a higher, class channel.<sup>15</sup> In this case, Station KBEX(FM)'s move to Channel 241C1 was made possible by Station KEYE-FM vacating Channel 241C3. Because Station KBEX(FM) benefits regardless of whether Station KEYE-FM moves to Channel 248C3 or Channel 229C3, Station KBEX(FM) remains obligated to reimburse PRI for the costs of the channel change.<sup>16</sup> Accordingly, we conclude that RD's reimbursement obligation is unaffected by PRI's decision to modify to a different channel.

Second, we find that, contrary to RD's allegations, Station KEYE-FM's expenses in changing channels in this particular case were not affected by its decision to modify to Channel 229C3. On the contrary, PRI has submitted a technical exhibit from its consulting engineering, demonstrating that the cost for a replacement antenna would be the same whether the station operates on Channel 229C3 or 248C3.<sup>17</sup> Likewise, the technical exhibit shows that there are no additional costs involved in retuning the transmitter to accommodate Channel 229C3 or 248C3.<sup>18</sup> Further, RD has not provided any documentation to rebut PRI's technical exhibit.

Third, we review the reasonableness of PRI's itemized expenses under *Circleville*. The Commission held there that reimbursement is proper for: (1) engineering, legal, and equipment charges; (2) printing (logs and stationery); (3) out of pocket nonreducible expenses while the station is off the air; (4) advertising promotion for the new frequency; and (5) miscellaneous expenses.<sup>19</sup> After review of the record, we find that PRI's itemized expenses are reasonable and reimbursable. All of PRI's legal,

---

from KBEX(FM)'s construction permit stating that KBEX(FM) cannot commence program tests until KEYE-FM commences program tests on Channel 248).

<sup>15</sup> See, e.g., *Lonoke, Arkansas, and Clarksdale, Mississippi*, Report and Order, 6 FCC Rcd 4861, 4862, ¶ 5 (MMB 1991) (finding that reimbursement was warranted where a station moved to a channel different from that proposed in an Order to Show Cause in order to facilitate an upgrade but limited reimbursement to the costs of changing to an equivalent class of channel).

<sup>16</sup> RD relies upon *Cumberland, Kentucky, Weber City, Glade Spring, and Marion, Virginia*, Notice of Proposed Rule Making, 20 FCC Rcd 18039, 18043 n.2 (MB 2005) ("*Cumberland*") to support its position that the *Circleville* requirements are not applicable. We find that *Cumberland* is distinguishable. In *Cumberland*, the staff proposed an involuntary channel change for Station WOLD-FM, Marion, from Channel 263A to 273A to accommodate a change of community proposal by another station. Reimbursement was found to be unnecessary because, in a prior proceeding, the license for Station WOLD-FM had been modified to specify Channel 263A in lieu of Channel 273A and Station WOLD-FM had never effectuated that channel change. Unlike *Cumberland*, Station KEYE-FM has actually changed channels.

<sup>17</sup> See Letter from Howard M. Weiss, Esq., to the Commission (rec'd Aug. 14, 2012), Technical Exhibit, at 2. Alternatively, PRI's consulting engineering submitted quotations for the retuning of the Station KEYE-FM antenna, showing that the cost for retuning would have been the same for the change to Channel 229C3 or 248C3. See *id.*, at 1-2.

<sup>18</sup> *Id.* at 2-3.

<sup>19</sup> See *Circleville*, 8 FCC 2d at 163-164.

engineering, equipment, printing, and promotional expenses are documented by statements and invoices from the companies involved and are within the guidelines established in *Circleville*. While RD offers \$500 for printing and \$500 for promotional expenses, PRI has thoroughly documented its printing expenses of \$3,002.73 and its promotional expenses of \$1,130.00, and we find them to be reasonable. Likewise, we find that \$86.11 for a banner and \$125.00 for a voice-over are reasonable under the “miscellaneous expense” category.

We do not find persuasive RD’s argument that some of the engineering fees are excessive. With respect to those expenses specifically questioned, PRI has demonstrated that the purchase of a new antenna was discussed by the parties and that RD agreed that this was a reasonable business decision.<sup>20</sup> Under these circumstances, we find that purchasing a new antenna to replace a nine-year old antenna was appropriate. Similarly, we agree that the use of a stand-by antenna while the channel change was being implemented was reasonable. We, therefore, will allow the entirety of the engineering fees -- \$39,209.89.<sup>21</sup>

With respect to legal expenses, the Commission has allowed reimbursement for legal fees “incurred in the negotiation process” and for filing or responding to pleadings “reasonably related to the necessary change of channel.”<sup>22</sup> We find that the legal fees of \$30,000 claimed in the Request are reasonably related to the channel change.<sup>23</sup> Although RD claims that the amount of the legal fees in this case is excessive, the amount is related to the lengthy time period in which the parties were negotiating and filing pleadings. Accordingly, we will allow PRI’s claims for reimbursement in their entirety.

**Conclusion.** Accordingly, for the reasons set forth above, IT IS ORDERED, that Radio Dalhart SHALL REMIT to Perryton Radio, Inc., the sum of \$73,553.73 within 30 days of the date of this letter.

---

<sup>20</sup> See Letter from Howard M. Weiss, Esq. (rec’d Aug. 14, 2012), at 5.

<sup>21</sup> See *supra*, at 2, Table of KEYE-FM’s Expenses, lines 1-3, 6-10, 13, and 15.

<sup>22</sup> See *Harold A. Jahnke*, Memorandum Opinion and Order, 74 FCC2d 265, 274 (1979).

<sup>23</sup> See Letter from Howard M. Weiss, Esq., to Christopher D. Imlay, Esq. (dated Jun. 11, 2012) (providing statement and itemization for legal services). To the extent that RD claims that certain charges for an ownership report did not relate to the channel change, counsel to PRI has stated that these items were inadvertently left in the narrative description on the bills but were not included in calculating the fees for the reimbursement request. See Letter from Howard M. Weiss, Esq., to the Commission (rec’d Aug. 14, 2012), at 4 n.9. Further, regarding the claimed reimbursement for legal fees incurred in seeking prepayment of expenses, the Commission does not generally require that a benefiting party prepay or deposit into an escrow account expenses for changing a channel. See *Irvington, Kentucky, and French Lick, Indiana*, Report and Order, 25 FCC Rcd 1147 (MB 2010) (rejecting a request for prepayment of expenses because the station changing channels had not provided documentation regarding its financial circumstances); *Dickson, Tennessee*, Report and Order, 4 FCC Rcd 8707 (MMB 1989) (denying a request for an escrow arrangement because lack of a factual basis questioning a party’s ability to reimburse). However, we find that legal fees paid by PRI for pleadings regarding the financial ability of RD to provide reimbursement or the financial qualifications of PRI to accomplish the channel switch are reasonably related to the channel change because RD’s financial viability was at issue. See Letter from Howard M. Weiss, Esq., to the Commission (rec’d Aug. 14, 2012) at 4 n.10 (stating that “[a]s its tax returns and sworn testimony showed, PRI did not have liquid assets (or any assets) necessary to make a channel switch in 2007-2011”). See also *Dalhart R&O*, 22 FCC Rcd at 4203 (finding, in response to a staff request for supplemental information, that RD had cured the default on a promissory note to a third party).

Certification of payment should be filed with the Office of the Secretary of the Commission within three days of the tender of payment.

Sincerely,

Peter H. Doyle  
Chief, Audio Division  
Media Bureau