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DA 16-1062

In Reply Refer to: 1800B3-AD

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In re: **MB Docket No. 02-376**
RM-10617
RM-10690

Application for Review

Dear Counsel:

We have before us an Application for Review (AFR), filed jointly on March 31, 2008, by KZLZ, LLC (KZLZ) and Lakeshore Media, LLC (Lakeshore),¹ the current and former licensee, respectively, of Station KWCX-FM, Channel 285A, Tanque Verde, Arizona (collectively, Joint Parties).² Journal Broadcast Corporation (Journal), then-licensee of FM translator station K285DL, Tucson, Arizona, filed an opposition (Opposition) on April 14, 2008. Joint Parties seek review of the Bureau's February 1, 2008, decision denying Lakeshore's Petition for Reconsideration.³ As a result of changed circumstances and as explained more fully below, the AFR is dismissed as moot.

Background. The *Sells Reconsideration Decision*: (1) denied Lakeshore's January 10, 2005, Petition for Reconsideration of the allocations proceeding Report and Order,⁴ which allotted Channel

¹ The Commission approved the application for the assignment of license of stations KWCX-FM and KHIL(AM), Willcox, Arizona, from Lakeshore Media, LLC to KZLZ on August 8, 2007. File No. BAL-20070626AQK. The sale was consummated on March 26, 2008.

² While the Application for Review was pending, KZLZ filed a minor change application proposing modification of the community of license for Station KWCX-FM from Willcox to Tanque Verde, Arizona, and relocation of the transmission facilities. File No. BPH-20080102ABU (granted August 27, 2009).

³ *Sells, Willcox, and Davis-Monahan Air Force Base, Arizona*, Memorandum Opinion and Order, 23 FCC Rcd 1242 (MB 2008) (*Sells Reconsideration Decision*).

⁴ *Sells, Arizona*, Report and Order, 19 FCC Rcd 22459 (MB 2004) (*Report and Order*).

285A at Sells, Arizona, and (2) affirmed the denial of Lakeshore’s counterproposal (Counterproposal), which proposed to: downgrade Channel 285C2 to Channel 285C3 at Willcox; reallocate Channel 285C3 from Willcox to Davis-Monthan Air Force Base, Arizona (Davis-Monthan AFB), as a first local transmission service;⁵ “backfill” two allotments, Channels 283C2 and 245C2 at Willcox, in order to provide service to unserved and underserved areas created by the proposed reallocation of Channel 285C3 from Willcox to Davis-Monthan AFB; and modify the associated license for Station KWCX-FM, pursuant to the provisions of Section 1.420(i) of the Commission’s Rules.⁶ The substitution of Channel 285C3 for Channel 285C2 at Willcox and the reallocation of Channel 285C3 from Willcox to Davis-Monthan AFB for Station KWCX-FM was denied because it would have created substantial “white” and “gray” loss areas.⁷ Applying the rationale in *Refugio*,⁸ the *Sells Reconsideration Decision* found that this loss of first and second full-time reception service to approximately 4,000 persons would not be adequately replaced by “backfill” service provided by two new vacant allotments at Willcox or outweighed by the provision of a first local transmission service under Priority (3) at Davis-Monthan AFB.

Discussion. Upon further consideration, we conclude that the AFR is moot due to changed circumstances. Subsequent events may affect the outcome of an allocations rulemaking proceeding pending before the Commission.⁹ As noted, while the AFR was pending, KZLZ filed a minor modification application to downgrade and change the community of license of Station KWCX-FM from Channel 285C2 at Willcox to Channel 285A at Tanque Verde, Arizona, and to modify the associated license for Station KWCX-FM. On August 27, 2009, the Staff granted the minor modification application, issued a construction permit, and modified the facility license for Station KWCX-FM to

⁵ With the consent of Citicasters Licenses, L.P., licensee of Station KZZP(FM), Mesa, Arizona, Lakeshore also proposed to downgrade KZZP(FM) from Channel 284C to 284C0 to accommodate KWCX-FM’s preferred transmitter site. Finally, Lakeshore proposed that an alternate channel, Channel 249A, be allotted at Sells, in lieu of Channel 285A, which had been requested by the original Sells, Arizona, allotment proponent, Rural Pima Broadcasting.

⁶ 47 CFR § 1.420(i). This rule permits the modification of a station’s authorization to specify a new community of license on a mutually exclusive co-channel or adjacent channel without affording other interested parties an opportunity to file competing expressions of interest. For a more detailed description of the background of this proceeding, see *Sells Reconsideration Decision*, 23 FCC Rcd at 1242-43, paras. 2-3.

⁷ A “white” area is an area in which there are no full-time aural reception services. A “gray” area is an area in which there is only one full-time aural reception service. *Cheyenne, Wyoming, and Gering, Nebraska*, Report and Order, 15 FCC Rcd 7528, 7530 n.8 (MMB 2000). In this case, the *Report and Order* found that the downgrade and relocation of Station KWCX-FM would create a white loss area under Priority (1) because 2,846 persons would be reduced from one full-time aural reception service to none, and a gray loss area under Priority (2) because 1,022 persons would be reduced from two full-time aural reception services to one.

⁸ *Pacific Broadcasting of Missouri LLC*, Letter, Ref. No. 1800B3-LAS (MMB, Dec. 21, 2001), *app. for rev. denied*, Memorandum Opinion and Order, 18 FCC Rcd 2291 (2003), *recon. denied*, Memorandum Opinion and Order, 19 FCC Rcd 10950 (2004) (discontinuing the practice of allowing licensees to use new vacant FM allotments as “backfills” to offset the proposed removal of a community’s sole local transmission service) (*Refugio*). A “backfill” allotment is one made to replace an allotment that is being modified or relocated in connection with the change of community of license of an authorized station. See, e.g., *Cheboygan et al., Michigan*, Request for Supplemental Information, 17 FCC Rcd 20491 (MB 2002).

⁹ See, e.g., *Murrieta, Arcadia, Fallbrook, Yucca Valley, and Desert Hot Springs, California*, Memorandum Opinion and Order, 21 FCC Rcd 9440, 9442 (2006) (withdrawal of consent to downgrade while application for review is pending results in denial of application for review without consideration of disputed issues).

specify operation on Channel 285A at Tanque Verde, Arizona.¹⁰ As a result, the former FM assignment, Channel 285C2 at Willcox, Arizona, which served as the basis for the Section 307(b) analysis in Lakeshore's Counterproposal, no longer exists. Once the requested facility modification to Station KWCX-FM was granted, the assignment at Willcox was deleted, and this in turn rendered moot any Section 307(b) comparison between Davis-Monthan AFB and the deleted Willcox assignment, and any legal challenge to the *Report and Order*. Accordingly, we dismiss the AFR as moot.¹¹

Should KZLZ still have a continued interest in changing the community of license of Station KWCX-FM to Davis-Monthan AFB, Arizona, KZLZ is directed to file a minor modification application proposing to change Station KWCX-FM's community of license from Tanque Verde, Arizona, to Davis-Monthan AFB.¹²

Conclusion. Accordingly, IT IS ORDERED that the Application for Review filed by KZLZ, LLC and Lakeshore Media, LLC IS DISMISSED without prejudice, for the reasons stated herein, as moot.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

¹⁰ Upon grant of the construction permit, the "assignment" was changed to specify Tanque Verde in the CDBS database. In addition, grant of the construction permit at Tanque Verde resulted in a mandatory move of Station KWCX-FM from Willcox to Tanque Verde, Arizona. We note, however, that the construction permit, File No. BPH-20080102ABU, expired on August 27, 2012. Therefore, KZLZ must file a new minor modification application to obtain a construction permit at Tanque Verde. We caution KZLZ that the current operation of the formerly licensed Wilcox station is pursuant to an implied STA and that such operation is not protected against new station or modification application filings. See *Mark N. Lipp, Esq.*, Letter, DA 16-920 (MB rel. Aug. 12, 2016) (citing *Brian M. Madden, Esq.*, Letter, 25 FCC Rcd 4765, 4767 (MB 2010) (quoting *1998 Biennial Regulatory Review—Streamlining of Mass Media Applications, Rules, and Processes*, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17540 n.55 (1999))).

¹¹ See *Entravision Holdings, LLC*, Letter, 27 FCC Rcd 2795, 2795 (MB 2012) (licensee's modification of allotment renders initial petition for rulemaking and legal challenges moot; Media Bureau dismisses application for review on this basis). See also *North Pacific International Television, Inc.*, Memorandum Opinion and Order, 21 FCC Rcd 541 (MB 2006) (Division level dismissal of Application for Review as moot); *Lima, Ohio*, Memorandum Opinion and Order, 10 FCC Rcd 8211 (MMB 1995) (Division level dismissal of Application for Review as moot).

¹² We note, however, that any such community change proposal must be between a built and operating facility at Tanque Verde, and a proposed mutually exclusive facility at Davis-Monthan AFB. *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, 14219 para.11 (2006) ("[A]ny application proposing a community of license change filed by a permittee that has not built its current permitted facilities and that is not mutually exclusive with either the applicant's built and operating facilities or its original allotment shall be returned as unacceptable for filing.").