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In re: **KSIY(FM), San Simeon, CA**
Centro Cristiana Vida Abundante
Facility ID No. 174426

File Nos. BLED-20130326BDK,
BMPED-20130222ADO,
BNPED-20071018ABC

**License Application
Informal Objection**

Counsel:

This letter concerns: (1) Centro Cristiana Vida Abundante's (CCVA) March 26, 2013, application for a license to cover the new noncommercial educational (NCE) Station KSIY(FM) (KSIY or Station) in San Simeon, California (Application);¹ (2) CCVA's construction permits for the Station;² and (3) KCBX, Inc.'s (KCBX) May 2, 2013, Informal Objection (Objection) to the Application.³ For the reasons set forth below, we dismiss the Application, declare that Modified CP expired on March 31, 2013, and dismiss the Objection as moot.

Background. On March 31, 2010, the Audio Division (Division) staff granted CCVA's application for a construction permit for a new NCE FM Station at San Simeon, California,⁴ establishing a permit expiration date of March 31, 2013. CCVA filed an application to modify the CP on February 22, 2013, requesting authorization to position its antenna higher while reducing its effective radiated power

¹ File No. BLED-20130326BDK.

² File Nos. BNPED-20071018ABC (CP); BMPED-20130222ADO (Modified CP). For clarity, the term "CP" will be used to refer both to the CP and the Modified CP. The CP specified an expiration date of March 31, 2013.

³ *Broadcast Actions*, Public Notice, Report No. 27986 (MB May 10, 2013). CCVA filed an Opposition to Informal Objection on August 19, 2013 (Opposition) to which KCBX filed a Reply to Opposition to Informal Objection on September 19, 2013 (Reply).

⁴ CP at § VII, Questions 6, 10 (specifying an antenna height of 83 meters above ground and an ERP of 0.7 kW(V)). The CP also specified the use of a directional antenna and required the submission of certain engineering data prior to requesting Program Test Authority (PTA) to commencement of station operations.

(ERP).⁵ The Division granted the modification application on March 8, 2013. CCVA filed the Application on March 26, 2013, noting further modifications and requesting approval to operate pursuant to PTA.⁶ Specifically, CCV states in the Application that it had installed “[a] non-directional antenna . . . in lieu of the authorized directional antenna,” which it believed was allowed under Section 73.1690(c) of the Commission’s Rules (Rules).⁷ CCVA certified, *inter alia*, that it had fully met all the terms, conditions, and obligations set forth in the underlying construction permit⁸

The Division granted the Application on May 2, 2013, but rescinded grant the same day upon receiving the Objection,⁹ in which KCBX initially alleged that: (1) KSIY was not timely constructed and had not commenced operations before the CP expired;¹⁰ and (2) CCVA was not authorized to use the transmitter site because the site owner had not yet obtained a required permit from the San Luis Obispo County (County).¹¹ Based on the staff’s identification of inconsistencies in CCVA’s account of construction, the Division issued CCVA a Letter of Inquiry (LOI) on January 31, 2014, directing it to provide specific information about its purported construction.¹² CCVA filed a response on March 10, 2014.¹³

Discussion. Section 319(d) states that “[w]ith respect to any broadcasting station, the Commission shall not have any authority to waive the requirement of a permit for construction, except that the Commission may by regulation determine that a permit shall not be required for minor changes in the facilities of authorized broadcast stations.”¹⁴ In that vein, Section 73.1690(c) of the Rules sets forth a specific set of changes to a broadcast station authorization that are not subject to the construction permit requirement and can be made without Commission authorization and reported by the filing of a license application on FCC Form 302. CCVA posits that the rule permits the substitution of a non-directional antenna for a directional antenna on a license application form.

CCVA, indisputably, is incorrect. Section 73.1690(c)(1) permits the replacement of an omnidirectional antenna with one of the same or different number of bays by the filing of a license application, so long as the antenna radiation center is not more than two meters above or four meters

⁵ Modified CP at § VII, Questions 6 and 10 (specifying an antenna height of 83.5 meters above ground and an ERP of 0.5 kW(V)). *See Broadcast Actions*, Public Notice, Report No. 47944 (MB Mar. 13, 2013).

⁶ Application at Attach’s. 7, 9, 22, and 24.

⁷ 47 CFR § 73.1690(c).

⁸ *Id.* at §§ II-III, Questions 2, 5.

⁹ Pursuant to staff practice, if an application is granted on the same day an informal objection is received, the staff will rescind grant of the application. *See, e.g., Alan Bishop and Saga Commc’ns of New England, LLC*, Letter Order, 25 FCC Rcd 4691, 4692 (MB 2010) (rescinding grant of an application when an objection was received on the same day, because the staff was unaware of the objection and had not considered the arguments raised therein).

¹⁰ Objection at 1-2.

¹¹ KCBX attached a declaration by Frank Lanzone (Lanzone), President and General Manager of KCBX, certifying that a County official, Arlin Singewald (Singewald), informed him that the site owner was “in the process of applying” for a County permit, and that CCVA could not construct its facility until the permit was approved. *Id.* at Declaration of Lanzone (May 1, 2013).

¹² Letter of Inquiry from Peter H. Doyle, Chief, Audio Division, FCC Media Bureau, to Dan J. Alpert, Esq., Counsel for CCVA (Jan. 31, 2014) (on file with the Division).

¹³ Letter of Inquiry Response from Dan J. Alpert, Esq., Counsel for CCVA, to Raphael S. Sznajder, Attorney Advisor, Audio Division, FCC Media Bureau (Mar. 10, 2014) (LOI Response) (on file with the Division).

¹⁴ 47 U.S.C. § 319(d).

below the authorized location. Section 73.1690(c)(2) permits the replacement of a directional antenna by a license application so long as the composite directional pattern of the replacement directional antenna does not exceed the composite directional pattern at any azimuth, there will be no change in effective radiated power, and compliance with the city coverage requirements of Section 73.315 of the Rules will be maintained. However, Section 73.1690(c) does not permit the substitution of an omnidirectional antenna for a directional antenna by the filing of a license application. Moreover, Section 319(d) of the Act bars the Commission from waiving the construction permit requirement on an *ad hoc* basis for the facility change specified in the Application.¹⁵ Accordingly, the Application is fatally defective and will be dismissed.

Additionally, the evidence is clear in this case that, in connection with its construction using an omnidirectional antenna rather than the directional antenna authorized by its permit, CCVA failed to complete construction of the Station's *authorized* facilities by the March 31, 2013, permit expiration date. Under Section 319(b) of the Act, as amended, a construction permit "will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee."¹⁶ Section 73.3598(e) of the Rules, which is promulgated pursuant to Section 319(b), provides for automatic forfeiture of a permit if construction is not completed by the permit's expiration date.¹⁷ Commission precedent makes clear that, absent waiver, construction of unauthorized facilities does not override the automatic forfeiture of a permit pursuant to Section 73.3598(e).¹⁸ In light of our finding that we cannot waive the construction permit requirement for installation of an omnidirectional antenna and thus cannot accept the Application, we will not waive Section 73.3598(e) in the circumstances presented here.

Conclusion/Actions. In light of the discussion above, pursuant to Section 73.3566(a) of the Rules,¹⁹ IT IS ORDERED that CCVA's pending License Application, BLED-20130326BDK, for Station KSIY(FM), San Simeon, California, IS DISMISSED.

IT IS FURTHER ORDERED that, pursuant to Section 73.3598(e) of the Rules, the Construction Permit BNPED-20071018ABC for Station KSIY(FM), San Simeon, California, as modified by BMPED-20130222ADO, EXPIRED BY OPERATION OF LAW on March 31, 2013, and is hereby FORFEITED, and the call letters KSIY(FM) ARE HEREBY DELETED.

¹⁵ See, e.g., *Calvary Chapel of Bremerton*, Letter Decision, 28 FCC Rcd 15537, 15538 (MB 2014) ("[a]lthough the Commission has authority to waive regulatory requirements, it does not have authority to waive a requirement imposed by statute"), citing *Rural Health Care Support Mechanism*, Order, 22 FCC Rcd 20360, 20415, para. 106 (2007); *Federal-State Joint Board on Universal Service*, Memorandum Opinion and Order, 15 FCC Rcd 7170, 7178, para. 13 (1999); and *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) ("[T]he exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to the limitations which that body imposes.").

¹⁶ 47 U.S.C. § 319(b).

¹⁷ See 47 C.F.R. § 73.3598(e).

¹⁸ See, e.g., *KCIY(FM), Helendale, California*, Letter Decision, 30 FCC Rcd 4989, 4900-01, citing *Great Lakes Community Broadcasting, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 8239, 8245, para. 20 (MB 2009). See also *KM Radio of St. Johns, LLC*, Memorandum Opinion and Order and Notice of Apparent Liability, 19 FCC Rcd 5847, 5850, paras. 8-9 (MB 2004) (*sua sponte* waiver of Section 73.3598(e) granted where station constructed in wrong location 900 feet from authorized site but: (1) permittee built facilities that it believed to be those authorized; and (2) facilities were constructed substantially in compliance with permit, in that the antenna was identical to that authorized and was mounted at the proper height on the tower, and tower height was also authorized).

¹⁹ 47 CFR § 73.3566(a).

IT IS FURTHER ORDERED that the Informal Objection filed by KCBX, Inc. on May 2, 2013,
IS DISMISSED AS MOOT.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau