



Federal Communications Commission
Washington, D.C. 20554

December 18, 2008

DA 08-2726

In Reply Refer to:

1800B3-JWR

Released: December 18, 2008

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In re: KBZR(FM), Papillion, NE
(Formerly KFRX(FM))¹
Chapin Enterprises, LLC
Facility ID No. 34435

Minor Change Application
File No. BPH-20070119AFW
Petition for Reconsideration

Minor Change Application
File No. BMPH-20080417AAY
Informal Objection

Gentlemen:

We have before us the petition for reconsideration ("Petition")² filed on June 15, 2007, by William B. Clay ("Clay"), directed to the action of the Commission granting the above-referenced application (the "Community Change Application") of Chapin Enterprises, LLC ("Chapin")³ to, *inter alia*, change the community of license of Station KBZR(FM), Lincoln, Nebraska to Papillion, Nebraska. Also on file is an application for modification of construction permit to, *inter alia*, change KBZR(FM)'s

¹ The Station's call sign was changed from KFRX(FM) to KBZR(FM) on September 28, 2007.

² Chapin filed an Opposition on June 26, 2007, and Clay filed a Reply on July 10, 2007.

³ The Community Change Application originally was filed by KBZR(FM)'s then licensee, Three Eagles of Lincoln, Inc. ("Three Eagles"). Chapin acquired the station from Three Eagles on April 10, 2007 (*see* File No. BALH-20061220ACY, granted on February 26, 2007), and Chapin continued prosecuting the Community Change Application (*see* 47 C.F.R. § 73.3573(c)) and filed the pleadings referenced in this letter and the subsequent modification application. Additionally, the staff recently granted the uncontested application for consent to assignment of KBZR(FM) to VSS Catholic Communications ("VSS"). *See* File No. BALH-20080629AFR, granted on November 19, 2008. On September 26, 2008, Chapin and VSS jointly filed a "Request for Expedited Action on Application to Modify Construction Permit (BMPH-20080417AAY) and Denial of Petition for Reconsideration." In light of our action in this letter, we need not consider this Request.

transmitter site (the "Modification Application"), filed by Chapin on April 17, 2008, and an informal objection ("Objection") against the Modification Application, filed by Clay on May 16, 2008. For the reasons set forth below, we dismiss the petition for reconsideration, deny the informal objection and grant the Modification Application.

Background. On January 19, 2007, Chapin filed the Community Change Application. On May 17, 2007, the staff granted the unopposed Community Change Application pursuant to Section 73.3573(g) of the Commission's Rules (the "Rules"), which treats an application to modify a station's authorization to specify a new community of license as one for minor modification.⁴ Any such application must result in a preferential arrangement of allotments.⁵ On June 15, 2007, Clay filed a petition for reconsideration, arguing that Chapin had failed to establish any public benefit that would justify relocating KBZR(FM) to Papillion. On April 17, 2008, Chapin filed the Modification Application to relocate KBZR(FM)'s transmitter site, and on May 16, 2008, Clay filed an informal objection to that application.

Petition for Reconsideration. In support of his Petition, Clay states that grant of the Community Change Application under Priority 3 of the Commission's *FM Priority Preferences* as a "first local service" is an "especially egregious abuse." Specifically, Clay states that there is no "rational link" between the Community Change Application's grant and the Commission's "clearly stated purpose" to provide the community of license with an "outlet for local self-expression," citing *Faye and Richard Tuck*.⁶ Clay maintains that a "reasoned interpretation" of the *FM Priority Preferences* would be to accord Chapin's Community Change Application consideration under Priority 4, "Other public interest matters." In this regard, Clay suggests that, under Priority 4, Chapin's proposal would not warrant favorable action because Chapin fails to establish a "public benefit" to justify relocating KBZR(FM) into the Omaha Metro. In support of his contention that grant of the Community Change Application undermines the provision of an outlet for local self-expression to Papillion, Clay asserts: (1) the population of Papillion is small relative to the population residing within the KBZR(FM) protected contour;⁷ (2) there are "at least 4 other communities" in the area, each of which "contain[s] a substantially greater share of the population to be covered";⁸ (3) the adjoining communities of Omaha and Council Bluffs comprise a "more compelling commercial market";⁹ (4) Chapin has not made an explicit commitment to serve Papillion and there is no Commission requirement "that will lead to Papillion receiving superior local transmission service, or any local transmission service";¹⁰ and (5) although the Commission has determined that its

⁴ See 47 C.F.R. § 73.3573(g). See also *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 (2006), permitting broadcast stations to propose community of license changes by minor modification application ("Changes of Community").

⁵ See *id.* at 14218. See also *Modification of FM and TV Authorizations to Specify a New Community of License*, Report and Order, 4 FCC Rcd 4870 (1989), *recon. granted in part*, Memorandum Opinion and Order, 5 FCC Rcd 7094 (1990). See also *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982) ("*FM Assignment Policies*"). The FM allotment priorities are as follows: (1) First fulltime aural service, (2) Second fulltime aural service, (3) First local service, and (4) Other public interest matters. Co-equal weight is given to Priorities (2) and (3). The FM allotment priorities were first applied to Section 307(b) determinations in mutually exclusive AM proceedings in *Alessandro Broadcasting Co.*, 56 RR 2d 1568 (Rev. Bd. 1984) ("*FM Priority Preferences*").

⁶ *Faye and Richard Tuck*, Memorandum Opinion and Order, 3 FCC Red 5374 (1988) ("*Tuck*").

⁷ Petition at 3. Clay indicates that Papillion's population of 16,363 is less than two percent of the 846,776-person population of the Omaha-Council Bluffs Arbitron Metro.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

rules and policies guard against "urban migration of FM broadcast stations," the Commission's determination is "clearly false in this case," as the licensee in this case seeks to abandon the city of Lincoln, Nebraska (the nation's #174 market) for Omaha (the nation's # 72 market).¹¹

Clay is a resident of Charlotte, North Carolina, a community located over 1,100 miles from both Papillion and Omaha, and does not allege that he is a regular listener of KBZR(FM). He thus lacks "listener standing" to file his Petition.¹² He argues, however, that he should be accorded standing because grant of the Community Change Application causes him a "procedural injury,"¹³ which he describes as "the threat of injury in fact through imminent changes to the broadcast radio service available to petitioner where he resides and regularly pursues recreational activities."¹⁴

Clay acknowledges that Section 1.106(b)(1) of the Commission's Rules (the "Rules")¹⁵ provides that petitions for reconsideration are unacceptable from non-parties unless they show why it was not possible to earlier participate in the proceeding. He acknowledges, further, that he could have participated earlier in this proceeding by filing an informal objection. He did not do so, he writes, because statutory party status in community change application proceedings "is denied to all entities other than the licensee applicant and the Commission *except* through a petition for reconsideration; he therefore filed the Petition in this proceeding "to establish his rights as a party to this proceeding yet avoid wasting the Commission's resources with the filing of an essentially identical informal objection."¹⁶ The remainder of Clay's Petition recites his participation in the *Changes of Community* proceeding¹⁷ and other filings he has made opposing applications granted pursuant to the Rules adopted in that proceeding.¹⁸ As relief, Clay requests that the Commission vacate the grant of the Community Change Application "and stay all similar proceedings until the Commission acts on the pending reconsiderations of the preceding rule making and corrects its errors with a new *Report and Order*."¹⁹

Discussion. Clay lacks standing to file the Petition. His "procedural injury" arguments relying on the Supreme Court's holding in *Lujan* are misplaced. *Lujan* clearly states that a "procedural right" accrues only if there is an associated "concrete harm" to the person asserting the right.²⁰ Similarly, under the Commission's standing requirements,²¹ a petitioner must show that not granting the relief it seeks would

¹¹ *Id.* at 4.

¹² See, e.g., *CHET-5 Broadcasting, L.P.*, Memorandum Opinion and Order, 14 FCC Red 13041, 13042 (1999) ("[W]e will accord party-in-interest status to a petitioner who demonstrates either residence in the station's service area or that the petitioner listens to or views the station regularly, and that such listening or viewing is not the result of transient contacts with the station").

¹³ Petition at 5-6 and n.23 (citing 5 U.S.C. § 706(2)(D); *Lujan v. Defenders of Wildlife*, 504 U.S. 572, 573, nn.7-8 (1992) ("*Lujan*"); *Sierra Club v. Marita*, 46 F.3d 606 (7th Cir. 1995); *Portland Audubon Society v. Endangered Species Commission*, 984 F.2d 1534, 1537 (9th Cir. 1993)).

¹⁴ Petition at 6.

¹⁵ 47C.F.R. § 1.106(b)(1).

¹⁶ Petition at 4-5 (emphasis in original).

¹⁷ Clay claims that the Commission ignored his comments and reply comments in that proceeding. *Id.* at 5.

¹⁸ *Id.*

¹⁹ *Id.* at 7.

²⁰ See *Lujan*, 504 U.S. at 568 n.8. (In which the Court stated that it found no case "in which we actually found standing solely on the basis of a 'procedural right' unconnected to the plaintiffs own concrete harm").

²¹ Within the mandate of the Communications Act, the Commission may consider petitions from parties who might lack standing before a federal court, *i.e.*, parties who lack "Article III standing." See, e.g., *Gardner v. FCC*, 530 F.2d 1086, 1090 (D.C. Cir. 1976).

cause it a direct injury, *i.e.*, that the claimed injury can "fairly be traced" to the action challenged, and that granting the relief requested would prevent or redress the claimed injury.²²

Clay does not explain, and we do not perceive, how grant of an application for a station over 1,100 miles from Clay's residence would result in a direct injury that threatens or otherwise affects the broadcast radio service available to him in Charlotte, North Carolina. Moreover, the vague "threat" of such harm that Clay alleges is conjectural rather than "direct." Even accepting, *arguendo*, Clay's conjecture that changes in his broadcast service are "imminent" in Charlotte, North Carolina, he has not shown how that supposed injury would be prevented or redressed if the Community Change Application were denied. Accordingly, we find no merit in Clay's argument that he has standing on "procedural injury" grounds, or otherwise.

Additionally, we do not accept Clay's rationalization that he did not file an informal objection in order to avoid wasting Commission resources. Section 1.106(b)(1) of the Rules required Clay to show why it "was not possible for him to participate in the earlier stages of a proceeding."²³ By Clay's own admission it was possible for him to do so - he simply elected not to. His failure to comply with Section 1.106(b)(1), therefore, compels dismissal of his Petition.²⁴

Its procedural infirmities aside, Clay's Petition is meritless. Chapin has demonstrated that it meets the well-established *Tuck*²⁵ criteria that apply when a licensee seeks to change its community of license to a suburban community in or near an Urbanized Area.²⁶ These criteria include the extent to which the station will provide service to the entire Urbanized Area, the relative populations of the suburban and central cities, and most importantly, the extent to which the suburban community is independent of the Urbanized Area.²⁶ Clay concedes that Chapin has met the most important criterion, *i.e.*, that Chapin has "demonstrated [Papillion's] independence from Omaha."²⁷ Thus, the other factors cited by Clay - the size of Papillion, the existence of larger communities where the allotment supposedly could be used with greater commercial success, and the lack of an explicit commitment by Chapin to serve Papillion - are either secondary or irrelevant.²⁸

Papillion is, as Clay states, much smaller than Omaha. FM stations, however, have been allotted to many communities of equivalent size even when the population of the licensable community is

²² See, e.g., *Daniel R. Goodman*, Order on Reconsideration, 14 FCC Red 20547, 20549 (1999) (citing *Los Angeles Cellular Telephone Company*, Order, 13 FCC Red 4601,4603-4604 (CWD, 1998), citing *AmericaTel Corporation*, 9 FCC Red 3993, 3995 (1994) citing *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972)).

²³ 47 C.F.R. § 1.106(b)(1) (emphasis supplied).

²⁴ Clay is correct that filing an informal objection against the Community Change Application would not confer "party" status under Section 1.106 of the Rules. However, because petitions to deny do not lie against minor modification applications, see 47 U.S.C. § 309(c) and 47 C.F.R. § 73.3584, the filing of an informal objection is "participation in our processes to the fullest extent permitted" and meets the requirements for standing to file a petition for reconsideration under 47 C.F.R. § 1.106(b)(1). *CMP-Houston KC, LLC*, Memorandum Opinion and Order, 23 FCC Red 10656, 10660 n.31 (2008), citing *Cloud Nine Broadcasting, Inc.*, Letter, 10 FCC Red 11555, 11556 (1995).

²⁵ *Faye and Richard Tuck*, Memorandum Opinion and Order, 3 FCC Red 5374 (1988) ("*Tuck*").

²⁶ See Application, Ex. 32.

²⁷ Petition at 7.

²⁸ Signal population coverage and the size of a proposed community of license relative to an adjacent community are "pertinent but less significant" than evidence that the proposed community has needs and interests independent of those of the larger community. See, e.g., *Bay St. Louis and Poplarville, Mississippi*, Report and Order, 10 FCC Red 13144, 13145 (MMB 1995).

substantially less than the population of the central city of an Urbanized Area.²⁹ Clay's argument that other communities would be more commercially advantageous locations for the allotment is not relevant. To the extent Clay's claim is in the nature of a counterproposal to the Papillion allotment, such counterproposals are barred by Section 73.3573(g) of the Rules which permits modification of a station's authorization to specify a new community of license on a first come/first served basis.³⁰ In any event, the Commission's allotment policy centers on the public interest, not whether an allotment is commercially advantageous to the allotment's proponent.

Although Clay claims that Chapin has made no explicit statement that it will serve the needs and interests of Papillion, he fails to note that Chapin is not required to make such a commitment as part of the application process. The obligation to serve a community of license is implicit in the Commission's Rules and policies. The "Commission has long cited the 'fundamental obligation of licensees to service the needs and interests of their communities of license.'"³¹ Although the Commission no longer imposes detailed ascertainment procedures, it presumes that an applicant will meet its local programming obligations on the basis of certain application representations and the satisfaction of certain technical requirements,³² and various Commission Rules are designed to ensure that stations serve their communities. For example, each licensee is required to maintain a local public inspection file and place in the file on a quarterly basis a list of the programs that have addressed the most significant community issues during the prior three months.³³ The lists are retained in the public inspection file until final action on the station's renewal application. This provides Chapin with a significant incentive to serve Papillion and for the public and the Commission to evaluate Chapin's record of service in connection with the KBZR(FM) renewal application.³⁴ We therefore find no merit in Clay's unsupported and speculative assertion that Chapin will not serve Papillion.

Additionally, we reject the charge that our policies do not adequately guard against "urban migration" of KBZR(FM) from Lincoln to the Omaha area. Although Chapin is relocating KBZR(FM) from Lincoln, Nebraska to a smaller community within the Omaha Metro, there is no evidence in the record that Chapin does not intend to meet the needs and interests of Papillion residents. As indicated in *Suburban Community* and affirmed in *WBBK Broadcasting*, the Commission presumes that an applicant for a new station construction permit or a proposed station buyer will meet its local programming obligations on the basis of certain application representations and the satisfaction of certain technical requirements. As we also noted in *Suburban Community* and *WBBK Broadcasting*, an alleged failure actually to serve the community of license is more appropriately addressed in the context of a license renewal challenge.³⁵

²⁹ See, e.g., *Ada, Newcastle and Watonga, Oklahoma*, Report and Order, 11 FCC Red 16896 (MMB 1996).

³⁰ See 47 C.F.R. § 73.3573(g).

³¹ See also *Changes of Community*, 21 FCC Red at 14214. ("The importance of our Section 307(b) criteria is directly tied to the fact that broadcasters must provide programming that is responsive to the interests and needs of their communities of license, and the concomitant importance of local radio service to the communities served").

³² See *WNOW-FM, Bessemer City, North Carolina*, Letter, 23 FCC Rcd 8412, 8420 (MB 2008), citing *Suburban Community Policy, the Berwick Doctrine, and the De Facto Reallocation Policy*, Report and Order, 93 FCC 2d 436 (1983) ("Suburban Community") and *WBBK Broadcasting, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 5906 (2000) (*WBBK Broadcasting*).

³³ See *Deregulation of Radio, Report and Order*, 84 FCC 2d 968 (1981), *recon. granted in part*, Memorandum Opinion and Order, 87 FCC 2d 796 (1981), *aff'd in relevant part, Office of Communications of the United Church of Christ v. FCC*, 707 F.2d 1413, 1435 (D.C. Cir 1983). See also 47 C.F.R. §§ 73.3526, 73.3527.

³⁴ See *WNOW-FM*, 23 FCC Rcd at 8420.

³⁵ *Suburban Community*, 93 FCC 2d at 456.

Having found the Petition defective procedurally and substantively lacking merit, we decline to act on Clay's request to "vacate the captioned grant and stay all similar proceedings." We note, however, that Clay has improperly incorporated his stay request within the Petition.³⁶ Finally and in any event, we also note that Clay has failed to demonstrate that grant of the Community Change Application would cause him irreparable harm or that he has a probability of succeeding on the merits.³⁷

Informal Objection. Under Section 309(e) of the Communications Act of 1934, as amended, (the "Act"),³⁸ informal objections, like petitions to deny, must provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with the public interest, convenience and necessity.³⁹

In support of his Objection, Clay maintains that since adoption of the *Report and Order* in the *Change of Community* proceeding, the Commission has "abdicated its statutory obligation [under Section 307(b) of the Act] to create and retain a 'fair' distribution of service to communities."⁴⁰ Clay states that the Modification Application "aggravates the very factors that gave rise to the Petition" by moving the station "again" and further "attenuating" KBZR(FM)'s "remote nexus" to Papillion. Clay states that the Objection "updates" the Petition's statistical showings⁴¹ and "reinforces" the Petition's arguments.

A review of Clay's Objection reveals that, in substance, Clay merely reiterates the arguments in his foregoing Petition, arguments that were considered and rejected above in the context of the Petition. For the reasons expressed previously, we also find that Clay has not established a substantial and material question of fact calling for further inquiry regarding the grant of the Modification Application.

Decision/Action: Clay's Petition is procedurally defective. Even were it not so, we would deny it on substantive grounds. Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed by William B. Clay IS DISMISSED.

³⁶ See 47 C.F.R. § 1.44(e).

³⁷ See *Hispanic Information and Telecommunications Network, Inc.*, Memorandum Opinion and Order, 20 FCC Red 5471, 5479 (2005) (citing *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), as revised by *Washington Metropolitan Area Transit Authority v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

³⁸ 47 U.S.C. § 309(e).

³⁹ See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 note 10 (1990), *aff'd sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 D.C. Cir. 1993, rehearing denied (Sep. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (informal objection must contain adequate and specific factual allegations sufficient to warrant the relief requested).

⁴⁰ Objection at 2.

⁴¹ For example, in the Objection, Clay indicates that Papillion represented a mere 1.8 percent of the population within the protected service contour proposed in the Community Change Application, and the Modification Application "would further dilute Papillion's share of the audience to 1.5 %, or fewer than one covered resident out of 68. In contrast, Clay observes, KBZR(FM)'s former community of license, Lincoln, comprised "an absolute majority" of the covered population and was "the largest covered community by a wide margin." Objection at 4-5.

IT IS FURTHER ORDERED that Clay's May 16, 2008, Informal Objection IS DENIED, and the application (File No. BMPH-20080417AAY) for minor modification of facilities for Station KBZR(FM), Papillion, Nebraska, IS GRANTED.

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau

cc: Chapin Enterprises, LLC
VSS Catholic Communications, Inc.