



Federal Communications Commission
Washington, D.C. 20554

June 25, 2012

In Reply Refer to:
1800B3-AJR

Dickenson County Broadcasting Corp.
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East Kentucky Broadcasting Corporation
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Re: **MB Docket No. 04-319**
Coal Run, Kentucky and
Clincho, Virginia

Motion for Stay

WPKE-FM, Coal Run, Kentucky
Facility ID No. 32973
File No. BPH-20111031AIP

**Application for Minor Modification
of Facilities**

Informal Objection

Dear Counsel:

We have before us: (1) the Motion for Stay (“Motion”), filed on July 18, 2011, by Dickenson County Broadcasting Corp. (“Dickenson”), licensee of Station WDIC-FM, Clincho, Virginia, requesting that the *Reconsideration Order*¹ in MB Docket No. 04-319 be stayed pending Commission review; (2) the referenced application (the “Application”) of East Kentucky Broadcasting Corporation (“East Kentucky”), licensee of Station WPKE-FM, Coal Run, Kentucky, for a minor modification of facilities, seeking to implement the *Reconsideration Order*; ² (3) an Informal Objection (the “Objection”) to the Application, filed on November 3, 2011, by Dickenson; and (4) various related pleadings.³ For the

¹ *Coal Run, Kentucky, and Clincho, Virginia*, Memorandum Opinion and Order, 26 FCC Rcd 8557 (MB 2011), *app. for rev. pending* (“*Reconsideration Order*”).

² See File No. BPH-20111031AIP.

³ These pleadings include (1) an Opposition to Motion for Stay filed by East Kentucky on August 2, 2011; (2) a Motion to Strike Opposition filed by Dickenson on August 8, 2011; (3) an Opposition to Motion to Strike filed by

reasons discussed below, we deny the Motion and the Objection and grant the Application subject to the final outcome of this rule making proceeding.

Background. The *Reconsideration Order* reinstated and granted East Kentucky's Petition for Rule Making in this proceeding,⁴ upgrading its Station WPKE-FM, Coal Run, Kentucky, from Channel 276A to Channel 221C3 at a new transmitter site. To accommodate the upgrade, the *Reconsideration Order* involuntarily modified the license for Dickenson's Station WDIC-FM, Clincho, Virginia, to specify operation on Channel 276A in lieu of Channel 221A. In so doing, the *Reconsideration Order* rejected Dickenson's argument that the upgrade of Station WPKE-FM is not technically feasible due to a terrain obstruction between Coal Run and the proposed reference site that would prevent delivery of a city-grade signal to Coal Run from the new location in contravention of Section 73.315(b) of the Commission's Rules (the "Rules").⁵ On July 18, 2011, Dickenson filed an Application for Review of the *Reconsideration Order*. On October 31, 2011, East Kentucky filed the Application, implementing the *Reconsideration Order*.⁶

Discussion. Preliminary Matter. In its Motion to Strike, Dickenson contends that East Kentucky's Opposition to the Motion should not be considered because it was filed eight days after the time period set forth in Section 1.45(d) of the Rules for filing oppositions to motions for stay. East Kentucky filed an Opposition to Motion to Strike, alleging that the longer time period for filing oppositions set forth in Section 1.45(b) should apply in this case because Dickenson styled its pleading as a "motion" instead of a "request" for stay that would trigger the shorter time period of Section 1.45(d). In a Reply, Dickenson argues that the test of when the response is due is its purpose, not how the pleading is styled. We agree with Dickenson. The styling of a pleading cannot be used to circumvent the Commission's procedural rules.⁷ Section 1.45(d) clearly applies because the relief asked for is a stay. Accordingly, we will not consider East Kentucky's Opposition because it was late filed and no reason was given for the late filing.

Stay. The Commission will grant a motion for stay if the moving party can demonstrate that (1) it is likely to prevail on the merits of its pending appeal; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay.⁸ A petitioner generally must satisfy each of these tests in order to justify grant of a stay.⁹

East Kentucky on August 10, 2011; and (4) a Reply to Opposition to Motion to Strike filed by Dickenson on August 17, 2011.

⁴ See *Coal Run, Kentucky, and Clincho, Virginia*, Report and Order, 22 FCC Rcd 5347 (MB 2007)..

⁵ 47 C.F.R. § 73.315(b).

⁶ The Application was accepted for filing on November 1, 2011. See *Public Notice*, November 3, 2011 (Report No. 27606).

⁷ See, e.g., *Davina Sashkin, Esq.*, Letter, 27 FCC Rcd 2920 (MB 2012) (rejecting an attempt to circumvent the time period for filing a petition for reconsideration by styling a pleading as an "informal request for Commission action").

⁸ See *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. F.P.C.*, 259 F.2d 921, 925 (D.C. Cir. 1958).

⁹ See, e.g., *Radio Station KDEW(AM), DeWitt, AR*, Memorandum Opinion and Order, 11 FCC Rcd 13683, 13686 (1996) (Commission upholds Mass Media Bureau's denial of stay request when all four tests were not met); *Price*

We find that Dickenson has not met this standard. Regarding the first factor, the *Reconsideration Order* determined that there would be city-grade (70 dBu) coverage of Coal Run in compliance with Section 73.315 of the Rules despite a terrain obstruction.¹⁰ Dickenson challenges this finding based upon a new engineering analysis that the staff did not have an opportunity to consider in violation of Section 1.115(c) of the Rules.¹¹ By way of contrast, East Kentucky submitted, at the reconsideration stage of this proceeding, an engineering showing under the Commission's standard method of propagation, demonstrating that a city-grade (70 dBu) signal would cover Coal Run from the proposed transmitter site despite the terrain obstruction.¹² *The Reconsideration Order* concluded that, consistent with controlling precedent, this showing was sufficient to demonstrate compliance with Section 73.315, because line of sight between the proposed transmitter and the community of license is not absolutely required provided that an engineering showing is made that a 70 dBu signal will encompass the community of license.¹³ Under these circumstances, we conclude that Dickenson has not shown a likelihood of success on the merits of its Application for Review.

Second, Dickenson has not demonstrated that it will suffer irreparable harm if the stay is not granted. Although Dickenson contends that, based upon a prior channel change over 20 years ago, there might be listener confusion and a loss in revenue if the station involuntarily changes channels, this argument is speculative.¹⁴ On the contrary, Dickenson cannot be harmed because all FM channels of the same class are considered to be equivalent,¹⁵ and East Kentucky has agreed, pursuant to Commission

Cap Regulation of Local Exchange Carriers, Order, 10 FCC Rcd 11979, 11988, ¶ 17 (1995); *Petition of the Connecticut Department Public Utility Control*, Order, 11 FCC Rcd 848, 853, ¶ 14 (1995) (applicants must meet all four tests to merit a stay); *Review of Part 87 of the Commission's Rules Concerning the Aviation Radio Service*, Order, 26 FCC Rcd 685, 687 n.16 (2011) ("The Commission typically balances all four factors, but does not require a showing as to each single factor in every case").

¹⁰ *Reconsideration Order*, 26 FCC Rcd at 8560-61, ¶ 10.

¹¹ 47 C.F.R. § 1.115(c) ("No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass).

¹² See East Kentucky's Reply to Opposition to Petition for Reconsideration, filed on June 18, 2007, Technical Report.

¹³ *Reconsideration Order*, 26 FCC Rcd at 8560-61, ¶ 10. See 47 C.F.R. § 73.315(b). See also *Margaret C. Shaller*, Hearing Designation Order, 5 FCC Rcd 5329 (MMB 1990), citing *Rush County Broadcasting Co., Inc.*, Memorandum Opinion and Order, 26 FCC 2d 480 (1970) ("[f]ailure to provide line of sight does not necessarily imply deficient coverage").

¹⁴ See *Ava, Branson, and Mountain Grove, Missouri*, Report and Order, 10 FCC Rcd 13035, 13036 (MMB 1995) (rejecting an argument that a station should not be required to change channels again after a recent involuntary channel change) ("*Ava and Branson*"); *Castle Rock, Colorado Springs, Colorado, et al.*, Report and Order, 7 FCC Rcd 7668, 7679 (MMB 1992) (rejecting allegations that a temporary disruption of service to listeners due to an involuntary channel change will adversely affect the station and its listeners); *Onawa, Iowa, and Vermilion, South Dakota*, Report and Order, 4 FCC Rcd 703 (MMB 1989) (determining that allegations of potential loss of a station's financing do not raise a substantial and material question of fact on an involuntary channel change).

¹⁵ *Vero Beach, Florida*, Report and Order, 3 FCC Rcd 1049 (1988), *rev. denied*, 4 FCC Rcd 2184 (1989) (treating FM channels of the same class as equivalent); and *Randolph and Brandon, Vermont*, Report and Order, 6 FCC Rcd 1760, 1765 (MMB 1991) (considering FM channels of the same class as equivalent).

policy,¹⁶ to reimburse Dickenson for its reasonable costs in changing its frequency, including advertising and promotional costs to avoid listener confusion.¹⁷ Moreover, no permanent harm would occur to Dickenson because any grant of a construction permit to East Kentucky will be conditioned on the finality of this rule making proceeding and any construction would be at the permittee's sole risk.¹⁸ Accordingly, for the foregoing reasons, we conclude that a stay is not warranted.

Objection. Under Section 309(d) of the Communications Act of 1934, as amended,¹⁹ 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.²⁰

In its Objection, Dickenson contends that the Commission should dismiss the Application because "it cannot be granted unless and until the Commission finally allots FM Channel 221C3 to Coal Run and allots Channel 276A to Clincho, Virginia."²¹ We disagree. The filing of an application for review of an order modifying a station authorization to specify operation on a different channel no longer automatically stays the channel change pending review.²² As a result, in light of the denial of Dickenson's stay request, it is appropriate to act on the Application despite the pending Application for Review provided that "... parties electing to proceed before the allotment decision is final do so at their own risk and must bear the costs of any subsequent action reversing or revising the allotment decision."²³ Accordingly, we find that Dickenson has not raised a substantial and material question of fact that would prevent grant of the Application with appropriate conditions.

Application. We have evaluated the Application, and we find that it complies with all pertinent statutory and regulatory requirements and that its grant would further the public interest, convenience, and necessity.

¹⁶ See *Circleville, Ohio*, Second Report and Order, 8 FCC 2d 159, 163-164 (1967) (requiring the party benefiting from an involuntary channel change to reimburse the affected station for its out-of-pocket expenses incurred).

¹⁷ See *Reconsideration Order*, 26 FCC Rcd at 8562, ¶ 13.

¹⁸ See, e.g., *Fredericksburg, Converse, et al., Texas*, Report and Order, 22 FCC Rcd 10883, 10885 (MB 2007) (discussing the impact of conditioning a construction permit on the final outcome of a rule making proceeding) ("*Fredericksburg*").

¹⁹ 47 U.S.C. § 309(d).

²⁰ See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff'd sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *reh'g denied* (Sept. 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).

²¹ See Dickenson's Informal Objection, at 1.

²² See *Amendment of Section 1.420(f) of the Commission's Rules Concerning Automatic Stays of Certain Allotment Orders*, Report and Order, 11 FCC Rcd 9501, 9502, ¶ 3 (1996).

²³ *Id.* at 9506, ¶ 11. See, *Fredericksburg*, 22 FCC Rcd at 10855 (noting that when a construction permit is granted subject to the outcome of a related proceeding, any construction undertaken would be at the permittee's sole risk); *Robert J. Buenzle, Esq., and Mark N. Lipp, Esq.*, Letter, 25 FCC Rcd 2129, 2131 (MB 2010) (declining to withhold action on a minor modification application notwithstanding the fact that an objector's challenge to the grant of the station's underlying authorization was pending before the Commission).

Conclusion. Accordingly, for the reasons set forth above, the Motion to Strike filed by Dickenson Broadcasting Corp. on August 8, 2011, IS GRANTED.

Additionally, the Motion for Stay and Informal Objection filed by Dickenson County Broadcasting Corp. on July 18, 2011, and on November 23, 2011, respectively, ARE DENIED.

Finally, the Application (File No. BPH-20111031AIP) of East Kentucky Broadcasting Corporation IS GRANTED subject to, *inter alia*, the following conditions:

This construction permit is granted subject to the final outcome of MB Docket No. 04-319. Any construction or operation pursuant to this construction permit before MB Docket No. 04-319 becomes final is at the permittee's sole risk.

Program tests for WPKE-FM (Facility ID No. 32973) will not commence on Channel 221C3 with the facilities specified herein until program tests for WDIC-FM, Clincho, Virginia, (Facility ID No. 16905) commence on Channel 276A, and a license will not be granted for WPKE-FM on Channel 221C3 with the facilities specified herein until a license is granted for WDIC-FM on Channel 276A.

Sincerely,

A handwritten signature in blue ink, appearing to read "Peter H. Doyle", with a long horizontal flourish extending to the right.

Peter H. Doyle
Chief, Audio Division
Media Bureau