



Federal Communications Commission
Washington, D.C. 20554

February 19, 2013

In Reply Refer to:
1800B3-KD

Commonwealth Broadcasting, LLC
c/o Howard M. Weiss, Esq.
Fletcher, Heald & Hildreth, PLC
1300 N 17th Street, 11th Floor
Arlington, VA 22209

WWGP Broadcasting Corp.
c/o Coe Ramsey, Esq.
Brooks Pierce McLendon Humphrey & Leonard, LLP
P.O. Box 1800
Raleigh, NC 27602

MHR License LLC
c/o Julian L. Shepard, Esq.
Williams Mullen
1666 K Street N.W., Suite 1200
Washington, DC 20006

In re: **WUSH(FM), Poquoson, VA**
Commonwealth Broadcasting, LLC
File No. BMPH-20070802ABX
Facility ID No. 78447

Petition for Reconsideration

Dear Counsel:

The Media Bureau ("Bureau") has before it a Petition for Reconsideration ("Petition") filed by MHR License LLC ("MHR") and related pleadings.¹ MHR requests reconsideration of the Bureau's August 15, 2008, letter decision ("Decision"), which granted the referenced application ("Modification Application") filed by Commonwealth Broadcasting, LLC ("Commonwealth") to modify the effective radiated power and antenna height of station WUSH(FM), Poquoson, Virginia ("Station"). For the reasons set forth below, we deny the Petition.

Background. Commonwealth filed the Modification Application on August 2, 2007. There, Commonwealth explained that, using the Commission's standard contour prediction methodology, as outlined in Section 73.313 of the Commission's rules ("Rules"), the proposed modifications would not

¹ The Petition for Reconsideration was filed on September 19, 2008. Commonwealth filed an Opposition on October 8, 2008, and MHR filed a Reply on October 21, 2008.

place the requisite 70 dBu signal over Poquoson, the Station's community of license. Commonwealth claimed, however, that use of a supplemental method of depicting city grade coverage was appropriate under Section 73.313(e) of the Rules because the terrain between the transmitter site and Poquoson departs widely from the average terrain that is assumed in the Commission's standard methodology.² As such, Commonwealth submitted a study using supplemental method calculations to demonstrate that, due to the favorable terrain conditions, its modification would satisfy the community coverage requirement of Section 73.315(a) of the Rules.³

On January 22, 2008, MHR filed an informal objection to the Modification Application, alleging that Commonwealth's community coverage showing failed to satisfy the Commission's guidelines on supplemental showings. MHR claimed that Commonwealth provided insufficient justification for using the proposed propagation methodology, and that its results were unreliable. MHR provided its own supplemental showings purportedly demonstrating that Commonwealth's application failed to comply with the community coverage requirements of Section 73.315 of the Rules.

On August 15, 2008, the Bureau granted the Modification Application.⁴ In its Decision, it determined that Commonwealth complied with the supplemental showing guidelines by demonstrating that the terrain "departs widely" from the standard assumption.⁵ It noted that the application had been reviewed by the Commission's Office of Engineering and Technology ("OET"), which conducted an independent study and concluded that the proposed facilities satisfied the community coverage requirement.⁶ As such, the Bureau denied MHR's informal objection and granted the Modification Application.

In its Petition, MHR argues that the Bureau should have dismissed the Modification Application because it failed to demonstrate city-grade coverage.⁷ It further asserts that, by referring the application to OET, the Bureau implicitly rejected Commonwealth's supplemental showings as defective.⁸ It maintains that the Bureau acted without authority when it instead referred the Modification Application to OET and relied on its showings to demonstrate compliance with Section 73.315.⁹ MHR argues that OET's substitution of its own methodology for Commonwealth's "defective" showing sets bad precedent and will only encourage future applicants to "cut corners" in their engineering analysis.¹⁰ It further maintains that the Decision violates its procedural due process rights because the Bureau failed to reveal

² Section 73.313(e) of the Rules allows the submission of a supplemental showing using an alternative contour prediction methodology in cases "where the terrain in one or more directions from the antenna site departs widely from the average elevation of the 3 to 16 kilometer sector . . .". See 47 C.F.R. § 73.313(e).

³ See 47 C.F.R. § 73.315(a). Under longstanding Commission policy, the Commission accepts proposals that would cover at least 80 percent of the FM station's community of license with a predicted 70 dBu signal as substantially in compliance with the rule, and not requiring a waiver. See *Barry Skidelsky*, Order, 7 FCC Rcd 5577 (1992).

⁴ *Letter to WWGP Broadcasting Corporation from Rodolfo F. Bonacci, Assistant Chief, Audio Division*, Ref. 1800B3 (MB August 15, 2008).

⁵ Decision at 3.

⁶ *Id.*

⁷ Petition at 1.

⁸ Petition at 5.

⁹ *Id.* At 6.

¹⁰ *Id.* At 7.

the OET methodology and criticizes the Commission for not adoption official guidelines regarding the use of alternative prediction methodologies.¹¹

Discussion. The Bureau will consider a Petition for Reconsideration only when the petitioner shows changed circumstances or additional facts not known or existing at the time of petitioner's last opportunity to present such matters, or if consideration of such arguments is required to serve the public interest.¹² A petition that simply repeats arguments previously considered and rejected will be denied.¹³

As an initial matter, we dismiss as repetitious MHR's general argument that Commonwealth's supplemental showings failed to demonstrate compliance with Section 73.315. This issue was considered and rejected in the Decision.¹⁴ Moreover, MHR's premise that the Decision's reliance on OET's studies somehow demonstrated rejection of Commonwealth's showings is unfounded. Nothing in the Decision indicated that OET found fault with Commonwealth's supplemental showings. Indeed, the Bureau routinely forwards supplemental coverage showings to OET for its expert advice. Such a routine referral hardly establishes that the Bureau thought that Commonwealth's showings were "unreliable" or "implicitly rejected" them.¹⁵ In any event, the Bureau was well within its authority to refer Commonwealth's supplemental showings to OET and to rely on OET's analysis in verifying that the proposed modifications met the community coverage requirements.¹⁶ MHR cites to no case law or Commission precedent to support its novel theory that the Bureau is prohibited from either confirming an applicant's compliance with Section 73.315 of the Rules or relying on the results of OET's independent studies to verify that an application meets the community coverage requirements.

MHR next contends that the Bureau's reliance on OET's "undisclosed" contour prediction methodology was arbitrary and capricious.¹⁷ MHR argues that the Bureau was required to disclose the

¹¹ *Id.* at 2, 7-8.

¹² See 47 C.F.R. § 1.106; *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966), and *National Association of Broadcasters*, Memorandum Opinion and Order, 18 FCC Rcd 24414, 24415 (2003).

¹³ *Infinity Broadcasting Operations, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 4216 (2004).

¹⁴ Decision at 3.

¹⁵ Petition at 5.

¹⁶ See 47 C.F.R. § 0.51(d) (OET is responsible for advising the Commission concerning engineering matters involved in resolving specific cases); 47 C.F.R. § 0.61 (the Bureau "acts for the Commission under delegated authority, in matters pertaining to . . . broadcast radio" and has authority to "process and act on all applications for authorization. . . [and] objections."); *CMP Houston-KC, LLC*, Memorandum Opinion and Order, 23 FCC Rcd 10656, 10658-10660 (2008) (upholding the grant of a modification application where the Bureau relied upon OET analysis verifying that the applicant met the community coverage requirements); *North American Broadcasting Company, Inc.*, Letter, 2012 WL 4959385 (MB October 17, 2012) (finding that an application complied with 47 C.F.R. § 73.315 where the applicant met the threshold requirement for consideration of a supplemental showing and OET determined that the proposed facilities would provide the required signal coverage). See also *Radio Ingstad Minnesota, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 8502, 8505 (1997) ("Our decision to perform an independent terrain analysis was entirely within our discretion . . . Petitioners cite no authority for the proposition that the Commission cannot resort to its own expertise under the circumstances presented here without providing for comment . . .").


¹⁷ Petition at 7.

methodology it used to confirm Commonwealth's compliance with Section 73.315(a).¹⁸ We disagree. In *Heritage Media*,¹⁹ the full Commission explicitly rejected the argument that the "staff's reliance on its independent terrain analysis, without providing an opportunity for adversarial review and comment, raise[d] due process concerns." As was the case in *Heritage Media*, MHR has cited to no authority for the proposition that the Commission cannot rely on its own expertise under the circumstances present here without providing for comment. Accordingly, we will not consider this argument further.

Finally, MHR takes issue with the Bureau's "continued application of *ad hoc*, unpublished, procedures and methodologies" and the lack of "official" guidelines for the use of alternative prediction methodologies.²⁰ However, in the *Minor Changes R&O*, the Commission specifically stated that "[b]ecause the exhibits provided with supplemental showings may vary from method to method, we will not set standards for such showings beyond the guidelines [given for determining when a supplemental showing is permitted]. . . ."²¹ To the extent that MHR takes issue with this flexible approach, its concerns are better raised in a petition for rulemaking.²²

Conclusions/Actions. We have carefully considered the full record in this case and find no grounds to rescind grant of the Modification Application. Accordingly, for the reasons set forth above, IT IS ORDERED, that the Petition for Reconsideration filed by MHR License LLC on September 19, 2008, IS DENIED.

Sincerely,

Handwritten signature of Peter H. Doyle in blue ink, with the initials "PH" at the end.

Peter H. Doyle
Chief, Audio Division
Media Bureau

¹⁸ Commonwealth included in its Opposition a copy of OET's internal memorandum, dated September 24, 2007, in which OET concluded that the Modification Application complied with Section 73.315 of the Rules. MHR notes that the OET memo was dated prior to the submission of MHR's initial objection, arguing that OET's failure to consider MHR's objection rendered the Decision arbitrary and capricious. Reply at 4. However, the Decision clearly references the objection, showing that it was considered. Decision at 1.

¹⁹ *Heritage Media Services, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 5644, 5650 (1998) ("*Heritage Media*").

²⁰ Petition at 8.

²¹ *Amendments of Parts 73 and 74 of the Commission's Rules to Permit Certain Minor Changes in Broadcast Facilities Without a Construction Permit*, Report and Order, 12 FCC Rcd 12371, 12403 ¶ 72 (1997) ("*Minor Changes R&O*").

²² See, e.g., *Community Television of Southern California v. Gottfried*, 459 U.S. 498, 511 (1984) (citation omitted) ("rulemaking is generally a 'better, fairer and more effective' method of implementing a new industry-wide policy"); *Sunburst Media L.P.*, Memorandum Opinion and Order, 17 FCC Rcd 1366 (2001) (stating "it has long been Commission practice to make decisions that alter fundamental components of broadly applicable regulatory schemes in the context of rule making proceedings, not adjudications").