

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Chapin Enterprises, LLC)	
)	
Application for a Construction Permit for a Minor Change to a Licensed Facility)	File No. BPH-20070119AFW
)	
Applications for Minor Modification of a Construction Permit)	File Nos. BMPH-20080417AAY BMPH-20090121ABD
)	
Station KVSS(FM), Papillion, Nebraska)	Facility ID No. 34435

MEMORANDUM OPINION AND ORDER

Adopted: April 17, 2014

Released: April 18, 2014

By the Commission:

1. In this Memorandum Opinion and Order, we dismiss in part and deny in part an Application for Review filed by William B. Clay (“Clay”) on January 21, 2009.¹ Clay seeks review of a December 18, 2008, action by the Media Bureau (“Bureau”)² that: (1) dismissed Clay’s June 15, 2007, Petition for Reconsideration of the Bureau’s May 17, 2007, grant of the above-captioned minor change application (“Community Change Application”); and (2) denied Clay’s May 16, 2008, Informal Objection to, and granted, Chapin’s above-captioned minor modification application, File No. BMPH-20080417AAY (“Modification Application”) (collectively, the “Applications”).³

2. In the Community Change Application, filed on January 19, 2007, Chapin sought to change the community of license of Station KVSS(FM) (formerly KBZR(FM)) (the “Station”) from Lincoln, Nebraska, to Papillion, Nebraska. On May 14, 2007, the Bureau granted the unopposed Community Change Application, having concluded that the change resulted in a preferential arrangement of allotments under Section 307(b) of the Communications Act of 1934, as amended (the “Act”) because it provided a first local transmission service to Papillion under Priority 3 of the *FM Assignment Policies*.⁴

¹ On January 28, 2009, Chapin Enterprises, LLC (“Chapin”) filed an Opposition to the Application for Review. On February 2, 2009, VSS Catholic Communications, Inc. (“VSS”) filed an Opposition to the Application for Review. On February 9, 2009, Clay filed a Reply to Chapin’s Opposition. On February 17, 2009, Clay filed a Reply to VSS’s Opposition.

² *William B. Clay*, Letter, 23 FCC Rcd 18034 (MB 2008) (“*Reconsideration Decision*”). In January 2009, Chapin assigned Station KVSS(FM) to VSS. See File No. BALH-20080619AFR. For purposes of convenience and consistency with the prior orders in this matter, we will continue to refer to the applicant as “Chapin” herein.

³ A second modification application was filed on January 21, 2009, and granted on January 28, 2009 (“Second Modification Application”). See File No. BMPH-20090121ABD. On January 29, 2009, Clay filed an Informal Objection to the Second Modification Application, which we construe as a petition for reconsideration (“Second Petition for Reconsideration”). In the Second Petition for Reconsideration, Clay requested that we defer action on the Second Modification Application pending Commission action on the Application for Review. Because of the decision herein, the Second Petition for Reconsideration is dismissed as moot.

⁴ See *Broadcast Applications, Public Notice, Report No. 46488 (May 17, 2008)*; see also 47 U.S.C. § 307(b). The FM allotment priorities are: (1) first fulltime aural service; (2) second fulltime aural service; (3) first local service;

(continued....)

On June 15, 2007, Clay filed a Petition for Reconsideration of that grant. On April 17, 2008, Chapin filed the Modification Application, which modified Chapin's minor change construction permit to specify a new transmitter site. On May 16, 2008, Clay filed the Informal Objection against the Modification Application.

3. In the *Reconsideration Decision*, the Bureau dismissed Clay's Petition for Reconsideration, finding that Clay lacked standing as either a competitor or listener of the Station. The Bureau also held that Clay had not satisfied the procedural requirement under Section 1.106(b)(1) of the Rules to "show good reason why it was not possible for him to participate in the earlier stages of the proceeding."⁵ Rather, the Bureau held, it was "possible for Clay to do so—he simply elected not to."⁶ However, because standing is not required to file an informal objection,⁷ the Bureau considered Clay's May 16, 2008, Informal Objection to the Modification Application on the merits, concluding that Clay had not raised a substantial or material question of fact that grant of the Modification Application was not in the public interest.⁸ The Bureau, accordingly, granted the Modification Application.⁹

4. On review, Clay objects to the *Reconsideration Decision* on two grounds. First, Clay argues that the Bureau erred in finding that he lacked standing to file the Petition for Reconsideration. Clay claims standing to oppose the grant of the Applications because:

[Grant of the Applications established] binding precedent that would then make it that much harder for Clay, or anyone, to raise similar substantial public interest objections to other grants of this nature, where Clay resides or where others reside. Based upon Clay's asserted interest in and dependence upon rural FM radio service, this threat is concrete and particularized with respect to Clay and qualifies as a justiciable injury under Article III of the U.S. Constitution. It is just such a *procedural* nexus that the Supreme Court recognizes as deserving a relaxed standard of immediacy in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), n.7.¹⁰

5. Second, Clay reiterates his substantive objections to the grant of the Applications: "The process and policies prescribed by the Commission in its [2006 *Community of License Order*], utterly failed to ensure that the facility authorized here has a reasonable probability of providing its community of license, Papillion, Nebraska, with an 'outlet for local self-expression,' the Commission's only stated objective for its first local service allotment preference, which was dispositive in this case."¹¹ Rather, Clay contends, Chapin has a commercial incentive to cater to the Omaha Metro community as a whole rather than to the residents of Papillion, who constitute a small fraction of the total covered population.¹²

6. *Petition for Reconsideration*. We agree with the Bureau's rationale and holding that Clay lacked standing to file the Petition for Reconsideration and did not comply with the procedural

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and (4) other public interest matters. Co-equal weight is given to Priorities 2 and 3. *See Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1982) ("*FM Assignment Policies*").

⁵ 47 C.F.R. § 1.106(b)(1).

⁶ *Reconsideration Decision*, 23 FCC Rcd at 18037.

⁷ *See, e.g., Barry Friedman, Esq.*, Letter, 23 FCC Rcd 15613, n.19 (MB 2008).

⁸ *Reconsideration Decision*, 23 FCC Rcd at 18039.

⁹ *Id.* at 18040.

¹⁰ Application for Review at 9 (citations omitted) (emphasis in original).

¹¹ *Id.* at 2-3; *see 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) (authorizing community of license changes through the minor modification application process) ("*Community of License Order*").

¹² Application for Review at 4.

requirements of Section 1.106(b)(1) of the Rules.¹³ Therefore, for the reasons set out in in the *Reconsideration Decision*, we deny the Application for Review to the extent that it challenges the Bureau's dismissal of the Petition for Reconsideration.

7. *Informal Objection.* We also find that Clay lacks standing, on review, to challenge the Bureau's denial of the Informal Objection to the Modification Application. While Clay was not required to demonstrate standing as an informal objector, he is now required to do so as an applicant for review.¹⁴ Under Section 1.115(a) of the Rules and Section 155(c)(4) of the Communications Act, an applicant for review must be a "person aggrieved" by an action taken pursuant to delegated authority.¹⁵ To show that it is "aggrieved" by an action, an applicant for review must demonstrate a direct causal link between the challenged action and the alleged injury to the applicant, and show that the injury would be prevented or redressed by the relief requested.¹⁶ In the broadcast regulatory context, standing is generally obtained in one of three ways: (1) as a competitor in the market suffering signal interference; (2) as a competitor in the market suffering economic harm; or (3) as a resident of the station's service area or regular listener of the station.¹⁷ In this regard, as the Bureau explained in the *Reconsideration Decision*, Clay's "procedural injury" arguments relying on *Lujan* are misplaced. In *Lujan*, the Supreme Court stated that a "procedural right" accrues only if there is an associated concrete harm to the person asserting the right.¹⁸ Here, Clay fails to show any concrete harm accruing to him as a resident of Charlotte, North Carolina, a community located over 1,100 miles from either Papillion or Omaha, from the grant of the Modification Application.¹⁹ He does not allege competitive harm or signal interference, nor does he allege to be a listener of the Station. Clay cites no case in which standing has been granted on the basis that the legal precedent set by one case could affect future, similar, cases. Moreover, Clay has failed to demonstrate a causal link between the claimed injury and the grant at issue. In granting the construction permit underlying the Modification Application, the Bureau *applied* the processing rules adopted in the

¹³ 47 C.F.R. § 1.106(b)(1) (petition for reconsideration subject to dismissal when petitioner does not show good reason for not participating in earlier stages of proceeding).

¹⁴ 47 U.S.C. § 155(c)(4); 47 C.F.R. § 1.115(a).

¹⁵ 47 U.S.C. § 155(c)(4); 47 C.F.R. § 1.115(a) ("Any person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission . . . Any application for review which fails to make an adequate showing in this respect will be dismissed.").

¹⁶ See, e.g., *Applications of AT&T Inc. and Deutsche Telecom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 27 FCC Rcd 4423, 4425 (2012); *Applications of WINV, Inc. and WGUL-FM, Inc. for Renewal and Assignment of License of WINV(AM), Inverness, Florida*, Memorandum Opinion and Order, 14 FCC Rcd 2032, 2033 (1998).

¹⁷ See *Applications of Clarke Broadcasting Corporation*, Memorandum Opinion and Order, 11 FCC Rcd 3057 (1996) (holding that where there is no nexus between the challenged application and an applicant for review, the applicant is not "aggrieved" for purposes of 47 C.F.R. § 1.115(a)); *Chet-5 Broadcasting, L.P.*, Memorandum Opinion and Order, 14 FCC Rcd 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"); *Office of Communications of the United Church of Christ v. FCC*, 359 F.2d 994, 1000-1006 (1966) (expanding standing from traditional categories of electrical interference or economic injury to station listeners).

¹⁸ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, n.8 (1992) ("*Lujan*") ("We do not hold that an individual cannot enforce procedural rights; he assuredly can, so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.").

¹⁹ The information on record in this proceeding establishes Charlotte as Clay's residence. However, it appears that Clay may have moved to Italy, according to a letter in another proceeding dated June 9, 2011. *William B. Clay*, Letter, (MB Oct. 13, 2011) at n.8 (granting application File No. BMPH-20070119AGG). Clearly, under our analysis, Clay would equally lack standing as a resident of Italy.

Community of License Order; it did not create them.²⁰ Therefore, the relevant rules would apply to any future applications notwithstanding grant of either Application. This causal connection is even more attenuated by the fact that the grant of the Modification Application did not authorize the move to Papillion—which was already authorized by the grant of the Community Change Application—but merely “further dilute[d]” Papillion’s share of the covered population by expanding the Station’s signal coverage.²¹ Finally, the relief Clay requests would no more directly and tangibly benefit him individually than the national public at large.²² For all of these reasons, Clay fails to identify a direct economic or other connection between his interests and grant of the Modification Application. Therefore, we dismiss, for lack of standing, the Application for Review to the extent that it challenges the Bureau’s denial of Clay’s Informal Objection.

8. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 5(c) of the Communications Act of 1934, as amended,²³ and Sections 1.115(a) and (g) of the Commission’s rules,²⁴ the Application for Review IS DISMISSED for the reasons stated in paragraph 6 above and otherwise IS DENIED.

9. IT IS FURTHER ORDERED that the Second Petition for Reconsideration filed by Clay on January 29, 2009, IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁰ The proper forum for Clay’s arguments was the proceeding leading to the 2006 *Community of License Order*, in which Clay did participate. Ultimately, Clay’s concerns regarding our Section 307(b) procedures were further addressed in the *Rural Radio* proceeding, which, *inter alia*, established a rebuttable presumption that when a proposed community is located, as here, in an urbanized area (or could, through a minor modification, cover 50 percent of an urbanized area) the Commission will treat the application, for Section 307(b) purposes, as proposing to serve the entire urbanized area. See *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Report and Order, First Order On Reconsideration, and Second Further Notice of Proposed Rule Making, 26 FCC Rcd 2556, 2567 (2011) (subsequent history omitted); *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Order on Reconsideration, 27 FCC Rcd 12829, 12840 (2012).

²¹ See Informal Objection at 7.

²² See, e.g., *Lujan*, 504 U.S. at 573-574 (“We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.”).

²³ 47 U.S.C. §§ 155(c)(4),(5).

²⁴ 47 C.F.R. § 1.115(a),(g).