

67039

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

2012 JUL 19 A 6:05

In re

HATFIELD MCCOY COMMUNICATIONS, INC.

)
) FCC File No. BPH-20120604AAI
) FCC Facility ID No. 67039
)

For Minor Modification of WVKM(FM), Matewan,
West Virginia License)

FILED/ACCEPTED

To: Office of the Secretary
Attn: Media Bureau

JUL 17 2012
Federal Communications Commission
Office of the Secretary

REPLY TO OPPOSITION

East Kentucky Broadcasting Corporation, by its attorneys, pursuant to Section 73.3587 and Section 1.106(h) of the Commission's rules, hereby submits its reply to the July 10, 2012 Hatfield McCoy Communications, Inc. ("WVKM") "Opposition to Petition for Reconsideration" regarding the June 25, 2012 Informal Objection to the application seeking a minor modification of the WVKM(FM), Matewan, West Virginia license. The Informal Objection was filed by East Kentucky Broadcasting Corporation on June 25, 2012 and pursuant to the FCC's Public Notice Report No. 27773, released July 5, 2012, is being treated as a petition for reconsideration (hereafter, the "Petition for Reconsideration"). In support of this Reply, the following is submitted:

AS A PROCEDURAL MATTER, THE PETITION IS FULLY ACCEPTABLE

1. WVKM complains that the June 25, 2012 Petition for Reconsideration is procedurally inadequate since it violates Section 1.106(c) of the Commission's rules. As shown below, this WVKM complaint ignores the factual circumstances of the prompt staff action

surrounding the filing of the Petition for Reconsideration, and the filing and quick grant of the WVKM application.

2. Here is a description of the compressed time-line of the filings:

- The WVKM application was filed on June 4, 2012 and FCC public notice of that filing was given in Public Notice Report No. 27753 released June 6, 2012.
- The WVKM application was amended on June 11, 2012 and FCC public notice of that filing was given in Public Notice Report No. 27758 released June 13, 2012.
- The WVKM application was further amended on June 20, 2012 and FCC public notice of that filing was given in Public Notice Report No. 27766 released June 25, 2012.
- Three days prior to the FCC Public Notice of the amendment and 16 days after FCC Public Notice of the filing of the WVKM application, the FCC granted the WVKM application on June 22, 2012 and gave Public Notice of such grant in Public Notice Report No. 47768, released June 27, 2012, two days subsequent to the filing of the Petition for Reconsideration.

3. This compressed time schedule resulting in a quick grant is far different than the case law factual situations cited by WVKM opposing standing for the Petition for Reconsideration. Contrary to the inapplicable cases cited by WVKM, the Commission has affirmatively accorded standing to petitioners for reconsideration who failed to file pre-grant objections when prompt staff action effectively precluded participation during the initial consideration of an application. *See The Association for Community Education, Inc.*, 19 FCC Rcd 12682, 12684 (2004). In *Aspen FM, Inc.*, 12 FCC Rcd 17852, 17854 (1997), standing was awarded to file a petition for reconsideration without pre-grant objection when the application granted five days after Public Notice of its acceptance. In *Ted and Jana Tucker*, 4 FCC Rcd 2816 (1989), standing to file petition for reconsideration was accorded without a pre-grant objection when application was granted four days after Public Notice of its acceptance.

4. In the WVKM situation, where the application was granted three days prior to Public Notice of the amended WKVM application and a mere 16 days after the initial Public

Notice of the filing of the WVKM application, and the objection was filed on the first business day after the grant and two days prior to Public Notice of the grant, standing is appropriate for the Petition for Reconsideration. It is also worth noting that East Kentucky Broadcasting Corporation was legally precluded from filing a petition to deny in the initial stage of this proceeding, as petitions to deny do not lie against minor modification applications.¹

5. Further, as noted in the Petition for Reconsideration, there was no FCC Public Notice of a grant of this application released at the time of filing of the Petition for Reconsideration. The FCC's CDBS, its informal, informational database, showed that the WVKM application may have been granted late the previous business day, possibly after the close of business at the FCC, and as noted above, some 12 days after Public Notice of the application's filing and three days prior to Public Notice of its amendment.

6. As competitors in the WVKM market, East Kentucky Broadcasting Corporation's interests will be adversely affected by a grant of the WVKM application. Therefore, the Petition for Reconsideration should be accorded standing.² The claim of standing is made within 30 days of the June 27, 2012 date of public notice of the WVKM grant.³ *The Last Bastion Station Trust, LLC*, 23 FCC Rcd 4941 stated that "[t]he Commission has afforded reconsideration to petitioners where the grant of an application occurred shortly after the application was filed", finding that an expeditious grant of the applications had not allowed sufficient time for potential objections to be filed, and thus it was in the public interest to allow those parties to file petitions for reconsideration.

¹ See 47 CFR §§73.3580(a)(1) and 73.3584(a).

² See *Cloud Nine Broadcasting, Inc.*, 10 FCC Rcd 11555, 11556 (1995) (citing *FCC v. Sanders Bros. Radio Station*, 309 US 470, 477 (1940) and *Rainbow Broadcasting Co.*, 9 FCC Rcd 2839, 2844 n.24 (1994)(subsequent history omitted).

³ See FCC Public Notice No. 47768, released June 27, 2012.

7. WVKM attempts to rely heavily upon procedure in arguing against the Petition for Reconsideration. It is therefore worth noting that the WVKM Opposition was filed late. The East Kentucky Broadcasting Corporation Petition for Reconsideration was filed on June 25, 2012. It was delivered via email to counsel for WVKM. Pursuant to Section 1.106(g) of the Commission's rules, oppositions to petitions for reconsideration were to be filed within 10 days after the petition was filed. Ten days after June 25, 2012 was July 5, 2012. Section 1.4(h) of the Commission's rules adding three business days for mailing is inapplicable as service by electronic means (email) is deemed equivalent to hand-delivery. The East Kentucky Broadcasting Corporation service list attached to the Petition for Reconsideration clearly stated that the document was emailed. Accordingly, WVKM's Opposition was due on July 5, 2012 and its July 10, 2012 Opposition was late-filed.⁴

WHILE THERE IS A PRESUMPTION OF CITY-GRADE COVERAGE, WVKM HAS THE BURDEN OF DEMONSTRATING BY A CREDIBLE ENGINEERING SHOWING THAT ITS SITE WILL BE SUITABLE TO ENCOMPASS THE COMMUNITY OF LICENSE WITH A SIGNAL OF REQUISITE STRENGTH.

8. While there is an initial presumption of city-grade coverage for WVKM based upon predicted contours, the East Kentucky Broadcasting Corporation Petition for Reconsideration overcame that presumption with its extensive and convincing engineering showing that city-grade coverage is not obtained. Therefore, WVKM had the burden of demonstrating by a credible engineering showing that its site will be suitable to encompass the community of license with a signal of requisite strength. This WVKM has failed to do. It only

⁴ This Reply is being filed pursuant to Section 1.106(h) within the requisite seven days after the last day (July 5, 2012) for filing oppositions.

provides a predicted contour map which proves nothing.⁵ Thus, the grant of its application must be rescinded.

9. The WVKM antenna center of radiation is blocked from its community of license by three major terrain obstructions that rise 166 meters, 160 meters and 200 meters above line-of-sight on two separate azimuths. Attached to the Petition for Reconsideration is the engineering analysis of Anderson Associates (the "Engineering Analysis") showing the absolute lack of line-of-sight between the WVKM transmitting antenna and the Matewan community of license.

10. It is well-settled that in when the presumption of community of license coverage is rebutted, a proponent has the obligation to provide a prima facie showing of compliance with the requirements of Section 73.315 of the Commission's rules. *See e.g. Hartford, VT*, 7 FCC Rcd 3245 (MMB 1992) (proponent required to provide prima facie showing that proposed facility will comply with requirements of Section 73.315 of the Commission's rules, and failure to do so will result in denial of proposal). In *New Castle, PA*, 32 FCC 2d 131 (1971), the Commission's found the initial showing of community of license 70 dBu coverage inadequate and gave an opportunity to make a showing of adequate coverage. The proponent in *New Castle, PA* instead chose to rest on the insufficient showing it previously made and limited itself without additional engineering support to generalized expressions minimizing the seriousness of the deficiencies in principal city coverage that would exist with between 67% to 80% of the principal city area in shadow and the predicted 70 dBu contour not extending as far as contended. The Commission in *New Castle, PA* denied the proposal based upon an inadequate

⁵ Even this predicted contour map is deficient in that it references the call sign "WKMV" (sic).

coverage of the community of license with a 70 dBu signal. WVKM has likewise had the opportunity to show the requisite coverage of its city of license but has failed to do so.

11. In the case law that WVKM submits, it erroneously ignores the qualifiers and caveats with respect to line-of-site and city-grade coverage in the supporting case law it cites. For instance, in quoting from *Rush County Broadcasting Co., Inc.*, 26 FCC 2d 480 (1970) (which East Kentucky Broadcasting Corporation also cited), WVKM seizes upon the statement that “Section 73.315 of the rules does not impose an absolute requirement for line-of-sight over an applicant’s entire community”. WVKM is correct. There is no “absolute” requirement for line-of-sight”. But, there is an absolute requirement that “in no event should there be a major obstruction in this path”⁶ which WVKM conveniently fails to note.

12. WVKM states that “terrain obstructions do not necessarily result in inadequate city-grade coverage, and that the failure to provide line-of-sight signal does not necessarily imply deficient coverage”, citing *Helen Broadcasters, Inc.*, 5 FCC Rcd 5642 (1990). That, of course, is again correct, but ignores the WVKM factual situation. The WVKM antenna center of radiation is blocked from its community of license by three major terrain obstructions that rise 166 meters, 160 meters and 200 meters above line-of-sight on two separate azimuths. For WVKM, there is an absolute lack of line-of-sight between the WVKM transmitting antenna and the Matewan community of license which necessarily does imply deficient coverage. Therefore, *Helen Broadcasters, Inc.* is woefully inapplicable to the WVKM situation.

13. WVKM cites *Jesse Willard Shirley*, 36 FCC 2d 127 (1972) for a situation unlike the WVKM situation where a community of license was covered with a 70 dBu signal even though there was a 150 foot high hill obstructing line-of-sight. As noted above, however, the

⁶ *Rush County Broadcasting Co., Inc.*, 26 FCC 2d 480 (1970)

three WVKM major terrain obstructions are 166 meters, 160 meters and 200 meters above line-of-sight on two separate azimuths. Comparing like units of measure, rather than the 150 foot hill in *Jesse Willard Shirley*, the WVKM situation has mountains 544 feet, 529 feet and 656 feet above line-of-sight! A 150 foot high hill in *Jesse Willard Shirley* is in no way comparable to mountains in excess of 500 feet high blocking the line of site in the WVKM application.

14. More to the point, WVKM omits the portion of *Jesse Willard Shirley* that states: “[e]ven assuming some shadowing effects from the hills in the transmission path, no facts have been presented to indicate that the community of Fayette will not receive a satisfactory signal from the proposed facility, or that the shadowing would be of such a nature as to justify the denial of the entire proposal.”⁷ Contrary to *Jesse Willard Shirley*, the Petition for Reconsideration presents facts that demonstrate that the community of Matewan will not receive a satisfactory city-grade signal from the WVKM facility under any circumstances. Thus, *Jesse Willard Shirley* is inapplicable in support of the WVKM application.

15. As the Petition for Reconsideration showed, when propagation is considered, given the substantial distance between the WVKM transmitter site and Matewan, no portion of the Matewan community receives anything near a 70 dBu signal. Both the WVKM application and the WVKM Opposition fail to note the major terrain obstructions. The effect of the major terrain obstructions is a failure of WVKM to provide any 70 dBu coverage to its community of license.

16. WVKM has now had the opportunity in both its application and in its Opposition to refute the East Kentucky Broadcasting Corporation showing that no portion of Matewan will receive a 70 dBu signal from the WVKM facility. An applicant bears the burden of

⁷ *Jesse Willard Shirley*, 36 FCC 2d 127 (1972) at paragraph 6.

demonstrating by a credible engineering showing that its site will be suitable to encompass the community of license with a signal of requisite strength. WVKM has failed to satisfy this burden. Accordingly, its application is fatally defective and having been granted, that grant must be rescinded and thereafter denied.

WHEREFORE, for the reasons above, the grant of the Hatfield McCoy Communications, Inc. application for a minor change to WVKM facilities should be immediately rescinded, and thereafter the application must be denied.

Respectfully submitted,

**EAST KENTUCKY BROADCASTING
CORPORATION**

By: _____


John F. Garziglia
Its Attorney

Womble Carlyle Sandridge & Rice, LLP
1200 19th Street, N.W. Suite 500
Washington, DC 20036
(202) 857-4455

July 17, 2012

CERTIFICATE OF SERVICE

I, John F. Garziglia, an attorney at the law firm of Womble Carlyle Sandridge & Rice, LLP, do hereby certify that a true copy of the foregoing "Reply to Opposition" was sent this 17th day of July, 2012 via U.S. Mail, postage prepaid, to the following:

*Lee J. Peltzman, Esq.
Shainis & Peltzman, Chartered
1850 M Street, N.W. Suite 240
Washington, DC 20036



John F. Garziglia

* Via U.S. Mail and E-Mail