



Federal Communications Commission
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In Reply Refer to:
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In re: **Three States Broadcasting Company, Inc.**
Station WVKM(FM), Matewan, West Virginia
Facility ID No. 67039
File No. BPH-20120604AAI

Informal Objection

Dear Counsel:

We have before us an Informal Objection (“Objection”) filed by East Kentucky Broadcasting Corporation on June 25, 2012, against the above-referenced application (“Application”) of Hatfield McCoy Communications, Inc. (“HMC”), former licensee¹ of Station WVKM(FM), Matewan, West Virginia (“Station”), to modify the facilities of the Station.² For the reasons set forth below, we will treat the Objection as a petition for reconsideration and dismiss it.

Background. HMC filed the Application on June 4, 2012, proposing to modify the licensed facilities of the Station by specifying a new tower location.³ The Application provided a contour map showing that the 70 dB μ contour of the proposed facility would completely encompass Matewan as required by Section 73.315 of the Commission’s Rules (“Rules”).⁴ HMC subsequently amended the

¹ During the pendency of the Objection, HMC assigned its license for the Station to Hatfield McCoy Broadcasting (no relation). See File No. BALH-20130506ADO. Hatfield McCoy Broadcasting subsequently assigned the Station’s license to Three States Broadcasting Company, Inc. See File No. BALH-20140623AAD.

² HMC filed an Opposition on July 10, 2012, and a Supplement to Opposition on July 11, 2012, which revised the Opposition to include a missing signature. East Kentucky filed a Reply on July 17, 2012.

³ See *Broadcast Applications*, Public Notice, Report No. 27753 (MB Jun. 6, 2012).

⁴ Application at Exhibit 27 (“HMC Engineering Statement”). See also 47 C.F.R. § 73.315 (“The transmitter location shall be chosen so that, on the basis of the effective radiated power and antenna height above average terrain employed, a minimum field strength of 70 dB above one μ V/m (dB μ), or 3.16 mV/m, will be provided over the entire principal community to be served.”).

Application on June 11, 2012 (“First Amendment”),⁵ and again on June 20, 2012 (“Second Amendment”).⁶ The Media Bureau granted the Application on June 22, 2012.⁷

East Kentucky filed the Objection on June 25, 2012, and argues that the Objection is timely filed because: 1) at the time it was filed, the Commission had not given public notice of the grant of the Application; and 2) the Application was apparently granted after business hours on Friday, June 22, 2012, and therefore the grant was not effective until the next business day, which was Monday, June 25, 2012.⁸ East Kentucky argues that the Application does not comply with Section 73.315 because three major terrain obstructions would block the WVKM signal from reaching its community of license.⁹ The Objection includes an engineering analysis conducted using Longley-Rice calculations showing a lack of line-of-sight between the antenna and Matewan.¹⁰ Although East Kentucky concedes that line-of-sight to a prospect community of license “is not absolutely required,” it argues that “when the presumption of coverage is rebutted, an engineering study is required by the applicant to show that ‘the received signal strength as transmitted from the [proposed] site will exceed 70 dBμ and will encompass the principal community.’”¹¹ East Kentucky argues that Hatfield failed to meet this burden and the Application should be denied.

In its Opposition, Hatfield argues that the Objection is procedurally defective because Kentucky did not participate earlier in the proceeding and does not rely on facts it could not have presented before the grant of the Application.¹² Hatfield also argues that the Application satisfied Section 73.315, and includes a technical statement from its engineer indicating that the proposal will provide a signal strength of 70 dBμ or more throughout Matewan despite the terrain obstructions.¹³

In its Reply, East Kentucky argues that the Commission grants standing to file petitions for reconsideration to parties that did not previously participate in the proceeding where the staff’s prompt action on an application prevented the party from participating. Here, East Kentucky notes, the staff acted on the Application before Public Notice of the Second Amendment was given, and the Objection was filed on the first business day after the grant.¹⁴ East Kentucky also states that Hatfield’s Technical Statement is deficient because it merely provides a contour map, which does not establish coverage of Matewan given the terrain obstruction.¹⁵

⁵ See *Broadcast Applications*, Public Notice, Report No. 27758 (MB Jun. 13, 2012). The First Amendment did not alter the technical proposal. See First Amendment at Exhibit 1 (“This amendment includes new Exhibits 5 (Multiple Ownership Compliance) and 33 (Section 73.215).”).

⁶ See *Broadcast Applications*, Public Notice, Report No. 27766 (MB Jun. 25, 2012). HMC stated that the Second Amendment reduced the power of the proposed facility and showed compliance with Section 73.215. See Second Amendment at Exhibit 1.

⁷ See *Broadcast Actions*, Public Notice, Report No. 47768 (MB Jun. 27, 2012).

⁸ Objection at 1 n.1.

⁹ *Id.* at 1.

¹⁰ *Id.* at 1 and Engineering Analysis.

¹¹ *Id.* at 2, citing *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Coal Run, Kentucky, and Clinchco, Virginia)*, Memorandum Opinion and Order, 26 FCC Rcd 8557, 8560-61 ¶10 (2001).

¹² Opposition at 2-3

¹³ *Id.* at 4-5 and Technical Statement.

¹⁴ Reply at 1-3.

¹⁵ *Id.* at 4-5.

Discussion. Procedural Matters. We find that the Objection, filed after the grant of the Application, should be treated as a petition for reconsideration under Section 1.106 of the Rules.¹⁶ While the Commission has accorded standing to petitioners for reconsideration who failed to file pre-grant objections when prompt staff action “effectively precludes participation during the initial consideration of an application,”¹⁷ we will not award East Kentucky such standing here. Although there is no filing deadline for informal objections to minor modification applications, East Kentucky had eighteen days from the filing of the Application in which to file an objection, but failed to do so. East Kentucky has failed to show that the Second Amendment is material to or altered the Application so as to warrant the Objection. Thus, the fact that the Application was granted two days after the filing of the Second Amendment is irrelevant. It is axiomatic that an adjudicatory process cannot operate efficiently or accurately if a party does not participate in a proceeding but is permitted to “sit back and hope that a decision will be in its favor and, when it isn't, to parry with an offer of more evidence.”¹⁸ The staff may dismiss a petition for reconsideration seeking to overturn the grant of an application where the petitioner did not show good cause for failing to participate earlier in the proceeding.¹⁹ Accordingly, we will dismiss the Objection.²⁰

Additionally, were we to consider the merits of the Objection, we would deny it. An FM station's transmitter location must satisfy the community coverage requirement of Section 73.315, which requires that the minimum field strength of 70 dB μ be provided over the entire principal community to be served.²¹ A construction permit is deemed to be in substantial compliance with this rule if at least 80 percent of the principal community is predicted to receive 70 dB μ or greater signal strength from the proposed facilities.²² Additionally, as HMC and East Kentucky note, the Commission has not interpreted line-of-sight to be an absolute requirement.²³ Where, as in this case, an application demonstrates community coverage utilizing the standard prediction method set forth in Section 73.313, alternative

¹⁶ See *Zwerling Broadcasting System Ltd.*, Letter, 29 FCC Rcd 9606 (MB 2014) (“*Zwerling*”) (informal objection filed after grant of application treated as petition for reconsideration). We reject East Kentucky's argument that we should consider June 25, 2012 as the date of the grant of the Application because the grant may have occurred after business hours. Moreover, even if the Application was considered granted on June 25, 2012, an informal objection filed the same day as the grant of an application is treated as a petition for reconsideration. See *Saga Communications of New England, LLC*, Letter, 25 FCC Rcd 4691, 4692 (MB 2010). See also 47 C.F.R. § 1.106.

¹⁷ See, e.g., *Aspen FM, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 17852, 17854 (1997) (standing awarded to file petition for reconsideration without pre-grant objection when application granted five days after Public Notice of its acceptance); *Ted and Jana Tucker*, Memorandum Opinion and Order, 4 FCC Rcd 2816 (1989) (standing to file petition for reconsideration without pre-grant objection when application granted four days after Public Notice of its acceptance).

¹⁸ See, e.g., *Canyon Area Residents for the Environment*, Memorandum Opinion and Order, 14 FCC Rcd 8152, 8154 (1999) (quoting *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941)).

¹⁹ See *The Association for Community Education, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 12682 (2004) (refusing to treat an untimely informal objection to an FM translator application on Section 74.1204(f) grounds as a petition for reconsideration because the objector had failed to participate earlier and had not shown good reason for its failure to participate); *Revival Christian Ministries*, Letter, 28 FCC Rcd 2041 (MB 2014) (dismissing petition for reconsideration that argued translator modification would cause interference in violation of Section 74.1204(f) because petitioner had failed to file an objection to the application prior to its grant).

²⁰ *Zwerling*, 29 FCC Rcd at 9607 (dismissing informal objection filed after grant of application where objector had not participated earlier in the proceeding).

²¹ 47 C.F.R. § 73.315.

²² See *John R. Hughes*, Memorandum Opinion and Order, 50 Fed. Reg. 5679 (1985) (coverage of 80 percent of a community's residential area with a “city-grade” signal constitutes “substantial compliance” with the Commission's city coverage requirements).

²³ See *Rush County Broadcasting Co., Inc.*, Memorandum Opinion and Order, 26 FCC 2d 480, 482 ¶ 7 (1970).

methodologies which seek to rebut community coverage will not be accepted.²⁴ The HMC Engineering Statement demonstrates that the Application will provide the required community coverage, and we would accordingly reject East Kentucky's Objection.

Conclusion/Actions. Accordingly, for the reasons set forth above, IT IS ORDERED THAT the Informal Objection filed by East Kentucky Corporation on June 27, 2012, treated as a Petition for Reconsideration, IS HEREBY DISMISSED.

Sincerely,



Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Three States Broadcasting Company, Inc.

²⁴ See, e.g., *New Life Broadcasting, Inc.*, Letter, 25 FCC Rcd 7293, 7297-98 (MB 2010).