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Donald E. Martin, Esq.
Post Office Box 8433
Falls Church, Virginia 22041

Meredith S. Senter, Esq.
Lerman Senter PLLC
2000 K Street, N.W.
Suite 600
Washington, DC 20006

In Re: **KVNW(FM), Napavine, Washington**
Facility ID Number: 189494
File No: BNPH-20110630AHJ

Petition for Reconsideration

Dear Counsel:

We have before us the Petition for Reconsideration ("the Petition") filed April 15, 2013, by Premier Broadcasters, Inc. ("Premier"), licensee of Station KITI(AM), Centralia-Chealis, Washington. The Petition seeks review of a staff action[1] that granted the captioned application, as amended, (the "Amended Application")[2] of Threshold Communications ("Threshold") for a new FM station at Napavine, Washington, and denied an Informal Objection (the "Objection") to the Amended Application filed by Premier.[3] For the reasons discussed below, we grant in part and deny in part the Petition and return the Amended Application to pending status until such time as Threshold has properly completed its post-filing local notice.

Background. Threshold was the winning bidder in Auction 91 for a new FM allotment at Clatskanie, Oregon. On June 30, 2011, Threshold submitted a long-form Application (the "Initial Application") to implement its winning bid on Channel 225C3 at Fords Prairie, Washington, pursuant to Section 73.3573(g) of the Commission's Rules ("Rules").[4] On May 23, 2012, Threshold submitted the Amended Application, seeking to change the proposed community of license from Clatskanie to Napavine.

[1] *See Donald E. Martin, Esq., and Meredith S. Senter, Esq.,* Letter, Ref. 1800B3-DD (Mar. 11, 2013) ("*Letter Decision*").

[2] See File No. BNPH-20110630AHJ.

[3] Threshold filed a Consent Motion for Extension of Time on April 26, 2013, and filed an Opposition to Petition for Reconsideration on May 10, 2013. Premier filed a Reply on May 22, 2013.

[4] 47 C.F.R. § 73.3573(g) (permitting the modification of an FM station's authorization or a winning bidder's FM assignment to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest, provided, *inter alia,* the reallotment would result in a preferential arrangement of allotments).

Threshold certified in the Amended Application[5] that it would comply with the local public notice requirement.[6]

On August 27, 2012, Premier filed the Objection. Premier argued that the Amended Application should be denied because: (1) in spite of Threshold's certification, it had failed to publish local notice of the Amended Application in Clatskanie; and (2) Clatskanie has a greater need for a new radio station than Napavine. In the *Letter Decision,* we found that Threshold had supplied proof of the required publication.[7] We also determined that the reallotment of the Clatskanie channel to Napavine would result in a preferential arrangement of allotments under the FM Allotment Priorities.[8] Accordingly, we granted the Amended Application and denied the Objection.

In its Petition, Premier first argues that we erred in the *Letter Decision* in finding that Threshold had supplied proof of compliance with the Local Notice Rule. On the contrary, Premier reiterates that Threshold never published notice of the Amended Application in the weekly newspaper in Clatskanie as required by the Local Notice Rule but relied instead on its local notice of the Initial Application. Second, Premier contends that Threshold has been aware of this defect since the Objection was filed but remained silent and did not cure the deficiency prior to the issuance of the *Letter Decision*. While Premier acknowledges that Threshold provided additional documentation on local notice after the *Letter Decision,* Premier asserts that its omission to provide this information earlier violates Sections 1.17 and 1.65 of the Rules.[9] Third, Premier argues that the *Letter Decision* is inconsistent with the revised Section 307(b) policies of *Rural Radio*.[10] Accordingly, Premier believes that the Amended Application should be dismissed or denied.[11]

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[5] *See* File No. BNPH-20110630AHJ at Section II, Item 9.

[6] *See* 47 C.F.R. § 73.3580(c)(1) and (3) (requiring that within 30 days of tendering an application to change a station's location, an applicant must give notice of this filing in a daily or weekly newspaper published in the community in which the station is located and the one in which it is proposed to be located) ("Local Notice Rule").

[7] *See Letter Decision* at 3.

[8] The FM Allotment Priorities are: (1) First fulltime aural service, (2) Second fulltime aural service, (3) First local service, and (4) Other public interest matters. Co-equal weight is given to Priorities (2) and (3). *Revision of FM Assignment Policies and Procedures,* Second Report and Order, 90 FCC 2d 88 (1988). Although the allotment of Channel 225C3 at either Clatskanie or Napavine would provide first local services under Priority 3, we applied our tie-breaking mechanism of favoring the community with the larger population. Because Napavine (population 1,766) is larger than Clatskanie (population 1,737), we preferred Napavine. *See Letter Decision* at 3.

[9] *See* 47 C.F.R. §§ 1.17 (requiring applicants to make truthful and accurate statement to the Commission) and 1.65 (requiring applicants to amend a pending application within 30 days whenever information is no longer substantially accurate and complete in all significant respects).

[10] Specifically, Premier contends that: (1) in comparing the service needs of Clatskanie and Napavine, the staff followed outdated precedent and did not consider all of the factors under Priority 4; (2) the staff improperly placed the burden on Premier, instead of Threshold, to show that there would be a preferential arrangement of allotments; and (3) Clatskanie is a rural community and Napavine is an urban community. *See Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures,* Second Report and Order, 26 FCC Rcd 2556 (2011) (subsequent history omitted) ("*Rural Radio*").

[11] Alternatively, Premier requests that, if the staff gives Threshold an opportunity to cure its local notice, the staff should require Threshold to submit information required in Priority 4 cases under the revised policies of *Rural Radio*.

In its Opposition, Threshold argues that it substantially complied with the Local Notice Rule because: (1) it provided notice of the Initial Application in a daily newspaper published in Longview Washington and circulated in Clatskanie; and (2) it published local notice of the Amended Application in Napavine but did not believe that it was necessary to provide a second notice in Clatskanie as it had already provided notice of the initial move-out. Threshold also rejects Premier's *Rural Radio* argument. Threshold submits an engineering study that demonstrates that the Clatskanie allotment covers more than 50 percent of the Longview, Washington, urbanized area. Applying the rebuttable presumption set forth in *Rural Radio,* Threshold contends that the Clatskanie allotment would be considered an additional allotment to this urbanized area under lesser Priority 4 and would not be favored over a first local service to Napavine under higher Priority 3. Accordingly, Threshold urges denial of the Petition. In its Reply, Premier argues that Threshold's engineering study should not be considered because it is impermissible new matter that could have been presented at an earlier stage of this proceeding.

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order, or raises additional facts, not known or existing at the time of the petitioner's last opportunity to present such matters.[12]

Local Notice. With respect to Premier's argument that Threshold has not provided sufficient local notice of the Amended Application, the Local Notice Rule requires that within 30 days of the tendering of an application, or an amendment thereto, to change the location of a station, an applicant must give notice in the community in which the station is located and the one in which it is proposed to be located in a local "daily newspaper of general circulation . . . twice a week for two consecutive weeks in a three-week period."[13] The Local Notice Rule further provides that, if there is no such daily newspaper, notice must be given in a local "weekly newspaper of general circulation once a week for 3 consecutive weeks in a 4-week period." If there is no daily or weekly newspaper published in the communities, the applicant is required to give notice "in the daily newspaper from wherever published, which has the greatest general circulation in that community, twice a week for 2 consecutive weeks within a 3-week period."[14]

Based upon evidence submitted by Premier, we find that it was error to conclude that Threshold had complied with the Local Notice Rule. On the contrary, Threshold did not comply with the Local Notice Rule in three respects. First, it did not give local notice in the correct newspaper. Because there is no daily newspaper in Clatskanie, Threshold was required to provide local notice in the *Clatskanie Chief,* which is the only weekly newspaper in Clatskanie. Instead, Threshold provided its only local notice for Clatskanie in the *Daily News*, which is published in Longview, Washington. Second, Threshold never provided local notice of the Amended Application in Clatskanie, relying instead upon its local notice of the Initial Application in that community. Third, Threshold's local notice of the Amended Application in Napavine was untimely.[15]

Although Threshold contends that there has been "substantial compliance" with the Local Notice Rule, we disagree. While the Commission has previously held late local notice to be in "substantial

[12] *See* 47 C.F.R. § 1.106(c), (d). *See also 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).

[13] *See* 47 C.F.R. § 73.3580(c).

[14] *Id.*

[15] Threshold was required to publish local notice of the Amended Application within 30 days from the filing of the Amended Application on May 21, 2012, but published notice in the *Centralia Chronicle* during the period July 12-21, 2012, a month late.

compliance" with the Rules,[16] the defects in this case are more serious because Threshold has acknowledged never providing local notice of the Amended Application in Clatskanie.[17] This omission is contrary to the purpose of the Local Notice Rule which is to give residents of both the move-in and move-out communities the opportunity to comment on the Section 307(b) aspects of the proposal.[18] Further, an applicant does not have an option of publishing notice in a distant daily newspaper when there is a weekly newspaper in the community.

When local notice is defective, the Commission typically provides applicants a chance to remedy their previous failure to comply with the Local Notice Rule.[19] Consequently, we will grant the Petition with respect to Premier's claim about defective local notice. Accordingly, we will rescind our action granting the Amended Application and return it to pending status to permit Threshold to comply with the Local Notice Rule[20] and to ensure that any party in interest will be provided a full opportunity to submit comments.[21]

New Matter. Before considering Premier's Section 307(b) issues, we address the procedural question of whether Threshold's engineering study is an impermissible new matter. Section 1.106(c)(1) provides that new facts or arguments may be considered when the petition for reconsideration relies upon events or circumstances that have changed since the last opportunity to present such matters or the information was unknown and could not have been discovered through ordinary diligence.[22] We recognize that Threshold's engineering study does not fall into these categories because the study could have been presented earlier in the proceeding as the reference coordinates for the Clatskanie allotment were known. However, Section 1.106(c)(2) permits the designated authority to consider the new matter if it determines that "consideration of the facts or arguments relied on is required in the public interest."[23] In this case, we believe that accepting Threshold's study meets this purpose. A key issue in this case is whether Clatskanie or Napavine are rural or urban communities. Acceptance of this engineering study is relevant to this issue and would facilitate resolution of this case on a complete and more accurate record.[24] Accordingly, we accept Threshold's engineering study.

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[16] *See, e.g., Rev. David P. McAfee,* Letter, 24 FCC Rcd 5306, 5307-08 (MB 2009) (late publishing of newspaper announcement held to be in substantial compliance of the Local Notice Rule).

[17] *See* Threshold Opposition at 4.

[18] *See Revision of Procedures Governing Amendments to FM Table of Allotments and Changes in Community of License in the Radio Broadcast Service,* Report and Order, 21 FCC Rcd 14212, 14220 (2006) (requiring an applicant "to publish both in the current community of license and the proposed community, so as to give maximum notice to all residents potentially affected by grant of the application").

[19] *See, e.g., Intercontinental Radio, Inc.,* Memorandum Opinion and Order, 88 FCC 2d 819, 824 (1981).

[20] Specifically, we expect Threshold to provide a new notice of the Amended Application in both Clatskanie and Napavine.

[21] To the extent that Premier also believes that the Commission should republish notice of the Amended Application in the Federal Register, we disagree. Premier has not shown any defect in the Commission's notice of the Amended Application. Further, Premier has cited no authority for requiring the republication by the Commission of notice in the Federal Register when there has been defective local public notice by an applicant.

[22] 47 C.F.R. § 1.106(c)(1).

[23] 47 C.F.R. § 1.106(c)(2).

[24] *See, e.g., Mark Van Bergh, Esq., and Donald E. Martin, Esq.,* Letter, 26 FCC Rcd 15135 (MB 2011) (considering additional evidence regarding site availability as in the public interest).

Section 307(b) Analysis. Because we are requiring republication of the local notice in this proceeding, the final resolution of the Section 307(b) issues cannot be made until additional comments are filed. However, we believe that it would be appropriate to clarify the Section 307(b) analysis in the *Letter Decision*. We treated the retention of the frequency at Clatskanie or its reallotment to Napavine as first local services under Priority 3. However, a staff engineering analysis confirms Threshold's engineering study that, at the reference coordinates for Channel 225C3 at Clatskanie, the allotment would cover more than 50 percent of the Longview, Washington urbanized area. As a result, the allotment is presumed to be an additional service to the Longview urbanized area under Priority 4, as opposed to a first local service under Priority 3. By way of comparison, the reallotment of Channel 225C3 at Napavine would be a first local service to that community. Napavine is not located in any urbanized area. Further, a staff engineering analysis confirms that the allotment cannot be modified to provide 70 dBu coverage to 100 percent of Napavine and more than 50 percent of the Longview urbanized area. Accordingly, our tentative view is that the Amended Application would result in a preferential arrangement of allotments because it triggers higher Priority 3.[25]

False Certification/Continuing Accuracy of Application. Section 1.17 of the Rules prohibits an applicant, *inter alia,* from in any written or oral statement "intentionally omit[ting] material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading."[26] Misrepresentation involves false statements made with an intent to deceive.[27] Lack of candor involves concealment, evasion, or other failure to be fully forthcoming, accompanied by an intent to deceive.[28] Additionally, Section 1.65 requires an applicant to submit an amendment within 30 days when the information in a pending application is no longer substantially accurate and complete in all significant respects.[29]

As discussed above, Threshold's certification in the Amended Application that it would comply with the Local Notice Rule was false because Threshold has acknowledged that it never published notice of the Amended Application in Clatskanie. Moreover, it did not provide updated information on this defect in its local notice until after the release of the *Letter Decision.* While Threshold's certification was false and the submission of its updated information was late, there has been no showing of an intent to deceive. On the contrary, Threshold has submitted an affidavit from one of its principals that it had made an honest mistake in determining that the local Clatskanie newspaper was neither a daily or weekly paper. Threshold also stated that it did not believe that republication in Clatskanie was required under the Rules. Nevertheless, we will admonish Threshold for its false certification in the Amended Application and its failure to update inaccurate information in the Amended Application in a timely manner.[30] We caution Threshold to exercise diligence in ascertaining the accuracy of its certifications because "a false

[25] We believe, at this stage of the proceeding, that it would be premature to rule on Premier's other Section 307(b) arguments. The parties may file additional information in response to our revised Section 307(b) analysis.

[26] 47 C.F.R. § 1.17(a)(1).

[27] *See Fox River Broadcasting, Inc.,* Order, 93 FCC 2d 127, 129 (1983).

[28] *Id.*

[29] 47 C.F.R. § 1.65.

[30] *See, e.g., Donald E. Martin, Esq., and Harry C. Martin, Esq.,* Letter, 28 FCC Rcd 411 (MB 2013) (admonishing applicant for failure to report a loss of transmitter site when the property was sold and to report changes in its governing board).

statement, even absent an intent to deceive, may constitute an actionable violation of Section 1.17 of the Rules."[31]

Conclusion. Accordingly, for the reasons set forth above, IT IS ORDERED, that the Petition for Reconsideration filed by Premier Broadcasters, Inc., IS GRANTED IN PART AND DENIED IN PART.

IT IS FURTHER ORDERED that the grant of the Amended Application of Threshold Communications (File No. BNPH-20110630AHJ) IS RESCINDED, and the Amended Application IS RETURNED TO PENDING STATUS.

IT IS FURTHER ORDERED that, pursuant to Section 1.17 of the Rules, Threshold Communications IS ADMONISHED for its false certification that for its Amended Application, it "has or will comply with the public notice requirements of 47 C.F.R. Section 73.3580[32] and for its violation of Section 1.65 during the pendency of the Amended Application (File No. BPH-20110630AHJ).

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

[31] *See, e.g., Applications of Detroit Public Schools,* Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 13688, 13692 (MB 2006).

[32] File No. BNPH-20110630AHJ at Section II, Item 9.