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

In re Application of	)	
	)	
RADIO 2000, INC.[1]	)	File No. BPH-940713IB
	)	
For Modification of Construction Permit for Station KCWX(FM), Columbia Falls, Montana.	)	

MEMORANDUM OPINION AND ORDER

Adopted: October 18, 1996 **Released: October 31, 1996**

By the Commission:

1. The Commission has before it the Application for Review filed November 22, 1995, by Cloud Nine Broadcasting, Inc. ("Cloud Nine"), licensee of Station KDBR(FM), Kalispell, Montana. Cloud Nine seeks review of the October 10, 1995, Mass Media Bureau ("Bureau") action[2] denying Cloud Nine's June 28, 1995, Petition for Reconsideration of the grant of the above-referenced application of Radio 2000, Inc. ("Radio 2000"), for modification of the facilities of Station KCWX(FM), Columbia Falls, Montana. Radio 2000 submitted an opposition to Cloud Nine's application for review on December 7, 1995. For the reasons set forth below, review is denied.

Background

2. Radio 2000's application for a construction permit for a new FM station on Channel 240A in Columbia Falls, Montana, was granted July 30, 1992. Shortly thereafter, on October 22, 1992, Radio 2000 submitted a rule making petition to upgrade the allotment to Channel 240C2. The Bureau granted the rule making request on March 2, 1993, over the objection of Cloud

[1] On December 6, 1995, a *pro forma* assignment of the KCWX authorization from Frank Copsidas, Jr. ("Copsidas") to Radio 2000, wholly owned by Copsidas, was granted. For convenience, the applicant is hereinafter referred to as "Radio 2000."

[2] Letter to Robert Lewis Thompson, Esquire, from the Acting Chief, Audio Services Division, Mass Media Bureau, October 10, 1995 (reference 1800B3-RRC) (hereafter "*Reconsideration Decision*").

Nine's predecessor,[3] and, on February 25, 1994, Radio 2000 filed an application for modification of its permit to specify Class C2 operations (File No. BPH-940225IA). Subsequently, on July 13, 1994, Radio 2000 filed a minor amendment proposing a change of transmitter site, tendering with the amendment the fee required for the filing of a minor modification application.[4] Cloud Nine filed an informal objection to Radio 2000's amended application on March 13, 1995, alleging that Radio 2000 had misrepresented that it had reasonable assurance of the new tower site specified in the amendment and that it had failed to notify the FAA of the proposed modification. In a decision dated May 30, 1995,[5] the staff resolved those issues in favor of Radio 2000 and denied Cloud Nine's informal objection. The staff noted that the amendment was filed more than thirty days after notice of acceptance for tender of the initial application, and that, because Radio 2000 had not submitted a showing of good cause for late filing of the amendment pursuant to Section 73.3522(a)(6) of the Rules, the amendment was subject to return. However, the staff, consistent with its standard procedure, for purposes of administrative convenience and to avoid unnecessary paperwork, associated the application as originally filed with the amendment, deleted the old file number and assigned the new composite application a File Number (BMPH-940713IB) which corresponded with the date of the amendment.[6] The staff subsequently granted the "composite" application bearing the new file number on May 30, 1995.

3. Cloud Nine, on reconsideration, argued that the staff improperly accepted the July 13, 1994, amendment, because the time for amendments as of right had expired, and Radio 2000 did not show good cause for acceptance of the late-filed amendment. Cloud Nine also argued that the staff failed to afford the public the 30-day period for filing petitions to deny by simultaneously accepting the July 13 amendment, renumbering the application, and granting it as amended on May 30, 1995. Finally, Cloud Nine reasserted its argument that Radio 2000 lacked reasonable assurance of site availability.

4. The Bureau's *Reconsideration Decision* denied reconsideration, ruling first that, although 47 C.F.R. §73.3522(a)(6) provides that a late-filed amendment is subject to return

[3] *Columbia Falls, Montana*, 8 FCC Rcd 1548 (MMB 1993), *recon. denied*, 8 FCC Rcd 6647 (MMB 1993). Bee Broadcasting, Inc., then the permittee of Station KDBR(FM), opposed the upgrade petition. On January 3, 1995, control of the KDBR permit was transferred to Cloud Nine (File No. BTCH-940916GG). Cloud Nine's application for a license (File No. BLH-940914KF) was granted April 20, 1995.

[4] This amendment was placed on a Public Notice announcing its receipt on December 1, 1994. See Report No. 16056, released December 1, 1994, at p. 6.

[5] Letter to Robert.L. Thompson, Esq. from the Chief, FM Branch, Audio Services Division, Mass Media Bureau, May 30, 1995 (reference 1800B3-SAH) (hereafter "*Letter Decision*").

[6] The application formerly was identified with File No. BMPH-940225IA. The *Letter Decision* at footnote 5 also recognized that "the appropriate minor change application processing fee was paid with the July 13, 1994 amendment."

without consideration, staff practice under the circumstances presented was to waive the rule's requirements, renumber and grant the amended application, and bill the applicant the appropriate fee for a "minor change" application. The staff noted that the "renumbering and billing" process is used only in the context of engineering amendments to applications to modify the facilities of existing FM stations or permits where such applications, as amended, do not conflict with any other application filed prior to the date of the grant of the amended applications. Second, the staff noted that the 30-day period for filing petitions to deny specified in 47 U.S.C. §309(b) does not apply to minor change applications, referencing 47 U.S.C. §309(c)(2)(A). The staff stated that, because such minor change applications are not subject to competing applications or petitions to deny, waiving the "good cause" requirement of Section 73.3522(a)(6) does not prejudice any other applicant, objector, or party. Finally, the staff rejected the site availability argument, ruling that Cloud Nine failed to raise a substantial and material question of fact regarding Radio 2000's site availability certification.

5. In its Application for Review, Cloud Nine argues once again that acceptance of Radio 2000's untimely amendment was improper. It contends that the staff's "renumber and billing" practice disserves the public by, in effect, repealing the "good cause" requirement of Section 73.3522(a)(6) of the Rules, thus undermining the public interest in evenhanded application of the Commission's processing rules. Cloud Nine also states that the simultaneous acceptance and grant of Radio 2000's amendment shortchanges the public's opportunity for comment on the proposal, because such amendments are not placed on a public notice, and that this practice, by permitting successive untimely amendments to applications, undermines the Commission's intent to streamline the FM application process. Further, Cloud Nine argues anew that Radio 2000 lacks reasonable assurance of the proposed transmitter site.

Discussion

6. *Untimely Amendment.* Pursuant to the Commission's FM processing rules, minor modification applications filed by FM station licensees or permittees, including applications to effectuate a class upgrade following a rule making proceeding, appear on a Public Notice simultaneously announcing their tender and acceptance for filing. *See Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application*, 8 FCC Rcd 4735 (1993). They are "first come-first serve" applications with protection vesting upon filing against subsequently-filed mutually exclusive proposals. Amendments to minor modification applications may be filed as a matter of right for a period of 30 days following issuance of the combined Notice of Tender and Acceptability. Amendments filed after that time are subject to return without consideration unless accompanied by acceptable "good cause" showings. 47 C.F.R. §73.3522(a)(6). A showing of "good cause" would typically involve a demonstration that the need for the change was necessitated by events which were beyond the control of the applicant, such as loss of the transmitter site or denial of FAA clearance.

7. As noted, the Bureau's practice, in situations involving untimely minor engineering amendments to applications to modify the facilities of existing FM licenses or permits, is to

waive the "good cause" requirement in Section 73.3522(a)(6), give the application a new file number corresponding to the date of the amendment, and bill the applicant for the appropriate filing fee. If the amended application does not conflict with any prior-filed application, the Bureau will then grant the new "composite" application, conditioned on the receipt of the appropriate filing fee by the Mellon Bank.

8. We conclude that the Bureau's limited waiver of Section 73.3522(a)(6) under such circumstances is a sound practice and violates neither the Communications Act of 1934, as amended, (the "Act") nor any Commission rule or policy. First, since the staff ensures that the amended application does not conflict with any prior-filed application before granting it, no other applicant is adversely affected. Moreover, when the narrow set of circumstances described above exists, the Bureau's processing staff consistently applies the same procedure. *See* Letter from Chief, FM Branch, Audio Services Division, Mass Media Bureau, to Henry E. Crawford, Reference 8920-DLW, August 9, 1991. There are no allegations, nor is there any evidence, that similarly situated applicants are not accorded similar treatment.

9. Finally, the "waive, renumber, and bill" process used by the Bureau permits the consideration of the information contained in an untimely amendment for the dual purposes of administrative convenience and expeditious institution of new or improved broadcast service. Without the process, whenever an applicant wishes to amend a pending modification application after the amendment as of right period for a legitimate but private interest reason, such as finding a better site or obtaining a higher position on a tower, the Commission is left only with options that would waste its own resources or those of the applicant. It could, for example, return the amendment as unacceptable, being both untimely and without good cause, and grant the original application. This action would be inappropriate and inefficient, since the applicant no longer really desires to effectuate the original proposal. Alternatively, the applicant could be forced to withdraw the original application and resubmit the amended application as a new application along with the appropriate filing fee. However, under this alternative the Commission would ultimately have to reprocess even those parts of the modification application not altered by the amendment. Moreover, the applicant would suffer the delays inherent in filing the "new" application and accompanying fee through the Mellon Bank. The "waive, renumber, and bill" process avoids this unnecessary burden for both the Commission and the applicant, and avoids any delay by billing the applicant at the time of grant rather than awaiting the tender to and processing of the fee by the Mellon Bank. However, it recognizes that the applicant did not file a timely amendment and grants the application contingent upon payment of the bill charging the applicant the same fee it would pay if filing a new minor change application. See 47 C.F.R. 1.1112(b) (indicating that, where the Comission has issued a bill payable at a future date, the grant of authority shall be conditioned upon final payment of the fee). Thus, contrary to Cloud Nine's contention that the practice undermines the Commission's intent to streamline the FM application process, it furthers that intent and results in the speedier initiation of improved broadcast service to the public, thereby promoting the public interest, while not unduly favoring any group of applicants or prejudicing the legitimate rights of any party. *Cf. Clarke Broadcasting Corporation*, 11 FCC Rcd 3057 (1996), at n. 5 (staff practice of waiving a rule *sua*

sponte to further the public interest found acceptable by the Commission where there is no adverse impact on other parties).

10. With respect to Cloud Nine's argument that the "waive, renumber, and bill" practice employed in this case deprived the public of an opportunity to comment on the application as amended, we note that the Bureau did in fact place Radio 2000's minor engineering amendment on a Public Notice on December 1, 1994 announcing its receipt prior to the May 30, 1995 grant of the amended application, as it would for any minor engineering amendment, whether or not timely filed. Moreover, while the Bureau typically places minor engineering amendments to pending minor modification applications on a Public Notice announcing their receipt for informational purposes, there is no regulatory or statutory requirement that it do so. This is true whether the amendment was filed filed during the 30-day amendment "as of right" period or if it was filed late with a "good cause" showing. In fact, while the Mass Media Bureau also typically places newly-filed minor modification applications on public notice for informational purposes, Section 309(c)(2)(A) of the Act, 47 U.S.C. §309(c)(2)(A), specifically excepts minor modification applications from the public notice requirement, and Section 309(d)(1) of the Act, 47 C.F.R. § 309(d)(1), provides no right for interested parties to file comments or petitions to deny with respect to minor modification applications. Thus, under the "waive, renumber, and bill" process at issue here, no rights of public notice or public comment are abrogated.[7]

11. *Site Availability.* We also affirm the Bureau's rejection of Cloud Nine's site availability allegation.[8] Cloud Nine argues that the Bureau erred in crediting an April 21, 1995, affidavit of J.R. Smith ("Smith"), Legal Affairs Administrator of site owner, MCII General Partnership d/b/a Western Wireless ("MCII"), which was submitted with Radio 2000's Opposition to Cloud Nine's informal objection. Cloud Nine states that its subsequent reply revealed, in a sworn declaration from its counsel, that: (1) Smith's company had merged with another in August of 1994, after he had allegedly given assurance of site availability; and (2) the new company's

[7] Cloud Nine in fact filed an informal objection to the amended application prior to the grant of that application, and its informal objection was fully considered and denied on the merits in the initial *Letter Decision*. Moreover, as noted above at footnote 2, *supra*, Radio 2000's modification application was filed to implement the upgrade approved in the *Columbia Falls, Montana*, rule making proceeding, *supra*, 8 FCC Rcd 1548, and Cloud Nine's predecessor fully participated in that proceeding as well.

[8] An applicant seeking a new broadcast station must possess "reasonable assurance" of the availability of its proposed transmitter site at the time it files its application. Although an applicant need not have a binding agreement or absolute assurance of the availability of its proposed site, it must have some reasonable assurance that the site is in fact available. A mere possibility of the site's availability is insufficient. *See William F. Wallace and Anne K. Wallace*, 49 FCC 2d 1424, 1427 (Rev. Bd. 1989). While the Commission's reasonable assurance standard does not require an applicant to obtain a binding commitment, there must be sufficient assurance to constitute a "meeting of the minds" that justifies the applicant's belief that the site would be available. *See Elijah Broadcasting Corporation*, 5 FCC Rcd 5350 (1990); *Alden Communications Corp.*, 3 FCC Rcd 3937 (1988); *Genessee Communications, Inc.*, 3 FCC Rcd 3595 (1988); *National Innovative Programming Network, Inc.*, 2 FCC Rcd 5641 (1987) (applicant need not own the proposed site and may work out the final details for the site lease at some point in the future).

policy is not to lease tower space to any entity not classified as an emergency service provider.[9] Cloud Nine also attaches a copy of a letter from Smith dated March 23, 1995, indicating that, due to this policy, it could not make space on its tower available to Cloud Nine's station, KDBR.

12. We reject Cloud Nine's attempts to question the validity of Smith's April 21, 1995, affidavit. That document clearly indicates that, while the terms had not been finalized, Radio 2000 "at all times" had permission to use the site specified in the July 13, 1994 amendment. Further, Smith's statement is independently supported by the draft tower lease proposal for the specified site which he mailed to Radio 2000 on June 9, 1994 (*i.e.*, prior to the filing of its site-change amendment), as well as a subsequent lease for that site executed on October 9, 1995. *See* Opposition to Application for Review, at Attachments 2, 3. These documents evidence not only that Radio 2000 initially had permission to specify the site at issue but also that such permission was never rescinded. We find, therefore, that Radio 2000 complied at the time of the July 13 amendment's filing and continues to comply with the Commission's site availability certification requirements.

13. Accordingly, the Application for Review filed November 22, 1995, by Cloud Nine Broadcasting, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[9] Cloud Nine's counsel's declaration also indicated that "no decision has been made whether to lease to Copsidas [Radio 2000; see note 1, supra], even though [Smith] had talked about granting a lease under a 'grandfather' exception [to the policy.]" May 1, 1995, Reply to Opposition, Exhibit B. Smith's April 21, 1995, declaration, while referencing the conversation with Cloud Nine's counsel, specifically indicates that "at no time did I inform [Cloud Nine's Counsel] whether I did or did not grant permission to Frank Copsidas to sublet space on the tower for his station. To my best recollection, [counsel] never even mentioned Mr. Copsidas' name during the course of our conversation."