



Federal Communications Commission
Washington, D.C. 20554

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In Reply Refer to: 1800B3-AD

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

Petition for Reconsideration

Dear Counsel:

The Audio Division (Division) has before it a Request for Clarification and Petition for Reconsideration (Petition) filed August 6, 2015, by Premier Broadcasters, Inc. (Premier), licensee of Station KITI(AM), Centralia-Chehalis, Washington. Premier seeks clarification and reconsideration of the staff's grant¹ of Threshold Communications' (Threshold) amended application for new station KVNW(FM), Napavine, Washington.² Threshold opposes the Petition.³ For the reasons discussed below, we deny in part and otherwise dismiss the Petition.

¹ *Donald E Martin, Esq. and Meredith S. Senter, Esq.*, Letter Order, 30 FCC Rod 7152 (MB July 7, 2015) (2015 Letter Decision).

² File No. BNPH-20110630AHJ (Amended Application).

³ Threshold Opposition and Supplement (filed August 19, 2015) (Opposition). In addition to the parties' initial pleadings, the following pleadings were filed in this proceeding: (1) Premier Reply to Opposition (filed Aug. 31, 2015) (Reply); (2) Threshold Motion to Strike Data (filed Sept. 15, 2015); (3) Threshold Motion to Dismiss Brandt Letter (filed Sept. 21, 2015); (4) Premier Opposition to Motion to Strike Data (filed Sept. 30, 2015); (5) Premier Opposition to Motion to Dismiss Brandt Letter (filed Oct. 2, 2015); (6) Threshold Reply to Opposition to Motion to Strike (filed Oct. 13, 2015); and (7) Threshold Reply to Opposition to Motion to Dismiss (filed Oct. 15, 2015).

Background. Threshold was the winning bidder in Auction 91 for a new FM allotment at Clatskanie, Oregon.⁴ On June 30, 2011, Threshold filed a long-form application to implement its winning bid on Channel 225C3 at Fords Prairie, Washington, pursuant to Section 73.3573(a)(1)(i) and (g) of the Commission's rules.⁵ On May 23, 2012, Threshold submitted the Amended Application seeking to change the proposed community of license from Clatskanie to Napavine, Washington. On August 27, 2012, Premier filed an Informal Objection to the Amended Application, arguing that Clatskanie has a greater need for a new radio station than Napavine. On March 11, 2013, we denied the Objection, granted the Amended Application,⁶ and found that the Amended Application would result in a preferential arrangement of allotments under Priority (3) of the FM allotment priorities.⁷ On April 15, 2013, Premier filed a Petition for Reconsideration of the *2013 Letter Decision*, arguing that Threshold had improperly certified in the Amended Application that it had complied with the post-filing local public notice requirements set forth in Section 73.3580(c) of the rules.⁸

On reconsideration, the Division rescinded the grant of the Amended Application and returned it to pending status because Threshold had not complied with Section 73.3580(c) in several respects.⁹ The Division also revisited its Section 307(b) analysis in the *2013 Letter Decision*, in which it reallocated the frequency from Clatskanie to Napavine when comparing both communities under Priority (3). The Division explained that Channel 225C3, using the allotment coordinates at Clatskanie, "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)."¹⁰ The Division, however, withheld final resolution of the Section 307(b) issues until additional comments could be filed.

In its Comments, Premier contended that our "tentative view" of the Section 307(b) aspect of the Amended Application was incorrect because we compared the hypothetical reference coordinates for Clatskanie to an existing tower site at Napavine.¹¹ Premier claimed that *Rural Radio* required the comparison of existing tower sites.¹² Premier submitted an engineering study of existing towers and

⁴ *Auction of FM Broadcast Construction Permits Closes; Winning Bidders Announced for Auction 91*, Public Notice, 26 FCC Rcd 7541, 7555 (MB/WTB 2011).

⁵ 47 CFR § 73.3573(a)(1)(i), (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 reallocation would result in a preferential arrangement of allotments or assignments).

⁶ *Donald E. Martin, Esq., and Meredith S. Senter, Esq.*, Letter Order, Ref. 1800B3-DD (MB Mar. 11, 2013) (*2013 Letter Decision*).

⁷ 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 F.C.C.2d 88 (1982).

⁸ 47 CFR § 73.3580(c).

⁹ *Donald E. Martin, Esq. and Meredith S. Senter, Esq.*, Letter Order, 29 FCC Rcd 15300, 15304 (MB Dec. 18, 2014) (*Dec. 2014 Rescission Letter*).

¹⁰ *Id.*

¹¹ Premier Response to Bureau's Section 307(b) Analysis, Engineering Statement (filed March 4, 2015) (Premier Comments).

¹² Premier Comments at 3 (citing *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, 2575, paras. 35, 38 & n.97 (2011) (*Rural Radio*) ("The determination of whether a proposed facility 'could be modified' to cover 50 percent or more of an urbanized area will be made based on an applicant's certification that there are no existing towers in the area to which, at the time of filing, the

contended that neither a station at Clatskanie nor a station at Napavine operating from any existing tower would provide 70 dBu coverage to any portion of the Longview urbanized area. Premier asserted that, regardless of whether existing towers or hypothetical sites were compared, Threshold had not met its burden of demonstrating that grant of the Amended Application would result in a preferential arrangement of allotments.

On July 7, 2015, after reviewing the additional comments generated by the post-filing local public notice, the Division granted the Amended Application.¹³ The Division reaffirmed its revised analysis under Section 307(b) that, using the allotment coordinates for Channel 225C3 at Clatskanie, a station would provide a 70 dBu signal to 100 percent of Clatskanie and would cover more than 50 percent of the Longview, Washington, urbanized area. Therefore, the Clatskanie allotment would be treated as an additional service to the Longview urbanized area under Priority (4), while the allotment of Channel 225C3 at Napavine would be a first local transmission service at Napavine under Priority (3), making the Napavine allotment a preferential arrangement of allotments.¹⁴ Furthermore, the *2015 Letter Decision* held that an auction winner requesting a community of license change in its post-auction long-form application need only consider the maximum class facilities at its specified reference coordinates at the “move-out” community; it need not consider any other transmission facilities in that community. The Division explained that use of only the allotment coordinates at the “move-out” community is appropriate because these coordinates establish core rights for auction participants, such as facilitating class upgrades at the long-form filing stage and determining if a proposed community of license modification satisfies the mutual exclusivity requirements of Section 73.3573(g) of the rules.¹⁵ Moreover, the Division stated that if the “could be modified”¹⁶ standard were applied to allotted reference coordinates at the “move-out” community, it would invite manipulation by making it easier for an applicant to establish that the community of license modification would result in a preferential arrangement of allotments, i.e., that Priority (4) applies to the “move-out” community.¹⁷ Finally, the *2015 Letter Decision* held that Threshold had now satisfied its post-filing local public notice requirements under Section 73.3580(c).¹⁸

On August 6, 2015, Premier filed the Petition.¹⁹ Premier asserts that the Division exceeded its delegated authority and erred in holding that an auction winner requesting a community of license change need only consider the maximum class facilities of the specified reference coordinates at the “move-out”

applicant’s antenna could be relocated pursuant to a minor modification application to serve 50 percent or more of an Urbanized Area.”)).

¹³ *2015 Letter Decision*, 30 FCC Rcd at 7156.

¹⁴ *Id.* We thus reject Premier’s claim (Petition at 9) that the Division has yet to “renounce” the *2013 Letter Decision*, which awarded the allotment to Napavine when comparing both communities under Priority (3).

¹⁵ *Id.* at 7154-55.

¹⁶ *See supra* note 12.

¹⁷ *2015 Letter Decision*, 30 FCC Rcd at 7154-55.

¹⁸ *Id.*

¹⁹ Threshold filed a Motion to Dismiss a letter dated August 31, 2015, from Carol Jane Brandt (Brandt Letter), claiming that the Brandt Letter was untimely filed when considered as a Petition for Reconsideration and that Carol Jane Brandt (Brandt) failed to establish good cause for the late filing. Threshold also challenges whether the Brandt Letter was actually filed with the Commission, as it does not appear in CDBS. Threshold Motion to Dismiss at 1-2. Premier and Brandt opposed the Motion and Threshold filed a Reply. Brandt has apparently failed to properly file her pleading as the Commission has no record that the pleading was filed either electronically or in paper format. Therefore, the Division will not consider the Brandt Letter.

allotment community.²⁰ Premier claims that even if the auction reference coordinates are used at the “move-out” community, Premier can rebut the staff analysis confirming an “urbanized area service presumption” (UASP) at Clatskanie, which rendered the allotment to be considered under Priority (4). In its Opposition, Threshold states that the Amended Application does not present a novel issue warranting review and that the Division correctly applied *Rural Radio* and the rules.²¹ In the Reply, Premier reiterates its Priority (3) claims.²²

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.²³ Premier has not met this burden. In addition, it is settled Commission policy that petitions for reconsideration are not to be used for the mere re-argument of points previously advanced and rejected.²⁴

Premier reiterates its arguments that were raised and fully addressed in the *2015 Letter Decision*. Therein, the Division correctly applied the FM Allotment Priorities in granting the Amended Application.²⁵ Using maximum class facilities at the allotment coordinates,²⁶ Channel 225C3 at Clatskanie covers 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). In contrast, the reallocation of Channel 225C3 would be a first local transmission service (Priority (3)) at Napavine, Washington, and is therefore preferred over retention of a sixth local transmission service (Priority (4)) at Longview, Washington. Moreover, contrary to Premier's analysis, the Division correctly determined service at the “move-out” community of Clatskanie using maximum class facilities at the allotment coordinates. In the case of a winning auction bidder, Section 73.3573(g) of the rules specifically states that the auction winner's “current assignment” is to be used to determine whether it is eligible for a change in community of license without affording other interested parties an opportunity to file competing expressions of interest.²⁷ Therefore, an auction winner, in pursuing a community of license change under Section 73.3573(g), must use the “current assignment” of the “move-out” community to determine whether the proposed community is preferred to the “current assignment.” Thus, for the reasons stated

²⁰ Petition at 3-5.

²¹ Threshold asserts that Premier improperly relies on the Section 73.3580(c) public notice comment letters (Clatskanie Letters) to address *Tuck* factors in an effort to rebut the UASP.

²² Threshold filed a Motion to Strike on September 15, 2015, alleging that Premier, contrary to Section 1.106(h) of the rules, which limits replies “to matters raised in the opposition,” includes *Tuck* data in its Reply in order to rebut the urbanized area service presumption. We dismiss the Motion to Strike without consideration as an unauthorized pleading. See 47 C.F.R. §§ 1.45(c), 1.115(d); see also *Robert J. Maccini, Receiver, Assignor*, 10 FCC Rcd 9376, 9376 (1995), citing *Llerandi v. FCC*, 863 F.2d 79 (D.C. Cir. 1988).

²³ 47 CFR § 1.106(c), (d); *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).

²⁴ See *Regents of the University of California*, Order, 17 FCC Rcd 12891, 12892 (WTB 2002) (citing *Mandeville Broadcasting Corp.*, Order, 3 FCC Rcd 1667 (1988)); *M&M Communications, Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 5100 (1987).

²⁵ *2015 Letter Decision*, 30 FCC Rcd at 7154-55.

²⁶ Under 47 CFR § 72.3573(g), an auction winner, in pursuing a community of license change through a minor modification, must use the “current assignment” of its “move-out community” to determine whether the proposed community is more preferential than the “current assignment.”

²⁷ 47 CFR § 73.3573(g)(2). In such cases, the proposed community of license change must result in a preferential arrangement of allotments under 47 U.S.C. § 307(b) and be mutually exclusive with the auction winner's current assignment. 47 CFR § 73.3573(g)(1), (2).

herein, in the 2015 *Letter Decision*, and in the rules, an auction winner seeking a community of license change in its post-auction long-form application must use the “current assignment,” i.e., the allotment coordinates and maximum class facilities, at the “move-out” community. Accordingly, we reject, as meritless, Premier’s contention that the staff lacked delegated authority to hold that an auction winner requesting a community of license change need only consider the maximum class facilities of the specified reference coordinates at the “move-out” allotment community.

Furthermore, we find that Premier has misapplied *Rural Radio* procedures in its attempt to “rebut” the staff engineering analysis, which found that the allotment at the move-out community of Clatskanie would presumptively provide an additional service to the Longview urbanized area.²⁸ The *Rural Radio* procedures that Premier employs were designed to prevent a community of license change applicant from proposing first local transmission service at a community in or near an urbanized area, only to use that application as a means to provide coverage to all or a substantial portion of the urbanized area, either through the community of license change application itself or through a subsequent minor technical modification.²⁹ These procedures, including the “would or could” test by which coverage from *existing area towers* is evaluated to determine whether a minor modification would enable such urbanized area coverage,³⁰ are thus designed solely to assess future service at the proposed “move-in” community, not to evaluate hypothetical service at or near a site from which the applicant seeks to relocate. Premier’s attempt to use these tools in a context for which they were not designed is misplaced at best and at worst is disingenuous. Finally, under the facts of this case, even assuming *arguendo* that Premier were allowed to evaluate service at the “move-out” community in the same manner as proposed service at the “move-in” community, at best it would demonstrate only first local service at the less-populous community of Clatskanie (population 1,737). Under long-standing Commission precedent, establishment of first local transmission service at Napavine (population 1,766) would still constitute a preferential arrangement of allotments.³¹

²⁸ Dec. 2014 *Rescission Letter*, 29 FCC Rcd at 15304.

²⁹ *Rural Radio*, 26 FCC Rcd at 2567, para. 20 (“[W]hen the community proposed is located in an urbanized area or could, through a minor modification application, cover more than 50 percent of an urbanized area, we will treat the application, for Section 307(b) purposes, as proposing service to the entire urbanized area....”).

³⁰ *Id.* at 2571, para. 28 (“First, the presumption will apply to all proposals in which the community of license is located within the urbanized area. Second, it applies to all proposals that could or would provide service to fifty percent of more of an urbanized area . . .”). This “would or could” test was intended “to ensure that applicants claiming preference under Priority (3) are not using the streamlined [change of community] procedures as a way of relocating from smaller communities to large urbanized areas, under the guise of providing first local transmission service to a smaller community in or adjacent to an Urbanized Area.” *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Notice of Proposed Rule Making, 24 FCC Rcd 5239, 5247, para. 17. See also *Rural Radio*, 26 FCC Rcd at 2563, para. 12.

³¹ See, e.g., *Blanchard, Louisiana and Stephens, Arkansas*, Report and Order, 10 FCC Rcd 9828, 9829, para. 11 (1995) (when comparing first local transmission service proposals for two well-served communities, the Commission bases its decision on a straight population comparison between the communities).

Conclusion. Accordingly, for the reasons set forth above, IT IS ORDERED, that the Petition for Reconsideration filed by Premier Broadcasters, Inc., IS DENIED IN PART and otherwise IS DISMISSED. Furthermore, as set forth above, the Motion to Strike and Motion to Dismiss filed by Threshold Communications ARE DISMISSED.

Sincerely,

Lisa Scanlon

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