

FEDERAL COMMUNICATIONS COMMISSION
445 TWELFTH STREET, SW
WASHINGTON, DC 20554

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MEDIA BUREAU
AUDIO DIVISION
APPLICATION STATUS: (202) 418-2730
HOME PAGE: www.fcc.gov/media/radio/audio-division

ENGINEER: Rodolfo Bonacci
TELEPHONE: (202) 418-2700
FACSIMILE: (202) 418-1410
MAIL STOP: 1800B2
EMAIL: Rodolfo.Bonacci@fcc.gov

John F. Garziglia, Esq. [1TV]
Womble Bond Dickinson LLP
1200 19th Street NW Suite 500
Washington DC 20036

Victor A. Michael, Jr. [Kona Coast]
Kona Coast Radio LLC
87 Jasper Lake Road
Loveland CO 80537

In re: **KIKO-FM, Claypool, AZ**
Facility ID No. 11894
File Nos. BPH-20170620ABH
BLH-20170620ABG

NEW(FM), Star Valley, AZ
File No. BNPH-20170621ABC

Petition for Rulemaking
Informal Objections

Dear Counsel:

We have before us informal objections (Informal Objections) filed on June 26, 2017, by Kona Coast Radio, LLC (Kona Coast) to the above-referenced applications for: (1) a license to cover a construction permit (KIKO License Application) for station KIKO-FM, Claypool, Arizona (KIKO); and (2) a minor change (KIKO Upgrade Application) (collectively, Applications) to upgrade the existing facilities of KIKO, both filed by 1TV.Com, Inc. (1TV) on June 20, 2017.¹ We also have before us the above-referenced application for a new FM station at Star Valley, Arizona (Star Valley Application) and petition for rulemaking for a new FM allotment on Channel 242A, Star Valley, Arizona (Star Valley Petition for Rulemaking) (collectively, Star Valley Petition). For the reasons below, we deny the Informal Objections, grant the Applications, dismiss the Star Valley Application, and return the Star Valley Petition for Rulemaking.

Background. On August 25, 2016, 1TV and Petracom of Holbrook, LLC (Petracom), licensee of KRFM(FM), Show Low, Arizona, entered into a facilities modification agreement, under which Petracom agreed to file a modification application to change KRFM's frequency from Channel 243C0 to Channel 253C0 so that 1TV could file a modification application to move KIKO from Channel 247C2 to Channel 243C2.²

¹ On August 21, 2017, 1TV filed Oppositions to the Informal Objections (Oppositions). On September 11, 2017, Kona Coast filed Replies to the Oppositions (Replies). The License and Modification Applications pleadings are identical and thus treated together herein.

² File No. BPH-20160927ADT, Exh. 5 (Facilities Modification Agreement).

Accordingly, on September 27, 2016, the parties filed contingent modification applications (Channel Change Applications).³ The Channel Change Applications were uncontested and were granted on June 20, 2017.⁴ On the same day, June 20, 2017, 1TV filed the KIKO License Application and KIKO Upgrade Application (seeking to upgrade KIKO from Class C2 to Class C). The next day, June 21, 2017, Kona Coast filed the Star Valley Petition, which conflicts with the previously licensed KRFM facilities (on Channel 243) and the facilities proposed in the KIKO Upgrade Application.⁵ On June 26, 2017, Kona Coast filed the Informal Objections to the License and Upgrade Applications. On August 10, 2017, Petracom filed a license to cover the KRFM Construction Permit (KRFM License Application), which was granted on August 18, 2017.⁶ On August 21, 2017, 1TV filed the Oppositions, to which Kona Coast filed Replies on September 11, 2017. Also on August 21, 2017, 1TV submitted an informal comment suggesting Channel 295A as an alternative to Channel 242A (1TV Comment). On February 13, 2018, Kona Coast responded to the 1TV Comment (Comment Response), noting that Channel 295A is no longer available due to contingent modification applications filed by Entravision Holdings LLC on December 27, 2017 (Entravision Applications).⁷ However, Kona Coast asserts that the Entravision Applications can be treated as a counterproposal to the 1TV Comment.⁸

In the Informal Objections and Replies, Kona Coast argues that 1TV should not be allowed to file a modification application to upgrade KIKO until a license to cover the KIKO Construction Permit has been granted. It cites to two conditions to the grant of the KIKO Construction Permit that could potentially delay such grant, one regarding Mexican concurrence and one regarding the KRFM channel change.⁹ Kona Coast also suggests that, because the KIKO License Application was filed on the same day that the underlying KIKO Construction Permit was granted, the channel change may have been implemented prematurely.¹⁰ In the alternative, Kona Coast argues that the Star Valley Petition should be treated as mutually exclusive with the KIKO Upgrade Application. In support of this argument, Kona Coast states that, when dealing with a two-step non-adjacent channel upgrade, it is difficult for a potentially competing applicant to find out when the channel change application has been granted so that it can file a competing application to the following upgrade application on the same day.¹¹ In this respect, Kona Coast cites to the *Harrisonburg* and *Woods Hole* decisions, in which the Commission confirmed a staff policy of accepting competing applications the day after an unbuilt

³ File No. BPH-20160927ADU (KRFM Channel Change Application and, when granted, KRFM Construction Permit); File No. BPH-20160927ADT (KIKO Channel Change Application and, when granted, KIKO Construction Permit).

⁴ See *Broadcast Actions*, Public Notice, Report No. 49013 (June 23, 2017).

⁵ The term “conflicting” refers to applications that cannot both be granted without creating impermissible interference. Conflicting applications are “mutually exclusive” or “competing” if they meet applicable criteria entitling them to equal priority; mutually exclusive applications cannot be disposed of except by elimination of the mutual exclusivity through technical amendment, settlement between the applicants, auction or other means. See, e.g., *Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission’s Rules*, First Report and Order, 14 FCC Rcd 5272, 5272 n.2 (1999).

⁶ File No. BLH-20170810ABW; *Broadcast Actions*, Public Notice, Report No. 49055 (Aug. 23, 2017).

⁷ File Nos. BPH-20171227AAJ and BPH-20171227AAK (accepted for filing December 28, 2017. *Broadcast Applications*, Public Notice, Report No. 29143 (Dec. 28, 2017)).

⁸ Comment Response at 3.

⁹ Informal Objections at 4 (referring to Conditions #2 and #4 of the KIKO Construction Permit). Regarding the KRFM channel change, we note that, in the KIKO Upgrade Application, Exhibit 30, Technical Report at 1, 1TV incorrectly stated that Petracom had already filed a license to cover the KRFM Construction Permit. In fact, the KRFM License Application was not filed until August 10, 2017. Although we conclude that, in the totality of the circumstances, this incorrect statement is immaterial to our actions herein and does not require a formal sanction, we caution 1TV to be more attentive to the information it provides to the Commission in the future. See 47 CFR § 1.17 (prohibiting applicants from providing factual material that is incorrect without a reasonable basis for believing that the statement is correct and not misleading).

¹⁰ Informal Objections at 5.

¹¹ Replies at 6-7.

construction permit expires.¹² Kona Coast urges that, to “be fair and afford potential applicants due process,” the Commission should likewise allow the filing of competing applications on the next business day after the relevant channel becomes available.¹³

In its Oppositions, 1TV contends that the Star Valley Petition should be dismissed under the Commission’s first-come, first-served rule for conflicting modification applications because the KIKO Upgrade Application was filed one day before the Star Valley Petition.¹⁴ 1TV argues that the KIKO Upgrade Application was not only acceptable for filing but, once KRFM was licensed on its new channel, grantable as well.¹⁵ Regarding premature construction, 1TV certifies that it was capable of transmitting on Channel 243 using its previously licensed facilities. Therefore, when the KIKO License Application was filed, the necessary facilities were already constructed.¹⁶ Finally, 1TV claims that the Informal Objections should be dismissed as strike pleadings filed for the “purpose of blocking the [KIKO Upgrade Application].”¹⁷ In support of its strike pleading argument, 1TV points to a “sour business relationship” between the parties’ principals and Kona Coast’s common control with the former licensee of FM translator K243BN, Laveen, Arizona, a translator that would be displaced by grant of the KIKO Upgrade Application.¹⁸

Discussion. An informal objection may be filed at any time prior to action the subject application¹⁹ and must, pursuant to Section 309(e) of the Communications Act, provide properly supported allegations of fact which, if true, would establish a substantial and material question of fact regarding whether grant of the application in question would be consistent with the public interest, convenience and necessity.²⁰ As a threshold matter, we reject 1TV’s contention that the Informal Objections were “strike pleadings” interpolated to block or delay competition. The evidentiary standard for such a claim is high and the charging party must make a strong showing of an improper purpose.²¹ In this case we find that the mere fact of common ownership with the former licensee of K243BN, combined with allegations of personal animosity between the parties’ principals, fall far short of establishing such a motivation on the part of Kona Coast.²² Therefore we consider the Informal

¹² *Board of Trustees of Eastern Mennonite University*, Letter, 29 FCC Rcd 5925, 5928 (MB 2014) (*Harrisonburg*) (confirming the longstanding staff practice of affording a one-day filing window for competing applications after a construction permit expires); *Robert P. Sanborn III*, Letter, 30 FCC Rcd 38, 40 (MB 2015) (*Woods Hole*) (preserving this post-expiration filing opportunity even when a permittee voluntarily cancelled its own construction permit prior to expiration in order to re-file an application for a new construction permit).

¹³ Reply at 6-7.

¹⁴ Oppositions at 1-3; see 47 CFR 73.3573(f)(1) (“Processing of [minor modification] applications will be on a ‘first come/first serve’ basis with the first acceptable application cutting off the filing rights of subsequent applicants.”).

¹⁵ Oppositions at 5.

¹⁶ Oppositions at 7-8.

¹⁷ Oppositions at 9-10.

¹⁸ Oppositions at 9. Victor Michael, Jr. (Michael) is the sole member of the former licensee of K243BN, Mountain Community Translators, LLC, and the sole member of Kona Coast. On June 30, 2017, the assignment of K243BN to Educational Media Foundation was consummated. See File No. BALFT-20170322AAD (granted June 12, 2017. *Broadcast Actions*, Public Notice, Report No. 49007 (June 15, 2017)).

¹⁹ 47 CFR § 73.3587.

²⁰ See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986).

²¹ See, e.g., *Hammock Environmental and Educational Community Services*, Letter, 25 FCC Rcd 12804, 12809 (MB 2010) (citing *Radio Carrollton*, Memorandum Opinion and Order, 69 FCC 2d 1139 (1978) (*Radio Carrollton*)).

²² See *Radio Carrollton*, 69 FCC 2d at 1151-1152 (holding that when determining the primary purpose behind such a pleading, the Commission considers several factors: (1) statements by the petitioner's principals or officers admitting the obstructive purpose; (2) the withholding of information relevant to disposition of the requested issues; (3) the absence of

Objections on the merits. However, as discussed below, we conclude Kona Coast has not established a substantial and material question of fact that grant of the Applications would not be in the public interest.

Regarding the acceptability of the KIKO Upgrade Application, with certain exceptions—such as where it is impossible to grant both applications in question—there is nothing in the Rules to prevent an applicant from filing an application for a license to cover an existing permit and then, prior to grant, seeking permission to modify those existing, if not yet operating, facilities in the future.²³ Such concurrently pending applications are routinely processed.²⁴ Likewise, neither of the conditions placed on the KIKO Construction Permit, by their terms, prohibits the filing of a license to cover. Condition #2 states that construction of the facilities proposed in the permit is carried out at the applicant's own risk should the Mexican authorities object. Condition #4 states in relevant part that "... a license will not be granted for KIKO on Channel 243C2 until KRFM is licensed on Channel 253C0." Neither condition relates to the acceptability for filing of the KIKO Upgrade Application. Finally, we rely on 1TV's certification that KIKO facilities were capable of operating on their new channel on June 20, 2017, and find unsupported Kona Coast's allegation that the KIKO channel change was implemented prematurely. Therefore, we reject Kona Coast's argument that the KIKO Upgrade Application should be dismissed and go on to consider Kona Coast's alternative argument that that the Star Valley Petition should be treated as mutually exclusive with the KIKO Upgrade Application, as follows.

The applicable procedures for non-adjacent channel upgrades were set out by the Commission in the 2007 *Examples PN*, in which it clarified that a non-adjacent channel upgrade—defined as a major change in Section 73.3573(a) of the Rules—could be accomplished either by: (1) filing a petition for a non-adjacent channel upgrade (similar to a petition for rulemaking and requiring notice and comment); or (2) first filing a channel substitution modification application and then, upon filing the license to cover the channel substitution construction permit, "immediately filing" an upgrade modification application.²⁵ In this case, 1TV elected to use the second procedure—i.e., two consecutive minor modification applications.

Under the first come/first served processing system for minor change applications for commercial FM broadcast stations, the filing of an acceptable application "cuts off" the filing rights of subsequent, conflicting applicants.²⁶ Mutual exclusivity between minor change applications arises only where conflicting minor change applications are filed on the same day.²⁷ Applying this processing rule to the two-step non-adjacent channel upgrade procedure set out in the *Examples PN*, it is clear that although 1TV's KIKO Upgrade Application was not protected from being considered mutually exclusive with conflicting applications filed on the same day, it was nonetheless properly filed "immediately" after filing the License Application.

Under Section 73.208(a)(3) of the Rules, a rulemaking proposal must comply with the minimum distance separation requirements on the date it is filed or will not be considered.²⁸ In this case, the Star Valley Petition was required to protect the pending KIKO Upgrade Application.²⁹ However, according to our staff

any reasonable basis for the adverse allegations in the petition; (4) economic motivation indicating a delaying purpose; and (5) other conduct by the petitioner).

²³ 47 CFR § 73.3533(a)(1). *Mark N. Lipp, Esq.*, Letter, 31 FCC Rcd 8916, 8919 (MB 2016).

²⁴ *Mark N. Lipp, Esq.*, Letter, 31 FCC Rcd 8916, 8919 (MB 2016).

²⁵ *Media Bureau Offers Examples to Clarify the Treatment of Applications and Rulemaking Petitions Proposing Community of License Changes, Channel Substitutions, and New FM Allotments*, Public Notice, 22 FCC Rcd 6852, 6853 (2007) (citing *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212, 14221-22, para. 15 (2006) (*Examples PN*)).

²⁶ 47 CFR § 73.3573(f)(1).

²⁷ *Id.*

²⁸ 47 CFR § 73.208(a)(3).

²⁹ See, e.g., *Cut and Shoot, Texas*, Memorandum Opinion and Order, 11 FCC Rcd 16383 (MB 1996) ("Processing petitions

engineering analysis, the proposed allotment of Channel 242A at Star Valley is short-spaced to the facility proposed in the KIKO Upgrade Application. Therefore, the Star Valley Petition will be returned. Because the Star Valley Petition was not acceptable at the time of filing, the Bureau did not issue a notice of proposed rulemaking, enter reference coordinates into our public database, or accept counterproposals.³⁰ Thus neither the 1TV Comment or Entravision Applications can be considered as counterproposals to the Star Valley Petition or to each other.

Regarding Kona Coast's *Ashbacker*-related arguments, it is well established that *Ashbacker* is no impediment to the Commission's establishment of procedural rules that limit the ability of parties to file mutually exclusive applications, such as the first-come, first-served procedure in effect here.³¹ Rather, in *Ashbacker*, the Supreme Court held that where two applications are mutually exclusive, the grant of one without considering the other violates the statutory right of the second applicant to comparative consideration.³² Applicants subject to such procedures must be treated equally and fairly, including being provided with due notice of the operation of the procedure.³³ In this case, the procedure set out in the *Examples PN* and cut-off rules satisfies this requirement: it was clearly set out by the Commission and applies equally to all applicants. Therefore, our application of the cut-off processing rules to the Applications and Star Valley Petition does not violate the doctrine set out in *Ashbacker* and subsequent cases.

Finally, we note that the factors that led us to preserve a one-day filing window for competing applications in the *Harrisonburg* and *Woods Hole* decisions are not present here. Those decisions were based on the policy concern that allowing the permittee of an unbuilt construction permit to immediately re-file an identical modification application without a meaningful opportunity for competing applications would encourage spectrum warehousing. Here, in contrast, the governing rule states that "immediate" filing of an upgrade application is permissible without mentioning any exceptions or policy concerns that might militate against such a procedure. Again, the *Ashbacker* doctrine is not implicated where due notice is provided of the operation of the relevant cut-off procedure. In *Harrisonburg* and *Woods Hole*, we clarified and codified an existing staff practice of allowing a one-day window for the filing of competing applications, whereas in this

for rule making which would rely on other events by third parties to effect the compliance of the proposal with the separation requirements is not conducive to the efficient transaction of Commission business and imposes unnecessary burdens on the administrative resources of both the Allocations Branch and the Audio Services Division.").

³⁰ See 47 CFR § 73.3564(d); *Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, Notice of Proposed Rulemaking, 6 FCC Rcd 7346, 7346, paras. 2-3 (1991); *FM Applications (Cut-Off Rule)*, Report and Order, 7 FCC Rcd 4917, 4920, para. 12 (1992). Although 1TV submitted an unauthorized pleading suggesting an alternative channel for the Star Valley Petition, Kona Coast chose not to amend the Star Valley Petition to specify Channel 295 before the Apache Junction Modification Application cut off subsequent conflicting applications for Channel 295.

³¹ See *Ashbacker*, 326 U.S. at 333 n.9; *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, 21 FCC Rcd 14212, 14217 (2006) (finding that in the community of license change context "the use of first come-first served procedures is consistent with the *Ashbacker* doctrine").

³² *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 332-33 (1945) (*Ashbacker*); see also *Bachow v. FCC*, 237 F.3d 683, 689-90 (D.C. Cir. 2001).

³³ See, e.g., *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1555 (D.C. Cir. 1987) ("The *Ashbacker* decision . . . held that the Commission must use the same set of procedures to process the applications of all similarly situated persons who come before it seeking the same license"); *Processing of FM and TV Broadcast Applications*, Report and Order, 50 FR 19936-01, 19939 (1985) ("[T]he use of cut-off procedures has been acknowledged by the Court as a reasonable and necessary limitation on the statutory right to a comparative hearing. However, any regulations limiting the right to a hearing must give fair notice to the public of what is being cut-off. Therefore, although the Commission can be flexible in establishing "housekeeping" rules, applicants must be treated equally and fairly by giving them notice of the due dates for their applications.") (internal citations omitted).

case, the applicable rule clearly established a "two-step" minor modification procedure for non-adjacent channel upgrades.

Conclusion/Actions. For the reasons set forth above, IT IS ORDERED that the informal objections filed on June 26, 2017, by Kona Coast Radio, LLC ARE DENIED and the license and modification applications filed by 1TV.Com, Inc. on June 20, 2017 (File Nos. BLH-20170620ABG and BPH-20170620ABH) ARE GRANTED, pursuant to Section 0.283 of the Commission's Rules.³⁴

IT IS FURTHER ORDERED that the petition for rulemaking filed by Kona Coast Radio, LLC, on June 21, 2017, IS RETURNED and the application for a new station filed by Kona Coast Radio, LLC, on June 21, 2017 (File No. BNPH-20170621ABC) IS DISMISSED.

Sincerely,

A handwritten signature in blue ink, appearing to read "Rodolfo F. Bonacci".

Rodolfo F. Bonacci
Assistant Chief
Audio Division
Media Bureau

³⁴ 47 CFR § 0.283.