



Federal Communications Commission
Washington, D.C. 20554

August 5, 2019

In Reply Refer to:
1800B3-IB/DS

Dennis J. Kelly, Esq.
Counsel to DuPage Radio, LLC
P.O. Box 41177
Washington, DC 20018

Mark Heller, President
Metro North Communications, Inc.
P.O. Box 100
Denmark, WI 54208-0100

In re: WCKG(AM), Elmhurst, IL
Facility ID No. 32227
File Nos. BP-20190604AAV
Minor Modification
Petition to Deny

Dear Messrs. Kelly and Heller:

This letter concerns the above-referenced application filed on June 4, 2019 (2019 Application) by DuPage Radio, LLC. (DuPage) for a minor modification to the facilities of WCKG(AM), Elmhurst, Illinois (Station). Metro North Communications, Inc. (Metro), licensee of co-channel station WLAK(AM), New Holstein, Wisconsin, objected to the Application (Objection). For the reasons below we grant the 2019 Application and deny Metro's Objection.

Background. DuPage filed an application in November 2015 to modify the Station's licensed facilities.¹ Metro opposed the 2015 Application but subsequently withdrew its objection. The Media Bureau (Bureau) issued a construction permit to DuPage on June 3, 2016 (2016 Permit) for a three-year term expiring June 3, 2019. The 2016 Permit expired because DuPage did not construct and file a covering license application by the deadline. On June 4, 2019, the day following the 2016 Permit's expiration, DuPage filed the 2019 Application seeking facilities identical to those previously authorized. Metro objected in a June 24, 2019 filing styled as a Petition to Deny.²

Metro argues that the Bureau should deny the 2019 Application because: (1) the Commission's rules (Rules) generally do not provide for extension of broadcast construction permits; (2) DuPage has not shown that it was precluded from building pursuant to the 2016 Permit; (3) further opportunity for DuPage to construct would preclude improvement of radio stations by other licensees, including Metro; and (4) the 2019 Application is based on outdated engineering data submitted with the 2015 Application and ignores subsequent development of the area around the transmitter site. We will consider Metro's

¹ File No. BP-20151110AMR (rec. Nov. 10, 2015) (2015 Application).

² DuPage filed an Opposition on July 5, 2019 and Metro filed a Reply on July 22, 2019.

filing as an informal objection because petitions to deny do not lie against applications for minor modifications.³

Permit Replacement. Construction permits expire automatically if the permittee does not complete construction or justify tolling of the construction period.⁴ The 2016 Permit expired automatically on June 3, 2019. DuPage's 2019 Application is not, as characterized by Metro, a request to extend the 2016 Permit but, rather, one for a new authorization to replace it. Metro's argument that DuPage has not justified its failure to construct by the existing deadline would be relevant to a tolling request but is inapplicable to the 2019 Application for a new, *i.e.*, replacement permit. Metro is also incorrect in its belief that a former permittee may not reapply for the same facilities after permit expiration. No rule prohibits replacement applications and the Bureau routinely accepts them.⁵ An applicant seeking to replace an expired permit pays a new filing fee, must comply with any timing requirements, and is subject to potential competition from any conflicting, timely-filed modification applications.

Metro contends that the 2019 Application unfairly precludes applications to improve other radio stations. We disagree. Following expiration of the 2016 Permit, any licensee of an existing station, including Metro and DuPage, could have applied for a minor facilities change without protecting the expired permit. The Rules provide for consideration of such applications on a first-come, first-served basis.⁶ DuPage availed itself of this opportunity by submitting the 2019 Application. Metro did not file any application. Had Metro filed a minor modification application on the same date as DuPage, the Bureau would have determined whether the two were mutually exclusive and, if so, have required them to use engineering solutions and good faith negotiation to resolve the mutual exclusivity.

Engineering Data. In its Reply, Metro asserts that DuPage's 2019 Application, "is a fraudulent or 'sham' application,"⁷ because the 2019 Application submits the same ground conductivity data as accepted by the Bureau in granting the 2016 Permit. Metro contends that submitting that data, "ignores the fact, that in the past three years, there has been significant industrial, commercial and even some residential building within a two-mile radius of the WCKG(AM) tower site."⁸

Metro, however, fails to submit any data to substantiate that the claimed development has in fact rendered the data defective. An anecdotal account of measurements made by Metro President Mark Heller in 2016 gives no data to support the conclusion that WCKG "was intentionally under powered, or

³ See *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, 14220, para. 12 (2006); See also 47 CFR §§ 73.3580(a)(1), 73.3584(a), 73.3587.

⁴ 47 CFR § 73.3598(e). The Commission will toll the broadcast construction period for specific circumstances delineated in the Rules and will waive the construction deadline upon a showing of "rare and exceptional circumstances" of a similar magnitude. See 47 CFR § 73.3598(b); *Streamlining of Mass Media Applications*, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17541 (1999) (*Streamlining*). As Metro correctly states, filing of a modification application does not extend a construction permit. Objection at 2, citing 47 CFR § 73.3533(b).

⁵ See, e.g., *Robert P. Sanborn, III*, Letter Order, 30 FCC Rcd 38, 40 (MB 2015); *Board of Trustees of Eastern Mennonite University*, Letter Order, 29 FCC Rcd 5925, 5928 (MB 2014).

⁶ See 47 CFR § 73.3571(f).

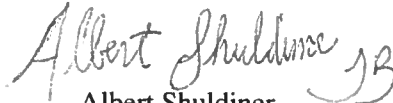
⁷ Metro Reply at 3.

⁸ *Id.*

its ground conductivity or ground system had significantly changed.”⁹ Metro states that, “metal roofed buildings that would clearly change the measurements that were submitted by DuPage Radio as ‘true, complete ...and made in good faith’, but using ancient, out-of-date, out-of-touch 2014 measurements... (need) to be corrected, or thrown out as wrong.”¹⁰ Anecdotal views, unsupported by a factual analysis, are insufficient to show that DuPage’s data lost its validity.

Conclusion. Accordingly, IT IS ORDERED That the application of DuPage Radio, LLC for a permit to modify the facilities of WCKG(AM) (File No. BP-20190604AAV) IS GRANTED and that the Petition to Deny of Metro North Communications, Inc., when considered as an Informal Objection, IS DENIED.

Sincerely,

A handwritten signature in cursive script that reads "Albert Shuldiner" followed by a stylized monogram "JB".

Albert Shuldiner
Chief, Audio Division
Media Bureau

⁹ *Id.* at 2.

¹⁰ *Id.* at 4.