

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

In the Matter of Application of)
)
BARTLESVILLE PUBLIC SCHOOLS) File No. BPLIF-19951020B8
)
For Authority to Construct and Operate)
an Instructional Television Fixed Service Station)
On Channels D1-4 at Bartlesville, Oklahoma)

MEMORANDUM OPINION AND ORDER

Adopted: August 28, 2003

Released: September 2, 2003

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

1. Introduction. In this Memorandum Opinion and Order, we address a petition for reconsideration filed on August 8, 1997 by Bartlesville Public Schools (Bartlesville).1 Bartlesville seeks reconsideration of the dismissal of its October 20, 1995 application, seeking authority to construct a new Instructional Television Fixed Service (ITFS) station at Bartlesville, Oklahoma. For the reasons stated below, we deny the Petition.

2. Background. On October 20, 1995, Bartlesville filed the above-captioned application to operate on the D Group channels in Bartlesville, Oklahoma.2 The application appeared on public notice as tendered for filing on November 9, 1995.3 On June 30, 1997, the Chief, Distribution Services Branch (Branch), Video Services Division of the former Mass Media Bureau dismissed the application because the proposed facility was predicted to cause harmful co-channel interference to the receive sites and/or protected service areas (PSA) of the licensed ITFS stations of Frontier Public Schools (Frontier), WNC280, at Glencoe, Oklahoma; Platt College (Platt), WLX397, at Tulsa, Oklahoma; Miami Public Schools (Miami), WNC544, at Miami, Oklahoma; and, Phillips University (Phillips), WNC568, at Enid, Oklahoma.4 In its decision the Branch stated, "[a]lthough Bartlesville has entered into an interference agreement with Frontier Public Schools and Platt College, our study shows that the interference caused by Bartlesville's proposed station is too severe to be accepted."5

3. On August 8, 1997, Bartlesville requested reconsideration of the dismissal. Bartlesville acknowledges that its application lacked consent agreements from Miami and Phillips at the time of its initial review.6 However, Bartlesville contends that "the Branch's dismissal of their application represents a distinct departure from that office's past practice of allowing applicants the opportunity to

1 Petition for Reconsideration (filed Aug. 8, 1997) (Petition).

2 File No. BPLIF-951020B8.

3 See ITFS Public Notice Report No. 23631-A (rel. Nov. 9, 1995).

4 See Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau to Bartlesville Public Schools (dated Jun. 30, 1997).

5 Id.

6 Id. at 2.

obtain and file needed interference consents.”⁷ Bartlesville attaches consent letters from Miami and Phillips to its Petition.⁸

4. *Discussion.* Bartlesville does not challenge the Branch's ruling that its proposed facility would cause interference to Stations WNC280, WLX397, WNC544 and WNC568. Section 1.106 of the Commission's Rules requires petitions to cite the findings of fact and/or conclusions of law which the petitioner believes are erroneous, and state with particularity the respects in which such findings and conclusions should be changed.⁹ Bartlesville provides no basis on which to conclude that the dismissal of its application was improper. Further, we note that Bartlesville did not respond to the Branch's finding that the interference resulting from the proposed station would be too severe, despite the consents from Frontier and Platt. Consequently, we find that Bartlesville has failed the threshold requirement to obtain reconsideration.

5. We nonetheless note that Bartlesville contends that we should reinstate and grant its application because the “circumstances in this case must be viewed in light of [Bartlesville's] position as merely an educational institution and its general lack of knowledge of and experience with the preparation and filing of an application for a new ITFS station.”¹⁰ Bartlesville also alleges that the dismissal of its application is inconsistent with a “staff policy” of contacting ITFS applicants and allowing those applicants to file interference consents after the filing of its application.¹¹ Bartlesville states that “in many cases,” the Commission has “judiciously refrained from strictly enforcing its rules and procedures on ITFS licensees and applicants.”¹²

6. We disagree that these contentions provide a sufficient basis for the requested relief. Section 1.106(c) of the Commission's Rules provides that we will accept a petition for reconsideration relying on facts not previously presented to the Commission only in one of three circumstances: (1) the petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters;¹³ (2) the petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity;¹⁴ or (3) the designated authority determines that consideration of the facts relied on is required in the public interest.¹⁵ In this case, we find that none of these circumstances is present. Significantly, we believe that Bartlesville could have attempted to obtain consents from Miami and Phillips prior to the filing of its application. Moreover, Bartlesville does not state it was unable to do so. We therefore conclude that Section 1.106(c)(1) of the Commission's Rules is therefore not applicable.

⁷ *Id.*

⁸ *Id.*, Exhibit A.

⁹ See Mike Gruss, *Order on Reconsideration*, 17 FCC Rcd 466 ¶ 3 (WTB PSPWD 2002); Federal Express Corporation, *Order*, 15 FCC Rcd 4289, 4293 n.40 (WTB PSPWD 2000). 47 C.F.R. § 1.106(d)(1).

¹⁰ Petition at 3.

¹¹ *Id.*

¹² *Id.* at 5.

¹³ 47 C.F.R. § 1.106(c)(1)(i).

¹⁴ 47 C.F.R. § 1.106(c)(1)(ii).

¹⁵ 47 C.F.R. § 1.106(c)(2).

7. We also conclude that, at this time, consideration of the consent letters Bartlesville obtained from Miami and Phillips are not in the public interest. The Commission's Rules require applicants to submit consent letters from the affected parties with the original application.¹⁶ Pursuant to Section 74.903 of the Commission's Rules,¹⁷ an application for an ITFS station must protect previously proposed facilities from interference and will not be granted if interference is predicted to occur. Given that applications must be filed only during designated filing windows,¹⁸ it is vital that applicants submit all necessary consent letters with the original application. Considering consent letters that did not exist at the time the original application was filed encourages the filing of incomplete applications. As the Commission has stated before, "[w]e cannot allow a party to 'sit back and hope that a decision will be in its favor and, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.'"¹⁹ We consider the fact that such consent letter was proffered almost two years after the subject application was filed, that such application was for a new ITFS facility, and the Branch's un rebutted finding that the resulting interference was too severe to be accepted to be decisionally significant. We believe that such time frame is inconsistent with the applicable provisions of the Commission's Part 74 rules regarding the substance of ITFS applications. We therefore decline to consider the consent letters Bartlesville provided with its petition for reconsideration.

8. For the reasons discussed herein, we conclude that Bartlesville has failed to meet the standard for consideration of its consent letters from Miami and Phillips. We therefore deny Bartlesville's Petition.

9. ACCORDINGLY, IT IS ORDERED, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405 and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by Bartlesville Public Schools on August 8, 1997 IS DENIED.

10. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R. § 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau

¹⁶ See, e.g., Guadalupe Valley Electric Cooperative, *Order on Reconsideration*, 11 FCC Rcd 7434, 7442-43 (1996); In the Matter of 4,330 Applications for Authority to Construct and Operate Multipoint Distribution Service Stations at 62 Transmitter Sites, *Memorandum Opinion and Order on Reconsideration*, 10 FCC Rcd 1335, 1465-66 (1994); Family Entertainment Network, Inc., *Order on Reconsideration*, 9 FCC Rcd 566, 567-68 n.10 (1994).

¹⁷ 47 C.F.R. § 74.903.

¹⁸ See Amendment of Part 74 of the Commission's Rules with Regard to the Instructional Television Fixed Service, *Report and Order*, MM Docket No. 93-24, 10 FCC Rcd 2907 (1995).

¹⁹ See Canyon Area Residents, *Memorandum Opinion and Order*, 14 FCC Rcd 8153, 8154 ¶ 7 (1999) quoting *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941).