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In Reply Refer:
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In re: WCVO(FM), Gahanna, Ohio
Christian Voice of Central Ohio, Inc.
Facility ID No. 11138
File No. BPH-20050121AJY

Gentlemen:

This letter concerns the captioned application of Christian Voice of Central Ohio, Inc. (“Voice”) for minor modification of the facilities of station WCVO(FM), Gahanna, Ohio. Duke Realty Corporation (“Duke”) filed an Informal Objection to the application on April 13, 2005.¹ For the reasons set forth below, the Informal Objection is denied and the construction permit application is granted.

Discussion. Procedural issue. Duke sought three extensions of time to file its reply. Duke requested additional time to investigate and resolve a perceived conflict of interest involving the environmental consulting firm of Evans, Mechwart, Hambleton & Tilton, Inc. (“EMHT”). Duke states that it originally retained EMHT to provide consulting services in connection with its Informal Objection,² yet subsequently (and without Duke’s knowledge) supplied supporting materials leading to Voice’s receipt of a favorable ruling from Ohio Historic Preservation Office (“OHPO”). Duke indicates that it needed additional time to evaluate whether it could rely on EMHT to assist it with the reply

¹ Voice filed an Opposition to the Informal Objection on May 10, 2005, a Motion for Extension of Time to file additional materials on May 18, 2005, and a Supplement to the Opposition on May 19, 2005. Additionally, Duke filed a Motion for Extension of time to Reply on May 18, 2005, a Second Motion for Extension of Time on May 31, 2005, and a Third Motion for Extension of time on June 10, 2005. Voice opposed the Second Motion on June 1, and it opposed the Third Motion on June 16, 2005. Duke replied to Voice’s Opposition to the Second Motion on June 8, 2005, and it ultimately filed its “Reply to Opposition to Objection to Construction Permit” on June 22, 2005.

² Although we do not question this statement, we observe that there is no evidence of EMHT’s involvement anywhere in Duke’s Informal Objection.

pleading; Duke sought additional time “until the air is suitably cleared and the conflicts regarding EMHT’s representation of both Duke and Voice are reasonably resolved” to file a reply.³

There is no formal petition to deny cycle for informal objections.⁴ Accordingly, despite the fact that Duke has failed to demonstrate good cause for needing six weeks to file its reply, we will consider this pleading as part of our consideration of the Voice application.

Substantive Issues. In its Informal Objection, Duke argues that the proposed WCVO(FM) antenna site location was “proximate to historic properties” and could not be processed further in the absence of an Environmental Assessment (“EA”) pursuant to Section 1.1307 of the Commission’s rules.⁵ Duke also argues that Voice had an obligation under Section 1.65 of the Commission’s rules⁶ to submit an EA within 30 days of the Commission’s release of a *Report and Order* implementing the *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process* (“NPA”).⁷ Duke states that this alleged violation of Section 1.65 is itself the basis for forfeiture or denial of the application.⁸ In its Opposition, Voice states that, until it received Duke’s informal objection, it was not aware of the Commission’s action. Upon receiving the Objection, however, Voice retained an environmental consulting firm, made the appropriate filing under the NPA with the OHPO, and received a determination that the proposal would have no impact on any historic property.⁹

Section VII.B.1. of the NPA reads as follows:

If the [state/tribal historic preservation officer] concurs in writing with the Applicant’s determination of no Historic Properties affected, it is deemed that no Historic Properties exist within the [Area of Potential Effect] or the Undertaking will have no effect on Historic Properties located within the APE. The Section 106 process is then complete, and the Applicant may proceed with the project, unless further processing for reasons other than Section 106 is required.

Thus, if the state historic preservation office issues a “no effect” determination, an applicant need not file an EA unless other factors listed in Section 1.1307 warrant the preparation and submission of an EA. In

³ Duke Motion for Extension of Time (May 18, 2005), at 2.

⁴ 47 C.F.R. § 1.45, which governs filing periods for pleadings, covers formal Petitions to Deny and not Informal Objections. *See, e.g., Tabback Broadcasting Company*, 15 FCC Rcd 11899 (2000) (“the limitations on the number and timing of pleadings filed in response to petitions to deny are inapplicable to informal objections”).

⁵ 47 C.F.R. § 1.1307.

⁶ 47 C.F.R. § 1.65(a), which states that each applicant is responsible for the continuing accuracy and completeness of its proposal and states that when information in the application is no longer “substantially accurate and complete in all respects,” or if there are other material changes of “decisional significance,” that fact must be reported to the Commission within 30 days.

⁷ 20 FCC Rcd 1073 (2004), 70 Fed. Reg. 555 (Jan. 4, 2005). The NPA became effective on March 7, 2005. Duke indicates that, in order to comply with its Section 1.65 obligation, Voice needed to submit an EA by April 6, 2005, and it did not do so.

⁸ In support of this allegation, Duke cites *SBC Communications, Inc.*, 16 FCC Rcd 19091 (2001); *A.A. Radio Partnership*, 10 FCC Rcd 8774 (1995); and *Lorain Community Broadcasting Co.*, 18 F.C.C.2d 686 (1969).

⁹ *See Letter to Farris Wilhite from Nathan J. Young, Project Reviews Manager, Resource Protection and Review, Ohio Historic Preservation Office* (May 11, 2005), which was submitted with Voice’s May 19, 2005 Supplement to Opposition and was filed as an amendment to the subject application also on May 19, 2005.

this case, the OHPO issued a “no effect” determination on May 11, 2005, and Duke has advanced no other basis for requiring Voice to submit an EA for the WCVO(FM) proposal here.¹⁰ Accordingly, Voice had no obligation to submit an EA. Additionally, because we find that Voice had no obligation to submit an EA, we reject Duke’s contention that Voice violated Section 1.65 of the Commission’s rules by failing to submit one.¹¹

Accordingly, the April 13, 2005 Informal Objection of Duke Realty Corporation IS DENIED, and the application (File No. BPH-20050121AJY) of Christian Voice of Central Ohio, Inc. for modification of facilities for station WCVO(FM) IS GRANTED. The applicant is cautioned that in the future it must complete its review of the effects of any proposed construction on historic properties (pursuant to Section 106 of the National Historic Preservation Act)¹² prior to making an affirmative environmental certification in Section III-B, Item 17 of FCC Form 301.

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau

cc: Christian Voice of Central Ohio, Inc.

¹⁰ In its Reply, Duke attempts to challenge the sufficiency and consistency of Voice’s submission to OHPO. We defer to OHPO and its “no effect” determination with regard to these matters.

¹¹ To the extent that Duke implies in its June 22, 2005 Reply that Voice has somehow failed to fulfill its obligations with respect to Indian tribes under Section IV of the NPA, we reject that implication. Voice demonstrates that it has attempted to identify and contact interested tribal authorities using the Commission’s Tower Construction Notification System, *see* Voice’s FCC Form 620, included with its Opposition, and the OHPO “strongly encourage[d]” Voice to continue those efforts. There is no evidence in the record here either that Voice has failed to meet the requirements of the NPA regarding Indian tribes or that any tribe has expressed concern over the proposed WCVO(FM) tower.

¹² 16 U.S.C. § 470f.