



Federal Communications Commission
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In Reply Refer to:
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In re: **(NEW), K255BE (FM Translator)**
Tulsa, OK
Facility No. 147372
File No. BNPFT-20030807AIX

Petition for Reconsideration

Gentlemen:

This letter refers to the August 9, 2004, "Joint Petition For Reconsideration" (the "Petition") filed by John Jason Bennett, Rick Covington and Angela Leigh (collectively the "Petitioners") directed to the July 2, 2004, action of the Chief, Audio Division (the "Staff Decision"), granting the above-referenced Educational Media Foundation ("EMF") application for construction permit (the "Application") to build new FM translator station K255BE at Tulsa, Oklahoma.¹ For the reasons set forth below, we dismiss the petition for reconsideration.

Petitioners state that the subject application violates Sections 74.1232, 1.17 and 1.65 of the Commission's rules.² Specifically, Section III-A, Item 14 of the application for authority to construct an FM Translator, FCC Form 349, requests that the applicant certify that it does not have any interest in an application or an authorization for an FM translator station that serves substantially the same area and rebroadcasts the same signal as the proposed FM translator station. EMF indicated "Yes" to that certification, however, Petitioners state that EMF owns FM translator station K293AP, Sand Springs, Oklahoma, which serves substantially the same area and will rebroadcast the same signal as K255BE in violation of Section 74.1232.³ In this regard, Petitioners maintain that EMF also violates both Section

¹ An Opposition and Reply were filed on August 30, and September 15, 2004, respectively.

² 47 C.F.R. §§ 74.1232, 1.17 and 1.65.

³ 47 C.F.R. § 74.1232, "Eligibility and licensing requirements," provides in pertinent part that:

(b) More than one FM translator may be licensed to the same applicant, whether or not such translators serve substantially the same area, upon an appropriate showing of technical need for such additional stations.

1.17, by its incorrect certification,⁴ and Section 1.65, by EMF's failure to amend the Application with the corrected information.⁵ In its response, EMF states that the certification was an "innocent mistake," attributed to its filing of numerous translator applications, and that when it discovered its error, it promptly filed an application to relocate the station to a new site, which would serve a different area and eliminate the vast majority of the contour overlap.

Procedural Matter. Because Petitioners did not file a petition to deny the Application, and are therefore not a party to this proceeding,⁶ the Commission's rules require that they "state with particularity the manner in which [their] interests are adversely affected by the action taken," and that they "show good reason why it was not possible . . . to participate in the earlier stages of the proceeding."⁷

Petitioners state that they are adversely affected "as individuals" and Tulsa residents, and that the grant of the Application will be "adverse to the public interest" of all the individuals residing in Tulsa, because K255BE will rebroadcast the same signal to substantially the same area as commonly owned K293AP. Petitioners also state that it was not possible to participate in the earlier stages of the proceeding by filing a petition to deny or informal objection because of EMF's "willful and repeated violations" of Sections 1.17 and 1.65 of the Commission's rules. Specifically, Petitioners assert that by inaccurately certifying its compliance with Section 74.1232(b), and thus violating Section 1.17, EMF prevented members of the public from identifying and bringing the defect to the Commission's attention.⁸

⁴ 47 C.F.R. § 1.17, "Truthful and accurate statements to the Commission," provides in pertinent part that:

(a) . . . no [Applicant for any Commission authorization] shall;

(1) In any written or oral statement of fact, intentionally provide material factual information that is incorrect or intentionally omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading; and

(2) In any written statement of fact, provide material factual information that is incorrect or omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading without a reasonable basis for believing that any such material factual statement is correct and not misleading.

⁵ 47 C.F.R. § 1.65, "Substantial and significant changes in information furnished by applicants to the Commission," provides in pertinent part:

(a) Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application . . . Whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate.

⁶ 47 C.F.R. § 1.106(b)(1); *see also Gulfcoast Broadcasting and University of North Carolina supra* (to qualify as a party, a petitioner for reconsideration must have filed a valid petition to deny).

⁷ 47 C.F.R. § 1.106(b)(1); *see also Robert Lewis Thompson, University of North Carolina and Gulfcoast Broadcasting supra*; *Eagle Radio, Inc.*, 12 FCC Rcd 5105 (1997) and *Midwest Bell Communications*, 15 FCC Rcd 11,005 (2000).

⁸ Petitioners state that "the failure of EMF to exercise the diligence required of licensees and applicants before the Commission deprived the Petitioners and others of the opportunity to participate in these matters previously . . ." Petition at 6.

Petitioners further assert that, by failing to file a corrective amendment, EMF violated Section 1.65 and thereby prevented the generation of public notices that would have given the Petitioners actual or constructive notice that the application warranted additional scrutiny.

In the instant case, Petitioners have not demonstrated a valid reason for not filing a petition to deny against the subject application.⁹ The public notice announcing that the Application had been accepted for filing was published on February 20, 2004;¹⁰ therefore, Petitioners had constructive notice of its filing.¹¹ Further, the public notice specified that the Application was accepted for filing and established a deadline for filing petitions to deny. The public notice also indicated that EMF had applied to construct a new FM translator station, and specified the station's community of license and frequency. Hence, the public notice provided sufficient information to alert Petitioners that the Application could potentially impact their service area.¹²

Moreover, the staff granted the Application on July 2, 2004, five months after the release of the public notice of acceptance. With the exercise of reasonable diligence, Petitioners had sufficient time to review the application to ensure that the interests they now posit were not adversely affected by the application and raise issues.¹³ Petitioners cite no authority to support their proposition that EMF's allegedly false certification deprived them of the opportunity to present the "false certification" argument prior to grant of the Application. Petitioners' assertion that they had no basis on which to file a petition to deny against the application is not "good reason" to justify the untimely filing of its petition. Accordingly, we dismiss the petition.¹⁴

Merits. Even assuming that Petitioners had met the requirements of Section 1.106(b)(1) of our rules, as discussed below, we would deny their petition for reconsideration.¹⁵ EMF admits that it

⁹ *Id.*

¹⁰ Report No. 25676 ("Broadcast Applications").

¹¹ See *R&S Media*, 19 FCC Rcd 6300 (2004).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* Petitioners assert that it may circumvent the procedural requirements of Section 1.106 by requesting that the information in its Petition be considered as an "Informal Request" for Commission Action under Section 1.41, citing *National Science and Technology Network, Inc.*, 17 FCC Rcd 11133, 11136 (WTB 2002) ("*National Science*") and *Pacific Gas & Electric Co.*, 17 FCC Rcd 98, 101 (WTB 2001) ("*PG&E*"). Notwithstanding that precedent from the Wireless Telecommunications Bureau ("WTB") is not binding on the Media Bureau staff, the WTB in *National Science* clearly stated that the petitioner had filed an objection to the proposal prior to grant, was entitled to receive notice of the Commission's decision and did not, and therefore "extraordinary circumstances" existed which warranted consideration of the petitioner's ostensibly untimely petition. Additionally, in *PG&E*, the petitioner filed a Petition to Revoke the Trunked Industrial/Business Pool Radio Service Station WPMU363, Milpitas, California; the WTB indicated that it would treat the request as an informal request for Commission action under Section 1.41 and did not have to characterize the pleading as a "petition for reconsideration" to take remedial action. *PG&E* has no relevance here.

¹⁵ Cf. *US West Communications, Inc.*, 12 FCC Rcd 4644, 4649 (1997) (Commission addresses merits of procedurally defective petition for reconsideration).

incorrectly certified that the application complied with Section 74.1232(b), but claims that the erroneous certification was inadvertent and attributes it to EMF's filing of numerous FM translator applications when the subject Application was filed.¹⁶ EMF states that its desire "is to serve as many people as possible with its service, not to duplicate listeners," and once EMF discovered its error, "it promptly filed an application to relocate the Tulsa translator station to a new tower site servicing a different area."¹⁷ It states that its certification of compliance with Section 74.1232(b) in the Application was the result of an "innocent mistake," not misrepresentation, and it has no motive to or interest in providing substantially duplicative service to any area.

We find that EMF's certification of compliance with Section 74.1232(b) was in fact false. We do not find, however, that the evidence presented by Petitioners or the record as a whole is sufficient to raise a substantial and material question as to whether EMF intended to deceive the Commission by making a false certification. An intent to deceive is a necessary component of a finding of misrepresentation or lack of candor that would underlie a challenge to an applicant's basic qualifications.¹⁸ There is no evidence in the record that EMF knowingly misstated that the Application complied with Section 74.1232(b), and there is no apparent motive from which we might infer an intent to deceive.

Nevertheless, because EMF falsely certified that the Application complied with Section 74.1232(b), it violated Section 1.17 of the rules.¹⁹ We will admonish EMF for that violation. Moreover, we caution EMF to be attentive to its application certifications in the future, because a false statement, even absent an intent to deceive, may constitute an actionable violation of Section 1.17 of the rules.²⁰

¹⁶ EMF Opposition at 1-2.

¹⁷ *Id.* at 2. See Application No. BMPFT-20040719ADL. On September 15, 2004, Petitioners filed an Informal Request to defer processing that application until after the instant Petition had been resolved. The staff denied that request and granted the modification application on January 21, 2005.

¹⁸ See *Liberty Productions, A Limited Partnership*, 16 FCC Rcd 12061, 12079-80 (2001) (in determining the merits of a false certification issue, substantial evidence of an intent to deceive is necessary to support a finding of misrepresentation or otherwise raise a question as to an applicant's basic qualifications); *Georgia Public Telecommunications Commission*, 7 FCC Rcd 2942 (Rev. Bd. 1992), *review denied*, 7 FCC Rcd 7996 (1992) (disqualification for false certification not warranted unless the applicant intended to deceive the Commission).

¹⁹ It is unclear how Section 1.65(a) is relevant to this matter. As quoted in Note 5, *supra*, that rule requires that applicants apprise the Commission of any decisionally significant changes in an application. See, e.g., *Manahawkin Communications Corporation*, 17 FCC Rcd 342, 353 (2001) (pursuant to 47 C.F.R. § 1.65, an applicant is required to amend its application within 30 days whenever there has been a substantial change to any matter which may be of decisional significance). Petitioners assert no unreported, decisionally significant change to EMF's proposal, but simply argue that its certification of compliance with Section 74.1232(b) is inaccurate. The failure to amend allegedly erroneous information in an application is more properly within the purview of Section 1.17 of the rules.

²⁰ *San Francisco Unified School District*, 19 FCC Rcd 13326, 13337 (2002), citing *Amendment of Section 1.17 of the Commission's Rules Concerning Truthful Statements to the Commission*, 18 FCC Rcd 4016 (2003). Intentional false certifications may, of course constitute misrepresentations and may result in severe penalties. *San Francisco Unified School District*, *supra* (license renewal application designated for evidentiary hearing on false certification issue); *Rancho Palos Verdes Broadcasters, Inc.*, 18 FCC Rcd 5043 (MB 2003) (\$20,000 Notice of Apparent Liability issued for violation of Section 73.1015 for false certification that application would result in compliance with rule requiring provision of city grade signal to community of license).

Accordingly, Petitioners' petition for reconsideration IS DISMISSED, and Educational Media Foundation IS ADMONISHED for its violation of Section 1.17 of the Commission's rules and cautioned to be more attentive to its application certifications in the future.

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau