

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

In the Matter of)	
)	
BLACK HAWK COLLEGE)	File No. 0002755947
Licensee)	
)	
And)	
)	
MOLINE DISPATCH PUBLISHING COMPANY,)	
L.L.C.)	
Lessee)	
)	
Application for Consent to <i>De Facto</i> Lease Transfer)	
Agreement for Educational Broadband Service Stations)	
WND204 and WND205, Moline, Illinois)	

ORDER ON RECONSIDERATION

Adopted: June 13, 2007

Released: June 14, 2007

By the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On September 27, 2006, Virginia Communications, Inc. (VCI)¹ filed a document entitled “Withdrawal of Consent and Petition to Rescind.”² On November 13, 2006, VCI filed a petition for reconsideration³ requesting reconsideration of the consent⁴ to the *de facto* transfer lease agreement for Educational Broadband Service (EBS) Stations WND204 and WND205 between Black Hawk College (Black Hawk) and Moline Dispatch Publishing Company (Moline Dispatch). For the reasons set forth below, we dismiss the Withdrawal and the Petition.

¹ The pleadings appear to be filed in the name of the wrong entity. As noted below, petitioner is basing its arguments on its status as the licensee of Broadband Radio Service (BRS) Station WHT588. The licensee of Station WHT588 is Comm Speed Quad Cities, LLC (Comm Speed), not VCI. While Comm Speed does not have a current ownership Form 602 on file, we note that VCI is listed as the point of contact for Comm Speed and that both entities share the same contact person (Steve Merrill). For purposes of this pleading, we will assume that VCI and Comm Speed are related entities and that the listing of VCI as the petitioner is a harmless error.

² Withdrawal of Consent to Interference and Petition to Rescind, Virginia Communications, Inc. (filed Sep. 27, 2006) (Withdrawal).

³ Petition for Reconsideration, Virginia Communications Inc. (filed Nov. 13, 2006) (Petition).

⁴ Wireless Telecommunications Bureau Assignment of License Authorization Applications, Transfer of Control of Licensee Applications, *De Facto* Transfer Lease Applications And Spectrum Manager Lease Notifications, Designated Entity Reportable Eligibility Event Applications, and Designated Entity Annual Reports Action, *Public Notice*, Report No. 2683 (WTB Oct. 11, 2006) (*Lease Grant PN*) at 58.

II. BACKGROUND

2. On October 20, 1995, Black Hawk filed an application for a new EBS Station on the D channel group at Moline, Illinois.⁵ At the time, VCI was the licensee of BRS Station WHT588 on the E channel group.⁶ Comm Speed is the current licensee of BRS Station WHT588.⁷ Under the Commission's pre-transition band plan, EBS Station WND205's Channel D4 (2590-2596 MHz) is immediately adjacent to BRS Station WHT588's Channel E1 (2596-2602 MHz).⁸ At the time Black Hawk submitted the Application, Black Hawk represented that it was in the process of obtaining an interference consent letter from VCI.⁹ VCI had submitted a letter proposing that, in return for Black Hawk and another [EBS??] licensee negotiating a channel lease agreement with VCI and agreeing to co-locate those stations with VCI, VCI would provide Black Hawk with a letter agreeing to accept any interference from Black Hawk's proposed EBS station.¹⁰

3. Black Hawk and VCI failed to enter into a lease agreement.¹¹ There is no evidence that an interference consent letter from VCI was ever submitted to the Commission. VCI did not file a petition to deny or other objection against the Application.¹² On July 18, 1997, the former Mass Media Bureau granted the Application.¹³ VCI did not seek reconsideration of that grant.¹⁴

4. On September 27, 2006, VCI filed the Withdrawal.¹⁵ The Withdrawal purported to rescind VCI's consent to interference caused by Black Hawk's EBS Station WND205 to BRS Station WHT588 and asked for "rescission" of Black Hawk's license.¹⁶ Shortly thereafter, on October 4, 2006, Black Hawk and Moline Dispatch filed an application seeking Commission consent to a *de facto* transfer long-term lease of EBS Stations WND204 and WND205.¹⁷ On October 5, 2006, the Wireless Telecommunications Bureau consented to the Lease Filing, and public notice of that action was given on October 11, 2006.¹⁸

5. On November 13, 2006, VCI filed the Petition.¹⁹ VCI argues that the Lease Agreement Application should not have been granted because Black Hawk no longer had their consent to the

⁵ File No. BPLIF-951020AM (Application).

⁶ File No. BLMD-9450448 (granted Sep. 14, 1994).

⁷ File No. BALMD-200103006AAC (granted Nov. 1, 2001).

⁸ 47 C.F.R. § 27.5(i)(1).

⁹ Application, Engineering Statement.

¹⁰ Letter from Stephen A. Merrill, Vice President, Virginia Communications, Inc. to Mr. Morris Bresnahan, General Manager, WQPT (Oct. 19, 1995). *See* Opposition to Petition for Reconsideration, Black Hawk College (filed Oct. 19, 2006) (Black Hawk Opposition), Exhibit 1.

¹¹ Petition at 2; Black Hawk Opposition at 2.

¹² Black Hawk Opposition at 1.

¹³ Broadcast Actions, Report No. 44041, *Public Notice* (Jul. 25, 1997).

¹⁴ Black Hawk Opposition at 1.

¹⁵ Withdrawal.

¹⁶ *Id.*

¹⁷ File No. 0002755947 (Lease Filing).

¹⁸ *Id.*; *Lease Grant PN*.

¹⁹ Petition.

interference that is caused to their BRS station, WHT588 by WND205, Black Hawk's EBS station.²⁰ VCI claims to have withdrawn their consent in the Withdrawal, which was filed with the Commission just prior to the filing of the Lease Agreement Application.²¹ VCI states that the Withdrawal was predicated on Black Hawk's failure to enter into an excess capacity lease agreement with them.²² However, VCI claims that this contract dispute is not the basis for the Petition.²³ VCI maintains that, "Black Hawk's rights with respect to Station WND205 are contingent on consent from VCI, and that consent has been withdrawn."²⁴

6. Black Hawk argues that the Petition is untimely because it is based on facts relating to the original grant of the Application that should have been presented when the Application was granted in 1997.²⁵ Accordingly, Black Hawk asserts that VCI is actually objecting to the original license grant, which has since become final and unappealable.²⁶ Black Hawk also argues that VCI has not established how their interests are being adversely affected by the consent of the Lease Filing.²⁷ Finally, Black Hawk asserts that VCI's claim is based on a contractual dispute that the Commission does not have jurisdiction to resolve.²⁸ Black Hawk also cites the Commission's new band plan, which is organized in such a way that BRS Station WHT588 and EBS Station WND205 are longer adjacent and thus no longer able to interfere with each other.²⁹

7. In reply, VCI attempts to recast the Withdrawal as a petition to revoke the EBS Station WND205 license and argues that the consent to the Lease Filing was premature because the Bureau had not acted on the Withdrawal.³⁰ VCI also contends that the Petition is procedurally proper because the only fact that it relies on is the withdrawal of VCI's consent to Black Hawk's operation.³¹ VCI also states that it is not asking the Commission to resolve the underlying contractual dispute between it and Black Hawk.³² On the merits, VCI claims that the Commission's post-transition band plan is irrelevant because the transition has not yet taken place in the market,³³ and that Section 27.1222 of the Commission's Rules requires Black Hawk to obtain Comm Speed's consent.³⁴

III. DISCUSSION

8. We are dismissing the Petition as untimely and because VCI lacks standing to challenge the consent to the Lease Filing. VCI should have raised these arguments when Black Hawk's Application

²⁰ Petition at 2.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Black Hawk Opposition at 4.

²⁶ *Id.* at 5-6.

²⁷ *Id.*

²⁸ *Id.* at 6-7.

²⁹ *Id.* at 7-9.

³⁰ Reply, Virginia Communications, Inc. (filed Dec. 11, 2006) (Reply) at 1.

³¹ *Id.* at 3.

³² *Id.* at 3-4.

³³ *Id.* at 4.

³⁴ *Id.* at 4-5.

was granted. Furthermore, VCI's assumption that Black Hawk has a continuing obligation to have VCI's consent is incorrect. Finally, we conclude that the Withdrawal does not provide any basis for Commission action and dismiss that pleading.

9. To establish a party in interest standing, a petitioner must allege facts sufficient to demonstrate that grant of the subject applications would cause it to suffer a direct injury.³⁵ In addition, a petitioner must demonstrate a causal link between the claimed injury and the challenged action.³⁶ In this case, VCI has not made such a showing with respect to the Lease Filing. Indeed, VCI does not attempt to claim that the Lease Filing was defective or violated the Commission's Rules. VCI also fails to demonstrate how its interests have been harmed by the Bureau's decision to consent to the Lease Filing.

10. Instead, VCI makes arguments challenging the underlying validity of the EBS Station WND205 license. With the one possible exception noted below, we conclude that we cannot consider such arguments because they should have been made when Black Hawk's original Application was granted in 1997. Section 405 of the Communications Act of 1934, as amended,³⁷ provides that petitions for reconsideration "must be filed within thirty days from the date upon which public notice is given of the order, decision, report or action complained of."³⁸ To the extent VCI believes Black Hawk's Application should not have been granted because VCI never provided a signed consent letter, such argument should have been made in a petition to deny the Application, or, at latest, in a petition for reconsideration of the 1997 grant of the Application. VCI has provided no legitimate reason why it failed to raise its concerns in a timely manner. Furthermore, we believe that VCI's delay has been particularly prejudicial in this case because it was raised when Black Hawk is attempting to enter into an arrangement with a third party.

11. We also reject VCI's argument that the filing of the Withdrawal should have suspended processing of the Lease Filing. Section 312 of the Communications Act provides the Commission with the discretion to institute revocation proceedings on its own motion. That provision does not specifically create rights in third parties to file petitions to revoke licenses or permits.³⁹ Nonetheless, the Commission has traditionally acted on such petitions by treating them as informal requests for Commission action pursuant to Section 1.41 of the Commission's rules.⁴⁰ VCI cites no authority for the proposition that a request for informal relief involving a station precludes Commission action on applications involving that station.⁴¹ Moreover, as originally filed, it was unclear what action, if any, the Withdrawal was requesting of the Commission. Most of the Withdrawal reported that VCI was withdrawing its consent to Black Hawk's operation.⁴² While the last clause of the Withdrawal asked that "the FCC rescind BHC's

³⁵ See AT&T Wireless PCS, Inc., *Order*, 15 FCC Rcd 4587, 4588 ¶ 3 (WTB CWD 2000) (*AT&T Wireless*) (citing *Sierra Club v. Morton*, 405 U.S. 727, 73 (1972); Lawrence N. Brandt, *Memorandum Opinion and Order*, 3 FCC Rcd 4082 (1988).

³⁶ *AT&T Wireless*, 15 FCC Rcd at 4588 ¶ 3 (citing *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72, 78 (1978)).

³⁷ 47 U.S.C. § 405 (1996).

³⁸ See also 47 C.F.R. § 1.106(f).

³⁹ 47 U.S.C. § 312. See also Manning Telecasting, Inc., File Nos. BMPCT-850328KF, BTCCT-850328KG, *Memorandum Opinion and Order*, 1986 WL 292657 (Feb. 14, 1986); Conn-2 RSA Partnership, *Memorandum Opinion and Order*, 9 FCC Rcd at 3298 n.7 (citing *City of Kerrville v. Dugosh Flying Service, Inc.*, *Memorandum Opinion and Order*, 99 FCC 2d 124, 126 (1984) and *Puerto Rican Media Action and Educational Council, Inc. v. Educational Broadcasting Corp.*, *Memorandum Opinion and Order*, 51 FCC 2d 1178 (1975)).

⁴⁰ 47 C.F.R. § 1.41. See Conn-2 RSA Partnership, 9 FCC Rcd at 3298 n.7.

⁴¹ Compare 49 U.S.C. § 309(d)(2) (if a petition to deny is filed, the Commission must evaluate the petition and issue a concise statement of reasons for denial of that petition before acting on the application).

⁴² Withdrawal.

license,”⁴³ VCI utterly failed to provide any clarification or justification for that ambiguous request. While it is unclear whether the Withdrawal is a proper informal request for Commission action, we will dismiss the pleading to eliminate any question regarding its status.

12. VCI’s filings are predicated on the assumption that Black Hawk has a continuing duty to have VCI’s consent to operate. No such duty exists under the Commission’s Rules. Any consent letter VCI would have provided would have been relevant only during the time Black Hawk’s Application was pending. Specifically, former Section 74.903(b) listed the technical information that applicants must provide with their applications.⁴⁴ Former Section 74.903(b)(4) of the Commission’s Rules stated, “In lieu of the interference analyses required by paragraphs (b)(1) and (b)(2) of this Section for any authorized or previously proposed station(s), an applicant may submit a statement(s) from the affected ITFS licensee(s) or permittee(s) that any resulting interference is acceptable.”⁴⁵ Since this section listed what was required as part of the application, nothing in the rule required Black Hawk to have the continuing consent of VCI after its Application was granted. Furthermore, VCI’s reliance on Section 27.1222 of the Commission’s Rules⁴⁶ is without any basis. That rule addresses operations in the J and K bands under the post-transition band plan.⁴⁷ Since VCI itself agrees the Commission’s post-transition band plan is irrelevant because the transition has not yet taken place in the market,⁴⁸ that rule has no relevance here.

IV. CONCLUSION AND ORDERING CLAUSES

13. We dismiss the Petition as untimely and for lack of standing. We also dismiss the Withdrawal as not providing any basis for Commission action. Black Hawk did not have a continuing duty to have VCI’s consent.

14. Accordingly, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.41 of the Commission’s Rules, 47 C.F.R. § 1.41, that the Withdrawal of Consent to Interference and Petition to Rescind filed by Virginia Communications, Inc. on September 27, 2006 IS DISMISSED.

⁴³ Withdrawal at 2.

⁴⁴ 47 C.F.R. § 74.903(b) (1995) (“An applicant for a new instructional television fixed station or for changes in an existing ITFS facility for a construction permit must include the following technical information with the application . . .”)

⁴⁵ 47 C.F.R. § 74.903(b)(4).

⁴⁶ 47 C.F.R. § 27.1222.

⁴⁷ The rule refers to the Lower Band Segment, Upper Band Segment, and Middle Band Segment, which are elements of the post-transition band plan. See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 03-66, 19 FCC Rcd 14165, 14183-14184 ¶ 37 (2004).

⁴⁸ *Id.* at 4.

15. IT IS FURTHER 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, that the Petition for Reconsideration filed by Virginia Communications, Inc. on November 13, 2006 IS DISMISSED.

16. 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

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