

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

In the Matter of)
)
Skytower Communications – 94.3, LLC) Facility I.D. No. 25799
Licensee of Station WULF(FM), Hardinsburg,) NAL/Acct. No. MB-201041410015
Kentucky) FRN: 0001790724
)
Request for Determination of Compliance with)
the Main Studio Location Rule, 47 C.F.R.)
§ 73.1125.)

MEMORANDUM OPINION AND ORDER
AND
NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: September 16, 2010

Released: September 17, 2010

By the Chief, Audio Division

1. We have before us a Request for Determination Regarding Compliance with Main Studio Rule (the "Request for Determination")¹ filed on January 14, 2004, by Skytower Communications - 94.3, LLC ("Skytower"), licensee of Station WULF(FM), Hardinsburg, Kentucky. Skytower requests that we determine whether WULF(FM)'s main studio site complies with Section 73.1125 of the Commission's Rules² (the "Main Studio Rule"), or, in the alternative, that we waive the Main Studio Rule. We also have before us an Objection to Determination of Compliance and for Waiver (the "Objection"), filed on September 27, 2004, by W&B Broadcasting, Inc. ("W&B"), licensee of Station WASE(FM), Radcliff, Kentucky, a Response to Informal Objection (the "Response") filed by Skytower on October 15, 2004, and other related pleadings.³ In this Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture ("NAL") issued pursuant to Sections 309(k) and 503(b) of the Communications Act of 1934, as amended (the "Act"), and Section 1.80 of the Commission's Rules (the "Rules"),⁴ by the Chief, Audio Division, Media Bureau, by authority delegated under Section 0.283 of the Rules,⁵ we find that the Licensee apparently willfully and repeatedly violated Section 73.1125 of the Rules by relocating the Station's main studio to two separate locations prior to receiving Commission approval to do so. Based upon our review of the facts and circumstances before us, we conclude that the Licensee is apparently liable for a monetary forfeiture in the amount of seven thousand dollars (\$7,000), and we dismiss the waiver request as moot.

¹ The Commission's procedural Rules make no provisions for "Requests for Determination." The instant pleading, its caption notwithstanding, is, substantively, a request for a declaratory ruling pursuant to 47 C.F.R. § 1.2 and we treat it as such.

² 47 C.F.R. § 73.1125 ("Section 73.1125").

³ W&B filed a Supplement to Objection on September 30, 2004, and a Reply to Response on October 27, 2004. Skytower filed a Clarification on November 24, 2004. W&B filed a Reply on December 13, 2004.

⁴ 47 U.S.C. §§ 309(k), 503(b); 47 C.F.R. § 1.80.

⁵ See 47 C.F.R. § 0.283.

I. BACKGROUND

2. Until October 16, 2002, the WULF(FM) main studio was located in Radcliff, Kentucky,⁶ within the station's 70 dBu "principal community" contour.⁷ On that date, Skytower notified the Commission that the WULF(FM) main studio had been relocated to a temporary site at 245 West Dixie Avenue, Elizabethtown, Kentucky, and asserted that "this location complies with Section 73.1125 of the Commission's Rules."⁸ On August 12, 2003, Skytower notified the Commission that the WULF(FM) main studio had again been relocated to a nearby permanent site at 233 West Dixie Avenue, Elizabethtown, Kentucky (the "233 West Dixie Studio").⁹ Skytower again stated that relocation to that site "complies with Section 73.1125 of the Commission's Rules."¹⁰ Both sites lie outside the principal community contour of any Hardinsburg station—as calculated using the standard contour prediction method specified in Section 73.313 of the Rules¹¹—and are more than twenty-five miles from the center of Hardinsburg.¹²

A. Inquiry From the Enforcement Bureau

3. Skytower did not request prior authorization from the Commission to relocate its main studio outside the WULF(FM) principal community contour to either the temporary or permanent Elizabethtown locations.¹³ On October 28, 2003, the Commission's Enforcement Bureau, responding to a complaint that WULF(FM)'s main studio was not in compliance with the Main Studio Rule, sent Skytower a letter of inquiry (the "LOI") requesting detailed information about the location of WULF(FM)'s main studio.¹⁴

⁶ See Response at 9.

⁷ See 47 C.F.R. §§ 73.315(a), 73.1125.

⁸ Opposition, Attachment 2.

⁹ The studio locations are approximately 100 meters apart. The relocation to the 233 West Dixie Studio was directly toward Hardinsburg, Kentucky.

¹⁰ Opposition, Attachment 3.

¹¹ 47 C.F.R. § 73.313. Hardinsburg has only two stations, WULF(FM), a Class C2 station, and WXBC(FM), a Class A station.

¹² Section 73.1125 provides, in pertinent part, that an FM station's main studio must be located within the 70 dBu principal community contour, within twenty-five miles from the center of the community of license, or within the principal community contour of any AM, FM or TV broadcast station licensed to the station's community of license.

¹³ Written authority is required if a licensee locates a main studio outside the boundaries described *supra* n.12: "[W]ritten authority must also be received from the Commission prior to the relocation of the main studio. Authority for these changes may be requested by filing a letter with an explanation of the proposed changes with the appropriate Media Bureau division. Licensees or permittees should also be aware that the filing of such a letter request does not imply approval of the relocation request, because each request is addressed on a case-by-case basis." 47 C.F.R. § 73.1125(d)(2).

¹⁴ The Enforcement Bureau Letter directed Skytower to provide, *inter alia*, the geographic coordinates of WULF(FM)'s main studio, a map demonstrating compliance with Section 73.1125(a) for both the temporary and planned permanent studios, tabular data supporting the map, and confirmation of continued main studio use. See Response, Ex. 1 (Letter from Joseph Casey, Chief, Spectrum Enforcement Division, Enforcement Bureau, FCC, to Mark Lipp, Esq., counsel for Skytower (Oct. 28, 2003)).

B. Skytower Response to the Enforcement Bureau Inquiry

4. On November 12, 2003, Skytower responded to the LOI (the “November Response”). Therein, Skytower alleged—for the first time—that the 233 West Dixie Studio location was encompassed by the station’s “extended” 70 dBu contour as derived from a supplemental coverage analysis which relied on the Longley-Rice propagation model.¹⁵

5. Skytower argued that the Commission had accepted a Longley-Rice showing once previously in connection with the prediction of 70 dBu contours.¹⁶ It noted that “the Commission permits a supplemental showing only in cases where the terrain departs sufficiently widely from the national average that the supplemental contour extends at least ten percent (10%) farther then (sic) the standard prediction method contour.”¹⁷ Its showing was acceptable, Skytower contended, because the recalculated WULF(FM) 70 dBu contour extended 36 percent farther than the contour calculated using the standard contour prediction methodology specified in the Rules.¹⁸ Skytower did not, however, make a specific showing that the terrain along the propagation path between the WULF(FM) transmitter site and the main studio “departed widely” from the national average.

6. Subsequently, in a telephone conversation with Skytower, Commission Enforcement Bureau staff directed Skytower to demonstrate that the terrain along the radial from the WULF(FM) transmitter to the relocated main studio departed widely from the national average.¹⁹ In response, on January 14, 2004, Skytower filed the Skytower Supplement with the Enforcement Bureau and, on the same day, filed the instant Request for Determination with the Media Bureau.

C. Skytower Supplement

7. The Skytower Supplement concedes that supplemental coverage demonstrations require submission of a “showing of how the terrain departs widely from the average terrain assumed for the F(50,50) propagation curves.”²⁰ Skytower acknowledges an unpublished decision—the *Cumulus Letter*²¹—where the staff rejected an alternative coverage showing because the applicant failed to show that terrain

¹⁵ See November Response at 2. See also Rice, P.L., Longley, A.G., Norton, K.A., Barsis, A.P., Transmission Loss Predictions for Tropospheric Communications Circuits, NBS Technical Note 101 (Revised), Volumes I and II, U.S. Department of Commerce, 1967.

¹⁶ See Response to Informal Objection at Ex. 1 (Letter from Mark Lipp, counsel for Skytower, to Gabriel Collazo, Spectrum Enforcement Division, Enforcement Bureau, FCC (Jan. 14, 2004) (the “Skytower Supplement”) (citing *Telemidia Broadcasting, Inc., WGRQ(FM), Colonial Beach, Virginia and Rappahannock River Broadcasting, LLC., WGRX(FM), Falmouth, Virginia*, Memorandum Opinion and Order, 17 FCC Rcd 14604 (2002) (“*Telemidia*”)); *Amendments of Parts 73 and 74 of the Commission's Rules to Permit Certain Minor Changes in Broadcast Facilities Without a Construction Permit*, Report and Order, 12 FCC Rcd 12371, 12401-03 (1997) (the “*Minor Changes R&O*”).

¹⁷ November Response at 2 (citing *Minor Changes R&O*, 12 FCC Rcd at 12402 n.53). The cited footnote provides, in pertinent part, that “in instances involving unusual terrain characteristics which depart widely from the 3 to 16 km segment . . . supplemental showings have been, and will continue to be, considered only where the applicant shows that the location of the FM contour as predicted by the supplemental method is at least 10 percent greater than the same contour as predicted by the standard method.”

¹⁸ See 47 C.F.R. § 73.313 (calculation of coverage using the Commission’s F(50,50) curves).

¹⁹ See Skytower Supplement at 1.

²⁰ *Id.* at 2 (citing *Minor Changes R&O*, 12 FCC Rcd at 12402-12403).

²¹ *Cumulus Licensing Corp.*, Letter, Aug. 8, 2003 (the “*Cumulus Letter*”).

“departed widely” from the 50 meter national average.²² There, the staff applied a threshold test: terrain would be deemed to depart widely from the 50 meter norm only if the value of delta-h²³ – a measure of terrain roughness—was 20 meters or less, or 100 meters or more.

8. Skytower concedes that its supplemental coverage showing fails the *Cumulus Letter* test because the delta-h on the path between the WULF(FM) transmitter site and the relocated main studio is 34.4 meters, *i.e.*, neither 20 meters or less nor 100 meters or greater. It argues, however, that the delta-h test should not apply here because the *Cumulus Letter* was not released until after Skytower had conducted its Longley-Rice analysis and relocated its main studio. It claims, therefore, that “[t]here was simply no way for Skytower to have anticipated a delta-h requirement.”²⁴

9. Skytower also argues that its supplemental showing is acceptable because the 36 percent coverage increase realized through application of Longley-Rice analysis so “greatly exceeds the 10 percent threshold” that it is self-evident that the terrain along the path “departs widely” from the 50 meter norm.²⁵ It also submits that it would be “inequitable” for the Commission to reject Skytower’s Longley-Rice showing, because the staff’s delta-h threshold was an after-adopted test for acceptability of supplemental showings. Skytower further asserts that the 20 meter/100 meter delta-h thresholds are overly restrictive because “[s]ome engineers estimate that only 20-25% of the land in the United States satisfies one or the other of these conditions, and much of that land is uninhabitable or unsuitable for tower construction.”²⁶ Skytower also argues that a delta-h test should not be applied to determine the acceptability of supplemental showings because the Rules for using delta-h in coverage prediction have been suspended since 1975.²⁷

10. The Enforcement Bureau closed its investigation on August 24, 2004, without addressing Skytower’s arguments. It cautioned Skytower, however, that it “should not construe the closing of the investigation as a determination that a violation did not occur.”²⁸

D. Request for Determination

11. In its Request for Determination, Skytower repeats the substance of its November Response and the Skytower Supplement, alleging that the staff improperly adopted a delta-h test in the *Cumulus Letter* and that, in any event, Skytower could not be held to the test because the test postdated Skytower’s commissioning of its Longley-Rice analysis.²⁹ It also re-states its argument that the terrain along the

²² The Commission’s F(50,50) propagation curves—which underlie the standard method of coverage prediction—assume a delta-h of 50 meters. *See* 47 C.F.R. § 73.313(f).

²³ “Delta-h” is the distance, in meters, between elevations exceeded, by all points on a terrain profile, for 10 percent and 90 percent, respectively, of the length of the profile segment. *See* 47 C.F.R. § 73.133(f).

²⁴ Skytower Supplement at 3.

²⁵ *Id.* at 2.

²⁶ Request for Determination at 5. Skytower does not identify the “some engineers” who allegedly hold this view. Skytower also argues that imposition of the threshold would cause some licensees, unable to meet the threshold, to apply for a change in community of license. *Id.*

²⁷ *Temporary Suspension of Certain Portions of Sections 73.313, 73.333, 73.684 and 73.699 of the Commission’s Rules and Regulations*, 56 FCC 2d 749 (1975).

²⁸ Letter to Mark Lipp, Esq., counsel to Skytower, from Joseph P. Casey, Chief, Spectrum Enforcement Division, Enforcement Bureau, Aug. 16, 2004.

²⁹ *See* Request for Determination at 2-3; Supplement to Response at 2.

relevant radial does “depart widely” from the national average because the “expanded” 70 dBu contour distance exceeds, by 36 percent, the distance to the contour predicted using the standard method.³⁰

12. Skytower also claims that the staff’s adoption of delta-h thresholds impermissibly contradicts the Commission’s determination in the *Minor Changes R&O*, that “we will not adopt standards for such [supplemental coverage] showings beyond the guidelines given here.”³¹ It argues that the delta-h test thus “gives concrete form to a standard that the Commission had deliberately decided, after notice and comment, to leave vague.”³² Conceding that the Commission may use the adjudicatory process for individualized determinations where “a general standard was not capable of being framed” in a Rule,³³ Skytower contends that is not the case here because the 20 meter/100 meter threshold is inflexible, leaving “no room for individualized determinations.”³⁴ Additionally, Skytower argues that, because the delta-h provisions in Section 73.313(e) of the Rules have been suspended, it would be arbitrary and capricious for the Commission to reinstate them without conducting a rule making proceeding.³⁵

13. Skytower also contends that use of the delta-h threshold would preclude applications that otherwise would “provide excellent service to the public.”³⁶ Arguing that Longley-Rice analysis is superior to the standard method of coverage prediction, Skytower claims that enforcement of a 20 meter/100 meter threshold would preclude use of Longley-Rice analysis “in all but the most extreme cases” thereby “condemning the public to inferior service the rest of the time.”³⁷

E. Request for Waiver of Section 73.1125

14. As alternative relief, Skytower seeks a waiver to maintain WULF(FM)’s main studio at its present site, collocated with the studio of commonly-owned station WQXE(FM), Elizabethtown, Kentucky.³⁸ It contends that it is committed to serving Hardinsburg, and that the studio relocation makes economic sense in a competitive market. It alleges that two of its competitors have realized significant economies of scale by consolidating their operations, including using a single main studio for their commonly-owned stations.³⁹ It states that WULF(FM) can remain economically viable only if it continues to share studios with WQXE(FM).⁴⁰ Skytower principal, Billy R. Evans (“Evans”), declares

³⁰ Request for Determination at 3. (Stating that the 36 percent increase in distance to the 70 dBu contour in the direction of the main studio significantly exceeds the 10 percent threshold in the *Minor Changes R&O*. See *Minor Changes R&O*, 12 FCC Rcd at 12402).

³¹ Request for Determination at 4 (citing *Minor Change R&O*, 12 FCC Rcd at 12401-12403).

³² *Id.*

³³ *Id.* (citing *NLRB v. Bell Aerospace, Co.*, 416 U.S. 267, 294 (1974)).

³⁴ *Id.*

³⁵ *Id.* (citing *California v. FCC*, 39 F.3d 919, 930 (9th Cir. 1994)).

³⁶ *Id.*

³⁷ *Id.* at 6.

³⁸ The site, 233 West Dixie Avenue in Elizabethtown, is approximately 33 miles from the center of Hardinsburg, WULF(FM)’s community of license.

³⁹ See Request for Determination at 6-7.

⁴⁰ See *id.* (citing *Shareholders of CBS Corp.*, 15 FCC Rcd 8230, 8243 (2000) (Main studio Rule waived to permit continued operation of television station as a satellite in market “extremely limited in size” such that maintaining a

(continued....)

that, by collocating WULF(FM) with WQXE(FM), “we have greatly expanded its [WULF(FM)’s] public service programming to Hardinsburg and Breckinridge County,” and that, by drawing “on the staff and resources of WQXE,” Skytower has achieved “a programming level well above the limits of WULF(FM) alone.”⁴¹

15. W&B opposes Skytower’s waiver request and maintains that Skytower engaged in misrepresentation in its filings with the Commission. It claims that Skytower knew, before it activated its new main studio, that the Commission would not accept a supplemental coverage showing unless the value of delta-h was 20 meters or less or 100 meters or more along the radial to the main studio.⁴² Accordingly, W&B argues, Skytower misrepresented a material fact when it filed notices with the Commission claiming that the WULF(FM) relocated main studios complied with Section 73.1125.⁴³

16. W&B also faults Skytower for its failure to document the claim that a separate WULF(FM) main studio, located in conformity to the Main Studio Rule, would not be economically viable.⁴⁴ It also asserts that Skytower was untruthful when it represented that its relocation of the WULF(FM) main studio was the “culmination of many years of planning on the part of Skytower.” That statement cannot be true, W&B alleges, because Skytower “did not own WULF for ‘many years’ and could not have made significant plans for the station prior to its acquisition.”⁴⁵ W&B submits, therefore, that the Commission should deny the waiver and fine Skytower, revoke its license, or both.⁴⁶

17. In its Response, Skytower claims that the Enforcement Bureau concluded its investigation “absolving Skytower of any wrongdoing.”⁴⁷ It asserts it relied on legal and technical experts to ensure that each of its two main studio relocations complied with the Main Studio Rule and that nothing that

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main studio “is not economically viable.”). *See also id.* at 7 (citing *Moody Bible Institute of Chicago*, Letter, 2002 FCC LEXIS 6524 (Dec. 10, 2002) (Noncommercial educational radio licensee granted waiver of main studio rule because “Commission has recognized the benefits of centralized operations for NCE stations, given their limited funding.”)).

⁴¹ *Id.*, Ex. 3. Evans asserts that the previous licensee of WULF(FM) had located its main studio in Radcliff, Kentucky, not Hardinsburg, and that the main studio has not been located in Hardinsburg for “nearly a decade.”

⁴² W&B imputes knowledge of the 20 meter/100 meter thresholds to Skytower because Skytower’s counsel was aware of the thresholds. Objection at 3.

⁴³ *See id.*

⁴⁴ W&B requests that the Commission require Skytower to provide its complete financial records to back up its claim that a separate studio would not be economically viable, and—should those records prove otherwise—to find Skytower guilty of misrepresentation. *Id.* at 6. Given our disposition of this matter, W&B’s request is moot.

⁴⁵ *Id.* at 6-7. In the Supplement, W&B includes a building permit application filed by Skytower for the construction of the new main studio. It claims that the permit was applied for two months after Skytower “became aware of the Commission policy regarding the use of supplemental contour calculations.” Therefore, W&B contends, Skytower misrepresented that it had “spent substantial money in planning WULF’s studio move prior to the August 8, 2002, policy announcement.”

⁴⁶ *See id.* at 11 (citing *San Francisco Unified School District*, Memorandum Opinion and Order and Hearing Designation Order, 19 FCC Rcd 13326 (2004) (Renewal application designated for hearing because licensee misrepresented its compliance with the Commission’s public file requirements)).

⁴⁷ Response at 2 (citing Letter from Joseph P. Casey, Chief, Spectrum Enforcement Division, Enforcement Bureau, to Mark N. Lipp, counsel for Skytower (Aug. 16, 2004)). Skytower is clearly wrong. The Enforcement Bureau stated specifically that the closing of the investigation was not a determination that Skytower had not violated the Rules. *See supra* ¶ 10.

Skytower filed could have misled the Commission “on the rules policy, and case law regarding main studio location.”⁴⁸ It advances four reasons why the *Cumulus Letter* (where the 20 meter/100 meter threshold test was first applied) is not relevant to the relocation of the WULF(FM) main studio: First, it argues that the *Cumulus Letter* is distinguishable because it dealt with principal community coverage, not main studio location.⁴⁹ Second, it asserts that the *Cumulus Letter*—because it was issued in an adjudicatory context—bound only the licensee, Cumulus Licensing Corp.⁵⁰ Third, it argues that it is evident that the staff did not intend the delta-h threshold to establish a new rule or policy because the threshold was not applied in subsequent cases.⁵¹ Fourth, Skytower contends that the *Cumulus Letter* is limited to cases “in which delta-h is used as the sole determinant that terrain departs widely,” whereas Skytower relies on the significant increase in coverage (36 percent) as a determinant that “the terrain is excessively flat.”⁵²

18. Skytower also contends that W&B is wrong in contending that the notices Skytower filed with the Commission concerning relocation of its main studio were incomplete. Skytower claims that, under Section 73.1125(d)(1), “a licensee is only required to notify the Commission of a main studio location. It is not required to demonstrate compliance with Section 73.1125.”⁵³ Finally, Skytower argues that prior Commission approval is “optional not mandatory” when a licensee relocates its main studio and relies on a supplemental showing to demonstrate that the main studio is encompassed by a principal community contour.⁵⁴

II. DISCUSSION

19. This case raises four basic issues: (1) whether Skytower impermissibly relocated its main studios without prior Commission approval to the temporary and permanent Elizabethtown locations ; (2) whether Skytower’s supplemental coverage showing was deficient for failure to meet the 20 meter/100 meter delta-h threshold test in the *Cumulus Letter*; (3) whether Skytower engaged in misrepresentation; and (4) whether a waiver of the Main Studio Rule is warranted to allow Skytower to maintain the WULF(FM) main studio at its present site.

20. For the reasons set out below, we find: (1) that Skytower violated Section 73.1125 by relocating its main studio to each of the two Elizabethtown locations without prior Commission approval; (2) that Skytower’s supplemental coverage showing is acceptable, notwithstanding it does not meet the 20-meter/100-meter delta-h threshold test; (3) that Skytower did not misrepresent a material fact to the Commission; and (4) that the acceptability of the supplemental coverage showing obviates the need for a waiver.

⁴⁸ See Response at 4.

⁴⁹ *Id.* at 7.

⁵⁰ *Id.*

⁵¹ *Id.* (citing *KNTV Licensee*, 19 FCC Rcd 15479 (2004); *Letter to Christopher Sova, Esq. re KFME(FM) from Peter H. Doyle, Chief, Audio Division, Media Bureau* (March 5, 2004) (“*KFME*”), *affirmed sub nom. CMP Houston-KC, LLC*, Memorandum Opinion and Order, 23 FCC Rcd 10656 (2008) (“*KFME MO&O*”).

⁵² Response at 7.

⁵³ *Id.* at 8.

⁵⁴ *Id.*

A. Relocation of the WULF(FM) Main Studio Without Prior Commission Approval

21. Skytower submits that it was free to relocate the WULF(FM) main studio without prior Commission approval if it satisfied itself that its supplemental Longley-Rice coverage analysis showed that the station's 70 dBu contour encompassed each of the relocated Elizabethtown main studio sites. It contends that the staff-level *Telemidia* decision supports its position that prior Commission approval was not required.

22. In *Telemidia*, a licensee, without prior Commission approval, located its main studio outside the station's 70 dBu contour calculated using the standard method. When a competitor filed a complaint, the licensee submitted a Longley-Rice analysis demonstrating that, "[b]ecause the terrain involved would result in better signal propagation than is assumed in the standard contour prediction methods," the main studio was within the extended 70 dBu contour. The Enforcement Bureau staff accepted the analysis and determined that the licensee's main studio "is not in violation of the Commission's rule."⁵⁵ The staff, however, did not address the licensee's failure to obtain prior Commission approval before relocating its main studio in reliance on its alternative coverage analysis.

23. To the degree that *Telemidia* may suggest that prior Commission approval for locating a main studio outside the principal community contour, as calculated in accordance with the standard method, is not required, we reject such a suggestion. Section 73.1125(d)(2) is unambiguous: "written authority must also be received from the Commission prior to the relocation of the main studio" outside the boundaries specified in Section 73.1125(a). Licensees may not self-evaluate the sufficiency of their supplemental coverage analyses; that evaluation is reserved to the Commission. As explained in the *Minor Changes* proceeding, supplemental coverage showings "are not routine by nature, are often controversial, and the outcome is not always as the applicant would wish."⁵⁶ Thus, there is no assurance that a main studio location, forecast by a licensee to be within an expanded 70 dBu contour, would, in fact, be acceptable to the Commission. Therefore, the Commission requires applicants "to submit [supplemental coverage showings] for consideration in a construction permit application prior to any construction," because it does not want "to promote the construction of facilities which later cannot be licensed."⁵⁷ Licensees of already-activated stations, such as WULF(FM), that wish to relocate their main studio are bound by Section 73.1125(d)(2) which provides that "[w]ritten authority to locate a main studio outside the locations specified [in Section 73.1125(a) or (c)] for the first time must be obtained . . . before the studio may be moved to that location."⁵⁸

24. Against that background, we cannot agree with Skytower's argument that prior Commission approval for relocation of a main studio, based on a supplemental coverage methodology, is "optional."⁵⁹

⁵⁵ *Telemidia*, 17 FCC Rcd at 14606.

⁵⁶ *Minor Changes R&O*, 12 FCC Rcd at 12403.

⁵⁷ *Id.* Skytower's contention, Request for Determination at 6, that Longley-Rice is a "favored method used in Section 73.313(e) showings," is unsupported. In fact, the Commission has no favored or standard method for supplemental coverage analyses submitted in connection with main studio locations, "[b]ecause the exhibits provided with supplemental showings may vary from method to method . . ." *Id.*

⁵⁸ See *KXOJ, Inc.*, Letter, 14 FCC Rcd 11196 (MMB 1999); *Chameleon Radio, Corp.*, Order to Show Cause, 11 FCC Rcd 11088, 11090 n.9 (1996) ("absent the *grant by the Commission* of a 'good cause' exception, a licensee of [a] . . . station must maintain a main studio within the station's [service contour] (emphasis supplied); *International Panorama TV, Inc.*, Memorandum Opinion and Order, 52 FCC 2d 258 (1975) (relocation of main studio without prior Commission approval).

⁵⁹ See Supplement to Response to FCC Letter at 4 (citing *Minor Change R&O*, 12 FCC Rcd at 12403 n.54).

Skytower's argument rests on a unrealistically strained construction of the word "may" in the following footnote in the *Minor Changes R&O*:

Where a licensee or permittee is filing a supplemental showing solely to obtain confirmation that a particular main studio location complies with 47 C.F.R. Section 73.1125, prior to moving to that location, it may do so in a letter to the Audio Services Division for FM stations or the Video Services Division for TV stations, with the appropriate exhibits attached.⁶⁰

When the quoted footnote is read in context with the related text, it is clear that the Commission was advising applicants that they must file supplemental showings as part of a construction permit application, whereas permittees, and licensees such as Skytower, could file their supplemental showings directly with the staff. To the extent there is any ambiguity inherent in the use of "may" in the quoted footnote, any such ambiguity is resolved by parsing the footnote in context and by the plain language of Section 73.1125(d)(2) that "[w]ritten authority . . . must be obtained . . . before the studio may be moved."

25. Skytower's "notification letters" did not satisfy its obligation to obtain prior Commission approval to relocate the WULF(FM) main studio. The cursory statement "this location complies with Section 73.1125 of the Commission's rules" was neither complete nor accurate. It gave no hint that Skytower was relying on a supplemental coverage showing for its asserted compliance with the Main Studio Rule.

26. In sum, Skytower failed to obtain Commission approval before it relocated the WULF(FM) main studio to a site outside the station's 70 dBu contour, as calculated using the standard method. Instead, it waited until its compliance with the Rules was challenged in a complaint. Only then did it file its supplemental coverage showing, one year and three months⁶¹ after relocating the WULF(FM) main studio.

27. Our review of Skytower's untimely-filed supplemental coverage showing confirms that Skytower appropriately used Longley-Rice analysis to demonstrate that the WULF(FM) 70 dBu contour does encompass its relocated main studio. Subsequent to the Skytower filing, the Commission affirmed *KFME sub nom. CMP Houston-KC, LLC*.⁶² In affirming the decision, the Commission held that the 20 meter/100 meter delta-h threshold for the acceptability of supplemental coverage showings articulated in the unpublished, staff-level, *Cumulus Letter* was, as such, neither "in effect" nor binding on the Commission or parties to Commission proceedings.⁶³ The *KFME* applicant's supplemental coverage study resulted in a "30 percent or greater difference in the distance to the 70 dBu contour compared to the distance provided by the standard prediction method."⁶⁴ The Commission deemed this coverage increase sufficient to conclude that the terrain in question departed widely from the norm.⁶⁵ Skytower's supplemental coverage showing, by comparison, demonstrates that the WULF(FM) 70 dBu contour exceeds, by 36 percent, the distance to the 70 dBu contour predicted using the standard method. Hence, we conclude that the terrain along the propagation path from the WULF(FM) transmitter site to the WULF(FM) relocated main studio "departs widely" from the 50 meter delta-h norm, thus satisfying the

⁶⁰ *Minor Changes R&O*, 12 FCC Rcd at 12403 n.54 (emphasis supplied).

⁶¹ The Request for Determination was filed in January, 2004; the main studio was relocated in October of 2002. See Response to Informal Objections, Ex. 1 at 2.

⁶² See *supra* n.51.

⁶³ *KFME MO&O* at 10658.

⁶⁴ *Id.*

⁶⁵ *Id.* at 10659.

requirements in the *Minor Changes R&O* that applicants show “how the terrain departs widely from the average terrain assumed for the F(50,50) propagation curves,”⁶⁶ and that “the 70 dBu contour as predicted by the supplemental method is at least 10% larger than the distance to the 70 dBu contour of the standard contour prediction method.”⁶⁷ We emphasize, however, that this conclusion neither nullifies nor excuses Skytower’s continuing violation of Section 73.1125(d)(2) since the WULF(FM) studio was relocated to Elizabethtown, Kentucky, almost eight years ago without written authority to do so.⁶⁸

B. Misrepresentation Claims

28. W&B claims that Skytower knew that relocating the WULF(FM) main studio without prior Commission approval was a Rule violation but intentionally misrepresented, in the notification letters, that the relocation complied with the Rules. We agree that the notification letters do not reflect the complete disclosure the Commission expects of its licensees.⁶⁹ We find that Skytower was required to disclose in its initial notification that it was relying on a supplemental coverage analysis as the basis for its claim that the studio location complied with Section 73.1125 of the Commission’s Rules.⁷⁰ Nonetheless, we do not find actionable misrepresentation here. Skytower had, in fact, completed an alternative coverage analysis before it relocated its main studio. It thus had no apparent motive to deceive the Commission – the “*sine qua non* of a misrepresentation issue.”⁷¹ Moreover, its claim that it did not seek advance Commission approval for relocating the WULF(FM) main studio because it relied on advice from its engineering and legal consultants who “based their opinion on the status of the law at that time”⁷² has not been controverted by W&B. Thus, we find that W&B has not raised a “substantial and material question of fact” justifying its requested imposition of a monetary forfeiture on Skytower or revocation of the WULF(FM) license.⁷³ The forfeiture that we are proposing herein should be sufficient to deter Skytower from making incomplete representations to the Commission in the future.

29. We do not credit W&B’s unsupported speculation that Skytower intentionally concealed its reliance on a supplemental coverage analysis because it knew the analysis did not meet the 20-meter/100-

⁶⁶ *Minor Changes R&O*, 12 FCC Rcd at 12402.

⁶⁷ *Id.* (citations omitted).

⁶⁸ See *Aurio A. Matos*, Letter, 15 FCC Rcd 21372 (1999) (finding rule violation even when subsequent rule change rendered studio relocation acceptable).

⁶⁹ “Applicants before the FCC are held to a high standard of candor and forthrightness. The Commission must license [thousands of] stations in the public interest, and therefore relies heavily on the completeness and accuracy of the submissions made to it. . . . Thus, “applicants . . . have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate.” *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1139 (D.C. Cir. 1985) (emphasis supplied) (citing *RKO General, Inc. v. FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982)). See also *Rancho Palos Verdes Broadcasters, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability, 18 FCC Rcd 5043, 5054 (MB 2003) (holding permittee apparently liable for forfeiture for failure to fully disclose that its proposed facility would not provide city-grade service to the community of license); *Liberty Cable Co., Inc.*, Decision, 15 FCC Rcd 20250, 25070 (2000) (finding lack of candor when party filed for Special Temporary Authorization without disclosing that the facilities were already operating).

⁷⁰ Objection at 9.

⁷¹ See, e.g., *Riverside Broadcasting Co., Inc.*, 104 F.C.C.2d 644, 648 (1986).

⁷² Letter from Mark Lipp, Esq., counsel for Skytower, to Gabriel Collazo, Enforcement Bureau, FCC, Jan. 14, 2004, at 3.

⁷³ See, e.g., *Citizens for Jazz on WRVR, Inc.*, 775 F.2d 392, 395 (D.C. Cir. 1985) (a finding of misrepresentation must rest on a “substantial and material question of fact”).

meter threshold referenced in the *Cumulus Letter*.⁷⁴ W&B does not claim that the Skytower principals knew of the threshold test. Instead, it asks us to impute knowledge of the test to Skytower because its counsel was aware of the test, but did not disclose that information to Skytower.⁷⁵ We decline to do so. Counsel may well have believed—as the Commission later ruled—that the *Cumulus Letter* was not binding precedent.⁷⁶ In any event, W&B has not shown that Skytower acted in bad faith in its reliance on counsel, a prerequisite to disqualification of an applicant based on imputation of an attorney’s knowledge.⁷⁷

30. W&B also accuses Skytower of misrepresentation because of Skytower’s claim that it expended substantial time and funds in planning the WULF(FM) main studio relocation prior to the issuance of the *Cumulus Letter*, whereas Skytower did not apply for a building permit for the new main studio until approximately two months after the *Cumulus Letter* was issued.⁷⁸ The accusation is a *non-sequitur*. Planning of a studio facility necessarily precedes requests for building permits. W&B’s claim of misrepresentation is rejected.

III. WAIVER REQUEST

31. After careful review of Skytower’s supplemental coverage showing, we conclude that no waiver is necessary to permit Skytower to maintain its current main studio location.⁷⁹ Skytower’s Longley-Rice analysis shows that there is a 36 percent extension of the 70 dBu contour along the radial to its relocated main studio and that the contour encompasses the main studio site. This satisfies both the 10 percent coverage extension threshold established in the *Minor Changes R&O* and is sufficient for us to conclude that the terrain along that radial departs widely from the national average 50 meter delta-h value underlying the Commission’s F(50,50) curves.⁸⁰

IV. DECLARATION

32. As noted *supra*,⁸¹ Skytower’s pleading, its caption notwithstanding, is in the nature of a request for a declaratory ruling. Under Section 1.2 of the Rules, the Commission “may . . . issue a declaratory ruling terminating a controversy or removing uncertainty.”⁸² The Commission has broad

⁷⁴ Objection at 3.

⁷⁵ *Id.* (“Skytower’s counsel personally received notice of this requirement [the threshold test] so it must be charged with knowledge thereof.”)

⁷⁶ *See supra* ¶ 27.

⁷⁷ *See Abacus Broadcasting Corp.*, Decision, 8 FCC Rcd 5110, 5113 (Rev. Bd. 1993) (citing *WEBR, Inc. v. FCC*, 420 F.2d 158, 167-178 (D.C. Cir. 1969) (good faith reliance on counsel deemed sufficient to avoid applicant being disqualified on character grounds).

⁷⁸ *See* Supplement to Objection at 2. (“WULF’s failure to approach the City of Elizabethtown for its permission to construct a studio until October 2002 is further evidence that its statement to the Commission that it expended substantial money in planning WULF’s studio move prior to the August 8, 2002, policy announcement is false.”)

⁷⁹ *See supra* ¶ 27.

⁸⁰ *See id.*

⁸¹ *See supra* n.1.

⁸² 47 C.F.R. § 1.2.

discretion whether to issue such a ruling.⁸³ It will do so only when critical facts are explicitly stated.⁸⁴ The factual predicate for a declaratory ruling is present here. Accordingly, to the extent that any uncertainty exists concerning licensees' reliance on supplemental coverage showings, we declare and reaffirm that applicants, permittees or licensees that rely on supplemental coverage showings for compliance with Section 73.1125 must submit those coverage showings to the Commission, and receive written Commission approval, before activating main studios located outside the locations specified in Section 73.1125 (a),(c).⁸⁵

V. PROPOSED FORFEITURE

33. *Proposed Forfeiture.* In this case, Skytower relocated the WULF(FM) main studio outside the Station's 70 dBμ contour in October of 2002, prior to receiving Commission approval to do so, in violation of Section 73.1125 of the Rules. The violation continued until the release of this *Order* confirming that the two Elizabethtown studio locations comply with Section 73.1125 utilizing the Longley-Rice supplemental contour-prediction methodology.

34. This *NAL* is issued pursuant to Section 503(b)(1)(B) of the Act. Under that provision, any person who is determined by the Commission to have failed willfully or repeatedly to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.⁸⁶ Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.⁸⁷ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,⁸⁸ and the Commission has so interpreted the term in the Section 503(b) context.⁸⁹ Section 312(f)(2) of the Act provides that "[t]he term 'repeated,' when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day."⁹⁰

35. The Commission's *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules establish a base forfeiture amount of \$7,000 for violation of the Commission's main studio rule.⁹¹ In determining the appropriate forfeiture amount, we may adjust the base amount upward or downward by considering the factors enumerated in Section 503(b)(2)(D) of the Act, including "the nature, circumstances, extent and

⁸³ See *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (1973).

⁸⁴ See *id.* (citing *Use of Broadcast Facilities by Candidates for Public Office*, Public Notice, 24 FCC 2d 832, 885 (1970)).

⁸⁵ Note that the declaration, *supra*, applies to all stations subject to the requirements of Section 73.1125, not only to full-service FM stations such as WULF(FM).

⁸⁶ 47 U.S.C. § 503(b)(1)(B). See also 47 C.F.R. 1.80(a)(1).

⁸⁷ 47 U.S.C. § 312(f)(1).

⁸⁸ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

⁸⁹ See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

⁹⁰ 47 U.S.C. § 312(f)(2).

⁹¹ See *Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997) ("*Forfeiture Policy Statement*"), *recon. denied*, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section I ("Violations Unique to the Service.").

gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”⁹²

36. In October 2002, Skytower relocated the WULF(FM) main studio to a location outside the Station’s 70 dBμ contour, as calculated on the basis of the standard FM prediction methodology. This relocation was done without written Commission authority. In October 2003 Skytower asserted for the first time that it was relying on a Longley-Rice showing to establish the 233 West Dixie Studio was within the WULF(FM) 70 dBμ contour. In January 2004, Skytower requested for the first time that the Commission determine that the main studio location was rule compliant. Although the Skytower supplemental showing establishes that the 233 West Dixie Studio complies with Section 73.1125 geographic restrictions, the licensee has continuously operated a main studio in Elizabethtown for nearly eight years without authority. Taking into consideration these facts and all of the factors required by Section 503(b)(2)(D) of the Act and the *Forfeiture Policy Statement*, we propose a forfeiture in base amount of \$7,000 for Skytower’s willful and repeated violation of Section 73.1125 of the Rules.⁹³

VI. DECISION/ACTIONS

37. Accordingly, IT IS ORDERED that the Request for Determination of Compliance with the Main Studio Rule, filed by Skytower Communications – 94.3, LLC, IS GRANTED to the extent stated herein, DENIED in all other respects, and DISMISSED AS MOOT to the extent it seeks waiver of Section 73.1125 of the Commission’s Rules. Skytower Communications – 94.3, LLC IS AUTHORIZED to locate its main studio at 233 West Dixie Avenue, Elizabethtown, Kentucky.

38. IT IS FURTHER ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission’s Rules, that Skytower Communications - 94.3, LLC is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of seven thousand dollars (\$7,000) for its apparent willful and repeated violation of Section 73.1125 of the Commission’s Rules.

39. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission’s Rules, that, within thirty (30) days of the release date of this *NAL*, Skytower Communications - 94.3, LLC SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

40. Payment of the proposed forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the *NAL*/Acct. No. and FRN No. referenced in the caption above. Payment by check or money order may be mailed to Federal Communications Commission, at P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank—Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank: TREAS NYC, BNF: FCC/ACV--27000001 and account number as expressed on the remittance instrument. If completing the FCC Form 159, enter the *NAL*/Account number in block number 23A (call sign/other ID), and enter the letters “FORF” in block number 24A (payment type code).

41. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington D.C. 20554, ATTN: Peter H. Doyle, Chief, Audio Division, Media Bureau, and MUST INCLUDE the *NAL*/Acct. No. referenced above.

⁹² 47 U.S.C. § 503(b)(2)(D); *see also Forfeiture Policy Statement*, 12 FCC Rcd at 17100; 47 C.F.R. § 1.80(b)(4).

⁹³ *See, e.g., KXOJ, Inc.*, Letter, 14 FCC Rcd 11196, 11198 (MMB 1999) (\$7,000 forfeitures proposed for two separate violations of Section 73.1125, each lasting longer than one year).

42. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (“GAAP”); or (3) some other reliable and objective documentation that accurately reflects the respondent’s current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

43. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director-Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.⁹⁴

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau

⁹⁴ See 47 C.F.R. § 1.1914.