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In Reply Refer to:
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In re: **KXLG(FM), Milbank, SD**
Dakota Communications, Ltd.
Facility ID No. 15262
File No. BMPH-20090602ABJ

Petition for Reconsideration

File No. BLH-20090928AFS

Informal Objection

Dear Counsel:

We have before us: (1) an August 18, 2009, Petition for Reconsideration (the "Petition") filed by Three Eagles of Joliet, Inc. ("Three Eagles")¹ seeking reconsideration of a July 30, 2009, staff action² denying Three Eagles' informal objection and granting the application of Dakota Communications, Ltd. ("Dakota") for minor modification of the facilities (the "Modification Application") of KXLG(FM), Milbank, South Dakota (the "Station");³ (2) a September 28, 2009, application for license to cover the modified facilities (the "License Application"), filed by Dakota; and (3) an October 16, 2009, Informal Objection (the "License Objection"), filed by Three Eagles.⁴ For the reasons set forth below, we grant the Petition to the extent indicated and deny it in all other respects; we deny the License Objection; and we grant the License Application.

¹ Three Eagles is licensee of station KKSD(FM), Milbank, South Dakota.

² *Letter to Dakota Communications, Ltd.*, Reference 1800B3-TB (MB rel. Jul. 30, 2009) (the "*Staff Decision*").

³ Dakota filed an Opposition to the Petition on September 2, 2009, to which Three Eagles replied on September 14, 2009 ("Reconsideration Reply").

⁴ Dakota filed an Opposition to the Objection on October 27, 2009, to which Three Eagles replied on November 12, 2009 ("License Objection Reply").

Background. On January 7, 2009, the staff granted Dakota's application to change the Station's community of license from Huron to Milbank, South Dakota (the "Community Change Application").⁵ The Community Change Application proposed service to the entirety of Milbank, in accordance with Section 73.315 of the Commission's Rules (the "Rules").⁶ On June 2, 2009, Dakota filed the Modification Application, proposing to change the Station's location and technical facilities. The Modification Application disclosed that the proposed 70 dBμ (3.16 mV/m) signal would cover 92.3 percent of the population and 83.3 percent of the land area of Milbank, South Dakota.⁷

On June 17, 2009, Three Eagles filed an informal objection to the Modification Application (the "Modification Objection"), arguing that the facilities proposed in the Modification Application would fail to provide a principal community (70 dBμ) signal to the entirety of Milbank as originally proposed.⁸ Three Eagles claimed that Dakota evidently intended to abandon Milbank in favor of bringing a new service to Watertown.⁹ Specifically, Three Eagles noted that Robert Faehn ("Faehn"), a former South Dakota state legislator with no ownership interest – per Commission records – in the Station, was quoted in a local newspaper proposing "location of station headquarters and the construction of a tower a few miles east of Watertown."¹⁰

On July 30, 2009, the *Staff Decision* denied the Modification Objection and granted the Modification Application. On August 18, 2009, Three Eagles filed the Petition. In September 2009, Dakota completed construction of the Station's modified facilities, notified the Commission that it had commenced operation with those facilities pursuant to program test authority,¹¹ and filed the License Application. On October 16, 2009, Three Eagles filed the License Objection.

In its Petition, Three Eagles argues that the *Staff Decision* did not address its argument that Dakota has engaged in an unauthorized transfer of control of the Station.¹² Specifically, Three Eagles contends that a newspaper article submitted with the Modification Objection indicates that Faehn, and not Dakota, was in control of the construction and operation of the Station.¹³ In its Opposition to the Petition, Dakota argues that Three Eagles did not raise the transfer of control issue in the Modification Objection and that Three Eagles has "brazenly switched arguments."¹⁴ Dakota also states that "Faehn has never had

⁵ See File No. BNP-20080828AAX.

⁶ 47 C.F.R. § 73.315.

⁷ Modification Application, Engineering Statement, at 5.

⁸ Modification Objection at 2. Three Eagles is the licensee of five radio stations in Watertown, South Dakota.

⁹ *Id.* at 2.

¹⁰ *Id.*

¹¹ Letter to Marlene H. Dortch from Lawrence Bernstein, Esq. (rec'd Sep. 17, 2009).

¹² Petition at 1. Three Eagles claims that this argument was "first raised in Three Eagles' informal objection [to the Modification Application] and amplified in Three Eagles' reply to Dakota's opposition to the objection." *Id.*

¹³ Petition at 2.

¹⁴ Opposition to Petition at 1, 2.

anything to do with the operation, management or control of [the Station].”¹⁵ In the Reconsideration Reply, Three Eagles argues that, although Dakota continues to contend that there is no ownership issue involved in this case, the Station’s own website “identifies Bob Faehn as the owner and manager of KXLG.”¹⁶

In its License Objection, Three Eagles argues that approval of the pending License Application would be premature due to the pendency of the Petition.¹⁷ In addition, Three Eagles argues that Dakota’s statement to the Commission that Faehn “never had anything to do with the operation, management or control” of the Station is false because on August 26, 2009, Dakota and TMRG Broadcasting, LLC, (“TMRG”) executed a Time Brokerage Agreement (“TBA”) and Option Agreement “pertaining to the management and operation of KXLG and its potential sale to TMRG.”¹⁸ Three Eagles notes that “Robert Faehn was identified as the Manager of TMRG” in both of these agreements.¹⁹ In its Opposition to the License Objection, Dakota claims that Three Eagles’ claims are immaterial and that it “has complied fully with Commission rules and policies” and that a covering license should be issued “to the holder of a construction permit – even after a protest – if station construction is in accordance with the permit.”²⁰

In the License Objection Reply, Three Eagles argues that it is clear that “Dakota’s proposal to serve Milbank was a straw man to serve Watertown [South Dakota], a conclusion which was confirmed when Dakota entered into time brokerage and option agreements with an entity managed by Rep. Faehn who was instrumental in . . . efforts to establish a Watertown radio station contrary to [Dakota’s proposed] . . . service to Milbank.”²¹

Discussion. *The Petition.* The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission’s original order, or raises additional facts, not known or existing at the time of petitioner’s last opportunity to present such matters.²² Three Eagles has not met this burden.

Initially, we agree with Three Eagles that the *Staff Decision* was issued without considering its Modification Reply. Although there is no formal pleading cycle for informal objections,²³ the Modification Reply was properly filed with the Office of the Secretary but not, apparently, forwarded to

¹⁵ *Id.* at 3.

¹⁶ Reconsideration Reply at 2.

¹⁷ License Objection at 1.

¹⁸ *Id.*

¹⁹ *Id.* at 2.

²⁰ Opposition to Objection at 1, 2 and at n.1.

²¹ License Objection Reply at 1-2.

²² 47 C.F.R. § 1.106; *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff’d sub nom.*, *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

²³ *See, e.g., WCVO(FM), Gahanna, Ohio*, Letter, 20 FCC Rcd 12348, 12349 & n.4 (MB 2005) (47 C.F.R. § 1.45, which governs filing periods for pleadings, covers formal Petitions to Deny and not Informal Objections).

the staff for review. We therefore will grant reconsideration to the extent that the Modification Reply should have been considered in issuing the *Staff Decision*.

Nevertheless, we find that Three Eagles failed to allege an unauthorized transfer of control of the Station to Faehn in the Modification Objection. It never explicitly used the term “unauthorized transfer of control,” or specifically argued that an unauthorized transfer of control had occurred. A plain reading of the Three Eagles pleadings, including the Modification Reply, establish that Three Eagles sought to bolster Faehn’s connection to KXLG for the purpose of arguing that Dakota’s intent in filing the Modification Application was to serve Watertown, not Milbank,²⁴ rather than to argue an unauthorized transfer of control.

Substantively, we find that the Petition is without merit. Three Eagles relies on an internet copy of a newspaper article from the Sioux Falls, South Dakota *Argus Leader*, reporting that Faehn had received Commission approval “to begin building a tower near Waverly that will serve Watertown, Milbank, and surrounding communities.”²⁵ The Commission has consistently held that newspaper articles are the equivalent of hearsay and cannot act as a substitute for affidavits based on personal knowledge that are required to substantiate serious allegations.²⁶ Three Eagles attached no affidavits to the Petition. Thus, we find that the article cannot provide a basis for establishing either that Dakota “intended” by virtue of its Modification Application to serve Watertown, not Milbank, or that Dakota had ceded control of the Station to Faehn without prior Commission approval. Regarding Three Eagles’ additional argument that the Station’s own website identifies Faehn as “owner,” the Commission has held that the content of websites is not probative on the issue of determining *de facto* control.²⁷ Three Eagles thus has submitted no probative evidence that Faehn in fact controls the Station’s personnel, programming, and finances.²⁸

Additionally, regarding Dakota’s intent in filing the Modification Application, the Commission will generally presume that an applicant intends to serve its designated community of license, where the

²⁴ See, e.g., *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 964 (1986) (informal objections, like petitions to deny, must contain adequate and specific factual allegations sufficient to warrant the relief requested); see also *Atlanta Newspapers, Inc.*, 16 FCC 143 (1951) (staff not required to deal exhaustively with every possible inference that can be drawn from petitioner’s pleadings).

²⁵ Petition at Attachments 2 (Associated Press article dated August 13, 2009) and 3 (separate view of same story).

²⁶ See, e.g., *Casa de Oracion Getsemani, Ephese French SDA Church, Zion Bible Institute, Brown Student Radio, and Providence Community Radio*, Memorandum Opinion and Order, 23 FCC Rcd 4118, 4130 n.76 (2008) (“[T]he Commission has consistently held that newspaper articles and magazine articles are the equivalent of hearsay and do not meet the specificity and personal knowledge requirements in a petition to deny.”). See also, *Secret Communications II, LLC*, Memorandum Opinion and Order, 18 FCC Rcd 9139 (2003) (“*Secret*”); *Heidi Damsky, Order*, 13 FCC Rcd 16352 (1998); *Pikes Peak Broadcasting Co.*, Memorandum Opinion and Order, 12 FCC Rcd 4626 (1997).

²⁷ See *Secret*, 18 FCC Rcd at 9149 (2003) (“While we recommend that licensees be attentive to their website depictions, we find that . . . allegations based on internet website idiom are speculative and inadequate to raise a substantial and material question of fact.”); see also, *Kathryn R. Schmeltzer, Esq.*, Letter, 19 FCC Rcd 3897, 3900 (MB 2004) (content of station websites wholly irrelevant to determination of station control).

²⁸ See, e.g., *WHDH, Inc.*, Memorandum Opinion and Order, 17 FCC 2d 856 (1969), *aff’d sub nom. Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (key indicia of control is decision-making authority over station personnel, programming and finances).

applicant: (1) provides principal community signal service to the designated community; (2) locates its main studio in compliance with Section 73.1125 of the Rules; and (3) proposes programming that will serve the designated community.²⁹ Minor modifications are, of course, exempt from providing new service program statements,³⁰ and there is no issue as to the first two criteria here. Therefore, we find that Three Eagles has provided no probative evidence to counter the Commission's presumption that the Modification Application is designed to serve Milbank.

The License Objection. Initially with respect to the License Objection, we stress the stringent standard of Section 319(c) of the Communications Act of 1934, as amended,³¹ by which Three Eagles' challenge to the License Application must be judged. Upon grant of the Modification Application, Dakota has a protected interest in grant of the License Application. Under Section 319(c), Dakota is entitled to a presumption that the Section 309 public interest determination made during the entire construction permit proceeding continues in effect unless "extraordinary circumstances"³² have arisen that would make operation of the Station against the public interest.³³ Under this standard, Three Eagles' challenge fails.

Three Eagles argues that the License Application should be denied and Modification Application grant rescinded because Dakota "was misleading and lacked candor" when it stated in its Opposition to the Petition that Faehn never had anything to do with the operation, management or control of the Station.³⁴ It argues that on August 26, 2009, several days before the filing of Dakota's Opposition to the Petition, Dakota entered into the TBA to provide programming on the Station, as well as an option to purchase the Station, with TMRG, which is managed by Faehn.³⁵

²⁹ See *WBBK Broadcasting, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 5906, 5907 (2000).

³⁰ *Id.* See also Instructions for FCC Form 301, General Instruction A (directing that minor change applicants need not respond to Section II, Item 6, Proposed Program Service).

³¹ 47 U.S.C. § 319(c).

³² See *Whidbey Broadcasting Service, Inc.*, Memorandum Opinion and Order, 4 FCC Rcd 8726, 8727 (1989).

³³ See *Focus Cable of Oakland, Inc.*, Memorandum Opinion and Order, 65 FCC 2d 35, 39-40 (1977).

³⁴ See License Objection at 1.

³⁵ *Id.* at 2. The License Objection does not allege an unauthorized transfer of control of the Station to Faehn or question the legitimacy of the TBA. We have reviewed the terms of the TBA and find that, on its face, it comports with Commission precedent in that Dakota retains all indicia of control of the Station. See, e.g., *Rocking M Radio, Inc.*, Letter, 25 FCC Rcd 1322, 1326 (MB 2010) (right of licensee to terminate agreement or reject programming is paramount consideration in Commission's analysis of whether an agreement constitutes transfer of control) citing *Manahawkin Communications Corp.*, Memorandum Opinion and Order, 17 FCC Rcd 342, 347 (2001); *Choctaw Broadcasting Corp.*, Memorandum Opinion and Order, 12 FCC Rcd 8534, 8539 (1997); *Roy M. Speer*, Memorandum Opinion and Order and Notice of Apparent Liability, 11 FCC Rcd 18393, 18418 (1996) (subsequent history omitted); *Gisela Huberman, Esq.*, Letter, 6 FCC Rcd 5397 (MMB 1991); and *J. Dominic Monahan, Esq.*, Letter, 6 FCC Rcd 1867 (MMB 1991). Here, Dakota has retained both rights. See TBA, § 3.1 and 6.1.

Misrepresentation involves false statements made with intent to deceive.³⁶ Lack of candor is “concealment, evasion, or other failure to be fully informative, accompanied by intent to deceive.”³⁷ Intent to deceive is established if a licensee knowingly makes a false statement³⁸ and can also be inferred when the surrounding circumstances clearly show the existence of intent to deceive.³⁹ The Commission may disqualify an applicant who deliberately makes misrepresentations or lacks candor in dealing with the agency.⁴⁰ Moreover, Section 1.17(a)(2) of the Rules provides that no person may provide, in any written statement of fact, “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.”⁴¹ Thus, even absent an intent to deceive, a false statement may constitute an actionable violation of Section 1.17 of the Rules if it is provided without a reasonable basis for believing that the statement is correct and not misleading.⁴²

Dakota stated in its September 2, 2009, Opposition to the Petition that Faehn “never had anything to do with the operation, management, or control” of the Station. Approximately one week earlier, on August 26, 2009, Dakota had executed the TBA and purchase agreement with TMRG, and on September 23, 2009, Dakota timely filed the TBA with the Commission, in accordance with Section 73.3613 of the Rules.⁴³ Under the terms of the TBA, TMRG was required to provide programming for the Station “at such time as the Station has ceased to broadcast in Huron, SD and has begun broadcasting in Milbank, South Dakota.”⁴⁴ The Station did not “begin broadcasting” to Milbank, South Dakota until at least September 17, 2009, the date on which Dakota commenced Station operations under program test authority with its modified facilities. Accordingly, at the time Dakota made its statement regarding Faehn’s non-involvement in Station affairs, the TBA was not in effect. Thus, there is no probative evidence that Dakota’s claim that that Faehn “never had anything to do with the operation, management, or control” was, in fact, false. Moreover, we can ascribe no motive to Dakota for an intentional

³⁶ See *Fox River Broadcasting, Inc.*, Order, 93 FCC 2d 127, 129 (1983).

³⁷ *Id.* See also *Trinity Broadcasting of Florida, Inc.*, Initial Decision, 10 FCC Rcd 12020, 12063 (1995) (intent to deceive is necessary and essential element of both misrepresentation and lack of candor).

³⁸ See *Leflore Broadcasting, Co., Inc. v. FCC*, 636 F.2d 454, 462 (D.C. Cir. 1980)).

³⁹ See *American International Development, Inc.*, Memorandum Opinion and Order, 86 FCC 2d 808, 816 n.39 (1981), *aff’d sub nom. KXIV, Inc. v. FCC*, 704 F.2d 1294 (D.C. Cir. 1983)).

⁴⁰ *Contemporary Media, Inc., v. FCC*, 214 F.3d 187, 196 (D.C. Cir. 2000).

⁴¹ 47 C.F.R. § 1.17(a)(2).

⁴² See *Amendment of Section 1.17 of the Commission's Rules Concerning Truthful Statements to the Commission*, 18 FCC Rcd at 4017 (stating that the revision to Section 1.17 is intended to “prohibit incorrect statements or omissions that are the result of negligence, as well as an intent to deceive”).

⁴³ 47 C.F.R. § 73.3613; see also *Secret*, 18 FCC Rcd at 9145 (2003). As noted earlier, although the TBA was executed on August 26, 2009, *before* the Opposition to the Petition was filed, Dakota filed the TBA with the Commission “within 30 days of execution thereof,” as required by Section 73.3613; see also, e.g., *Lake Havasu City, AZ*, Report and Order, 10 FCC Rcd 6522 n.1 (MMB 1995) (“It is the actual filing date . . . of a document that constitutes its official filing . . .”).

⁴⁴ See TBA, § 1.2.

misrepresentation regarding Faehn's involvement with the Station when it made the TBA and Option Agreement part of the public record by timely and properly filing copies of those agreements.⁴⁵

Finally, for the reasons discussed above, we reject Three Eagles' allegation that Dakota and its new management intend that the Station serve Watertown rather than Milbank, South Dakota.⁴⁶ In sum, we find that Three Eagles has not demonstrated "extraordinary circumstances" indicating that operation of the Station at Milbank, South Dakota, would contravene the public interest.

Conclusion/Actions. For the reasons stated above, IT IS ORDERED, that the August 18, 2009, Petition for Reconsideration filed by Three Eagles of Joliet, Inc., IS GRANTED to the extent indicated and IS DENIED in all other respects.

IT IS FURTHER ORDERED, that the October 16, 2009, Informal Objection filed by Three Eagles of Joliet, Inc., IS DENIED.

IT IS FURTHER ORDERED, that the application for covering license for Station KXLG(FM), Milbank, South Dakota (File No. BLH-20090928AFS) filed by Dakota Communications, Ltd., IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Dakota Communications, Ltd.
Three Eagles of Joliet, Inc.

⁴⁵ See, e.g., *Valley Broadcasting Company*, Decision, 4 FCC Rcd 2611, 2617 (Rev. Bd. 1989) ("when accurate information previously supplied by a party is a matter of open Commission record, 'an intent to categorically misrepresent . . . is difficult to find'"), citing *Intercontinental Radio Inc.*, Decision, 98 FCC 2d 608, 639 (Rev. Bd. 1984).

⁴⁶ License Objection Reply at 1-2.