



Federal Communications Commission  
Washington, D.C. 20554

November 29, 2011

**DA 11-1949**

*In Reply Refer to:*

1800B3-JAN

Released: November 29, 2011

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In re: New(FM), Tonopah, AZ  
Able Radio Corporation  
Facility ID No. 170953  
File No. BNPH-20070403ACO  
**Informal Objection**

Gentlemen:

We have before us: (1) the referenced application (the "Application") of Able Radio Corporation ("Able") for a new FM station at Tonopah, Arizona; (2) an August 17, 2010, "Informal Objection and Request for Dismissal" ("Objection") filed on behalf of Entravision Holdings, LLC ("Entravision"); and (3) related responsive pleadings.<sup>1</sup> For the reasons set forth below, we deny the Objection and grant the Application.

**Background.** Able was the winning bidder for a new commercial FM station on Channel 297C2 (107.3 MHz) at Aguila, Arizona, in FM Auction 70.<sup>2</sup> In its April 3, 2007, "long-form" FCC Form 301 Application, Able proposed to serve Aguila from an antenna site located at the coordinates 33° 49' 53" North Latitude, 113° 1' 38" West Longitude. On August 10, 2007, Able amended the Application to upgrade and remove the allotment from Channel 297C2 at Aguila to Channel 297C1 at Tonopah, Arizona, pursuant to Section 73.3573(g) of the Commission's Rules (the "Rules"),<sup>3</sup> proposing a new transmitter location at the coordinates 33° 49' 04" NL, 113° 16' 18" WL. Subsequently, Able filed a series

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<sup>1</sup> On September 2, 2010, Able filed an Opposition to the Objection ("Opposition"), to which Entravision filed a Reply ("Reply") on September 14, 2010. Additionally, Entravision filed a Supplement to the Objection ("Supplement"), also on September 14, 2010.

<sup>2</sup> See *Auction of FM Broadcast Construction Permits Closes, Winning Bidders Announced for Auction No. 70*, Public Notice, 22 FCC Rcd 6323 (2007), Attachment A p. 1.

<sup>3</sup> 47 C.F.R. § 73.3573(g), which permits changes in a station's or application's community of license by application.

of minor amendments to the Application's technical proposal, including a May 5, 2008, amendment specifying service to Tonopah from a location at 33° 48' 5" NL, 113° 17' 4" WL (the "May 2008 Site").

Entravision filed its Objection on August 17, 2010. Entravision alleges that the May 2008 Site is located in the Harquahala Mountains Wilderness (the "Wilderness"), that the tract of land is administered by the Bureau of Land Management of the Department of Interior ("BLM"), and that federal law forecloses the use of the land as a site for communications facilities.<sup>4</sup> Entravision contends that Able thus could not have had "reasonable assurance" for the specified site as required by the Commission<sup>5</sup> and that the Application must be dismissed.<sup>6</sup> Entravision also argues that dismissal is warranted because Able has failed to prosecute its Application.<sup>7</sup> In support of its allegations, Entravision supplies an engineering statement demonstrating that the coordinates for the May 2008 Site correspond to a location in the Wilderness,<sup>8</sup> a copy of an email from a BLM representative stating that the BLM would not authorize a communications facility at the May 2008 Site and had not, in the two years prior to the email, received an application for such a facility,<sup>9</sup> and copies of relevant legal authorities.<sup>10</sup>

Able filed its Opposition on September 2, 2010, arguing that it did in fact have reasonable assurance for the May 2008 Site.<sup>11</sup> In support of its position, Able submits unsworn declarations from its employees detailing the events leading up to the specification of the May 2008 Site, including a fact-finding visit to the site as well as conversations with an unspecified BLM representative in the Hassayampa Field Office. Able also filed a contemporaneous amendment to specify a new transmitter site and change the community of license from Tonopah, Arizona back to Aguila, Arizona.

On September 14, 2010, Entravision filed its Supplement and its Reply. In the Supplement, it argues that Able's September 2, 2010, amendment is tantamount to an admission that Able did not and could not have had reasonable assurance of the availability of the May 2008 Site and that Able cannot amend its Application to specify a new site where it did not have reasonable assurance for the previous one.<sup>12</sup> In the Reply, Entravision attacks the credibility of the unsworn statements proffered by Able,<sup>13</sup>

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<sup>4</sup> Objection at 2-3.

<sup>5</sup> See FCC, Instructions for FCC 301 Application for Construction Permit for a Commercial Broadcast Station, p. 2, <http://transition.fcc.gov/Forms/Form301/301.pdf> (retrieved Nov. 8, 2011) ("Form 301 Instructions") (citing *Genesee Communications, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 3595, 3595 (1988); *National Innovative Programming Network, Inc. of the East Coast*, Memorandum Opinion and Order, 2 FCC Rcd 5641, 5643 (1987), *recon. denied*, 3 FCC Rcd 5650 (1988); *William F. and Anne K. Wallace*, Memorandum Opinion and Order, 49 FCC 2d 1424, 1427 (Rev. Bd. 1989)).

<sup>6</sup> Objection at 4.

<sup>7</sup> *Id.* at 5. Entravision notes that it has been over three years since the auction closed and argues that this passage of time demonstrates that Able "has not made any material effort to prosecute its application."

<sup>8</sup> See *id.*, Exhibit A.

<sup>9</sup> See *id.*, Exhibit B.

<sup>10</sup> See *id.*, Exhibit B. This exhibit includes copies of the Arizona Desert Wilderness Act of 1990, Pub. L. No. 101-628 (1990) (designating the Harquahala Mountains Wilderness) and the Wilderness Act of 1964 § 4(c), 16 U.S.C. § 1133(c) (prohibiting, *inter alia*, structures, installations, and commercial enterprises in designated wilderness areas).

<sup>11</sup> Opposition at 1.

<sup>12</sup> Supplement at 1-2.

<sup>13</sup> Reply at 2-5.

reasserts that Able did not have reasonable assurance for the May 2008 Site,<sup>14</sup> and also provides additional emails from BLM staff and additional engineering statements in support of its positions.<sup>15</sup>

**Discussion. Informal Objection.** Under Section 309(e) of the Communications Act of 1934, as amended, (the “Act”),<sup>16</sup> informal objections, like petitions to deny, must provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with the public interest, convenience and necessity.<sup>17</sup> Upon review of the record, we find that Entravision has not raised a substantial and material question of fact calling for further inquiry.<sup>18</sup>

**Site Availability.** Entravision argues that Able lacked reasonable assurance for the May 2008 Site, that Able cannot now amend to specify a new site, and that this apparent defect warrants dismissal of the Application. In support, it cites a number of cases in which the Commission did not allow curative amendments<sup>19</sup> and dismissed applications for lack of reasonable assurance of the specified transmitter site.<sup>20</sup> However, Entravision has misapplied this precedent, which pertains to reasonable assurance for an *originally-proposed site* as opposed to a *later-amended site*.<sup>21</sup> Entravision cites no cases in which the Commission has dismissed an application based on a lack of reasonable assurance for an amended site, and we decline to do so here.

Furthermore, dismissal of Able’s Application on these grounds would conflict with the Commission’s stated policy regarding amendments to pending applications filed by auction winners. In

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<sup>14</sup> *Id.* at 10.

<sup>15</sup> *Id.*, Exhibits A and B.

<sup>16</sup> 47 U.S.C. § 309(e).

<sup>17</sup> See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n. 10 (1990), *aff’d sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *reh’g denied* (Sept. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (informal objection must contain adequate and specific factual allegations sufficient to warrant the relief requested).

<sup>18</sup> In light of our action herein, we find it unnecessary to reach the issues of: 1) whether or not Able did in fact have reasonable assurance for the May 2008 Site, and 2) the evidentiary sufficiency of hearsay generally, unsworn statements, and unverified copies of electronic communications.

<sup>19</sup> Objection at 4 (citing *Classic Vision, Inc.*, 104 FCC 2d 1271 (Rev. Bd. 1986), *rev. denied*, 2 FCC 2376 (1987); *South Florida Broadcasting Co.*, 99 FCC 2d 840 (Rev. Bd. 1984), *recon. denied*, 100 FCC 2d 474 (Rev. Bd. 1985)).

<sup>20</sup> *Id.* (citing *Radio Delaware, Inc.*, Memorandum Opinion and Order, 4 FCC Rcd 8630 (1989); *Port Huron Family Radio, Inc.*, Decision, 4 FCC Rcd 2532 (Rev. Bd. 1989), *modified*, 5 FCC Rcd 4562; *Steven A Roy*, 22 FCC Rcd 16828 (MB 2007);

<sup>21</sup> See, e.g., *Classic Vision, Inc.*, 104 FCC 2d at 1273 (citing *South Florida Broadcasting Co.*, 99 FCC 2d at 845 n. 12) (noting in dicta that even if the subject application has not been dismissed for failure to prosecute, it would have been dismissed for lack of reasonable assurance of the originally-proposed site and amendment would be denied); *South Florida Broadcasting Co.*, 99 FCC 2d at 842 (referencing alleged deficiencies in an originally-proposed site and delaying action on a petition for leave to amend until it was determined whether or not applicants had reasonable assurance of the availability of the site); *Duchess Communications Corp.*, Decision, 101 FCC 2d 243, 253 (Rev. Bd. 1985) (citing *South Florida Broadcasting Co.*, 99 FCC 2d at 845 n. 12) (denying leave to amend where applicant did not have reasonable assurance of an originally-proposed site).

adopting rules to implement authority to auction commercial broadcast licenses,<sup>22</sup> the Commission established a “more lenient approach toward the processing of defective broadcast applications for new facilities and major changes, . . . permitting multiple corrective amendments, if necessary.”<sup>23</sup> The Commission also noted that “in relaxing the standards for filing amendments, deficiencies in long-form applications filed by winning bidders will not be curable by major amendment. As they significantly change the long-form application as originally filed, major amendments must be filed in accordance with the window filing procedures discussed above.”<sup>24</sup> Finally, unlike the previous “hard look” processing procedures, “the new processing standards for broadcast long-form applications will enable applicants [for new facilities] to avoid dismissal and to liberally correct heretofore fatal defects in application information.”<sup>25</sup> As present Commission policy permits the “liberal” filing of non-major corrective amendments, we will not dismiss Able’s Application due to an alleged lack of reasonable assurance for the May 2008 Site.

*The Application.* We have examined the amended Application and find that it complies with all pertinent statutory and regulatory requirements and that its grant will further the public interest, convenience, and necessity.

*Failure to Prosecute.* Entravision also asserts that Able has violated Section 73.3568(a)(1) of the Rules<sup>26</sup> by failing to “make any material effort to prosecute its application.”<sup>27</sup> Entravision argues that the passage of three years since the close of Auction 70 indicates, “as best as can be told, [that] Able has not made any material effort to prosecute its application.”<sup>28</sup> Section 73.3568(a)(1) states that “[f]ailure to prosecute an application, or failure to respond to official correspondence or request for additional information, will be cause for dismissal.” Under this provision, an applicant therefore will not suffer dismissal for failure to prosecute unless, “with contempt or inexcusable sloth, [it] plainly defies an order.”<sup>29</sup> Able’s conduct does not rise to this level. Since Able filed the Application, it has filed seven amendments to its proposal. This does not evidence that Able has made no “material effort to prosecute its application,” and we reject this argument.

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<sup>22</sup> *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses*, First Report and Order, 13 FCC Rcd 15920 (1998), *recon. denied*, 14 FCC Rcd 8724 (1999), *aff’d sub nom. Orion Communications, Ltd. v. FCC*, 213 F.3d 761 (D.C. Cir. 2000) (the “Auction Order”).

<sup>23</sup> *Auction Order*, 13 FCC Rcd at 15986.

<sup>24</sup> *Id.* We note that the specification of a new transmitter site is considered a minor amendment as opposed to a major amendment. See 47 C.F.R. § 73.3573(a)(1) (defining what constitutes a “major facility change”).

<sup>25</sup> *Id.* at 15987.

<sup>26</sup> 47 C.F.R. § 73.3568(a)(1).

<sup>27</sup> Objection at 5.

<sup>28</sup> *Id.*

<sup>29</sup> *Innovative Women’s Media Ass’n v. F.C.C.*, 16 F.3d 1287, 1289 (D.C. Cir. 1994) (quoting *The Dunlin Group*, Memorandum Opinion and Order, 6 FCC Rcd 4642, 4644 (Rev.Bd.1991).

**Conclusion/Actions.** Accordingly, IT IS ORDERED that, for the reasons set forth above, the Informal Objection and Request for Dismissal filed by Entravision Holdings, LLC IS DENIED.

IT IS FURTHER ORDERED that the application of Able Radio Corporation for a new FM station at Tonopah, Arizona (File No. BNPH-20070403ACO) IS GRANTED.

Sincerely,

Peter H. Doyle  
Chief, Audio Division  
Media Bureau