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In Reply Refer To:

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Mr. James Allen Patten
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In re: KWKJ(FM), Windsor, Missouri
D & H Media, LLC
Facility ID No. 39629
File No. BRH-20120926ADF

Informal Objection

Dear Mr. Patten and Mr. Skall:

We have before us: (1) the referenced application (“Renewal Application”) of D & H Media, LLC (“Licensee”) to renew its license for KWKJ(FM), Windsor, Missouri (“Station”), and (2) the January 7, 2013, Informal Objection (“Objection”) to that application filed by James Allen Patten (“Patten”).¹ For the reasons set forth below, we deny the Objection and grant the Renewal Application.

Background. Previously, the Station was licensed to serve Warsaw, Missouri.² On May 4, 2001, the Commission granted Licensee’s Petition for Rule Making and modified the Station’s community of license from Warsaw to Windsor, Missouri.³ Licensee subsequently constructed transmission facilities to serve Windsor and received a license to operate with those facilities in 2002.⁴

On September 26, 2012, Licensee timely filed the Renewal Application. On January 7, 2013, Patten filed the Objection, expressing concern that the Station has not operated in the public interest.⁵ He presents three main arguments: (1) the Station’s main studio does not comply with Section 73.1125 of the Commission’s Rules (“Main Studio Rule”);⁶ (2) the Station caters to the residents of Warrensburg, Missouri, rather than Windsor, Missouri;⁷ and (3) the change of the Station’s community of license from

¹ Licensee filed an Opposition to Informal Objection (“Opposition”) on February 11, 2013.

² *Caro and Cass City, Michigan; Warsaw and Windsor, Missouri*, Notice of Proposed Rule Making, 16 FCC Rcd 2908, 2908 (MB 2001).

³ *Caro and Cass City, Michigan; Warsaw and Windsor, Missouri*, Report and Order, 16 FCC Rcd 9461, 9462–63 (MB 2001).

⁴ See File No. BLH-20020313ABA, granted on May 10, 2002.

⁵ Objection at 1.

⁶ *Id.* See also 47 C.F.R. § 73.1125.

⁷ Objection at 1–3.

Warsaw to Windsor reduces the chances of establishing a low-power FM (“LPFM”) radio station in Windsor.⁸ Patten urges the Commission to find that the Station did not act in the public interest and, thus, deny the Renewal Application.⁹

In the Opposition, Licensee first argues that the Station has not violated the Main Studio Rule¹⁰ because the Station’s main studio lies within 25 miles of Windsor’s post office.¹¹ Next, Licensee argues that the Station serves Windsor residents with programming responsive to the Windsor community.¹² Licensee emphasizes that licensees have broad discretion in choosing programming to serve the public interest.¹³ Finally, Licensee contends that the Station’s designation of Windsor, Missouri, as its community of license does not hinder that community’s ability to acquire an LPFM license and that claiming otherwise is irrelevant in any case.¹⁴ Licensee concludes that the Objection fails to establish a substantial and material question of fact as to whether granting the Renewal Application would not serve the public interest.¹⁵

Discussion. Informal objections to license renewal applications must, pursuant to Section 309(e) of the Communications Act of 1934, as amended (“Act”), 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 Section 309(k) of the Act,¹⁶ which governs our evaluation of an application for license renewal. Specifically, Section 309(k)(1) provides that we are to grant the renewal application if, upon consideration of the application and pleadings, we find that: (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations of the Act or the Rules; and (3) there have been no other violations which, taken together, constitute a pattern of abuse.¹⁷ If, however, the licensee fails to meet that standard, the Commission may deny the application — after

⁸ *Id.* at 1.

⁹ *Id.* at 4–5.

¹⁰ Opposition at 2–3.

¹¹ *Id.* at 2; Opposition, Exhibit A. See 47 C.F.R. §§ 73.208(a)(1)(iv), 73.1125(a)(3).

¹² Opposition at 3 (citing Opposition, Declaration of Greg Hassler, Attachment 1).

¹³ *Id.* at 4 (citing *WSKG Public Telecommunications Council*, 23 FCC Rcd 1259 (MB 2008); *WUFT-FM, Gainesville, FL*, 21 FCC Rcd 6957 (MB 2006)) (other citations omitted).

¹⁴ Opposition at 3. Licensee also argues that it satisfied the Section 307(b) requirements for changing the Station’s community of license to Windsor, Missouri. Opposition at 4. See 47 U.S.C. § 307(b); *Modification of FM and TV Authorizations to Specify a New Community of License*, Report and Order, 4 FCC Rcd 4870 (1989), *recon. granted in part*, Memorandum Opinion and Order, 5 FCC Rcd 7094 (1990). However, the Informal Objection to the Renewal Application cannot serve as a basis for revisiting the decision to license the Station as a Windsor station — that decision became a final order many years ago. Instead, we need only examine Patten’s allegation regarding availability of spectrum for future LPFM licensing as part of our Section 309(k) analysis. See *infra* text accompanying notes 16–18.

¹⁵ Opposition at 5. See 47 U.S.C. § 309(k)(1).

¹⁶ 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), *rehearing denied* (Sep. 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).

¹⁷ 47 U.S.C. § 309(k)(1). The renewal standard was amended to read as described by Section 204(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). See *Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures)*, Order, 11 FCC Rcd 6363 (1996).

notice and opportunity for a hearing under Section 309(e) of the Act — or grant the application “on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted.”¹⁸

With respect to Patten’s first argument, the Main Studio Rule requires that each broadcast station operate its main studio either: (1) within the station’s community of license; (2) within the contour of any other broadcast station licensed to its community; or (3) within 25 miles of the reference points of the center of its community of license, as described in Section 73.208(a)(1) – “whichever it chooses.”¹⁹ We have confirmed that the distance from the post office²⁰ to the Station’s main studio is 19.9 miles; thus, we agree with Licensee that the Station complies with the Main Studio Rule.

Patten’s second argument is that Licensee’s programming “focus[es] . . . entirely on Warrensburg,” Missouri, instead of the neighboring community of Windsor.²¹ In support, Patten alleges that the Station’s website, including its “local news reports, local sports reports, community calendar, or any [other] area,” does not mention “Windsor, Missouri.”²² He also alleges that the programming does not mention “Windsor, Missouri.”²³ Patten concludes that Licensee has essentially “substitut[ed] Warrensburg for Warsaw,” the previous community of license, and questions whether that substitution serves the public interest of Windsor and constitutes a “preferential arrangement of allotments.”²⁴

Licensees have a duty to respond to local needs and issues by choosing appropriate programming.²⁵ They also have broad discretion to determine, in good faith, the issues that they believe to be of concern to the communities that they serve and the manner in which to address those issues.²⁶ The Commission will not intervene unless a licensee has abused this discretion and has consistently and unreasonably ignored matters of public concern.²⁷ For instance, we may consider whether a licensee offers such nominal levels of issue-responsive programming as to have defaulted on this core obligation.²⁸ However, Patten has failed to provide specific allegations of fact calling for further inquiry as to whether

¹⁸ 47 U.S.C. §§ 309(k)(2), 309(k)(3).

¹⁹ 47 C.F.R. § 73.1125(a); *Review of the Commission’s Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations*, Report and Order, 13 FCC Rcd 15691, 15694 (1998) (“*Main Studio R&O*”), *recon. granted in part*, 14 FCC Rcd 11113 (1999). In this context, these reference points are generally the coordinates listed in the United States Department of Interior publication entitled *Index to the National Atlas of the United States. Main Studio R&O*, 13 FCC Rcd at 15694 n.17 (citing 47 C.F.R. § 73.208(a)(1)). If a community’s reference coordinates are not listed in the *Atlas*, however, the coordinates of the main post office serve as an alternative. *Id.*

²⁰ *See* 47 C.F.R. § 73.208(a)(1)(iv).

²¹ Objection at 1–3.

²² *Id.* at 2.

²³ *Id.*

²⁴ *Id.*

²⁵ *See, e.g., WTMX(FM), Skokie, IL*, Letter, 22 FCC Rcd 6568, 6570 (MB 2007) (“*WTMX*”).

²⁶ *Time-Life Broadcast, Inc.*, Memorandum Opinion and Order, 33 FCC 2d 1081, 1092 (1972). *See also Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413, 1431 (D.C. Cir 1983), and *Broadcast Localism*, Notice of Inquiry, 19 FCC Rcd 12425, 12429 (2004).

²⁷ *Columbia Broadcasting System, Inc.*, Memorandum Opinion and Order, 51 FCC 2d 273, 280 (1975).

²⁸ *See, e.g., Philadelphia Radio Stations*, Memorandum Opinion and Order, 5 FCC Rcd 3487, 3487–88 (1990).

Licensee has abused its broad discretion or otherwise failed to meet this programming obligation.²⁹ His one unsupported and conclusory phrase that the programming does not mention “Windsor, Missouri,” does not provide the quantum of evidence necessary to establish *prima facie* that grant of the Application would be contrary to the public interest.³⁰ Moreover, Patten has not challenged Licensee’s evidence showing that the Station has chosen programming responsive to issues faced by Windsor residents. For example, the Station broadcasts local Windsor news and weather reports, hosts regular discussions with the U.S. Representative from Missouri’s 4th Congressional District and other local public officials, airs the Windsor High School varsity athletic scores and provides coverage of the Windsor Basketball Tournament. In contrast, we find information about the Station’s website to be far less probative in determining whether the Licensee has fulfilled its *on-air* obligation to serve the community of Windsor.³¹

Patten also expresses concern that the Station’s official station identification lists Windsor, Missouri, alongside “several other local towns.”³² But as Licensee notes,³³ Section 73.1201(b)(2) permits the Station to name communities other than the community of license in the Station’s official station identification, as long as the community of license precedes the other communities.³⁴ Thus, the fact that the Station lists other communities alongside Windsor, Missouri, in its official station identification is no indication that the Station is not complying with Section 73.1201 or otherwise is failing to serve the public interest.³⁵

Finally, we reject Patten’s third argument, which is that the Station’s operation as a full-service station licensed to Windsor, Missouri lessens that community’s chances of acquiring a low-power FM radio license.³⁶ Within the context of this Renewal Application, Section 309(k) of the Act expressly prohibits us from considering whether other potential licensees would better serve the public interest,

²⁹ See *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986); *WSIA(FM), Staten Island, New York*, Letter, 22 FCC Rcd 4890, 4894 (MB 2007). Patten also alleges that the Windsor community is unaware that the Station’s community of license is, in fact, Windsor. Objection at 3. He claims that he “could provide plenty of anecdotal evidence” (but does not) and also notes that Windsor’s official website does not list the Station. *Id.* However, these allegations similarly do not raise a substantial and material question of fact calling for further inquiry into whether the Station serves Windsor.

³⁰ See Objection at 2.

³¹ See *KXLG(FM), Milbank, SD*, Letter, 26 FCC Rcd 15567, 15570 n.27 (MB 2011) (citing cases in which the staff found that content on a website was not dispositive and did not raise a substantial and material question of fact that would warrant further consideration).

³² Objection at 2.

³³ Opposition at 3.

³⁴ See 47 C.F.R. § 73.1201(b)(2). The Commission decided to amend Section 73.1201(b)(2) to allow “a broadcaster to include in its official station identification the name of any community or communities that it selects, irrespective of the level of signal coverage provided to such communities.” *In the Matter of Amendment of Section 73.1201(b)(2) of the Commission’s Rules—Additional City Identification*, Report and Order, 95 FCC 2d 1253, 1258–59 (1983) (“*Additional City Identification R&O*”), *recon. denied*, 98 FCC 2d 787 (1984). Furthermore, the Commission found that this change would not affect a station’s “primary service obligation to its community of license” when considering a license renewal. *Id.*

³⁵ See 47 C.F.R. § 73.1201(b)(2); *Additional City Identification R&O*, 95 FCC 2d at 1258–59. See also, e.g., *WTMX*, 22 FCC Rcd at 6571 n.22 (applying the rule to find as acceptable an announcement naming an additional city after the community of license).

³⁶ See Objection at 3–4.

convenience, or necessity.³⁷ We therefore cannot deny the Application because that Station uses spectrum that a potential LPFM applicant might desire. Accordingly, Patten's various objections to the Renewal Application do not raise a substantial and material question of fact as to whether the Station has operated in the public interest.³⁸

Conclusion/Actions. We have examined the Objection and find that it does not raise a substantial and material question of fact calling for further inquiry or otherwise persuade us that to grant the Renewal Application would contravene the public interest, convenience, and necessity. Accordingly, we deny the Informal Objection. Moreover, we have evaluated the Renewal Application pursuant to Section 309(k) of the Act, and we find that the station has served the public interest, convenience, and necessity during the subject license term; there have been no serious violations of the Act or the Rules; and there have been no other violations which, taken together, constitute a pattern of abuse.

Accordingly, IT IS ORDERED that the Informal Objection filed on January 7, 2013 by James Allen Patten IS DENIED, and the application (File No. BRH-20120926ADF) of D & H Media, LLC for renewal of its license for Station KWKJ(FM), Windsor, Missouri, IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

³⁷ 47 U.S.C. § 309(k)(4). Moreover, as Patten admits, LPFM stations remain "secondary to existing and modified full-service FM stations." Objection at 4; Local Community Radio Act of 2010, Pub. L. No. 111-371, § 5(3), 124 Stat. 4072, 4073 (2011); *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, 26 FCC Rcd 2556, 2571-72 n.77 (2011), *recon. granted in part*, 27 FCC Rcd 12829 (2012) (stating that Congress "direct[ed] us to ensure that FM translator and booster stations, and LPFM stations, remain secondary to existing and modified full-service FM stations"). The availability of any frequencies near Windsor, Missouri, for LPFM service is, thus, irrelevant to whether the full-service Station's license should be renewed. In any event, we refer Patten and any other parties interested in an LPFM filing opportunity to our LPFM channel finder tool: <http://www.fcc.gov/encyclopedia/low-power-fm-lpfm-channel-finder>. This tool shows, at the reference coordinates for Windsor, Missouri, nine potential channels remain available for licensing in the upcoming October 2013 LPFM filing window.

³⁸ See 47 U.S.C. § 309(k)(1).