

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

In the Matter of)
ABUNDANT EPHESIAN 320 SPECTRUM, LLC)
Stations WQTI787 and WQTI775) File Nos. 0006598972, 0006598961
AIR APPARENT ASSOCIATES LLC)
Stations WQTI795 and WQTI778) File Nos. 0006483679, 0006483694
CHOICE COMMUNICATIONS LLC)
Stations WQTI781 and WQTI786) File Nos. 0006593615, 0006593616
PROSPERITY GROUP PMA)
Stations WQTI777 and WQTI793) File Nos. 0006597991, 0006597995
INNOVATIVE GROUP)
Stations WQTI783 and WQTI790) File Nos. 0006598016, 0006598017
SBH SPECTRUM, LLC)
Station WQSG215) File No. 0006459412
RICHARD C. NEWELL)
Station WQSG657) File No. 0006459420
CENTRAL VALLEY COMMUNICATIONS,)
LLC)
Stations WQSF968, WQUA521, and WQSH269) File Nos. 0006459406, 0006462989,
0006459410
2008 KIANG FAMILY TRUST)
Station WQSG672) File No. 0006459417
KATHERINE KIANG REVOCABLE TRUST)
Station WQSG674) File No. 0006459418
KIANG FAMILY TRUST)
Station WQSG676) File No. 0006459419
RED RIDER LLC)
Station WQSF370) File No. 0006459414
BLUEGOLD SPECTRUM, LLC)
Station WQSG871) File No. 0006459426

ORDER AND ORDER ON RECONSIDERATION

Adopted: July 10, 2015

Released: July 10, 2015

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

- 1. Introduction. We have before us 1) an informal complaint filed by Smartcomm, LLC

(Smartcomm) alleging non-construction of above-captioned site-based 806-821/851-866 MHz (800 MHz) Specialized Mobile Radio (SMR) Pool licenses held by Abundant Ephesian 320 Spectrum, LLC (Abundant), Air Apparent Associates LLC (Air), Choice Communications LLC (Choice), Prosperity Group PMA (Prosperity), and Innovative Group (collective First Group of Licensees);¹ 2) a similar complaint filed by Smartcomm alleging non-construction of the above-captioned site-based 800 MHz SMR licenses held by SBH Spectrum, LLC, Richard C. Newell, Central Valley Communications, LLC, 2008 Kiang Family Trust, Katherine Kiang Revocable Trust, Kiang Family Trust, Red Rider LLC, and Bluegold Spectrum, LLC (collectively Second Group of Licensees);² and 3) a petition filed by Abundant³ for reconsideration of our decision granting a prior similar complaint and terminating Abundant's license for site-based 800 MHz SMR Station WQTI787 for non-construction.⁴ As set forth below, we deny both Smartcomm complaints, and grant Abundant's petition for reconsideration.

2. *Background. Abundant Petition for Reconsideration.* On December 30, 2014, Abundant filed a notification indicating that the facilities for Station WQTI787 had been constructed.⁵ On January 16, 2015, M2M Spectrum Networks, LLC (M2M) filed an informal complaint regarding the station's construction status.⁶ M2M presented correspondence from the relevant tower operators stating that they had no lease with Abundant, and Abundant had no equipment at those sites.⁷ The Wireless Telecommunications Bureau's Mobility Division (Division), acting pursuant to Section 308(b) of the Communications Act of 1934, as amended,⁸ sent a letter to Abundant's address of record requesting specified information concerning the construction and operational status of the station within thirty days.⁹ The letter was returned as undeliverable. The Division then concluded, based on the information submitted by M2M and Abundant's failure to respond, that the station had not been constructed and its authorization canceled automatically.¹⁰

3. By electronic mail,¹¹ letter,¹² and pleading filed via the Commission's Universal Licensing System,¹³ Abundant sought reconsideration of the Division's decision. It noted that it had not timely

¹ Letter dated March 12, 2015 from Rob Somers, General Counsel, Smartcomm to Marlene H. Dortch, Secretary, FCC (Smartcomm First Complaint) (pertaining to Stations WQTI775, WQTI795, WQTI778, WQTI781, WQTI786, WQTI777, WQTI793, WQTI783, WQTI790).

² Letter dated April 10, 2015 from Rob Somers, General Counsel, Smartcomm to Marlene H. Dortch, Secretary, FCC (Smartcomm Second Complaint) (pertaining to Stations WQSG215, WQSG657, WQSF968, WQUA521, WQSH269, WQSG672, WQSG674, WQSG676, WQSF370, WQSG871).

³ Letter dated April 2, 2015 from J. Otis Mitchell, Manager, Abundant Ephesian 320 Spectrum, LLC to Marlene H. Dortch, Secretary, FCC (Abundant Letter).

⁴ Abundant Ephesian 320 Spectrum, LLC, *Order*, 30 FCC Rcd 2350 (WTB MD 2015) (*Order*).

⁵ See FCC File No. 0006598972.

⁶ Letter dated Jan. 16, 2015 from Rob Somers, General Counsel, M2M to Marlene H. Dortch, Secretary, FCC.

⁷ *Id.* at Exhibit.

⁸ 47 U.S.C. § 308(b).

⁹ Letter dated Feb. 9, 2015, from Scot Stone, Deputy Chief, Wireless Telecommunications Bureau, to J. Otis Mitchell, Manager, Abundant Ephesians 320 Spectrum, LLC.

¹⁰ See *Order*, 30 FCC Rcd at 2350 ¶ 4. Section 90.155 of the Commission's Rules provides that a license for a private land mobile radio station must be placed in operation within twelve months from the date of grant or the authorization cancels automatically. See 47 C.F.R. § 90.155(a).

¹¹ Electronic mail dated March 26, 2015 from J. Otis Mitchell to Scot Stone.

¹² Abundant Letter.

¹³ Letter dated April 8, 2015 from Dale Gray to Wireless Telecommunications Bureau (Petition).

received the Division's inquiry letter because Abundant had failed to inform the Commission that its office had moved.¹⁴ Abundant also provided the information requested in the inquiry letter regarding Station WQTI787's equipment.¹⁵ Finally, Abundant explained that the relevant tower operators had no lease with Abundant because its system is deployed and maintained by its third-party affiliate, RapidLink Wireless LLC (RapidLink), so its site lease contracts would not be in Abundant's name, but instead in the name of RapidLink.¹⁶ In reply, M2M asserted that Abundant still had not demonstrated that the station was constructed.¹⁷

4. Smartcomm First Complaint. Between October 1 and December 30, 2014, the First Group of Licensees filed notifications indicating that their above-captioned station facilities had been constructed.¹⁸ On March 12, 2015, Smartcomm filed an informal complaint regarding the stations' construction status. It stated that its "informal research into the notifications has produced no evidence that any of the sites . . . have actually been built."¹⁹ Specifically, Smartcomm presented correspondence from the relevant tower operators stating that they had no lease with Air, Choice, or Prosperity and the licensees had no equipment at those sites.²⁰ Smartcomm also noted that Air and Choice subsequently filed applications to modify their licenses to change the licensed locations, which Smartcomm characterized as "an odd decision for two small businesses who presumably just invested significant resources in building out the original locations."²¹ Licensees responded, explaining that their systems are deployed and maintained by RapidLink, and that their site lease contracts would not be in their business names, but instead in the name of RapidLink.²² In reply, Smartcomm asserted that the licensees still had not demonstrated that the stations were constructed.²³

5. Smartcomm Second Complaint. Between September 15 and 27, 2014, the Second Group of Licensees filed notifications indicating that their above-captioned station facilities had been constructed.²⁴ On April 10, 2015, Smartcomm filed an informal complaint regarding the stations' construction status. It noted that the licensees had filed requests for two-year construction extensions that were dismissed on September 8, 2014,²⁵ and Smartcomm deemed it "suspicious" that a licensee could construct a facility

¹⁴ On March 17, 2015, Abundant filed an administrative update to change its address of record. See FCC File No. 0006713073.

¹⁵ Petition at 2-3.

¹⁶ *Id.* at 3; Abundant Letter at 1.

¹⁷ Letter dated April 6, 2015 from Rob Somers, General Counsel, M2M to Marlene H. Dortch, Secretary, FCC, at 1-2.

¹⁸ FCC File Nos. 0006483679, 0006483694, 0006593615-16, 0006597991, 0006597995, 0006598016-17, 0006598961.

¹⁹ Smartcomm First Complaint at 1-2.

²⁰ *Id.* at Exhibits A-C.

²¹ Smartcomm First Complaint at 2.

²² See Letter dated March 30, 2015 from Susan L. Newell, Manager, Air Apparent Associates LLC to Marlene H. Dortch, Secretary, FCC; Letter dated March 30, 2015 from George W. Cushman, Manager, Choice Communications, LLC to Marlene H. Dortch, Secretary, FCC; see also Abundant Letter at 1.

²³ Letter dated April 20, 2015 from Rob Somers, General Counsel, Smartcomm to Marlene H. Dortch, Secretary, FCC, at 1-2.

²⁴ FCC File Nos. 0006459406, 0006459410, 0006459412, 0006459414, 0006459417-20, 0006459426, 0006462989.

²⁵ See FCC File Nos. 0006443422, 0006443492, 0006443729, 0006443734, 0006443733, 0006443490, 0006443393, 0006443396, 0006442095, 0006444902. The extension requests were dismissed because SMR licensees are not eligible for extended implementation. See 47 C.F.R. § 90.629(e).

shortly after requesting additional time to construct.²⁶ Smartcomm also “conducted preliminary research into the local permit filings that would be necessary for the above-referenced licensees to have constructed at their licensed locations,” and determined that “the local permits required for the construction do not appear to have been obtained for several of the sites.”²⁷

6. *Discussion.* A party asserting that a license has automatically terminated bears the burden of proving that the station was not constructed or has permanently discontinued operation. That burden is not met where the petitioner presents solely a documentary or circumstantial case not based on monitoring or site visits, especially when the target licensee offers a plausible explanation to rebut the petitioner’s assertions.²⁸ The uncontested explanation of the First Group of Licensees that Smartcomm and M2M did not find tower leases in their names because the leases are held by RapidLink is plausible. The Division’s initial decision regarding Abundant’s Station WQTI787, which relied substantially on Abundant’s failure to respond to the allegations, was correct.²⁹ We now conclude, however, based on the expanded record, that M2M and Smartcomm have not demonstrated that the above-captioned station facilities of Abundant and the rest of the First Group of Licensees were not constructed. We therefore grant Abundant’s petition for reconsideration, and deny the Smartcomm First Complaint.

7. With respect to the Second Group of Licensees, Smartcomm offers speculation and conjecture rather than evidence. Informal research that fails to uncover expected documentation of construction does not demonstrate that a facility is not constructed and operational.³⁰ Nor does circumstantial evidence regarding the sequence and timing of various applications. We conclude that Smartcomm has not demonstrated that the licenses at issue terminated for failure to construct. We therefore deny the Smartcomm Second Complaint.

8. For the reasons set forth above, we deny both Smartcomm complaints, and grant Abundant’s petition for reconsideration. This action is without prejudice to the filing of a sufficient complaint alleging that any of the above-captioned station licenses automatically canceled due to lack of construction or permanent discontinuance of operations.³¹

9. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 309, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, 405, and Section 1.106 of the Commission’s Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed April 2, 2015 by Abundant Ephesian 320 Spectrum, LLC IS GRANTED and application FCC File No. 0006598972 SHALL BE REINSTATED TO PENDING STATUS and ACCEPTED.

10. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 1.41 and 90.155 of the Commission’s Rules, 47 C.F.R. §§ 1.41, 90.155, the informal complaints filed by Smartcomm, LLC on March 12 and April 10,

²⁶ Smartcomm Second Complaint at 1.

²⁷ *Id.* Smartcomm also noted that several of the licensed locations did not appear in the Commission Antenna Structure Registration database. *Id.*

²⁸ See National Ready Mixed Concrete Co., *Memorandum Opinion and Order*, 23 FCC Rcd 5250, 5253 ¶ 10 (2008); see also, e.g., Davis Electronics, Inc., *Memorandum Opinion and Order*, 17 FCC Rcd 10400, 10404 ¶ 8 (WTB PSPWD 2002).

²⁹ See, e.g., Milton H. Pintell, *Order on Reconsideration*, 20 FCC Rcd 19315, 19316 ¶ 5 (WTB PSCID 2005).

³⁰ Cf. National Science and Technology Network, Inc., *Order on Reconsideration*, 23 FCC Rcd 5723, 5726 n.35 (WTB MD 2008) (“Any purported conflict with El Segundo’s Municipal Code or other applicable procedures . . . is irrelevant to the question of whether the facilities are constructed and operational.”).

³¹ See 47 C.F.R. §§ 90.155(a), 90.631(f).

2015 ARE DENIED.

11. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. § 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Scot Stone
Deputy Chief, Mobility Division
Wireless Telecommunications Bureau