

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of)	
)	
WBBK BROADCASTING, INC.)	
Radio Station WFDL (FM))	
Lomira, Wisconsin)	File No. BPH-971210IE
)	
Application to modify facilities including)	
channel classification and transmitting)	
location)	

MEMORANDUM OPINION AND ORDER

Adopted: February 29, 2000

Released: March 22, 2000

By the Commission:

1. The Commission has before it an Application for Review filed June 24, 1999 by RBH Enterprises, Inc. ("RBH").¹ RBH requests review of a May 25, 1999 letter decision by the Assistant Chief, Audio Services Division, Mass Media Bureau ("Bureau") denying RBH's Informal Objection and granting the application of WBBK Broadcasting, Inc. ("WBI") for a "one-step" minor change to the facilities of station WFDL (FM), Lomira, Wisconsin.² For the reasons set forth below, the Application for Review is denied.

2. Background. On December 10, 1997, WBI filed a "one-step" application to upgrade WFDL from Channel 249A to Channel 249C3, and to relocate the station's transmission facilities. Citing the *Suburban Community Policy, the Berwick Doctrine, and the de Facto Reallocation Policy* ("*Suburban Community*"), 93 FCC 2d 436 (1983), RBH objects to WFDL's modification application, claiming that the proposal would violate 47 U.S.C. §307(b) because WBI allegedly "does not provide a local program service to [the community of license] worthy of the name by any objective evaluation." Application for Review, ¶6. RBH contends that WFDL does not provide programming for Lomira residents, and charges WBI with failing to submit a programming proposal with its modification application. The Bureau denied RBH's Informal Objection, concluding that WBI was not required to file a programming statement with its minor change application, and that RBH had failed to provide any evidence to support its claim that WBI would not serve its community of license.

3. In its Application for Review, RBH renews its contention that WFDL would not adequately serve its community of license with the proposed facilities, and therefore RBH concludes that grant of the subject application would conflict with §307(b) of the Communications Act of 1934, as amended. Should the Commission conclude that the application is consistent with the policies it has developed to advance §307(b), RBH claims that those policies are in conflict with the statute. Finally, RBH contends that the

¹ WBBK Broadcasting, Inc. filed an opposition to the application for review on July 7, 1999.

² *Letter to WBBK Broadcasting, Inc.*, Reference 1800B3-MFW (Assistant Chief, Audio Services Division, Mass Media Bureau, May 25, 1999).

Commission has a duty to examine “the efficacy of the subject policy,” and that as an aggrieved party-in-interest it has the right to object to a minor change application under these circumstances.³

4. Discussion. RBH’s reliance on *Suburban Community* is misplaced. In *Suburban Community* the Commission eliminated certain policies that it concluded had frustrated rather than furthered the goals of §307(b). It concluded that its obligation to implement those goals would be satisfied, i.e., the Commission will presume that an applicant intends to serve its designated community of license, where the applicant (1) provides city grade service to the designated community; (2) locates its main studio in compliance with 47 C.F.R. §73.1125; and (3) proposes programming that will serve the designated community. While RBH points out that WFDL’s main studio is located in Fond du Lac rather than Lomira, it concedes that this nonetheless complies with §73.1125;⁴ likewise, RBH concedes that WBI proposes to provide a city grade signal to Lomira. Thus, there is no issue as to the first two *Suburban Community* criteria.

5. As to the third criterion, RBH alleges that the application contains “no proposal...to provide programming,” and asserts that WBI’s current operations provide no evidence that WFDL will use upgraded facilities to provide local service.⁵ RBH’s contention fails on both counts. RBH cites *Roberts Communications, Inc.*, 11 FCC Rcd 1138 (1996), as support for the proposition that “an applicant seeking to change facilities must...reaffirm that it will continue to provide programming to its community of license.” 11 FCC Rcd, 1139-40. WBI’s modification application did not include a programming proposal. However, General Instruction A to the relevant version of Form 301 specifically directs an applicant for a change in facilities *not* to file Section IV-A (Program Service Statement). See Instructions for FCC Form 301, April 1996. As indicated in *Suburban Community*, the Commission presumes that an applicant for a new station construction permit or a proposed station buyer will meet its local programming obligations on the basis of certain application representations and the satisfaction of certain technical requirements. As we also noted in *Suburban Community*, an alleged failure actually to serve the community of license is more appropriately addressed in the context of a license renewal challenge.⁶ The filing of a modification application to enhance service does not put at issue this programming presumption. To the extent that *Roberts Communications* can be read to require that an applicant for minor modification must file a new program service statement, it is overruled.

6. Moreover, as for RBH’s contention regarding WBI’s current service, we must agree with the Bureau that RBH has failed to meet its burden of raising a substantial and material question of fact. See 47 U.S.C. §309(d). The evidence set forth in RBH’s Informal Objection consists of either vague and conclusory statements regarding WFDL’s studio facilities and programming policies, unsupported by credible evidence, or statements which, while true, are irrelevant. While RBH provides transcripts of a sample of WFDL newscasts from “late February and early March, 1998” to support its claim that WFDL covered no local news, it fails to disclose its sampling methodology, does not document whether the transcribed passages constituted the entire newscasts, and fails even to specify the dates and times of the

³ This last issue is meritless. RBH has objected to the application. The staff and now the Commission have considered RBH’s objections in accordance with Commission rules. Since we have considered RBH’s arguments on the merits, we need not address its arguments as to whether it has standing to object.

⁴ Application for Review, ¶¶6-7. While in its Informal Objection RBH accused WFDL of failing to have a local Lomira telephone number, it has not rebutted WBI’s statement that Lomira and Fond du Lac are in the same local calling area, and that moreover WFDL has a toll-free number.

⁵ Informal Objection, ¶7.

⁶ *Suburban Community*, 93 FCC 2d at 456.

newscasts presented.⁷ The mere fact that a small, selected sample of WF DL's newscasts contains no Lomira news does not demonstrate that the station failed in its obligation to provide relevant programming to Lomira residents.

7. In any event, WBI has reaffirmed its commitment to local service in the papers it filed in this proceeding.⁸ WBI's documentation of its coverage of local high school sporting events, participation in community events, remote broadcasts from Lomira businesses, and its awards for coverage of a major local news event (a train derailment),⁹ demonstrate that WF DL has provided programming that serves the needs of the station's community of license. Moreover, we note that it is not necessarily inconsistent with WF DL's local service obligation for the station to provide programming for the larger community of Fond du Lac. "Even if it's true that the station intends to compete in the metropolitan market, this does not mean that it would not be able to offer programming responsive to the needs of this smaller locality." *Suburban Community, supra*, 93 FCC2d at 451 (quoting *In the Notice of Proposed Inquiry and Proposed Rule Making in BC Docket 80-130*, 45 Fed. Reg. 26390 (April 18, 1980)).

8. RBH requests that we decide whether the standards the Commission uses to implement §307(b) in the context of facility modification applications violate the Communications Act, and whether the agency has a duty to examine "the efficacy" of this policy. We believe our application processing policies are fully consistent with §307(b). Where, as here, an applicant already provides city-grade coverage to its community of license, and proposes a modification that would provide even greater coverage, this is *prima facie* in the public interest and clearly advances the goals of §307(b). RBH wholly fails to show how our approval of WBI's application undermines those goals. Also, while we generally try not to review policies of broad applicability in an adjudicatory proceeding such as this "where third parties, including those with substantial stakes in the outcome, have had no opportunity to participate, and in which we, as a result, have not had the benefit of a full and well-counseled record,"¹⁰ we do recognize our responsibility to reevaluate regulatory standards over time and to modify policies in response to changes in the broadcast industry. See, e.g., *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1425 (1983). However, RBH has failed to make a showing that convinces us of the need to require programming statements of minor change applicants.

9. Accordingly, in light of the above discussion, IT IS ORDERED that the Application for Review filed on June 24, 1999 by RBH Enterprises, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Román Salas
Secretary

⁷ Reply to Opposition, Filed March 16, 1998, Attachment to Declaration of Randal R. Hopper.

⁸ Opposition of WBI to Informal Objection, ¶¶8-9.

⁹ While RBH points out that the derailment was also covered by stations across Wisconsin, the fact that WF DL's coverage of this major local news event won two broadcast awards underscores its service to the community of license.

¹⁰ *Capital Cities/ABC, Inc.*, 11 FCC Rcd 5841, 5888 (1996).