

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

In the Matter of)	
)	
CMP Houston-KC, LLC)	Facility I.D. No. 87565
)	
For Minor Modification of Construction Permit)	File No. BMPH-20010420ABA
Of Station KFME-FM, Garden City, MO)	

MEMORANDUM OPINION AND ORDER

Adopted: May 28, 2008

Released: July 2, 2008

By the Commission: Commissioner Copps concurring and issuing a statement.

I. INTRODUCTION

1. The Commission has under consideration, pursuant to Section 5(c)(4) of the Communications Act of 1934, as amended,¹ and Section 1.115 of the Commission's Rules (the "Rules")², an Application for Review jointly filed by Entercom Communications Corp. ("Entercom") and CBS Corporation, as the successor to Infinity Broadcasting Corporation ("CBS" and, collectively with Entercom, "Appellants"),³ and related pleadings regarding station KFME-FM (formerly KGAR(FM)),⁴ Garden City, Missouri.⁵ Appellants request review of a March 5, 2004 decision ("Staff Decision") which affirmed grant of the above-captioned application filed by 1051FM, LLC, a predecessor to the current licensee, which is CMP Houston-KC, LLC (the "Applicant"), to modify the station's construction permit to relocate its transmitter site (the "Modification Application"). For the reasons set forth below, we affirm grant of the Modification Application, and deny the Application for Review.

II. BACKGROUND

2. On May 1, 2001, the Media Bureau (the "Bureau") granted the Modification Application without written decision.⁶ Appellants timely filed a Petition for Reconsideration,⁷ asserting that the

¹ 47 U.S.C. § 155(c)(4).

² 47 C.F.R. § 1.115.

³ In the relevant Kansas City market, through subsidiaries, Entercom controls nine radio stations and CBS controls four. *See* Application for Review at 1 n. 1.

⁴ According to the Commission's database, the station has again changed its call letters and is currently operating as KCJK(FM), but we use herein the former call letters KFME-FM.

⁵ The Application for Review was filed on April 9, 2004. The Applicant filed an Opposition on April 26, 2004, and Appellants filed a Reply on May 11, 2004.

⁶ *See* Public Notice, *Broadcast Actions*, Report No. 44978 (rel. May 4, 2001).

⁷ Appellants explain in their Application for Review that public notice of acceptance of the Modification Application appeared on Friday, April 27, 2001 (*see Broadcast Applications*, Report No. 24973 (rel. Apr. 27, 2001)), and because of difficulties accessing the exhibits electronically, Appellants by letter that day sought a deferral of the processing of the Application. The Applicant's counsel provided the exhibits to Appellants by fax on Monday, April 30, 2001. On May 1, 2001, Appellants notified the Commission in writing of their preliminary

(continued...)

Applicant's proposal did not satisfy the signal coverage requirement set forth in Section 73.315(a) of the Rules.⁸ The Applicant had explained in its Modification Application that, using the Commission's standard contour prediction methodology, the transmitter at the proposed new site would not place the requisite 70 dBu signal over Garden City, the station's community of license. The Applicant claimed, however, that in the direction of Garden City, the terrain is particularly smooth and therefore departs widely from the average terrain that is assumed in the Commission's standard methodology. Section 73.313(e) of the Rules allows submission of a supplemental showing using an alternative contour prediction methodology in cases "where the terrain in one or more directions from the antenna site departs widely from the average elevation of the 3 to 16 kilometer sector"⁹ Invoking this Rule, the Applicant submitted a supplemental study to demonstrate that the favorable terrain conditions would allow the coverage requirement of Section 73.315(a) to be satisfied from the new transmitter site.

3. In their Petition for Reconsideration, Appellants disputed the claim that the terrain departs widely from the average elevation along the radial toward Garden City and argued that a supplemental study should not have been accepted. Primarily on this basis, Appellants claimed that grant of the Modification Application was in error and should be rescinded. The Staff Decision found no material error or omission in the underlying grant.¹⁰ The Bureau explained that it had referred the supplemental coverage study to the Commission's Office of Engineering and Technology ("OET"), and that OET had evaluated the Applicant's showing "and verified that the . . . proposal will provide a 3.16 mV/m (70 dBu) signal to Garden City, Missouri," thus complying with section 73.315(a).¹¹ A copy of the report of the OET engineer who had performed the analysis ("OET Report") was included with the Staff Decision, together with OET's map showing its calculated 70 dBu contour ("OET Map") and the cover memo from the Chief of OET's Technical Analysis Branch in the Electromagnetic Compatibility Division ("OET Memo").

4. On review, Appellants argue that the staff grant is "premised upon material errors of fact in contravention of FCC rules, policies and precedent"¹² They further assert that the staff "refused to address the merits of Appellants' arguments below" and failed to provide the "requisite reasoned consideration of all material facts and issues."¹³ Their specific arguments are discussed in more detail below.¹⁴

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concerns and requested until May 3, 2001 to file a detailed objection. The Bureau granted the Modification Application on May 1, 2001, as announced publicly on May 4, 2001 (*see supra* note 6). Appellants submitted their Petition for Reconsideration on May 4, 2001. *See also infra* note 32 regarding Appellants' party status in this proceeding.

⁸ 47 C.F.R. § 73.315(a). Under longstanding Commission policy, the Commission accepts proposals that would cover at least 80 percent of the FM station's community of license with a predicted 70 dBu signal as substantially in compliance with the rule, and not requiring a waiver. *See Barry Skidelsky*, Order, 7 FCC Rcd 5577 (1992).

⁹ 47 C.F.R. § 73.313(e).

¹⁰ *See* Staff Decision at 2 (citing *Infinity Broadcasting Operations, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 4216 (2004) (citations omitted)).

¹¹ *Id.*

¹² Application for Review at 2 (citing 47 C.F.R. § 1.115(b)(2)(iv)).

¹³ *Id.*

¹⁴ Appellants explain that they did not contest the application for license to cover the modified facilities which was granted on March 15, 2004 (FCC File No. BLH-20010620AAM) because, as they correctly observe, if the Commission were to grant the Application for Review and rescind grant of the Modification Application, grant of the license application would be rendered moot. *See id.* n. 2.

III. DISCUSSION

5. In order to obtain relief through an application for review of action taken pursuant to delegated authority, the aggrieved party must meet at least one of the criteria set forth in Section 1.115(b)(2) of the Rules.¹⁵ The Appellants fail to make the required showing.

6. In support of their argument that the staff should not have permitted use of a supplemental study in this case, Appellants cite an unpublished staff decision that was issued August 8, 2002, roughly 15 months after grant of the KFME-FM Modification Application on May 1, 2001, involving station KMAJ-FM, Topeka, Kansas (the “*KMAJ Decision*”).¹⁶ Appellants assert that so-called “guidelines” set forth in the *KMAJ Decision* regarding the definition of “terrain departs widely” for purposes of Section 73.313(e) were in effect for FM stations at the time the Bureau referred the Modification Application to OET, and that such guidelines did not support acceptance of a supplemental study in this case. Appellants also conclude that the Bureau staff relied on OET’s “delta-h” calculation¹⁷ in granting the Modification Application¹⁸ and submit an engineering study to substantiate their claim that OET’s “delta-h” calculation was incorrect.¹⁹

7. Appellants’ reliance on the *KMAJ Decision* is misplaced. That decision was issued more than a year after grant of the KFME-FM Modification Application. In addition, contrary to Appellants’ assertion, benchmarks or guidelines mentioned in an unpublished staff decision are not “in effect” or binding on the Commission or parties to Commission proceedings. As shown in the following paragraph, the Commission has adopted a threshold standard for determining when a supplemental showing would be considered, but to date has declined to specify guidelines for determining when “terrain departs widely” as stated in Section 73.313(e). Moreover, the OET Report confirmed that the Modification Application meets the test set forth in the *KMAJ Decision* of a 30 percent or greater difference in the distance to the 70 dBu contour compared to the distance provided by the standard prediction method.²⁰

8. The Bureau’s Memorandum referring the KFME-FM proposal to OET for 70 dBu signal

¹⁵ 47 C.F.R. § 1.115(b)(2) (the application for review must argue that the staff’s decision pursuant to delegated authority (i) conflicts with a relevant “statute, regulation, case precedent, or established Commission policy,” (ii) “involves a question of law or policy which has not previously been resolved by the Commission,” (iii) “involves application of a precedent or policy which should be overturned or revised,” (iv) makes “an erroneous finding as to an important or material question of fact,” and/or (v) contains a “prejudicial procedural error”).

¹⁶ See *Letter to Mark N. Lipp, Esq.* (MB Aug. 8, 2002) (finding that the applicant’s supplemental contour study failed to show that the terrain in question departs widely from the average terrain).

¹⁷ “Delta-h” is a measure of terrain roughness that was adopted by the Commission in 1975, although its use in submissions by TV and FM applicants relying on standard predicted contours was subsequently suspended, with use of the delta-h factor reserved as an option in certain circumstances, e.g., where the accuracy of predicted contours is in doubt and a supplemental coverage study is submitted for consideration. See *Amendment of Sections 73.333 and 73.699, Field Strength Curves for FM and TV Broadcast Stations; Amendment of Part 73 of the Rules Regarding Field Strength Measurements for FM and TV Broadcast Stations*, Report and Order, 53 FCC 2d 855 (1975); *Temporary Suspension of Certain Portions of Sections 73.313, 73.333, 73.684 and 73.699 of the Commission’s Rules and Regulations*, Order, 56 FCC 2d 749 (1975); *Effects of Terrain on Signal Propagation, Evaluation*, 42 Fed. Reg. 25736 (May 19, 1977).

¹⁸ See, e.g., Application for Review at 11.

¹⁹ See *id.* at Exhibit A.

²⁰ See OET Report (“Based on the standard prediction method in §73.313 of the FCC Rules, the predicted 70 dBu contour distance is 48 km . . . [whereas the alternative analysis shows that] the 70 dBu contour is near the radio horizon at about 65 km.”); *KMAJ Decision* at 2 n. 4 (setting forth two alternative guidelines, including the 30 percent guideline).

contour analysis states: “Our review of the supplemental showing reveals that in the direction of Garden City, MO, the 70 dBu contour, using the Diffcomb program, extends beyond the 70 dBu field strength contour, calculated using the prediction methodology of § 73.313, by greater than 30 percent.”²¹ It states further that “[b]y policy, the extension must be 10 percent or more for referral to [OET] for analysis.” The “10 percent or more” standard was included in the *Report and Order* issued by the Commission in its streamlining rulemaking proceeding, as were other guidelines concerning supplemental showings submitted pursuant to Section 73.313(e).²² In this case, the Applicant met that threshold 10 percent standard with an alternative showing of a difference exceeding 30 percent. Although the Commission specified the 10 percent or more standard as a threshold requirement for considering a supplemental showing, the Commission declined to “set standards for such showings beyond the guidelines given here” as to the definition of “terrain departs widely.”²³ Because different applicants may use different methods of making supplemental showings, a case-by-case analysis applies to supplemental showings that meet the threshold standard.²⁴

9. In this case, OET’s verification of coverage of Garden City by the station’s signal at the 70 dBu signal strength -- the dispositive assessment on which the staff relied in granting the Modification Application -- suggests that the terrain does depart widely from the average elevation of the 3 to 16 kilometer sector in the direction of Garden City. Specifically, based on OET’s analysis, the actual 70 dBu contour location is extended significantly -- roughly 17 kilometers -- beyond the 70 dBu contour location that is calculated using the standard prediction methodology, and provides the requisite coverage under Section 73.315(a).

10. We reject Appellants’ contention that OET’s analysis of the 70 dBu contour is nullified by its “misplotting” the location of Garden City “closer to the transmitter facility,” and by the “decision to examine the terrain profile along the 150° N, 155° N and 160° N radials”²⁵ Specifically, Appellants claim that the community boundaries lie “within the 156° and 159.5° radials”²⁶ and calculate the farthest distance of Garden City to be 65.2 km from the transmitter,²⁷ versus OET’s estimate of 64.5 kilometers. According to Appellants, these alleged errors render OET’s analysis of signal coverage “meaningless.”²⁸ These complaints, however, amount to nothing more than hair splitting on immaterial points. The OET Map attached to the Staff Decision depicts OET’s calculated 70 dBu contour and the three radials that OET used. This Map indicates that the 70 dBu contour -- in particular, the arc connecting the calculated 70 dBu points on the 155° and 160° radials -- encompasses Garden City. Even if we accepted Appellants’ estimated distance of 65.2 kilometers, a potential shortfall of 0.2 kilometers of coverage of Garden City would be *de minimis* and not require a waiver.²⁹ Notably, Appellants have not submitted their own map depicting a different 70 dBu contour or any actual shortfall of coverage of

²¹ This Memorandum, dated April 27, 2001, was marked “Non-Public for Internal Use Only” but is nonetheless part of the record of this proceeding, as it was attached by the Applicant to its Opposition to Petition to Deny filed May 29, 2001 (as Attachment 4) and is referenced in Appellants’ Reply to Opposition to Application for Review at 4 n. 5.

²² See *Amendments of Parts 73 and 74 of the Commission’s Rules to Permit Certain Minor Changes in Broadcast Facilities without a Construction Permit*, Report and Order, 12 FCC Rcd 12371, 12401-03 (1997) (citing, for FM stations, 47 C.F.R. §§ 73.333 and 73.313(e)) (TV citations omitted) (subsequent history omitted).

²³ See *id.*, 12 FCC Rcd at 12403.

²⁴ *Id.*

²⁵ Application for Review at 9.

²⁶ *Id.*

²⁷ See *id.*

²⁸ *Id.* at iii.

²⁹ See note 8 *supra*.

Garden City with a 70 dBu contour. Accordingly, we affirm the finding of the Staff Decision that the Modification Application complies with Section 73.315(a).

11. Finally, Appellants assert that the Staff Decision rejected Appellants' arguments set forth in the Petition for Reconsideration entirely on "procedural grounds" and "failed to provide a reasoned analysis of material facts supporting the grant" of the Modification Application.³⁰ Appellants mischaracterize the Staff Decision. The Bureau staff did not *dismiss* the Petition for Reconsideration for procedural defects or on any other grounds, but *denied* the Petition for Reconsideration on substantive grounds. In reaching its determination that Appellants had not shown a material error or omission in the underlying grant, the staff necessarily considered the merits of the Petition and also considered various other pleadings submitted by Appellants thereafter.³¹ While the staff could have chosen to discuss Appellants' arguments in greater detail, there was no requirement to do so, nor was the staff's analysis required to be of a minimum length.³² As noted above, the dispositive finding supporting grant of the Application was concisely stated in the Staff Decision: OET "verified that the KFME-FM proposal will provide a 3.16 mV/m (70 dBu) signal to Garden City, Missouri."³³ In addition, the Staff Decision included a copy of the OET Report, OET Memo, and OET Map -- attachments that provided Appellants with important information as to the basis for OET's conclusion that the 70 dBu contour encompasses Garden City from the proposed location. We thus reject Appellants' complaint that the staff did not address the merits of their arguments below. In any event, we have carefully considered the full record in this case and find no grounds to rescind grant of the Modification Application. Accordingly, Appellants' argument regarding the deficiency of the Staff Decision is now moot.

IV. ORDERING CLAUSE

12. Accordingly, IT IS ORDERED, that the Application for Review filed jointly by Entercom Communications Corp. and CBS Corporation, as the successor to Infinity Broadcasting Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁰ *Id.*

³¹ See Staff Decision at 1 n.1 (listing the various pleadings/materials submitted by Appellants and considered by the staff). In considering the merits of Appellants' arguments, the staff also implicitly accorded Appellants status as parties in this proceeding without addressing whether they met the "aggrieved party" test under 47 C.F.R. 1.106(b)(1). We find this constituted harmless staff error. Both of the Appellants satisfy that test and therefore had standing to file a petition for reconsideration. First, as competitors in the Applicant's market, the Appellants' interests have been adversely affected by the Staff Decision. See *Cloud Nine Broadcasting, Inc.*, Letter, 10 FCC Rcd 11555, 11556 (1995) ("*Cloud Nine*") (citing *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940) and *Rainbow Broadcasting Co.*, Memorandum Opinion and Order, 9 FCC Rcd 2839, 2844 n.24 (1994)(subsequent history omitted)). Second, Appellants were legally precluded from filing a petition to deny in the initial stage of this proceeding, as petitions to deny do not lie against minor modification applications. See 47 C.F.R. §§ 73.3580(a)(1) and 73.3584(a). As indicated above (*see supra* note 7), Appellants submitted notification of their concerns about the Application, which is appropriately treated as an informal objection under 47 C.F.R. § 73.3587. Accordingly, we find that Appellants "participated in our processes to the fullest extent permitted" and have met the good cause standard of 47 C.F.R. § 1.106(b)(1). *Cloud Nine*, 10 FCC Rcd at 11556.

³² See *Wendell and Associates*, Memorandum Opinion and Order, 14 FCC Rcd 1671, 1679 (1998) ("It is clear from the staff's order that it considered [the objector's] pleadings, which is all that was required").

³³ Staff Decision at 2 (citing OET Memo).

**CONCURRING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: *CMP Houston-KC, LLC for Minor Modification of Construction Permit of Station KFME-FM, Garden City, MO; Shaw Communications, Inc., Application for a New FM Translator Station, Berlin, NH*

These cases provide another example of how the Commission tips the playing field against local interests—particularly local *rural* interests. Standing alone, the cases may seem unremarkable. When juxtaposed, however, they reveal how even arcane broadcast engineering rules can be manipulated to make it easier to loosen the bonds between broadcast stations and the local communities they are licensed to serve.

The first case deals with an FM station’s application to move its transmitter to Independence, Missouri (part of the Kansas City, Missouri metropolitan area). The station is not licensed to Kansas City but to Garden City, a rural community of about 1,500 residents approximately 40-50 miles to Kansas City’s southeast. Because of the distance, the station would not cover Garden City with the requisite city grade signal strength using the Commission’s standard prediction methodology. Specifically, using the Commission’s standard methodology, the station’s city grade contour falls some 13.5 km short of providing adequate coverage to Garden City.

Nevertheless, the Commission approves the site move under Section 73.313(e) of our rules, which permits alternative coverage calculations where the topography in question “departs widely” from the average terrain assumed by our standard methodology. The station seeking the site change demonstrated that the terrain in the direction of Garden City is particularly smooth, and therefore that its coverage extends beyond what the Commission’s standard model would predict. Commission staff analyzed the data and confirmed that Garden City will, in fact, receive a city grade signal due to the flat terrain.

The lesson of *Garden City* therefore seems to be that we will use our standard prediction methodology to assess signal coverage, but if the terrain varies significantly from our baseline assumptions, we will be guided by the facts on the ground. The rule itself gives the example of a mountain ridge that “may indicate the practical limit of service although the prediction method may indicate otherwise.” See 47 CFR §73.313(e).

Which brings us to the Berlin, New Hampshire case. There, the issue is whether a proposed FM translator station in Berlin, New Hampshire can—as required by our rules—receive the off-air signal of the “main station” located in Conway, New Hampshire. An objecting party asserts that, in reality, several tall mountains preclude the signal of the Conway station from reaching the proposed translator in Berlin. Under the reasoning of *Garden City*, one would expect the Commission: (1) to examine whether the mountainous New Hampshire terrain “departs widely” from our baseline assumptions, and, if so, (2) to assess whether, in fact, the intervening mountains prevent the Conway signal from reaching Berlin.

But that’s where the Commission pulls a quick one. While it *permits* the station in *Garden City* to use unusual terrain to show that its signal actually reaches *farther* than the standard prediction model, it *refuses* to permit the objecting party in *Berlin* to use unusual terrain to show that the Conway station’s signal actually travels *less far* than predicted. In essence, the Commission recognizes the reality of the flat Missouri terrain but then assumes away the existence of mountains in New Hampshire. The only way to make sense of this approach is that the Commission permits alternative showings where they enable broadcasters to move farther from their local communities, but bars them where they could keep broadcasters closer to home.

I want to make clear that I am not concluding that the broadcasters in these cases cannot and will not serve their local communities. Perhaps the Missouri station can fully serve the needs and interests of the people of Garden City from its distant Kansas City tower site.¹ Perhaps the Berlin translator will be just as “local” as if it actually received an off-air signal from the main station in Conway. But I fear—over time and over similar cases—our approach takes its toll.

Ultimately, the erosion of localism is not the result of a particular rule change or single event. It is the result of countless steps—some large, some small—that incrementally shift the center of gravity until we wake up one day and wonder where we are and how we ever got here. That’s why the localism problem can’t be fixed overnight and why the issues can’t be cordoned off in a single “localism” proceeding. Localism must infuse everything we do—including, perhaps surprisingly, our choice of engineering methodologies.

I reluctantly concur in these items because they arguably adhere to existing Commission precedent. But we can and should revisit our technical and allotment rules as they relate to localism, some of which are raised here (including the more general policies regarding distant FM translators raised in *Berlin*). The localism dam may have been breached, but that doesn’t mean it’s not repairable and all we can do is watch the water level continue to rise. It’s time to roll up our sleeves and get to work.

¹ On the other hand, one cannot glean much comfort from the station’s branding on its website as “Jack FM Kansas City” and the fact that the station’s main studio is located some 50 miles from Garden City in Mission, Kansas.