

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

In the Matter of )
ANDERSON RADIO BROADCASTING, INC. ) Facility ID No. 83460
Application For Minor Modification of Licensed ) File No. BPH-20020214ACI
Station KIBG(FM), Bigfork, Montana ) File No. BMPH-20040407AAK

MEMORANDUM OPINION AND ORDER

Adopted: January 15, 2008

Released: January 17, 2008

By the Commission:

I. INTRODUCTION

1. We have before us the August 29, 2003, Application for Review filed by Bee Broadcasting, Inc. ("BBI"), against Anderson Radio Broadcasting, Inc. ("Anderson"), the licensee of broadcast station KIBG(FM) ("KIBG"), Bigfork, Montana. BBI requests review of the Media Bureau's ("Bureau") July 30, 2003, letter decision denying BBI's "Petition to Designate for Hearing" and "Informal Objection and Motion to Dismiss" Anderson's application for minor modification of the facilities of station KIBG at Bigfork, Montana. We also have before us BBI's April 27, 2004, "Petition for Cancellation of License and Deletion of Call Sign" ("Petition for Cancellation") and July 22, 2004, "Petition for Rescission of

1BBI operates KBBZ-FM at Kalispell, Montana.

2 Formerly KSIL(FM).

3 Anderson filed an Opposition to the Application for Review on September 22, 2003 ("Opposition"), to which BBI replied on October 14, 2003 ("Reply").

4 Letter to Robert Lewis Thompson, Esq., and George R. Borsari, Jr., Esq., from Peter H. Doyle, Chief, Audio Division, Media Bureau (rel. Jul. 30, 2003) ("July 30, 2003, Bureau Decision").

5 Petition to Designate for Hearing filed by BBI on September 11, 2002.

6 Additional Informal Objection and Motion to Dismiss filed by BBI on December 17, 2002. BBI earlier had filed an Informal Objection and Further Informal Objection, respectively, on March 8, 2002, and June 4, 2002.

7 Anderson filed an Opposition to Petition for Cancellation on May 7, 2004, to which BBI replied on May 20, 2004. In response to the Petition for Cancellation, on September 15, 2004, the staff sent Anderson a letter of inquiry requesting further information on the operational status of KIBG. On October 15, 2004, Anderson filed a letter responding to the staff's inquiries. On October 26, 2004, BBI filed a response to Anderson's letter. On

(continued . . .)

Construction Permit” (“Petition for Rescission”) referencing the Bureau’s June 22, 2004, grant of a subsequent minor modification application for KIBG,<sup>8</sup> and related responsive pleadings for both appeals.<sup>9</sup> For the reasons discussed below, we deny BBI’s Application for Review.

## II. BACKGROUND

2. On February 14, 2002, Anderson filed the subject application to implement a rulemaking proceeding to re-allot channel 264C from Wallace, Idaho, to Bigfork, Montana.<sup>10</sup> A March 8, 2002, BBI objection contended that the captioned application was untimely, *i.e.*, not filed within 90 days of the effective date of the *Report and Order*,<sup>11</sup> and proposed the use of an unauthorized channel.<sup>12</sup> On June 4, 2002, BBI submitted a “Further Objection” alleging that Anderson violated Section 1.65 of the Rules<sup>13</sup> by failing to inform the Commission that its proposed antenna site was “no longer suitable or desirable.” On June 25, 2002, Anderson submitted an engineering amendment proposing full Class C facilities at a different antenna location and a greater antenna height above average terrain.

3. In an August 22, 2002, letter decision, the staff denied BBI’s March 8, 2002, Informal Objection, finding that Anderson’s untimely filing, in the context of implementing a rulemaking, did not warrant the application’s denial.<sup>14</sup> Moreover, the Bureau stated that notwithstanding the allotment of

---

(...continued from previous page)

November 8, 2004, Anderson filed a supplement to its October 15, 2004, response. On November 17, 2004, BBI filed a response to Anderson’s supplement, to which Anderson responded on December 7, 2004.

<sup>8</sup> BBI styles this pleading a “Petition for Rescission of Construction Permit.” Section 1.113(a) of the Commission’s Rules (the “Rules”), 47 C.F.R. § 1.113(a), provides the staff with discretion to set aside an action taken under delegated authority within 30 days of public notice of that action, but it does not specifically create the right of third parties to file petitions to rescind an authorization. Rather than dismiss the pleading as unauthorized, the Bureau has treated it as a timely petition for reconsideration of the June 22, 2004, grant of Application File No. BMPH-20040407AAK, and referred the pleading to us under 47 C.F.R. § 1.106(a)(1).

<sup>9</sup> Anderson filed an Opposition to the Petition for Rescission on August 4, 2004, to which BBI replied on August 12, 2004.

<sup>10</sup> *Wallace, Idaho and Bigfork, Montana*, Report and Order, 16 FCC Rcd 9591 (MMB 2001) (“*Report and Order*”), *recon. denied*, Memorandum Opinion and Order, 17 FCC Rcd 2243 (MMB 2002), *rev. denied*, Memorandum Opinion and Order, 19 FCC Rcd 15267 (2004). Anderson acquired KIBG from rulemaking proponent Alpine Broadcasting Limited Partnership on October 15, 2001. *See* Application File No. BALH-20010214ADB, granted on July 24, 2001.

<sup>11</sup> The *Report and Order* was effective on June 25, 2001; Anderson did not file the subject application until February 14, 2002.

<sup>12</sup> Anderson applied for channel 264C1, not the channel 264C referenced in the *Report and Order*.

<sup>13</sup> 47 C.F.R. § 1.65 (requires that all applicants ensure that their proposals maintain the continuing accuracy and completeness of their applications).

<sup>14</sup> *Letter to Robert Lewis Thompson, Esquire and George R. Borsari, Esquire*, reference 1800B3-JWR (MB Aug. 22, 2002). The Bureau ruled that Anderson’s action or inaction in filing the captioned application within the 90-day period specified by the *Report and Order* concerned only the condition precedent to modifying KIBG’s license and whether Anderson would ultimately propose operation of KIBG on channel 264C, citing *Southwest Educational Media Foundation of Texas, Inc.*, Memorandum Opinion and Order, 8 FCC Rcd 1681 (1993). The Bureau added that the Commission’s Rules do not provide for the automatic downgrading of an allotment when a licensee or

(continued . . .)

channel 264C to Bigfork, Anderson was not precluded at the application stage from filing a one-step downgrade application.<sup>15</sup> The Bureau also denied BBI's June 4, 2002, Further Objection, holding that although Anderson may have withdrawn its application for conditional use permit, "there is no evidence in this record that Anderson has been informed that it could not use the specified site."<sup>16</sup> The Bureau stated that BBI's conclusory assertion that the site is "no longer suitable or desirable" cannot form the basis for a finding that Anderson violated the reporting provisions of Section 1.65.

4. The August 22, 2002, letter decision also found that Anderson's June 25, 2002, engineering amendment was unaccompanied by a showing of good cause;<sup>17</sup> therefore, the Bureau dismissed the amendment. Finally, the Bureau stated that it was unable to confirm whether the proposal complied with the maximum permissible radiofrequency ("RF") electromagnetic exposure limits for both controlled and uncontrolled environments due to insufficient information about the proposed antenna. Accordingly, the Bureau requested that another amendment ("Second Amendment") be filed to include this information. The Bureau also asked Anderson to register its proposed antenna structure with the Commission as well as to notify the Federal Aviation Administration (FAA) pursuant to Section 17.4(a) of the Rules.<sup>18</sup> On September 20, 2002, Anderson filed the requested "Second Amendment." However, the amended application violated Section 73.211 of the Rules,<sup>19</sup> and by letter dated November 22, 2002, Anderson was given "one opportunity for corrective amendment pursuant to Section 73.3522(c)(2)."<sup>20</sup> On November 29, 2002, Anderson filed the corrective amendment ("Third Amendment") specifying Class C0 facilities.<sup>21</sup>

5. On September 11, 2002, BBI filed a further objection to Anderson's application,<sup>22</sup> raising the arguments that are the basis for the instant appeal. BBI stated that "a substantial question exists" as to

---

(...continued from previous page)

permittee fails to file a minor change application to implement an upgrade within the 90-day period set forth in the rulemaking *Report and Order*. *Milledgeville, Georgia*, Memorandum Opinion and Order, 10 FCC Rcd 7727 (MMB 1995) (modification application implementing rulemaking filed over one and one-half years after 90-day period preserved amended allotment).

<sup>15</sup> See 47 C.F.R. §§ 73.203, 73.3573(a).

<sup>16</sup> *Letter to Robert Lewis Thompson, Esquire and George R. Borsari, Esquire, supra*, at 3.

<sup>17</sup> See 47 C.F.R. § 73.3522(c). The amendment was unaccompanied by any demonstration of "good cause."

<sup>18</sup> See 47 C.F.R. § 17.4(a).

<sup>19</sup> See 47 C.F.R. § 73.211. Specifically, Item 2 of Section III-B of the amended application indicated that the proposal is for a Class C facility. Section 73.211(a)(2) specifies that a Class C must have an antenna height above average terrain ("HAAT") of at least 451 meters. However, Item 10 of the amended application specified an HAAT of 305 meters.

<sup>20</sup> The staff also cited 47 C.F.R. § 73.3564(a)(3).

<sup>21</sup> The amended application specified an Effective Radiated Power ("ERP") of 100 kW at an antenna HAAT of 305 meters.

<sup>22</sup> BBI styled this objection a "Petition to Designate for Hearing." There being no basis in the Rules for such a pleading, the staff in its July 30, 2003, letter treated BBI's pleading as a timely petition for reconsideration of the staff's August 22, 2002, denial of its informal objection, as it referenced the same arguments as BBI's June 4, 2002, objection.

whether Anderson misrepresented material facts and argued that Anderson “continuously” violated Section 1.65 of the Rules by not timely informing the Commission after April 22, 2002, that Anderson’s initial proposed antenna site “was no longer suitable nor even desired” by Anderson. BBI alleged that Anderson “abandoned” its initial site on April 22, 2002, when it voluntarily withdrew its zoning application and advised the local zoning authority that it intended to utilize a more suitable site. BBI claimed that Anderson’s response to BBI’s informal objection -- that its zoning request was voluntarily withdrawn without prejudice to its re-filing, and thus the initial site remained “available” -- was not forthcoming and misrepresented Anderson’s intention to “abandon” that site. BBI argued that the issue is not whether the initial site remained “available” but “whether Anderson intended after April 22, 2002 that [the site] continued to be its proposed antenna site for purposes of its pending application.”<sup>23</sup> Finally, BBI maintained that Anderson’s subsequent amendment of the subject application specifying an alternate site circumstantially evidenced a lack of candor and misrepresentation by Anderson.

6. On December 17, 2002, BBI filed yet another objection to Anderson’s application.<sup>24</sup> In this pleading, BBI argued that Anderson’s application should have been dismissed after the Second Amendment failed to cure the defect referenced in the staff’s August 22, 2002, letter. In this pleading, BBI claimed that the staff erred in providing Anderson with an additional opportunity to perfect its application.<sup>25</sup> Additionally, BBI argued that the site proposed in the Third Amendment failed to provide Bigfork with requisite principal community coverage.<sup>26</sup>

7. On July 30, 2003, the Bureau denied each of BBI’s remaining objections and granted KIBG’s Class C0 application. With respect to the Section 1.65 issue, the Bureau acknowledged that if an applicant becomes aware during the course of a proceeding that a previously specified site is not or is unlikely to be available, the Commission must be so advised forthwith under Section 1.65.<sup>27</sup> However, the Bureau stated that there was no evidence in the record that Anderson had been informed that it could not use the specified site, and BBI failed to present any evidence of the site’s unavailability. Additionally, the Bureau found that neither Anderson’s statements nor its subsequent amendment specifying an alternate site evidenced a lack of candor or misrepresentation. The Bureau also found that the fact that Anderson chose to specify another site did not raise a substantial and material question of fact calling for further inquiry. The staff further found that the matters raised in the August 22, 2002, letter – that the subject application contained insufficient RF exposure information and failed to demonstrate that the proposed antenna structure had been registered – were not deficiencies in the tenderability or acceptability of the application, and thus did not trigger the “one opportunity to amend” provision of Section 73.3522(c)(2).<sup>28</sup> It explained, however, that the Second Amendment did contain such a deficiency in that the amended proposal specified insufficient HAAT for a Class C station under Section 73.211 of the Rules. Thus, the staff in its November 22, 2002, letter properly gave Anderson the “one opportunity to correct” this deficiency, in accordance with Section 73.3522 (c)(2). Finally, the staff stated that it had reviewed the

---

<sup>23</sup> Petition to Designate for Hearing, at 5.

<sup>24</sup> BBI entitled this pleading a “Further Informal Objection and Motion to Dismiss.”

<sup>25</sup> BBI cited 47 C.F.R. § 73.3522(c)(2), which states that applicants whose proposals meet minimum filing requirements but are not complete and acceptable shall have one opportunity to correct any and all deficiencies in the tenderability and acceptability of the underlying application.

<sup>26</sup> See 47 C.F.R. § 73.315(a).

<sup>27</sup> See, e.g., *South Florida Broadcasting Company, Inc. et al.*, 99 FCC 2d 840, 841 (Rev. Bd. 1984).

<sup>28</sup> See n.10, *supra*.

Anderson application, as supplemented by the Third Amendment, and found that the proposal did, in fact, provide the requisite principal community coverage to Bigfork and complied with all other pertinent technical requirements. The staff, therefore, granted Anderson's amended KBIG application conditioned on the final outcome of the rulemaking proceeding changing the station's allotment from Wallace to Bigfork.<sup>29</sup> On August 29, 2003, BBI timely filed an application for review.

8. On April 7, 2004, Anderson filed an application to modify its KIBG Class C0 permit, specifying another transmitter site and proposing full Class C facilities.<sup>30</sup> On June 22, 2004, the Bureau granted this application, also conditioned upon the final outcome of MM Docket No. 98-159.<sup>31</sup> BBI did not object to this application prior to grant. However, BBI did file a "Petition for Rescission of Construction Permit" on July 22, 2004, which Anderson opposed on August 4, 2004.

### III. DISCUSSION

9. In its Application for Review, BBI argues that the staff rulings contravened the Commission's legal standard on misrepresentation and lack of candor issues and erroneously found that the application complied with city grade coverage requirements. BBI reiterates its argument that Anderson failed to timely report its change of site plans in violation of Section 1.65(a) of the Rules. BBI also asserts that the Bureau applied an erroneous legal standard regarding Section 1.65(a); arbitrarily and unlawfully excused *prima facie* evidence of Anderson's repeated intentions to deceive the Commission; and erroneously granted Anderson's construction permit without a reasoned explanation of all of the serious technical issues raised by BBI.

10. These allegations are baseless. BBI has not specified, as required by our Rules, any factors which warrant Commission review.<sup>32</sup> Furthermore, BBI essentially reargues its petition for reconsideration – that Anderson's efforts to locate an acceptable antenna site to serve Bigfork "devolved" into outright misrepresentation and lack of candor about its first proposed site.<sup>33</sup> We find that those arguments were properly resolved by the July 30, 2003, *Bureau Decision*, which denied BBI's numerous objections.

11. *Site Availability Issue.* The Commission has repeatedly held that applicants before the agency must tell the truth and timely disclose decisionally significant information. A misrepresentation is a false statement of fact made with an intent to deceive the Commission.<sup>34</sup> Lack of candor is

---

<sup>29</sup> Anderson's minor modification to the construction permit bore the following condition:

This construction permit is conditioned on the final outcome of MM Docket No. 98-159. Any construction undertaken by the permittee/licensee pursuant to this construction permit is at the permittee/licensee's sole risk. A license to cover this construction permit shall not be granted until the outcome of MM Docket No. 98-159 is final.

<sup>30</sup> This application proposed operation with an ERP of 100kW at a HAAT of 646 meters.

<sup>31</sup> See File No. BMPH-20040407AAK.

<sup>32</sup> Section 1.115(a) of the Rules permits any person aggrieved by an action taken pursuant to delegated authority to apply for Commission review if the action complained of meets certain standards described in subsection (b).

<sup>33</sup> Application for Review at Summary.

<sup>34</sup> See *KM Radio of St. John's, LLC*, Order on Reconsideration, 19 FCC Rcd 5847, 5848 (2004); see also *LUI, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 16980 (2002).

concealment, evasion, or other failure to be fully informative, accompanied by an intent to deceive the Commission.<sup>35</sup> A necessary and essential element of both misrepresentation and lack of candor is intent to deceive.<sup>36</sup> Fraudulent intent can be found from "the fact of misrepresentation coupled with proof that the party making it had knowledge of its falsity."<sup>37</sup> Intent can also be found from motive.<sup>38</sup> A *prima facie* showing of an intent to conceal a decisionally significant matter is therefore necessary to warrant the addition of a disqualifying misrepresentation or lack of candor issue.

12. If an applicant becomes aware during the course of a proceeding that the site specified in its application is not or is unlikely to be available, the Commission must be so advised as promptly as possible, and in any event, within 30 days under Section 1.65.<sup>39</sup> We affirm the Bureau's finding that no Section 1.65 amendment was required here because BBI has not raised a substantial question about the continuing availability of the site specified in Anderson's application. BBI, again, fails to present any information to support this speculative claim that Anderson by its statements to the zoning board irrevocably abandoned that initial site after April 22, 2002. Anderson's initial site choice became mired in local controversy. Anderson subsequently located an alternate site and voluntarily withdrew its zoning application without prejudice to its re-filing. We find that Anderson's initial site remained available as an option during this period. Indeed, the local planning department informed Anderson that its application "met all requirements, and unless the citizen opposition produced some legitimate objection that had not yet been heard, its application would be approved."<sup>40</sup> Furthermore, Anderson certifies to the following: "[a]t all times the original site remained available . . . and even after [it] amended to a new site, if the Commission had granted the application at the original site, [it] could have re-filed its original zoning request, and, on approval, constructed at the original site."<sup>41</sup> BBI fails to present any evidence based on personal knowledge that undermines the accuracy of that certification.

13. *Section 1.65 Reporting Issue.* BBI claims that Anderson had an obligation under Section 1.65 of the Rules to inform Commission staff within 30 days of the April 22, 2002, withdrawal of its zoning request that it no longer intended to prosecute its application for the original site. Anderson filed a site-change amendment three months later. BBI argues that "the FCC's policy in cases such as this long has been to require every applicant to timely inform the agency *not merely* whether a proposed site is still 'technically' available, but also whether the applicant still intends to specify that site for purposes of its pending application."<sup>42</sup> BBI maintains that the Commission has not narrowly interpreted Section 1.65 to require an amendment only when a site becomes "unavailable." Therefore, BBI argues that the *Bureau Decision* applied an erroneous legal standard, and the Bureau's failure to designate a reporting issue under Section 1.65 against Anderson unlawfully departed from Commission precedent.

---

<sup>35</sup> See *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983).

<sup>36</sup> See *Trinity Broadcasting of Florida, Inc.*, Initial Decision, 10 FCC Rcd 12020, 12063 (1995).

<sup>37</sup> See *David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253, 1260 (D.C. Cir. 1991) (quoting *Leflore Broadcasting Co. v. FCC*, 636 F.2d 454, 462 (D. C. Cir. 1980)).

<sup>38</sup> See *Joseph Bahr*, Memorandum Opinion and Order, 10 FCC Rcd 32, 33 (Rev. Bd. 1994).

<sup>39</sup> See, e.g., *South Florida Broadcasting Company, Inc. et al.*, 99 FCC 2d 840, 841 (Rev. Bd. 1984).

<sup>40</sup> Opposition at 5.

<sup>41</sup> *Id.*

<sup>42</sup> Application for Review, at 5 (emphasis in original).

14. BBI's argument is unfounded. As correctly observed by BBI, Section 1.65, *inter alia*, requires that applicants inform the Commission of decisionally significant facts regarding a pending application, and a Section 1.65 issue is warranted when the unreported information is in fact decisionally significant or there is a *prima facie* showing of intentional concealment or a pattern of violations.<sup>43</sup> BBI provides no support for its novel contention that Anderson was obligated by Section 1.65 to inform the Commission within 30 days of its decision to investigate alternate sites, and we are aware of none. The cases on which BBI relies are inapposite because they concern the affirmative duty to timely report decisional changes.<sup>44</sup> Clearly, the actual loss of a proposed transmitter site would constitute a decisionally significant fact that must be timely reported to the Commission.<sup>45</sup> We have found, however, that Anderson had not been denied the use of its original site or made a final commitment to utilize a second site; thus, there was no actual site loss or site change, and no decisionally significant fact was concealed here. Additionally, Anderson would have had no motive to conceal the status of a site that remained available.

15. *Misrepresentation/Lack of Candor.* BBI also argues that the *Bureau Decision* erred in failing to specify a misrepresentation/lack of candor issue against Anderson. Anderson's claim (in a June 27, 2002, opposition pleading) that it had not "abandoned" its original site is patently contradicted, BBI argues, by the following: (1) Anderson's statement to the local zoning board that it "intended to utilize a more suitable site;" and (2) Anderson's subsequent June 25, 2002, application amendment specifying a new site. Anderson's statement to the Commission that it had not abandoned the original site and could return to that site if necessary, BBI charges, was simply an attempt to deceive the agency to avoid a Section 1.65 hearing issue. BBI claims that the *Bureau Decision*, by declining to add such a reporting issue, "makes it clear" that the Commission was, in fact, misled by Anderson.

16. We disagree. BBI has not established that Anderson would have been unable to reinstate its application with the zoning board if its efforts to find an alternate site were unsuccessful, or otherwise established a *prima facie* case of misrepresentation or lack of candor. Accordingly, the misrepresentation claim must fail. We also conclude that the attempt to premise a misrepresentation allegation on statements about the "desirability" of a particular transmitter site is fundamentally misguided. So long as the site specified in the application remains available, an applicant's voluntary pursuit of alternate, potentially less controversial sites is not a decisionally significant matter that must be reported to the Commission until the applicant actually commits to use a second site.<sup>46</sup>

---

<sup>43</sup> *Kralowec Childrens Family Trust*, Memorandum Opinion and Order, 12 FCC Rcd 19690, 19693 (VSD 1997). See also *Goodlettsville Broadcasting Company, Inc.*, Memorandum Opinion and Order, 8 FCC Rcd 5178, 5181 (1993) (citing *Merrimack Valley Broadcasting*, 99 FCC 2d 680, 683 n. 9 (1984)).

<sup>44</sup> *Texas Communications, L.P.*, Memorandum Opinion and Order, 6 FCC Rcd 5191, 5192 (1991); *Valley FM Radio*, 93 FCC 2d 1330 (Rev. Bd. 1983); and *RKO General, Inc. v. FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981).

<sup>45</sup> See, e.g., *California State University, Sacramento*, Report and Order, 13 FCC Rcd 17960, 17963 (1998). Similarly, for example, significant changes in an applicant's ownership may trigger reporting obligations, see *Constellation Communications, Inc.*, Order, 10 FCC Rcd 2258, 2261 (1995); *Colonial Communications, Inc.*, Initial Decision, 4 FCC Rcd 5969, 5970 (ALJ 1989). BBI's reliance on *Edwin A. Bernstein*, Memorandum Opinion and Order, 6 FCC Rcd 6841, 6842 (Rev. Bd. 1991) is misplaced. In *Bernstein*, the Commission designated a Section 1.65 issue because the applicant had lost its principal source of funding and had not reported that fact to the Commission, not, as BBI contends, because the applicant had decided to change funding sources.

<sup>46</sup> See *Elijah Broadcasting Corporation and Reston Community Broadcasting, Inc.*, Memorandum Opinion and Order, 5 FCC Rcd 5350 (1990) ("It bears emphasis that the Commission's reasonable assurance standard is a liberal (continued . . .)

17. *City Coverage Issue.* BBI argues that Anderson’s “Third Amendment” to the captioned application fails to provide the required 70 dBu coverage over the entire community of license, pursuant to Section 73.315 of the Rules,<sup>47</sup> and that the *Bureau Decision* is mute on this issue.<sup>48</sup> BBI asserts that “a significant terrain obstruction . . . precludes 70 dBu service to Bigfork” along three radials at the new site.<sup>49</sup> BBI also labels the Bureau’s finding on this issue as “palpably inadequate.”<sup>50</sup> Anderson responds that “at no point on any radial does the signal strength drop below 70 dBu at 25 kilometers. On the 348° radial, the closest to [BBI’s] 348.65° radial, the signal does not drop below 70 dBu until beyond 50 kilometers from the transmitter site.”<sup>51</sup> Anderson also notes that the maximum distance between the most remote part of Bigfork and the proposed transmitter site is 25 kilometers.

18. We disagree with both of BBI’s contentions. First, we affirm the Bureau’s determination that Anderson made a sufficient showing that KIBG provides the requisite 70 dBu coverage to Bigfork based upon the standard FM signal prediction methodology set forth at Section 73.313 of the Rules. The Bureau’s engineering staff correctly interpreted the technical data. Moreover, we find the Bureau’s discussion of the issue adequately addresses the arguments raised by BBI. The Bureau’s ruling clearly states that “[it has] reviewed Anderson’s technical showing and find[s], contrary to BBI’s assertion, that Anderson’s application, as amended, does provide the requisite principal city coverage to Bigfork.”<sup>52</sup> Further, the Bureau stated that the subject application, as amended, comports with all pertinent technical requirements. In other words, the Bureau’s denial of BBI’s petition was based on record evidence, and its decision provided a concise statement of the reasons sufficient to justify its technical analysis.<sup>53</sup>

19. *Petition for Rescission.* In its July 22, 2004, Petition for Rescission, BBI argues that the Bureau erred when it granted Anderson’s application to modify the outstanding KIBG permit without awaiting administrative disposition of BBI’s pending appeal of the grant of the underlying construction permit. BBI contends that it was “unlawful” under both the Rules and the Administrative Procedure Act for the staff to grant a modification application while BBI’s application for review of the underlying permit was pending. Additionally, BBI claims that the Bureau erred in granting Anderson’s application without conditioning the permit on the outstanding “Petition for Cancellation” that BBI filed on April 27,

---

(...continued from previous page)

one, reflecting an underlying policy judgment that it would not serve the public interest to add to the cost and risk that applicants incur by requiring them to secure binding commitments for the use of proposed transmitter sites”).

<sup>47</sup> See 47 C.F.R. § 73.315.

<sup>48</sup> Application for Review at 10; see also Reply at Attachment.

<sup>49</sup> Application for Review at 11.

<sup>50</sup> Application for Review at 11 and n.20.

<sup>51</sup> Opposition at 8.

<sup>52</sup> July 30, 2003, *Bureau Decision* at 4.

<sup>53</sup> See, e.g., *Wendell & Associates*, Memorandum Opinion and Order, 14 FCC Rcd 1671, 1679 (1998) (in addressing Petition to Deny, which is treated with greater formality than an informal objection, the staff need issue only a “concise statement” of the reasons for denying the petition).



2004, in which it argued that the KIBG license expired as a matter of law because the station had been off the air for more than 12 consecutive months.<sup>54</sup>

20. BBI's pleading is procedurally deficient under Section 1.106(b)(1) of the Rules.<sup>55</sup> BBI did not object to Anderson's April 7, 2004, modification application prior to its grant, even though the application was pending for over two and one-half months, and BBI has not demonstrated in the petition why it could not have participated prior to grant. In any event, we note that grant of the modification application when the underlying permit grant was still under appeal does not violate any statutory provision or Commission Rule. Under well-established policies and procedures, and as expressly stated in the Bureau's decision, any construction undertaken prior to resolution of a related appeal is at the permittee's risk.<sup>56</sup> Similarly, there is no statute, Commission Rule, or policy that requires the Bureau to condition the permit on the disposition of BBI's unauthorized April 27, 2004, Petition for Cancellation.

21. *Petition for Cancellation.* The May 7, 2004, Petition for Cancellation was not filed against any then-pending Anderson application. It also cannot be treated as a timely petition for reconsideration of any staff action. Substantively, it can be characterized as a "complaint." BBI argues that the Bureau should have cancelled Anderson's KIBG license, pursuant to Section 73.1750,<sup>57</sup> because BBI claims that the station did not transmit broadcast signals for 12 consecutive months from August 14, 2001, through August 14, 2002, and "perhaps" through February of 2004. BBI submits as evidence the declarations of the Sheriff of Shoshone County, Idaho, and the general manager of KWAL, Wallace, Idaho, who state that neither has ever "heard" or "heard of" KIBG.<sup>58</sup> Further, BBI contends that the local utility company has no record of an account with either the station or its licensee.<sup>59</sup> In response, Anderson submitted, under penalty of perjury, station operating logs for August 7 through 14, 2002, refuting BBI's claim that KIBG was off the air for 12 consecutive months.<sup>60</sup> In addition, Anderson's agreement for the transmitter site specifies that the county would pay utility bills and Anderson would reimburse the county for utility

---

<sup>54</sup> See 47 U.S.C. § 312(g).

<sup>55</sup> 47 C.F.R. § 1.106(b)(1) (if the petition is filed by a person not a party to the proceeding, it shall state the manner in which the person's interests are adversely affected by the action taken and shall show good reason why it was not possible to participate in the earlier stages of the proceeding).

<sup>56</sup> The Commission's rules do not prohibit the grant and construction of authorized facilities pending final resolution of a related, outstanding rulemaking proceeding. *Auburn, Northport, Tuscaloosa, Camp Hill, Gardendale, Homewood, Birmingham, Dadeville, Orrville, Goodwater, Pine Level, Jemison, and Thomaston, Alabama*, Memorandum Opinion and Order, 18 FCC Rcd 10333, 10340 (MB 2004). See also *Amendment of Section 1.420(f) of the Commission's Rules Concerning Automatic Stays of Certain Allotment Orders*, Report and Order, 11 FCC Rcd 9501 (1996) (deleting rule that automatically stayed allotment proceedings upon the filing of a petition for reconsideration).

<sup>57</sup> See 47 C.F.R. § 73.1750 (providing that "[t]he license of any station that fails to transmit broadcast signals for any consecutive twelve month period expires as a matter of law at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary.>").

<sup>58</sup> See Petition for Cancellation at 3; see also Attachments B and C.

<sup>59</sup> *Id.* at 4.

<sup>60</sup> See Letter to Peter H. Doyle, Chief, Audio Division, Media Bureau from George R. Bosari, Jr., Esq., Counsel for Anderson Radio Broadcasting, Inc., filed Oct. 15, 2004.

payments.<sup>61</sup> The fact that neither the station nor the licensee has an account with the local utility company does not, therefore, establish that the station was off the air for twelve consecutive months. Based on our review of the declarations of the Shoshone County Sheriff and KWAL general manager, we conclude that these allegations are meritless. Finally, any silences of less than 12 consecutive months during the period in question were pursuant to the Bureau's grant of Anderson's special temporary authorization ("STA") requests for authority to remain silent necessitated by equipment failure.<sup>62</sup>

#### IV. ORDERING CLAUSES

22. Accordingly, for the reasons set forth above, IT IS ORDERED that Bee Broadcasting Inc.'s August 29, 2003, Application for Review, its July 22, 2004, Petition for Rescission of Construction Permit and its May 7, 2004, Petition for Cancellation ARE DENIED.

23. IT IS FURTHER ORDERED that copies of this *Memorandum Opinion and Order* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to Anderson Radio Broadcasting, Inc., 581 North Reservoir Road, Polson, Montana 59860, and to its counsel, Anne Thomas Paxson, Esq., Bosari & Paxson, 4000 Albemarle Street, N.W., Suite 100, Washington, DC 20016; Bee Broadcasting, Inc., P.O. Box 5409, Kalispell, Montana 59903, and to its counsel Robert Lewis Thompson, Esq., Thiemann, Aitken & Vohra, LLC, 908 King St., Suite 300, Alexandria, Virginia 22314.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

---

<sup>61</sup> The KIBG station file contains a lease agreement between the station and the county stating that the licensee will reimburse Shoshone County for payment of utility bills.

<sup>62</sup> See File Nos. BLSTA-20020411AAY (granted Apr. 16, 2002); BLSTA-20030319AFD (granted Mar. 25, 2003); and BLSTA-20040202BIF (granted Mar. 12, 2004).