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In re: W245BL, Branchport, NY
Facility ID No. 147188
File No. BPFT-20080714ADP
File No. BMPFT-20080825ABI
File No. BLFT 20080822ABF

Petition for Reconsideration
Informal Objection

Dear Counsel:

We have before us a "Petition for Reconsideration and Request to Rescind Grant of Construction Permit" ("Petition") filed by Saga Communications of New England, LLC ("Saga")[1] on August 14, 2008, and related pleadings.[2] Saga seeks reconsideration of the grant of the above-referenced application ("CP Application") of Lake Country Broadcasting, Inc. ("Lake Country") for a construction permit to modify FM translator W245BL, Branchport, New York, to change its community of license from Branchport to Dundee and Penn Yan, also New York, and relocate its transmitting antenna.[3] We also have before us the above-referenced applications of Lake Country for a minor modification of the Construction Permit ("Modification Application") and license to cover the Construction Permit ("License Application"). Finally, we have an Informal Objection ("Informal Objection") filed against the Modification and License Applications by Saga on August 27, 2008, and related pleadings.[4] For the reasons set forth below, we grant the Petition, rescind the grant of the CP Application, dismiss the CP Application, dismiss the Modification and License Applications, and dismiss the Informal Objection as moot.

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[1] Saga is the licensee of full service Station WYXL(FM), Channel 247B, Ithaca, New York.

[2] On September 8, 2008, Lake Country filed an Opposition to Petition for Reconsideration ("Reconsideration Opposition"). On September 18, 2008, Saga filed a Reply to the Opposition to Petition for Reconsideration and Request for Order to Cease and Desist ("Reply").

[3] The CP Application was filed July 14, 2008, placed on public notice of acceptance July 17, 2008 (Report No. 26780), and granted July 22, 2008 ("Construction Permit").

[4] On September 18, 2008, Saga filed a Supplement to Informal Objection and Request for Order to Cease and Desist ("Supplement"). On November 7, 2008, Lake Country filed an Opposition to Informal Objection ("Objection Opposition").

Background. *CP Application.* The CP Application is the latest in a series of translator "hops" relocating Station W245BL's facilities to various sites in the Finger Lakes region of upstate New York. The CP Application was granted July 22, 2008, the Petition was filed August 14, 2008, and Lake Country completed construction by August 22, 2008, the filing date of the License Application. Saga's primary contention is that the CP Application was granted in error because it violated the contour overlap provision of Section 74.1204(a) of the Rules, causing prohibited overlap with the protected contour of Station WYXL(FM), but failing to qualify for the "lack of population" exception of Section 74.1204(d).[5] In support of this argument, Saga submits a recent USGS aerial topographical image showing buildings within the relevant area.[6]

In its Opposition, Lake Country acknowledges that the CP Application does not fall within the "lack of population" exception to the contour overlap rule; however, it argues that—in the absence of any listener complaints showing actual interference—Station W245BL should be allowed to continue to operate until the violation is "cured" by grant of the Modification Application.[7] In reply, Saga contends that the public interest will not be served by allowing Station W245BL to continue to operate despite a demonstrated violation of the Rules.[8]

Modification and License Applications. Saga contends that the Modification Application suffers from the same defect as the CP Application: namely, that the proposed contour overlap area is actually populated and therefore not exempt from the general prohibition on contour overlap. Specifically, Saga argues that a road passing through the overlap area, Porters Corner Road, is a "major road" that precludes application of Section 74.1204(d).[9] Saga also argues that the License Application should be dismissed or denied because the underlying Construction Permit is not yet final, due to the pending Petition.[10] Lake Country disputes Saga's characterization of Porters Corner Road, pointing out that the New York State Department of Transportation has classified it as "FC 09/Rural Local Road," the most minor road classification in New York.[11]

Discussion. *Petition for Reconsideration*. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order,

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[5] Petition at 3-5; 47 C.F.R. § 74.1204(a),(d). Initially, Saga also argued that: (1) the facility violates 47 C.F.R. § 74.1235(d)(3) (limiting the 34 dBμ interfering contour of translator stations within 320 kilometers of the Canadian border to 60 kilometers); and (2) Lake Country falsely certified that it built the facilities for each of several station moves ("hops") preceding the CP Application. Petition at 5-9; *see* File Nos. BLFT-20080423ADC, BLFT-20080512AAA, BLFT-20080609ACA, and BLFT-20080703ACW. In response to subsequent showings by Lake Country that no part of its interfering contour intersects the Canadian border and that each of the relevant facilities were constructed as authorized, Saga withdrew its arguments on these issues. Reply at 2, n. 2. In light of Saga's withdrawal, we have reviewed the pleadings and find that they raise no questions on these issues that require further consideration here. *See Stockholders of CBS, Inc*., Memorandum Opinion and Order, 11 FCC Rcd 3733, 3739 (1995); *Booth American Company*, Memorandum Opinion and Order, 58 FCC 2d 553, 554 (1976). We also note that Saga's arguments regarding Lake Country's previously-granted modification applications are untimely. No objections or petitions to deny were filed against these applications, and those grants are now final. *See* 47 U.S.C. § 405(a); 47 C.F.R. § 1.106(f).

[6] Petition at Attachment 1, Exhibit 2.0.

[7] Opposition at 4, 6; *see* 47 C.F.R. § 74.1204(a),(d).

[8] Reply at 3.

[9] Supplement at 3-4.

[10] Informal Objection at 1.

[11] Objection Opposition at 2.

or raises additional facts, not known or existing at the time of the petitioner's last opportunity to present such matters.[12] If the petitioner is not a party to the proceeding, it must state with particularity the manner in which its interests are adversely affected and show good reason why it was not possible to participate in the earlier stages of the proceeding.[13] In this case, Saga has properly alleged that its interests are adversely affected because grant of the CP Application would cause prohibited overlap with the protected contour of its Station WYXL(FM), Ithaca, New York. Saga has also shown that its failure to participate earlier in the proceeding is justified by the short time frame (three full business days) between public notice of acceptance and grant of the CP Application.[14]

An application for an FM translator station will not be accepted for filing if the proposed operation involves overlap of specified predicted field contours with any other station, unless the applicant demonstrates that no actual interference will occur due to intervening terrain, lack of population, or other factors.[15] In the CP Application, Lake Country alleged that there was no population within the proposed overlap area of Stations W245BL and WYXL(FM).[16] In support of this statement, Lake Country provided a topographic map that displays no structures or roads within the overlap area.[17] This map, while not dated, appears to be a reprint of the 1942 United States Geologic Survey ("USGS") topographical series. To refute Lake Country's "lack of population" claim, in its Petition, Saga submits a recent copy of a USGS "US Topo" series aerial topographic image, available free to the public online at http://nationalmap.gov/, which shows several buildings within the overlap area.

We agree with Saga that the "US Topo" map, which was not before the staff at the time of grant, demonstrates that the CP Application violated the general contour overlap rule of Section 74.1204(a) and therefore was granted in error.[18] We do not agree with Lake Country that a permittee can "cure" a technically defective application, after grant, by modifying the construction permit to relocate the violating facilities to a rule-compliant site. Such a policy would potentially waste staff resources and undermine our application processing rules by encouraging applicants to file defective applications or build violating facilities with the expectation that such defect or violation could be rectified through a modification application.[19] Nor do equitable considerations compel a different result: it is well-established that a permittee opting to construct before the grant of its application becomes final does so at

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[12] *See* 47 C.F.R § 1.106(c),(d); *see also WWIZ, Inc.,* Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

[13] 47 C.F.R. § 1.106(b)(1).

[14] In similar circumstances, the Commission has found that such a short filing opportunity effectively precludes participation during the initial consideration of an application. *See Mr. David Levandusky*, Letter, 25 FCC Rcd 14172, 14174, n.16; *Aspen FM, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 17852, 17854 (1997).

[15] 47 C.F.R. § 74.1204(a), (d).

[16] CP Application, Exhibit 13.

[17] CP Application, Attachment 13, "Overlap Area – Lack of Population Detailed View."

[18] *See* 47 C.F.R. § 74.1204(a),(d); *Living Way Ministries, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 17054, 17059 (2002) ("Where a USGS Topographic Map depicts residences, commercial or industrial areas . . . within an area of predicted interference, or other potentially occupied sites where one would expect listeners, we will presumptively conclude that the "lack of population" exception does not apply.").

[19] *See* 47 C.F.R. § 73.3566 ("Applications which are determined to be patently not in accordance with the FCC rules, regulations, or other requirements ... will be considered defective and will not be accepted for filing or if inadvertently accepted for filing will be dismissed").

its own risk.[20] Accordingly, we grant the Petition, rescind grant of the CP Application, and dismiss the CP Application.[21] Because there is no authorization remaining for Lake Country to modify or cover, we also dismiss the Modification Application and License Application as null and void and the Informal Objection as moot.[22]

Conclusion. Based on the above, we find that Saga has shown material error in the grant of the CP Application. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Saga Communications of New England, LLC on August 14, 2008, IS GRANTED and the grant of the Construction Permit to modify FM translator W246BL, Branchport, New York (File No. BPFT-20080714ADP), IS RESCINDED and the CP Application IS DISMISSED.

IT IS FURTHER ORDERED that the applications of Lake Country for minor modification of the Construction Permit (File No. BMPFT-20080825ABI) and a license to cover the Construction Permit (File No. BLFT 20080822ABF) ARE DISMISSED and the informal objection filed by Saga Communications of New England, LLC on August 27, 2008, IS DISMISSED as moot.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

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[20] *See, e.g., Robert J. Buenzle, Esq.*, Letter, 25 FCC Rcd 2129, 2131 (2010) (citing *Dennis P. Corbett, Esq.*, Letter, 22 FCC Rcd 4795, 4797-98 (MB 2007); and *Las Americas Communications, Inc*., Memorandum Opinion and Order, 6 FCC Rcd 1507, 1510 (1991)). Here, Lake Country chose to construct the facilities even before the end of the 30-day statutory period for reconsideration. *See* 47 U.S.C. 405(a); 47 C.F.R. § 1.106(f).

[21] However, we remind Lake Country that the Commission will favorably consider (and reinstate *nunc pro tunc*) petitions for reconsideration after an initial dismissal or return of an application when the applicant submits "a relatively minor curative amendment within 30 days." *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, Public Notice, 56 RR.2d 776 (1984) (as subsequently published in the Federal Register, 49 Fed. Reg. 47331, 47332 (Dec. 3, 1984)); *see also Gerald R. Proctor, Esq.*, Letter, 20 FCC Rcd 12345, 12846 (2005).

[22] *See WCYQ Inc*., Memorandum Opinion and Order, 18 FCC Rcd 16900, 16904 (2003) ("[B]y operation of law, there no longer existed any translator station license to modify, and the modification application had become null and void"). Although we base dismissal here on the non-existence of the underlying Construction Permit, we also observe that the License Application, on its face, contains other apparent defects that would affect its acceptability if it were to be processed. First and foremost, of course, the facilities that Lake Country proposed to license violate the contour overlap rule. *See* Discussion, *supra*; *see also* 47 C.F.R. § 74.1204(a),(d). Second, and relatedly, Lake Country certified in the License Application that "no cause or circumstance has arisen since the grant of the underlying construction permit which would cause any statement or representation contained in the construction permit application to be incorrect now." License Application, Section II, Question 3. This certification was made *after* Lake Country was served with Saga's Petition and its accompanying up-to-date USGS maps. Indeed, just 17 days later—apparently without new information— Lake Country expressly acknowledged that its maps were not accurate: "[Lake Country] recognizes ***now*** that the structures exist." Opposition at 4 (emphasis added). At whatever point Lake Country concluded that its mapping data was incorrect, it should have supplemented the License Application to that effect. *See* 47 C.F.R. § 1.65. Third, in the License Application, Lake Country inaccurately summarized Saga's objection as Lake Country's "fail[ure] to construct the facilities as certified" and states that Saga "withdrew its objection with respect to that allegation." License Application, Exhibit 7. This statement is incomplete to the point of misstatement. It omits Saga's key argument that the License Application violates Section 74.1204(a) of the Rules. That argument was *not* withdrawn.