



Federal Communications Commission
Washington, D.C. 20554

May 3, 2013

DA 13-997
In Reply Refer to:
1800B3-CEG
Released: May 3, 2013

David Oxenford, Esq.
Wilkinson Barker Knauer, LLP
2300 N Street, NW, Suite 700
Washington, DC 20037

John C. Trent, Esq.
Putbrese Hunsaker & Trent, P.C.
200 S. Church Street
Woodstock, VA 22664

In re: **NEW(FM), Phillipsburg, Kansas**
Facility ID No. 190424
File No. BNPH-20120518AAP

Petition for Reconsideration

Dear Counsel:

We have before us a Petition for Reconsideration (“Petition”) filed by Robert D. Yates, Jr. d/b/a RTY Broadcasting (“RTY”) on August 8, 2012. RTY seeks reconsideration of the grant of the above-referenced application of Christopher Falletti (“Falletti”) for a new FM station at Phillipsburg, Kansas (“Application”), and related responsive pleadings.¹ For the reasons stated below, we dismiss the Petition.

Background. Falletti was the winning bidder in FM Auction 93 for a new commercial FM station on Channel 237A at Phillipsburg, Kansas.² On May 18, 2012, Falletti filed his post-auction long-form Application, proposing to serve Phillipsburg from an antenna site located at 39° 37’ 2” NL, 99° 17’ 55” WL, ASR No. 1007950 (the “KQMA Tower”). The Application was granted on July 3, 2012. On October 18, 2012, Falletti filed a minor modification application (“Modification Application”) to upgrade from Channel 237C2 at Phillipsburg to Channel 237C1 at Wakeeney, Kansas, with a new transmitter site at 39° 15’ 57” NL, 99° 50’ 0” WL, ASR No. 1033402 (“KZNA Tower”).³ No petitions to deny were filed against either application. The Modification Application was granted on April 2, 2013.

In its Petition, RTY contends that Falletti failed to obtain reasonable assurance of site availability prior to filing the Application, as required by the Commission’s rules.⁴ Yates, the owner and general manager of the KQMA Tower, certifies that he was never approached by Falletti about possible use of the KQMA Tower and has not agreed to such use. Therefore, RTY argues, the Application must be

¹ On August 20, 2012, Falletti filed an Opposition to Petition for Reconsideration (“Opposition”). On September 4, 2012, RTY filed a Reply to Opposition to Petition for Reconsideration (“Reply”).

² See *Auction of FM Broadcast Construction Permits Closes, Winning Bidders Announced for Auction 93*, Public Notice, 27 FCC Rcd 4056 (2012), Attachment A at 3.

³ File No. BMPH-20121018ABU; see 47 C.F.R. § 73.3573(g), which permits community of license changes by application for a minor modification.

⁴ See, e.g., *Michael Couzens, Esq.*, Letter, 27 FCC Rcd 11218, 11221 (MB 2012) (citing *Les Seraphim and Mana’o Radio*, Memorandum Opinion and Order, 25 FCC Rcd 2785, 2787 (MB 2010)).

dismissed without the possibility of curative amendment.⁵ While RTY acknowledges that it failed to participate in the proceeding earlier by filing a petition to deny the Application, it claims that reconsideration is nonetheless appropriate due to its lack of awareness of the proceedings and the “fundamental nature of the defect identified.”⁶

For its part, Falletti responds that his failure to obtain reasonable assurance for the proposed transmitter site was due to a “perfect storm” of miscommunications and the death of his communications counsel.⁷ Falletti states that he has located another tower and will file a corrective application to this new location.⁸ Permitting an auction winner to cure its long-form application in this way, Falletti argues, is in keeping with the Commission’s “more lenient approach toward the processing of defective broadcast application for new facilities . . . permitting multiple corrective amendments, if necessary.”⁹

RTY’s Reply largely restates the Petition, with an additional discussion of whether Falletti’s failure to obtain reasonable assurance of site availability was in fact due to miscommunication.

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission’s original order, or raises additional facts, not known or existing at the time of the petitioner’s last opportunity to present such matters.¹⁰ A petitioner who is not a party to the proceeding must state with particularity the manner in which its interests are adversely affected by the action taken, and show good reason why it was not possible to participate in the earlier stages of the proceeding.¹¹ RTY has not met this threshold pleading requirement.

RTY does not specify the manner in which its interests are adversely affected by grant of the Application, nor does it show good reason why it was not possible to participate in the earlier stages of the proceeding. RTY states merely that it was “unaware of the pendency and grant of the Falletti application” and that reconsideration is appropriate due to the “fundamental nature of the defect identified.”¹² RTY’s statement that it was unaware of the Application is insufficient, because the Application appeared on two public notices, first on May 23, 2012 (announcing that the Application had been “received”), and then on May 31, 2012 (announcing that the Application had been “accepted for filing”).¹³ RTY therefore had ample constructive notice of Falletti’s Application, including information regarding the proposed frequency and

⁵ Petition at 3-4; Reply at 3-4 (citing *Edward A. Schober*, Memorandum Opinion and Order, 23 FCC Rcd 14263, 14266 (2008) (“*Schober*”) (“The Commission has, however, repeatedly held that an applicant will not be permitted to amend where it did not have the requisite reasonable assurance to begin with . . .”) (internal quotations and citations omitted)).

⁶ Petition at 1, n.2.

⁷ Opposition at 2, n.2.

⁸ Opposition at 2. Falletti subsequently filed the Modification Application, specifying the KZNA Tower.

⁹ Opposition at 3 (citing *Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses*, First Report and Order, 13 FCC Rcd 15920, 15963 (1998), *recon. denied*, 14 FCC Rcd 8724 (1999), *aff’d sub nom. Orion Communications, Ltd. v. FCC*, 213 F.3d 761 (D.C. Cir. 2000)) (“*Auction Order*”).

¹⁰ 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).

¹¹ 47 C.F.R. § 1.106(b)(1).

¹² Petition at 1, n.2.

¹³ See *Broadcast Applications*, Public Notice, Report No. 27744 (May 23, 2012); *Broadcast Applications*, Public Notice, Report No. 27749 (May 31, 2012).

community of license.¹⁴ Under Section 73.5006(b) of the Commission's rules, a petition to deny the Application could have been filed within ten days of the May 31 public notice.¹⁵ Finally, we note that there is no "fundamental defects" exception to the pleading requirements of Section 1.106 of the rules. Accordingly, RTY is barred from participating in the proceeding at this late date and the Petition is dismissed as procedurally defective.¹⁶

We also observe that, as an Auction 93 winning bidder, Falletti falls under our liberal amendment policy and would have been permitted, if necessary, to amend the Application to cure the alleged defect. The Commission expressly treats auction winners differently than other, non-auction applicants with respect to amending defective applications.¹⁷ Due to the relatively small volume of winning bidder long-form applications,¹⁸ the relatively brief time period that winning bidders have to prepare and file their long-form applications following the close of an auction,¹⁹ and the incentive for auction winners to recoup their bid expenditures,²⁰ we have adopted a liberal amendment policy for such applicants, including sending staff deficiency letters and permitting multiple amendments, if necessary.²¹ Accordingly, even if RTY had timely raised the issue of site availability, Falletti would have been permitted to amend the Application to specify a new, conforming, site.

Conclusion/Actions. For the reasons given above, IT IS ORDERED that the Petition for Reconsideration filed by Robert D. Yates, Jr. d/b/a RTY Broadcasting on August 8, 2012, IS DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

¹⁴ See, e.g., *John Jason Bennett*, Letter, 20 FCC Rcd 17193, 17195 (MB 2005) (citing *R&S Media*, Memorandum Opinion and Order and Order to Show Cause, 19 FCC Rcd 6300 (MB 2004)).

¹⁵ 47 C.F.R. § 73.5006(b).

¹⁶ The Commission adjudicates site availability issues in the auction context only to the extent that there is a substantial and material question of false certification that puts the applicant's basic qualifications at issue. *Liberty Productions*, Memorandum Opinion and Order, 16 FCC Rcd 12061, 12072 (2001) (citing *Auction Order*, 13 FCC Rcd at 15856); see also *Schober*, 23 FCC Rcd at 14265, n.22. Because we dispose of the Petition on procedural grounds, we need not reach the issue of whether RTY raises a substantial and material question of false certification.

¹⁷ *Mark Lipp, Esq.*, Letter, 27 FCC Rcd 15190, 15193 (MB 2012) ("*Able Radio*").

¹⁸ See *Auction Order*, 13 FCC Rcd at 15986.

¹⁹ *Id.* at 15988.

²⁰ *Id.*

²¹ *Id.* at 15986. In contrast, we have disallowed curative amendments in circumstances where the applicant did *not* participate in the competitive bidding process. See, e.g., *Schober*, 23 FCC Rcd at 14266 (disallowing amendment of an FM translator non-mutually-exclusive ("singleton") application that lacked reasonable assurance of site availability); *Mark Van Bergh, Esq.*, Letter, 26 FCC Rcd 15135, 15140 (MB 2011) (disallowing amendment of a noncommercial educational ("NCE") station application that lacked reasonable assurance of site availability).