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In Reply Refer to:

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Anthony T. Lepore, Esq.
P.O. Box 823662
South Florida, FL 33082

Kathleen Victory, Esq.
Fletcher, Heald & Hildreth PLC
1300 North 17th Street, 11th Floor
Arlington, VA 22209

In re: **KPTJ(FM), Grape Creek, Texas**
Facility ID No. 164190
File No. BLH-20110804ABM

Petition for Reconsideration

Dear Counsel:

We have before us a Petition for Reconsideration (Petition) filed by Frank Vaquera, Sr. (Vaquera) on September 7, 2011, seeking reconsideration of the August 11, 2011, grant of the above-referenced application for a license to cover (Application) of Castle Holdings, LLC (Castle).¹ We also have before us an Opposition to the Petition filed by Castle on September 22, 2011 (Opposition), and a Reply filed by Vaquera on October 4, 2011 (Reply). For the reasons stated below, we deny the Petition.

Background. On October 8, 2010, Castle purchased a construction permit (Construction Permit) for a new commercial FM station on Channel 283 at Grape Creek, Texas (Station).² The Construction Permit expired on August 5, 2011.³ Castle states that on August 2, 2011, it completed construction of the Station's facilities and conducted equipment tests.⁴ On August 4, 2011, Castle filed the Application for a license to cover. The Station was then silent for nearly a year, filing an STA request to operate with reduced power on July 17, 2012.⁵ Castle assigned the Station to the current licensee, La Unica Broadcasting Co. (La Unica), on May 27, 2014.⁶

The Construction Permit contained the following special operating condition (Special Operating Condition #3):

¹ Grant of the Application was announced by public notice released August 16, 2011. *Broadcast Actions*, Public Notice, Report No. 47551 (Aug. 16, 2011).

² See File No. BAPH-20100819ABA.

³ File No. BNPH-20050103ABC, as modified by File No. BMPH-20110627ABX.

⁴ Opposition at 1.

⁵ File Nos. BLSTA-20110915ADG; BSTA-20120717ACM.

⁶ File No. BALH-20140228AHJ (granted on May 23, 2014, and consummated on May 27, 2014).

The permittee/licensee shall, upon completion of construction and during the equipment test period, make proper radiofrequency electromagnetic (RF) field strength measurements throughout the transmitter site area to determine if there are any areas that exceed the FCC guidelines for human exposure to RF fields. If necessary, a fence must be erected at such distances and in such a manner as to prevent the exposure of humans to RF fields in excess of the FCC Guidelines (OET Bulletin No. 65, Edition 97-01, August 1997). The fence must be a type which will preclude casual or inadvertent access, and must include warning signs at appropriate intervals which describe the nature of the hazard. Any areas within the fence found to exceed the recommended guidelines must be clearly marked with appropriate visual warning signs.

In the Petition, Vaquera claims that Castle failed to satisfy Special Operating Condition #3 in two respects: (1) it did not perform RF field strength measurements to determine if there were any areas at the Station's transmitter site that exceeded the FCC guidelines; and (2) it did not post appropriate RF safety signs on the fence surrounding the site.⁷ Rather than take field strength measurements, Vaquera objects, Castle used the Office of Engineering Technology's FM Model program to evaluate the Station's RF power density.⁸ Vaquera expresses concern that this evaluation might not have included RF emissions from a co-located FM station, KSJT(FM) (now KGKL-FM), San Angelo, Texas, as well as from two nearby stations, KDCD(FM) and KMDX(FM), both San Angelo, Texas.⁹ Finally, Vaquera contends, because Castle did not satisfy Special Operating Condition #3, its certifications in the Application that all the terms, conditions, and obligations in the underlying Construction Permit had been met and that the facility was constructed as authorized were "false and misleading."¹⁰

In its Opposition, Castle argues that the Petition should be dismissed because Vaquera did not demonstrate good cause for failing to participate earlier in the proceeding, as required by Section 1.106(b)(1) of the Rules.¹¹ Castle also claims that Vaquera lacks standing because grant of the Application would not "harm or affect him in any way whatsoever."¹² Substantively, Castle asserts that the Application was filed in full compliance with the Commission's Rules and the terms of the Construction Permit. Nothing in the Petition, according to Castle, contradicts the sworn statements of Castle's engineers that the Station was constructed and underwent equipment testing on August 2, 2011.¹³ With respect to the field strength measurements, Castle states that "it is the standard practice of broadcast engineers to utilize the Commission's approved software to ensure that, once the specific antenna is identified and installed, the facility satisfies the RF exposure criteria."¹⁴ Castle notes that Stations KDCD(FM) and KMDX(FM) need not be considered in the RF calculation, because they are more than 1,034 feet from the evaluated facility.¹⁵ Furthermore, Castle points out, the FM Model program is

⁷ Petition at 3-4, 6-7.

⁸ FM Model, a program created by Commission staff, is based on a model originally developed by the Environmental Protection Agency to predict ground-level RF power density in the vicinity of towers supporting FM radio broadcast antennas. See Federal Communication Commission, *FM Model for Windows*, <http://transition.fcc.gov/oet/info/software/fmmodel/> (last visited March 23, 2016).

⁹ Petition at 5-6.

¹⁰ Petition at 3, 9.

¹¹ Opposition at 2; 47 CFR § 1.106(b)(1) ("If the petition is filed by a person who is not a party to the proceeding, it shall state with particularity 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 for him to participate in the earlier stages of the proceeding.")

¹² Opposition at 2.

¹³ Opposition at 3.

¹⁴ Opposition at 6.

¹⁵ Opposition at 7; FCC Form 301 Worksheet 3, at 2.

designed to account for any additional sources of RF emissions in the area. Lastly, Castle states that no RF safety signs were required to be put on the outside perimeter fence of the property on which the Station's facilities were located, and that a second interior fence and gate not visible from the public road displayed the necessary signage.¹⁶

In its Reply, Vaquera explains that it was unable to participate earlier in the proceeding because the Application was granted only six days after it was "available for viewing in CDBS."¹⁷ Furthermore, Vaquera states, it was busy gathering evidence during this time so that a complete record would be before Bureau staff.¹⁸ Vaquera alleges that no signal was broadcast from the Station between 11:00 AM and 12:01 PM on August 2, 2011—the time period Castle claims to have "energized" the equipment—and provides data recorded by various monitoring devices in support of its claim.¹⁹ Even if the Station had operated during this interval, Vaquera argues, it was impossible for it to perform RF field strength tests in so brief a time.²⁰ With respect to signage, Vaquera disputes the existence of a second interior fence on the property and provides photographs and video footage in support of this claim.

Discussion. Procedural issues. Section 1.106(b)(1) of the Commission's Rules allows a petition for reconsideration to be filed by any party to the original proceeding or any party whose interests will be adversely affected by the action taken by the Commission.²¹ If a petitioner was not a party to the original proceeding, it must show good reason for why it was unable to participate in the earlier proceeding.²² However, the Commission has accepted petitions for reconsideration when the grant of an application occurred shortly after the application was placed on public notice, finding that such expedient grant effectively precluded participation during the initial consideration of an application.²³ Here, the Bureau granted the Application on August 11, 2011, two days after public notice of acceptance for filing.²⁴ We find that this brief interval effectively precluded Vaquera's participation in the earlier proceeding. Therefore, we will not dismiss the Petition due to Vaquera's failure to file an informal objection to the Application. With respect to standing, the Commission accords party-in-interest status to a petitioner who demonstrates that he resides in the service area of the station that is the subject of the petition.²⁵ In the Petition, Vaquera states that he resides within the proposed 60 dB μ service area of the Station. Castle does not dispute this fact. Therefore, we find that Vaquera has standing to file the Petition.

Substantive issue. 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

¹⁶ Opposition at 8.

¹⁷ Reply at 2.

¹⁸ Reply at 2.

¹⁹ Reply at 3.

²⁰ Reply at 5-6.

²¹ 47 CFR § 1.106(b)(1).

²² *Id.*

²³ See *Ted and Jana Tucker*, Memorandum Opinion and Order, 4 FCC Rcd 2816, 2816 (1989) (standing to file a petition for reconsideration found when application granted four days after public notice issued); *Aspen FM, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 17852, 17854-55 (1997) (standing to file a petition for reconsideration found when application granted five days after acceptance).

²⁴ See *Broadcast Applications*, Public Notice, Report No. 27546 (Aug. 9, 2011); *Broadcast Actions*, Public Notice, Report No. 47551 (Aug. 16, 2011).

²⁵ *Chet-5 Broadcasting, L.P.*, Memorandum Opinion and Order, 14 FCC Rcd 13041, 13042 (1999) ("[W]e will accord party-in-interest status to a petitioner who demonstrates either residence in the station's service area *or* that the petitioner listens to or views the station regularly, and that such listening or viewing is not the result of transient contacts with the station") (emphasis in original).

known or existing at the time of the petitioner's last opportunity to present such matters.²⁶ Vaquera has failed to meet this burden.


Vaquera argues that if the Station were silent, Castle's engineers could not have taken RF field strength measurements in compliance with Special Operating Condition #3. However, Castle correctly observes that "it is the standard practice of broadcast engineers to utilize the Commission's approved software to ensure that, once the specific antenna is identified and installed, the facility satisfies the RF exposure criteria."²⁷ The RF field strength measurement condition in Special Operating Condition #3 is routinely issued to any applicant for a construction permit that does not specify an antenna model in its initial application. If the antenna specifications are provided initially, then the applicant and Bureau engineering staff use the FM Model program to predict ground level RF power density in the vicinity of the proposed facility, and no special operating condition requiring additional RF evaluation is imposed. If the applicant does not submit antenna specifications until the licensing stage, then it may—as at the permitting stage—demonstrate compliance with the RF exposure limits using the FM Model program, with the applicant's analysis confirmed by Bureau staff. Here, Castle has provided an RF exposure analysis using the FM Model and submitted sufficient technical information for the Bureau to confirm this analysis, thus satisfying Special Operating Condition #3.

Regarding Castle's alleged failure to erect appropriate signage along its perimeter fence, we find that the facilities as specified in the Application were not predicted to result in any areas at or near ground level exceeding the FCC guidelines for human exposure to RF fields. Therefore, Castle was not required to erect a fence or post RF safety signs to comply with Special Operating Condition #3. We conclude that there is no need to take action at this time other than to caution the current licensee, La Unica, to ensure ongoing compliance with the RF exposure guidelines as restated and clarified in the *RF Exposure Policy Order*.²⁸

Conclusion/Actions. We find that Vaquera has not shown a material error in the Bureau's grant of the Application. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Frank Vaquera, Sr. on September 7, 2011, IS DENIED.

Sincerely,



Peter H. Doyle 
Chief, Audio Division
Media Bureau

²⁶ See 47 CFR § 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).

²⁷ Opposition at 6.

²⁸ See *Reassessment of Federal Communications Commission Radiofrequency Exposure Limits and Policies*, First Report and Order, Further Notice of Proposed Rulemaking, and Notice of Inquiry, 28 FCC Rcd 3498, 3564 *et seq.* (2013) (*RF Exposure Policy Order*).