



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

**August 14, 2020**

*In Reply Refer to:*  
1800B3-SS

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In re: **K225DB, San Jose, CA**  
Facility ID No. 148598  
File Nos. BMPFT-20190311ABA  
BMPFT-20190318AAQ

**Informal Objection**

**Petitions for Reconsideration**

Dear Counsel:

This letter concerns (1) the referenced, granted applications (March 11 Modification Application and March 18 Modification Application, or collectively, Modification Applications) of Elohim Group Corporation (Elohim) for minor changes of facilities for FM translator station K225DB<sup>1</sup> on Channel 225 (92.9 MHz) at San Jose, California (Translator);<sup>2</sup> (2) an Informal Objection (Objection) filed on March 13, 2019, by Manual J. Martinez (Martinez) against the March 11 Modification Application; (3) two Petitions for Reconsideration filed on March 14 and 18, 2019 (Petition I and Petition II, or collectively, Petitions) by Center for Training and Careers (CTC),<sup>3</sup> seeking reconsideration of the staff's grants of the March 11 Modification Application and the March 18 Modification Application, respectively; and (4) related pleadings.<sup>4</sup> For the reasons set forth below, we deny the Petitions, and we dismiss the Objection as moot.

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<sup>1</sup> Formerly K224FG.

<sup>2</sup> The Modification Applications propose fill-in service for Station KVVN(AM), Santa Clara, California.

<sup>3</sup> CTC is the licensee, and Martinez is the station manager/engineer, of low-power FM Station KCXU-LP, San Jose, California, located on Channel 224.

<sup>4</sup> In addition to seeking reconsideration of the grant of the March 18 Modification Application, Petition II also seeks denial of a dismissed license to cover application. As discussed below, we dismiss Petition II as moot to the extent it seeks denial of the dismissed covering license application. *See infra* note 12. On March 28, 2019, Elohim filed a consolidated Opposition to Petitions for Reconsideration and Informal Objection (Consolidated Opposition), to which CTC replied (Reply) on April 12, 2019.

**Background.** On March 11, 2019, Elohim filed the March 11 Modification Application for a minor change of facilities to modify the location of the Translator and to move the Translator from Channel 224 to Channel 225. The staff accepted the March 11 Modification Application for filing on March 12, 2019.<sup>5</sup> On March 13, 2019, the staff granted the March 11 Modification Application,<sup>6</sup> and Martinez filed his Objection the same day shortly after the application was granted. The next day Martinez filed Petition I.

On March 18, 2019, Elohim filed the March 18 Modification Application.<sup>7</sup> The staff accepted the March 18 Modification Application for filing and granted it that same day.<sup>8</sup> Within hours, CTC filed Petition II seeking reconsideration of the grant of the March 18 Modification Application.

In Petition I,<sup>9</sup> CTC argues that Elohim had no reasonable assurance to construct at the site proposed in the March 11 Modification Application and that the grant of the application should therefore be rescinded and the application dismissed. Specifically, CTC argues that the site proposed in the March 11 Modification Application was “in the middle of a narrow county road, rather than on private property,” and that the Santa Clara (California) County Planning Office never granted any permits for Elohim to construct the Translator’s facilities at that site.<sup>10</sup> In support of this allegation, CTC submits a declaration made under penalty of perjury in which Martinez asserts that a local building permit is needed for the site proposed in the March 11 Modification Application, photos and mappings of the coordinates for the proposed site, and emails from the Santa Clara County Planning Office stating that there were no local building permit records for an FM broadcast facility at or near that site.<sup>11</sup>

In Petition II, CTC reiterates the assertions it made in Petition I regarding the location of the Translator’s site and Elohim’s alleged noncompliance with local permitting requirements.<sup>12</sup> CTC also claims that its staff visited the Translator’s site on March 18, 2019, and found no antenna structure at that site.<sup>13</sup>

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<sup>5</sup> See *Broadcast Applications*, Public Notice, Report No. 29443 (rel. Mar. 14, 2019).

<sup>6</sup> See *Broadcast Actions*, Public Notice, Report No. 49445 (rel. Mar. 18, 2019).

<sup>7</sup> Elohim filed a license to cover application, File No. BLFT-20190318AAJ, on March 18, 2019, and that application was dismissed on March 20, 2019.

<sup>8</sup> See *Broadcast Applications*, Public Notice, Report No. 29448 (rel. Mar. 21, 2019) (notice of acceptance for filing); *Broadcast Actions*, Public Notice, Report No. 49448 (rel. Mar. 21, 2019) (notice of grant).

<sup>9</sup> We note that the Objection and Petition I contain essentially the same arguments. Because Martinez filed the Objection after we granted the March 11 Modification Application and the Objection’s arguments are reiterated in Petition I, we dismiss the Objection as moot. Alternatively, if we were to consider the Objection on the merits and treat it as a petition for reconsideration of the grant of the March 11 Modification Application, we would deny the Objection for the same reasons we deny Petition I.

<sup>10</sup> Petition I at 1-2. CTC argues that if Elohim actually intended to construct an antenna on “the property to the north” of the county road, this would cause the antenna to be elevated 10 meters above authorized values, in violation of section 73.1690 of the FCC’s rules (Rules). Petition I at 2, n.5. CTC further asserts that mounting the antenna at this height would cause harmful interference to Station KSJO(FM), San Jose, California, in violation of section 74.1204 of the Rules. *Id.* at 2; see also 47 CFR §§ 73.1690(c)(2) and 74.1204(d).

<sup>11</sup> Declaration of Manual J. Martinez, at Attachment to Petition.

<sup>12</sup> Petition II at 1-2. In addition to seeking reconsideration of the grant of the March 18 Modification Application, Petition II also seeks denial of a license to cover application, File No. BLFT-20190318AAJ. Because the license application was dismissed on March 20, 2019, we dismiss Petition II as moot to the extent it seeks denial of the dismissed license application.

<sup>13</sup> *Id.* at 2.

In its Consolidated Opposition, Elohim argues that the Petitions should be dismissed because CTC is neither adversely affected nor a party to the proceeding.<sup>14</sup> Elohim argues that the Petitions do not raise an issue warranting reconsideration of the staff's grants of the Modification Applications because in its view CTC and Martinez both failed to properly assess the Modification Applications' proposals.<sup>15</sup> Specifically, Elohim argues that CTC and Martinez took photographs of "a non-existent proposal" and that Elohim constructed the Translator's facilities before its construction permit expired.<sup>16</sup> Elohim submits as evidence of authorized construction a declaration from its chief engineer stating that construction of the Translator was completed as authorized at 7:00 p.m. local time on Sunday, March 17, 2019.<sup>17</sup> Elohim also provides photographs of its site proposal and the constructed facility.<sup>18</sup> Elohim asserts that the sites specified in the photos are on private land<sup>19</sup> and that CTC's concerns about zoning issues are inaccurate and not within the Commission's purview.<sup>20</sup>

In its Reply, CTC claims standing as an adversely affected party due to alleged "cross-channel" interference from the Translator to KCXU-LP.<sup>21</sup> In addition, CTC reiterates its arguments that (1) Elohim falsely certified that it constructed at the location authorized in the construction permit; (2) the Translator's construction permit expired as a matter of law at 3:00 a.m. on March 18, 2019; and (3) Elohim did not secure the requisite county permits, thus failing to satisfy the Commission's criteria for "reasonable assurance."<sup>22</sup>

**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 new facts or changed circumstances not known or existing at the time of the petitioner's last opportunity to present such matters.<sup>23</sup> As discussed below, CTC has not met this burden.

*Standing.* Section 1.106(b)(1) of the 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

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<sup>14</sup> 47 CFR § 1.106(b)(1). Elohim asserts that the filing of an informal objection does not confer standing to later file a petition for reconsideration. Consolidated Opposition at 1-2.

<sup>15</sup> Consolidated Opposition at 1-2.

<sup>16</sup> *Id.* at 3.

<sup>17</sup> *Id.* at 3 & Attachment 4.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 2-3 & Attachments 1, 2, and 3. Elohim notes that the coordinates of the site are 37°18'40.9"N, 121°45'33.4"W and that those coordinates convert to NAD 27 coordinates of 37°18'41.11" N, 121°45'29.5" W—the exact coordinates applied for in the granted March 18 Modification Application, which also contains the correct height above average terrain of the site—276 meters (906 feet). *See id.* at 3, n.3.

<sup>20</sup> *Id.* at 3-4, citing *KAZV(FM), Aguila, Arizona*, Letter Order, 33 FCC Rcd 6685, 6691 (MB 2018) ("We have left compliance and enforcement issues regarding zoning matters to local land use authorities."); *KAZV(FM)*, 33 FCC Rcd at 6691 ("[W]e leave enforcement actions concerning any alleged violations of this nature to appropriate local authorities.").

<sup>21</sup> Reply at 1.

<sup>22</sup> *Id.* at 1-5 & Exhibits (containing a report and photos from the survey of the site CTC states its staff visited and copies of FCC authorizations and emails from the Santa Clara County Planning Office).

<sup>23</sup> 47 CFR § 1.106(c); *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686, para. 2 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 397 U.S. 967 (1966); *Davis & Elkins Coll.*, Memorandum and Order, 26 FCC Rcd 15555, 15556, para. 5 (MB 2011).

by the Commission.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup> Here, the staff granted the March 11 Modification Application on March 13, 2019, one day after public notice of its acceptance for filing,<sup>27</sup> and the staff granted the March 18 Modification Application the same day as public notice of its acceptance for filing.<sup>28</sup> We find that these brief intervals effectively precluded CTC's participation in the earlier stages of the proceeding. Therefore, we will not dismiss the Petitions due to CTC's failure to file a petition to deny prior to the grant of the Modification Applications.<sup>29</sup> The Commission accords party-in-interest status to a competitor in a market suffering signal interference. CTC raises a question as to whether "the protections required by section 74.1204(d) and acknowledged in the [March 11 Modification Application] could [be] guaranteed in regards to KSJO."<sup>30</sup> In addition, CTC claims to have received reports of interference from its listeners shortly after the March 18 Modification Application was filed.<sup>31</sup> Elohim does not dispute these claims. Therefore, we find that CTC has standing to file the Petitions.

*Reasonable Site Assurance.* We find that CTC's site availability allegations raise two interrelated issues: (1) whether the applicant had reasonable assurance of the availability of the site at the time that the applicant so certified (*i.e.*, whether there was a meeting of the minds sufficient to establish reasonable assurance of a transmitter site's availability for its intended use); and (2) whether the certification was deliberately false, or whether the applicant believed, even if such belief was incorrect, that the site owner had made a commitment to make the transmitter site available to the applicant (*i.e.*, whether the applicant intended to deceive the Commission, as established by substantial evidence).<sup>32</sup>

With respect to the first issue, to demonstrate that it has obtained reasonable assurance that its proposed site is available, an applicant must provide proof of the property owner's favorable disposition toward making an arrangement with the applicant, beyond simply a mere possibility. This reasonable assurance may be acquired by informal telephone contacts with a representative of the property owner or

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<sup>24</sup> 47 CFR § 1.106(b)(1).

<sup>25</sup> *Id.*

<sup>26</sup> See *Ted and Jana Tucker*, Memorandum Opinion and Order, 4 FCC Rcd 2816, para. 3 (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, para. 9 (1997) (standing to file a petition for reconsideration found when application granted five days after acceptance).

<sup>27</sup> See *supra* notes 6 and 7.

<sup>28</sup> See *supra* notes 8 and 9.

<sup>29</sup> We note that CTC's Martinez filed his Objection one day after the grant of the March 11 Modification Application.

<sup>30</sup> Petition I at 1.

<sup>31</sup> Petition II at 2.

<sup>32</sup> See *Liberty Productions, A Limited Partnership*, Memorandum Opinion and Order, 16 FCC Rcd 12061, 12084-85, para. 54 (2001) (subsequent history omitted); see also *National Innovative Programming Network, Inc. of the East Coast*, Memorandum Opinion and Order, 2 FCC Rcd 5641, 5642, para. 8 (1987) (the proper initial inquiry is whether, based on the information available to it, was it reasonable for the applicant to conclude that the site would be available); *Rem Malloy Broad.*, Memorandum Opinion and Order, 6 FCC Rcd 5843, 5846, para. 13 (Rev. Bd. 1991), citing *South Florida Broad. Co.*, Memorandum Opinion and Order, 99 FCC 2d 840, 845 n.12 (Rev. Bd. 1984).

prospective landlord, and rent and other details may be negotiated at a future date.<sup>33</sup> The photos of the build out submitted by Elohim and the made-under-penalty-of-perjury declaration of Elohim's Chief Engineer Lozano that "we met with the owner of the land and commenced the installation of K225DB on Sunday, March 17, 2019, around 12:30 pm" are evidence of reasonable assurance that Elohim did in fact receive permission from the site owner to operate the Translator from the authorized site.<sup>34</sup> Further, we have no reason to disregard or discount Lozano's declaration in the circumstances presented here. The documentation before us as to proof of build out as authorized and Lozano's unequivocal statement, demonstrates reasonable assurance.<sup>35</sup> With respect to the second issue of possible false certification by Elohim, we find the fact that the site owner was present when Elohim commenced installation of the antenna was enough for Elohim to believe that it had reasonable site assurance from the owner.<sup>36</sup> Under these circumstances, there is no evidence of any false certification or untrue statements to the Commission by Elohim regarding the availability of the specified site.

*Interference Allegations.* We find that CTC's interference allegations are moot given the subsequent grants of the uncontested minor change and covering license applications authorizing Elohim to move the Translator from channel 225 to channel 264.<sup>37</sup>

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<sup>33</sup> See *National Innovative Programming Network*, Memorandum Opinion and Order, 2 FCC Rcd 5641, 5642, para. 11 (1987) (all that is ordinarily necessary for reasonable assurance is some clear indication from the landowner that he is amenable to entering into a future arrangement with the applicant for use of the property as its transmitter site, on terms to be negotiated, and that he would give notice of any change of intention; reasonable assurance may be acquired by informal telephone contacts by the applicant's agent).

<sup>34</sup> Consolidated Opposition at 3 & Attachment 4.

<sup>35</sup> *Id.*, Attachments 1-4.

<sup>36</sup> *Id.*, Attachment 4.

<sup>37</sup> File Nos. BPFT-20190430ABG, 0000105865. We note that CTC did not provide an affidavit and engineering showing to support its interference allegations against the Translator's previously authorized facilities using the standard contour prediction methodology specified in the Rules. See 47 CFR §§ 1.106(e), 73.313, 74.1203(a)(3).

**Conclusion/Actions.** Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed by Center for Training and Careers, on March 14, 2019, seeking rescission and dismissal of Elohim Group Corporation's Application File No. BMPFT-20190311ABA, IS DENIED.

IT IS FURTHER ORDERED, that the Petition for Reconsideration/Petition to Deny filed by Center for Training and Careers, on March 18, 2019, IS DENIED to the extent it seeks rescission and dismissal of Elohim Group Corporation's Application File No. BMPFT-20190318AAQ, AND OTHERWISE IS DISMISSED as moot.

IT IS FURTHER ORDERED, that the March 13, 2019, Manual J. Martinez Informal Objection to Elohim Group Corporation's Application File No. BMPFT-20190311ABA, IS DISMISSED as moot.

Sincerely,

Albert Shuldiner  
Chief, Audio Division  
Media Bureau

cc: Center for Training and Careers  
Elohim Group Corporation