

FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554

IN REPLY REFER TO:

1800B3-DEB/DJF/JR

April 24, 1995

Radio Ingstad Minnesota, Inc.  
Radio Station KMFX  
232 Third Street, NE  
Valley City, ND 58072

Re: KMFX(FM); Lake City, MN  
Radio Ingstad Minnesota, Inc.  
BLH-930310KC

"Motion to Deny License"

Gentlemen:

This concerns: (1) the captioned application (File No. BLH-930310KC) of Radio Ingstad Minnesota, Inc. ("Ingstad"); (2) the May 6, 1993 "Motion to Deny License" filed by Olmstead County Broadcasting Co. and by United Audio Corporation ("Movants")<sup>1</sup>; and (3) associated pleadings.<sup>2</sup> Ingstad was granted a construction permit for Class C3 Station KMFX, Lake City, Minnesota, on April 30, 1992<sup>3</sup> and now seeks a covering license. As set forth below, Movants' "petition" is dismissed and, considered as an informal objection, denied, and Ingstad's license application is granted.

"Motion to Deny". Movants argue that Ingstad's operation does not conform to the requirement of 47 C.F.R. §73.315 for a minimum field strength of 70 dBu over a station's community of license. According to Movants, Ingstad's permit lacked a specific showing of compliance with this rule, in particular regarding line-of-sight coverage, major terrain obstructions, and selection of a transmitter site to maximize coverage of Lake City. Movants fault Ingstad for not examining the radial between the KMFX transmitter site and its community of license beyond 16 km. They suggest that had it done so, Ingstad would have determined that Lake City is terrain shielded between approximately 18 and 22 km of its antenna site. Moreover, Movants fault Ingstad for not undertaking a supplemental showing pursuant to 47 C.F.R. § 73.313(e) which would allegedly have shown that 70 dBu coverage could not be achieved with the proposed facility. Movants attached their own supplemental

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<sup>1</sup> Olmstead County Broadcasting Co. is the licensee of KOLM (AM) and KWWK (FM), Rochester, MN. United Audio Corp. is the former licensee of station WNXR, Rochester, MN.

<sup>2</sup> Movants supplemented their "Motion to Deny" on June 1 and June 8, 1993. Ingstad filed oppositions on May 19 and 24 and June 16 and 17, 1993.

<sup>3</sup> File No. BPH-910819IE.

analyses to demonstrate this point. Thus, according to Movants, "[t]here is persuasive evidence that Ingstad knew or, by the exercise of ordinary diligence, should have known that its Channel C3 operation would not provide acceptable service to Lake City." Movants further argue that sites exist from which Ingstad could operate under the contour protection rule of 47 C.F.R. § 73.215 while providing the required coverage. Movants add that had the Commission known about the terrain obstructions at the rulemaking stage, it would not have created the C3 allotment for KMFX. Therefore, Movants urge that Ingstad be required to comply with the rule and, if Ingstad refuses, that its license application be designated for hearing.

Discussion. Movants' pleadings are essentially a petition for reconsideration of the grant of the construction permit. While nominally directed at the license application, their arguments are substantively directed at the underlying construction permit and its purported lack of compliance with §73.315. As such, Movants' pleadings are untimely. Pursuant to 47 C.F.R. §1.106(f), a petition for reconsideration must be filed within 30 days of the release of the public notice of final Commission action. Movants' filed their oppositions approximately one year after release of the Public Notice of the grant. Further, pursuant to 47 C.F.R. §1.106(c), a petition for reconsideration which relies on facts not previously presented may be granted only under limited circumstances.<sup>4</sup> Here, Movants do not reference events which have occurred since the last opportunity to present such matters, nor do they show that they could not have uncovered the alleged city coverage deficiency at an earlier stage. Since Movants could have presented their arguments within 30 days of the Public Notice announcing the grant of the permit, they clearly did not exercise "ordinary diligence" in filing their pleadings.

The "Motion to Deny" may also be considered as an informal objection to the license application pursuant to 47 C.F.R. § 73.3587. However, even considered as such, Movants' pleadings are without merit. We note that Section 309(c) of the Communications Act of 1934, as amended, [47 U.S.C. § 309(c)] places an applicant for a covering license in a protected position, different from and superior to that of a construction permit applicant. Thus, the Commission is "enjoined to issue the license to cover the construction permit unless factors coming to our attention subsequent to the grant of the permit would, in our judgment, make a grant of the license...against the public interest." Chesapeake-Portsmouth Broadcasting Corp., 53 FCC 2d 60, 61 (1975). Movants have not made such a showing.

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<sup>4</sup> Pursuant to 47 CFR § 1.106(c), such petitions can be granted only if (i) the petition relies on facts relating to events which occurred or circumstances which have changed since the last opportunity to present such matters; or (ii) relies on facts previously unknown to the petitioner until after the last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity; or (iii) the public interest requires consideration of the facts relied on.

Ingstad's permit application meets the public interest standard of 47 U.S.C. § 309 as well as the technical standards set forth in 47 CFR §73.315 of the Commission's rules. The Commission staff has also confirmed the 70 dBu coverage of Lake City as shown in the construction permit application using the procedures set forth in 47 C.F.R. § 73.313. As Ingstad points out, applicants are not compelled to perform special supplementary studies pursuant to § 73.313(e) in order to conclusively demonstrate proper city coverage when preparing an application. Thus, Ingstad did not need to make NBS Technical Note 101 analyses, extended radial, or propagation tests to prove coverage of the community of license. Since the permit application on its face complied with the rule and was properly granted, it is not appropriate to consider the Movants' alternative contour analyses here.

In light of the above and pursuant to 47 C.F.R. § 0.283, the "Motion to Deny License" filed May 6, 1993 by Olmstead County Broadcasting Co. and by United Audio Corporation IS DISMISSED and, considered as an Informal Objection, IS DENIED, and the application for a license of Radio Ingstad Minnesota, Inc. (File No. BLH-930310KC) IS GRANTED.

Sincerely,



*for* Larry D. Eads, Chief  
Audio Services Division  
Mass Media Bureau

cc: Clifford M. Harrington, Esquire  
James K. Edmundson, Esquire