



Federal Communications Commission
Washington, D.C. 20554

December 22, 2023

DA 23-1205
In Reply Refer to:
1800B3-CEG
Released December 22, 2023

Electron Benders
c/o Michael R. Reynolds
4130 E 31st St., Apt. 2029
Tulsa, OK 74135
mrrcpa@cox.net

Screen Door Broadcasting, LLC and
Broken Arrow Catholic Radio, Inc.
c/o Jason Bennett, FM Expansion Group LLC
7107 South Yale Ave #444
Tulsa, OK 74136
jason@fmexpansion.com

In re: KOKT-LP, Tulsa, Oklahoma
Facility ID No. 194191
Application File No. 147725

Informal Objection

KPIM-LP, Broken Arrow, Oklahoma
Facility ID No. 197632
Application File No. 147897

Dear Counsel and Objector:

We have before us the above-referenced applications to: (1) modify the facilities of LPFM station KOKT-LP, Tulsa, Oklahoma (KOKT), filed by Electron Benders on May 28, 2021 (KOKT Application); and (2) modify the facilities of LPFM station KPIM-LP (KPIM), Broken Arrow, Oklahoma, filed by Broken Arrow Catholic Radio, Inc. (Broken Arrow) also on May 28, 2021 (KPIM Application). We also have an informal objection to the KOKT Application filed by Screen Door Broadcasting, LLC (Screen Door)¹ on June 2, 2021 (Informal Objection).² For the reasons stated below, we deny the Informal Objection and designate the KOKT and KPIM Applications as mutually exclusive.

Background. On May 27, 2021, Tulsa Community Radio, Inc. submitted an application to voluntarily surrender the license for LPFM station KJZT-LP (now DKJZT-LP), assigned to Channel 211.³

¹ Screen Door is the licensee of three FM translators with service areas that overlap the service areas of both referenced LPFM stations. The three FM translators are: K235BK, K281CO and K289CC. FM translator station K235BK rebroadcasts the signal of KPIM-LP. The managing member of Screen Door, Jason Bennett, is also the technical consultant for Broken Arrow Catholic Radio, Inc. Informal Objection at 1.

² Pleading No. 149467 (duplicate of 149469). On June 4, 2021, Electron Benders filed an opposition to the Informal Objection (Opposition) (Pleading No. 149671). On April 6, 2023, Electron Benders filed a supplement to the Opposition (Supplement) (Pleading No. 213571).

³ Application File No. 147597 (cancelled May 27, 2021, public notice of the cancellation published June 1, 2021 (*Broadcast Actions*, Public Notice, PN Report No. PN-2-210601-01 (MB June 1, 2021)). Public notice of cancellation became final July 1, 2021). Although both applications were defective when filed because they failed

On May 28, 2021, Electron Benders and Broken Arrow filed the KOKT and KPIM Applications, respectively, each requesting a channel change to newly-vacated Channel 211. In the Technical Certifications section of the KOKT Application, responding to the three-part “Reasonable Site Assurance” questions, Electron Benders certified that it has reasonable assurance of the site’s availability, but for this particular modification application, it did not certify that it had obtained reasonable assurance by contacting the site owner and did not provide contact information for the person contacted. Rather, Electron Benders entered “N/A” in response to the second question, explaining that its understanding was that the second certification was not needed for “a channel change, which requires no actual construction work.”⁴ On June 2, 2021, Screen Door filed the Informal Objection, contending that Electron Benders lacked reasonable assurance of site availability at the time it filed the KOKT Application.⁵ Even if Electron Benders demonstrated that it had timely obtained reasonable assurance of site availability, Screen Door argues, failure to provide that information in the initial application is a “fatal defect” that cannot be cured by subsequent amendment.⁶ Therefore, Screen Door urges, the KOKT Application should be dismissed and the KPIM Application granted.

In the Opposition, Electron Benders responded that site assurance is not necessary for a minor modification requesting a channel change at the same site.⁷ It notes that Screen Door “offers no example of any minor modification application, either involving the same or different site, where the Commission has “fatally” dismissed the application.”⁸ It also states that site assurance for its licensed facility was obtained five years ago.⁹ In any case, Electron Benders reports, it amended the KOKT Application on June 3, 2021, to provide contact information for an agent of the tower owner.¹⁰ Finally, Electron Benders argues that the information it provided on the KOKT application form was appropriate given “inconsistencies” in the instructions for the LPFM construction permit application form with respect to the reasonable assurance of site availability requirement.¹¹ On April 6, 2023, Electron Benders filed the Supplement, in which it argues that section 73.870(e) provides that LPFM applications receive first in

to protect KJZT-LP, this defect was cured by the time the applications were acted upon. *See WKVE, Semora, North Carolina*, Memorandum Opinion and Order and Notice of Apparent Liability, 18 FCC Rcd 23411 (2003) (*Semora*) (upholding the grant of a full service FM station modification application that failed to protect the licensed facilities of another station at the time of filing but where the short-spacing had been eliminated before staff acted on the application and explaining that “[o]ur broadcast licensing procedures do not require the return of applications that were unacceptable at the time of filing but which came into compliance with our technical rules prior to the deadline for corrective amendments. We will not take adverse action on [an application] based solely on its acceptability as filed, when subsequent events prior to staff review resulted in a fully acceptable application.”).

⁴ Opposition at 2.

⁵ Informal Objection at 1-4.

⁶ Informal Objection at 4.

⁷ Opposition at 1-3. Both parties cite to the Commission’s 2008 *Schober* decision, in which the Commission rescinded the grant of an FM translator construction permit application due to lack of initial site availability without permitting a curative amendment. *See Edward A. Schober*, Memorandum Opinion and Order, 23 FCC Rcd 14263 (2008). We note that this decision was overruled for applications in the auctionable services in *Christopher Falletti*, Memorandum Opinion and Order, 30 FCC Rcd 827, 831, para. 10 (2015).

⁸ Opposition at 3.

⁹ *Id.* at 1.

¹⁰ *Id.* at 3.

¹¹ *Id.* at 2.

time priority if they are filed earlier than another application on the same day.¹²

Discussion. An informal objection must provide properly supported allegations of fact which, if true, would establish a substantial and material question of fact regarding whether grant of the application in question would be consistent with the public interest, convenience and necessity.¹³ Screen Door has failed to meet this burden.

Mutual exclusivity. First, we reject Electron Benders' argument that the KOKT Application should receive first-in-time priority based on the time of day it was filed. For FM broadcast service applications, the Commission has never assigned cut-off priority based on the exact time of day. Rather, in both the noncommercial and commercial FM services, conflicting modification applications filed on the same day are treated as simultaneously filed and thus mutually exclusive.¹⁴ In the LPFM service, minor modification applications are governed by section 73.870(e), which states, "Minor change LPFM applications may be filed at any time, unless restricted by the staff, and generally, will be processed in the order in which they are tendered."¹⁵ Although this language is not identical to the corresponding rule provisions in the other FM services, there is no indication in either the rule itself or the adopting orders that section 73.870(e) was intended to implement a new cut-off priority rule based on the specific time of day that the application was filed.¹⁶ To the contrary, in the *First LPFM Order*, the Commission considered and rejected a similar proposal for new LPFM applications, stating that "we are concerned that such an approach, by placing a premium on filing at the earliest possible moment, might unfairly disadvantage certain applicants based solely on the quality of their Internet connections."¹⁷ Therefore, we conclude that first-come, first-served processing for LPFM minor modification applications follows the well-established general procedure, under which applicants filing on the same day are considered mutually exclusive and directed to use engineering solutions and good faith negotiation to resolve their mutual exclusivity.¹⁸

Site availability. We reject Screen Door's suggestion that the KOKT Application should be dismissed either for failure to obtain reasonable assurance of site availability or failure to supply complete information relating to site availability. The three-part "Reasonable Site Assurance" questions in the Technical Certifications section of the FCC Form 2100, Schedule 318 (Schedule 318) require applicants to first certify that they have "reasonable assurance in good faith that the site or proposed structure at the

¹² Supplement at 1-2.

¹³ See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986).

¹⁴ 47 CFR §§ 73.3573(e)(1) (reserved channel FM broadcast applications), 73.3573(f)(1) (non-reserved band FM broadcast applications), 74.1233(b)(1) (reserved band FM translator applications).

¹⁵ 47 CFR § 73.870(e).

¹⁶ See generally, *Creation of a Low Power Radio Service*, Notice of Proposed Rulemaking, 14 FCC Rcd 2471 (1999); *Creation of a Low Power Radio Service*, Report and Order, 15 FCC Rcd 2205 (2000) (*First LPFM Order*).

¹⁷ *First LPFM Order*, 15 FCC Rcd at 2256, para. 130. The Commission also noted, "Under first-come first-served procedures, applications may be filed at any time, and the filing of an acceptable application precludes the subsequent filing of mutually exclusive applications, unless filed on the same day. Mutual exclusivity arises when competing applications are filed on the same day. These procedures now are used only for minor changes for commercial and NCE broadcast stations."). *Id.* at 2255, para. 128, n.193

¹⁸ See *Streamlining Radio Technical Rules*, First Report and Order, 14 FCC Rcd 5272, 5273 n.4 (1999) (stating that mutually exclusive applications must be disposed of by elimination of the mutual exclusivity through "technical amendment, settlement between the applicants, auction or other means"); see generally 47 U.S.C. § 309(j)(6)(E).

location of its transmitting antenna will be available to the applicant for the applicant's intended purpose." Schedule 318 then includes a second follow-up certification that, if reasonable assurance is not based on the applicant's ownership of the proposed site or structure, the applicant certifies that it has obtained such reasonable assurance by contacting the owner or person possessing control of the site or structure. Applicants are given three response options: "Yes," "No," and "N/A." Only applicants selecting either a "Yes" or "No" response are provided with fields to specify the name and telephone number of the person contacted, and whether that contact is the tower owner, agent or an authorized representative. The "N/A" response option is to be used where the applicant itself owns the proposed site or tower structure and therefore further contact information is unnecessary.

In the KOKT Application, Electron Benders responded "Yes" to the first reasonable assurance of site availability certification, and "N/A" to the second certification that it had obtained reasonable assurance from the site owner. Since Electron Benders selected the "N/A" option, no further site owner contact data fields displayed on the form and therefore Electron Benders did not submit that additional information, noting that "the official Form 2100, Schedule 318 instructions does not address these questions" and that "it is understandable why 'N/A' could be answered on a Schedule 318 for a minor modification for channel change, which requires no actual construction work."¹⁹ Although the "N/A" response to the second certification is intended to be used only by applicants that also own the site, Electron Benders' interpretation was not unreasonable in these circumstances.

Screen Door does not cite to any cases, and we are not aware of any, in which the Commission has required a re-certification of reasonable assurance of site availability for an application for a channel change at the currently licensed site. The seminal cases establishing the reasonable assurance of site availability requirement all involve either a proposed new station or a proposed new facility site for an existing station.²⁰ The Schedule 318 reasonable site assurance certifications (and the corresponding form instructions regarding reasonable site availability) do not distinguish between LPFM applications for a new facility and modifications to an existing facility, or between modification applications based on whether they do or do not propose a new site. However, these application certifications, added in 2019,²¹ do not change the underlying substantive site availability requirement—they merely require applicants to now certify and substantiate that they have complied with it.²² Therefore, we conclude that Screen Door has not established that the reasonable assurance of site availability requirement applies to the KOKT Application's request for a new channel at its existing licensed site.

¹⁹ Opposition at 2.

²⁰ See, e.g., *Port Huron Family Radio, Inc.*, Decision, 66 RR 2d 545 (1989); *South Florida Broadcasting Co.*, Memorandum Opinion and Order, 99 FCC 2d 840, 842 (1984); *William F. Wallace and Anne K. Wallace*, Memorandum Opinion and Order, 49 FCC 2d 1424, 1427, para. 6 (1974) (*Wallace*); *Indiana Community Radio*, Memorandum Opinion and Order, 23 FCC Rcd at 10965; *Genesee Communications, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 3595 (Rev. Bd. 1988); see also *Radio 2000, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 15453, 15457-58, paras. 11-12 (1996); *Global Broadcasting Group, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 5437, 5439, para. 12 (1995) (applying reasonable site assurance standard to a minor modification application proposing a new transmitter site).

²¹ *Reexamination of the Comparative Standards and Procedures for Licensing Noncommercial Educational Broadcast Stations and Low Power FM Stations*, Report and Order, 34 FCC Rcd 12519, 12542-43, paras. 57-59 (2019) (*NCE Procedures Order*); *Media Bureau Announces October 30, 2020, Effective Date of New NCE and LPFM Rules*, Public Notice, 35 FCC Rcd 12694, 12695 (MB 2020).

²² *NCE Procedures Order*, 34 FCC Rcd at 12543, para. 59 ("Because obtaining reasonable site assurance is already a prerequisite to the application filing, the requirement to simply report substantiating information on the initial Schedule 318 and Schedule 340 construction permit applications should pose little or no burden on applicants.").

Even if the policy did apply here, Electron Benders has demonstrated that it had reasonable assurance of site availability at the time it filed the KOKT Application, as it indicated in response to the first site availability question. The reasonable assurances standard is satisfied where the applicant has “[s]ome 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.”²³ Here, Electron Benders has already had permission to use the site for several years without any indication in the record that the site might become unavailable. In these circumstances, the reasonable assurance of site availability standard is easily satisfied.

Finally, we find that Electron Bender’s failures to certify that it contacted the person possessing control of the site or structure or to provide contact information—unlike failure to actually procure reasonable assurance of site availability—are not fatal defects that cannot be cured by subsequent amendment.²⁴ Therefore, Electron Benders was permitted to amend the KOKT Application to provide site owner contact information, which it did on June 3, 2021.²⁵

For the above reasons, we deny the Informal Objection and find the KOKT and KPIM Applications to be simultaneously filed and thus mutually exclusive. In accordance with our longstanding policy for mutually exclusive applications, we expect the applicants to use engineering solutions and good faith negotiation to resolve their mutual exclusivity.²⁶

Conclusion/Actions. For the reasons set forth above, IT IS ORDERED that the informal objection filed by Screen Door Broadcasting, LLC on June 2, 2021 (Pleading File Nos. 149467 and 149469), IS DENIED and the modification application for station KOKT-LP, Tulsa, Oklahoma, filed by Electron Benders on May 28, 2021 (Application File No. 147725), and the modification application for station KPIM-LP, Broken Arrow, Oklahoma, filed by Broken Arrow Catholic Radio, Inc. on May 28, 2021 (Application File No. 147897), are left in pending status and will be treated as mutually exclusive. We hereby direct the applicants to use engineering solutions and good faith negotiation to resolve their mutual exclusivity.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau

²³ *Elijah Broadcasting Corp.*, Memorandum Opinion and Order, 5 FCC Rcd 5350, 5351, para. 10 (1990); *Wallace*, 49 FCC 2d. at 1427, para. 6 (“Some indication from the property owner that he is favorably disposed to making an arrangement is necessary.”).

²⁴ *Association for Community Education, Inc.*, Letter Decision, 37 FCC Rcd 9558, 9562 (MB 2022) (holding that an applicant may amend the new Schedule 340 if it has reasonable assurance of site availability but failed to provide the requested contact information documenting site availability in the application). Moreover, the D.C. Circuit has held that the Commission must provide “clear and explicit” notice if it wishes to treat a defect as incurable, which it has not done for reasonable assurance certifications. *JEM Broadcasting Co., Inc. v. FCC*, 22 F.3d 320, 329 (D.C. Cir. 1994).

²⁵ See *Broadcast Application*, Public Notice, Report No. PN-1-210608-01 (MB June 8, 2021).

²⁶ See *supra*, notes 16, 18.