

# FEDERAL COMMUNICATIONS COMMISSION

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May 2, 2002

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In re: NEW; Glen Arbor, MI  
George S. Flinn, Jr.  
Application BPH-19970724M4  
Facility ID No. 87653

Gentlemen:

This letter addresses the above-captioned application filed on July 24, 1997 for a new FM commercial radio station in Glen Arbor, MI filed on behalf of George S. Flinn (hereafter "Flinn"). On April 24, 2000, WKJF Radio, Inc. ("WKJF"), licensee of WJQZ, Cadillac, MI, filed a "Motion to Dismiss Application" against Flinn's amended proposal.<sup>1</sup> This pleading was opposed by Flinn on May 9, 2000 (as supplemented May 11, 2000), and WKJF replied to Flinn's opposition on May 19, 2000. As set forth below, we find the amended application to be unacceptable for filing and the application is dismissed.

*Background.* By letter dated November 19, 1998, the staff advised Flinn that the application failed to meet the minimum filing requirements of 47 C.F.R. Section 73.3564. The letter afforded Flinn one opportunity to amend the application pursuant to the procedures set forth in the *Report and Order in Processing Procedures for Commercial FM Broadcast Applications*, FCC 920238, 7 FCC Rcd 5074, 57 Fed. Reg. 34872 (1992). The site change amendment was timely filed on December 18, 1998. By letter dated January 20, 1999, the staff indicated that the amended application required Federal Aviation Administration ("FAA") approval and FCC antenna structure registration.

*Informal Objection.* WKJF's objection raises four issues meriting discussion. First, WKJF contends that Flinn has not been able to secure FAA approval. Flinn's May 9, 2000 pleading states that the applicant is awaiting the FAA review. A recent check of the Commission's Antenna Structure Registration System shows that the proposed structure was registered on December 5, 2000. Therefore, we resolve this issue in Flinn's favor.

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<sup>1</sup> WKJF Radio, Inc. is the licensee of WKJF-FM, Channel 225C, Cadillac, MI. Simultaneously with the Motion to Dismiss, WKJF filed a petition for rulemaking seeking (in part) to delete the Channel 227A Glen Arbor, MI allotment. We are treating WKJF's Motion to Dismiss against the present application as an Informal Objection, pursuant to 47 C.F.R. Section 73.3587.

Second, WKJF argues that Flinn's original application should be dismissed inasmuch as Flinn never had reasonable access to the initial site. In support of this position, WKJF attaches a letter from the National Park Service dated December 18, 1997 opposing the initial site proposed in this application, as well as our November 18, 1998 letter. Citing *62 Broadcasting, Inc.*, WKJF contends that Flinn's original application failed to have a valid site certification and should be dismissed on that consideration.<sup>2</sup> Flinn in reply indicates that his initial conversation with the National Park Service representative indicated that an application could be filed at the requested transmitter site.

The December 18, 1997 National Park Service letter indicated that Flinn's conversation with its representative had been "misconstrued". It is clear that some level of misunderstanding occurred between Flinn and the National Park Service representative. However, the record supports Flinn's presumption that the site would be available, or at least could be applied for. This differs from the situation in *62 Broadcasting, Inc.*, *supra* where the record clearly established that the applicant in fact knew that the site was not and would not be available when its application was filed. As the Commission stated in *Alden Communications Corp.*, 3 FCC Rcd 3937, 3938 at paragraph 10 (1988):

Where an applicant is dealing with a government agency that is unwilling or unable to make less than a legally binding commitment, and where the record contains no explicit rejection of the applicant's proposal, a mere willingness by the government agency to entertain a request for use of the land in question is sufficient to provide reasonable assurance of the site's availability.

*See also Atlantic City Community Broadcasting, Inc.*, 8 FCC Rcd 4520, 4525 at paragraphs 25 - 43 (1993) ("proposal to construct a station on a publicly owned site has not been formally rejected by the City") and *Warren Price Communications, Inc.*, 7 FCC Rcd 4342, 4343 at paragraph 8 (1992) (initial information from town did not specifically state a request for zoning would be denied, and sufficient ambiguity exists between present proposal and an earlier rejected proposal). In the present case, the record does not establish that no application would be entertained by the National Park Service at the time the application was filed. The explicit rejection of the initially proposed site by the National Park Service occurred almost four months after the application was filed. Thus, the National Park Service's decision letter represents a loss of transmitter site and triggers an opportunity for the applicant to amend its proposal, not outright dismissal of the application as argued by WKJF. This opportunity was afforded by the staff's November 19, 1998 letter, and Flinn properly filed its amendment within the time frame specified in that letter.

Third, WKJF states that the amended proposal does not meet the minimum separation requirements of 47 CFR Section 73.207 with respect to WBCM, Boyne City, MI. Under this rule section, the amended proposal must be located at least 106 km from WBCM. Our study reveals that the actual spacing is 108.7 km, exceeding the requirement. Flinn's application is acceptable in this regard.

Fourth, WKJF contends that the proposed antenna height above average terrain (HAAT) of 43 meters is not sufficient to allow line-of-sight coverage of Glen Arbor. To support his claim, WKJF provides an engineering exhibit showing that intervening terrain (obstruction) exists between the transmitter site and the community of license. Based on the obstruction, WKJF argues that the 70 dBu community coverage contour falls short of Glen Arbor. Flinn's opposition provides an engineering exhibit using Longley-Rice calculations. Flinn concludes that 89.6% of Glen Arbor will receive 70 dBu or more, thus meeting the principal community coverage requirement of 80%.<sup>3</sup>

Our policy is to refer Longley-Rice supplemental propagation showings, and any related objections, to the FCC's Office of Engineering and Technology for expert review. The Office of Engineering and Technology's (OET) has determined that no 70 dBu coverage will occur in Glen Arbor. OET states "[t]here are two hills

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<sup>2</sup> See *62 Broadcasting, Inc.*, 4 FCC Rcd 1768 (1989).

<sup>3</sup> Showings of this type may be submitted in accordance with the policy set forth in *Certain Minor Changes in Broadcast Facilities Without a Construction Permit*, 12 FCC Rcd 12371, 12401 at paragraphs 69 - 72 (1997).

(about 220 meters in height) between the transmitter site and Glen Arbor ... Based on our calculations, the 70 dBu contour is limited to the first hill at about 5 km from the transmitter site." This falls far short of the community boundaries of Glen Arbor, the closest of which lie approximately 10 km distant from the proposed transmitter site. Accordingly, the application as amended December 18, 1998 is still unacceptable for filing, this time for violation of 47 C.F.R. Section 73.315(a).

The staff's November 18, 1998 deficiency letter included the following language:

Pursuant to 47 C.F.R. § 73.3522(a)(6), "an applicant whose application is found to meet the minimum filing requirements but nevertheless is not complete and acceptable shall have the opportunity in the 30-day period specified in the staff's deficiency letter to correct all deficiencies in the tenderability and acceptability of the underlying application, including any deficiency not specifically identified by the staff. " Additionally, 47 C.F.R. § 73.3564(a) states that, [a]pplications with uncorrected tender and/or acceptance defects remaining after the opportunity for amendment will be dismissed with no further opportunity for corrective amendment." See Appendix B in the Report and Order in MM Docket 91-347, 7 FCC Rcd 5074, 57 Fed. Reg. 34872, released July 27, 1992. This letter constitutes your opportunity for corrective amendment pursuant to 47 C.F.R. § 73.3522(a)(6).

The burden is on the applicant to provide an amendment free of any defects by the end of the curative amendment period. The thirty day period expired December 18, 1998. The timely filed site change amendment introduces a new deficiency. Pursuant to the procedures set forth in the November 28, 1998 letter (as duplicated immediately above), the amendment and application will be dismissed inasmuch as all deficiencies in the application, as amended, have not been rectified.<sup>4</sup> Under that procedure, Flinn is not entitled to submit further amendments to perfect his application.

Accordingly, WKJF's Informal Objection IS GRANTED to the extent indicated in this letter, and DENIED in all other respects. The application of George S. Flinn for a new station in Glen Arbor, both as originally filed and as amended, IS DISMISSED. This action is taken pursuant to 47 CFR Section 0.283.

Sincerely,



Edward P. De La Hunt  
Associate Chief, Audio Division  
Office of Broadcast License Policy  
Media Bureau

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<sup>4</sup> Our conclusion in the January 29, 1999 letter that the amendment was acceptable was based on the information available at that time, and before the community coverage issue had been raised by WKJF and reviewed in detail.