

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC**

In the matter of:)
)
Electron Benders, licensee of KOKT-LP, Tulsa,) File No. 0000147725
Oklahoma – Minor modification for channel) Facility ID No. 194194
change only.)
)

OPPOSITION

I. INTRODUCTION

1. Electron Benders (EB), licensee of KOKT-LP, Tulsa, Oklahoma submits an *Opposition* to the *Informal Objection* filed by Screen Door Broadcasting, LLC. (SDB) (“*Objection*”). In this opposition, we demonstrate that site assurance has existed for this facility for the past five years; long standing Commission policy does not require site assurance on minor modifications; especially simple channel changes at the same site; and that due to a curative amendment, the issue raised in the *Informal Objection* is now moot.

II. PETITION IS UNTIMELY AS “SITE ASSURANCE” WAS OBTAINED FIVE YEARS PRIOR TO THE FILING OF THE *OBJECTION*

2. SDB’s reliance on *Schober* is without merit.¹ *Schober* relates to *new* broadcast facilities as opposed to minor modifications at sites in which, site assurance has been already established through previously constructed facilities at the same site.² In *Genesee*, the Commission defines site assurance as a “meeting of the minds resulting in some firm understanding as to the site’s availability.”³ For the instant facility, this “meeting of the minds” for the current site took place five years ago in respect to the minor modification, which actually did involve moving to a new site, even though such site assurance was not required for this type of change.⁴ Further SDB provides absolutely no information to substantiate any claim that EB does not have site assurance at their current site. SDB does not provide any statements from the

¹ Objection at 2, citing *Edward A. Schober*, Memorandum Opinion and Order, 23 FCC Rcd. 14263 (2008) (“*Schober*”).

² *Schober* at 14264-14265.

³ *Genesee Communications*, Memorandum Opinion and Order, 3 FCC Rcd. 3595 (1988) (“*Genesee*”).

⁴ KOKT-LP was moved to this site back in 2016. See File No. BPL-20160616ABV (granted Jul. 15, 2016).

site owner or its agent to attest that EB is not authorized to use the site in question.⁵ Even if they were to provide such a statement and even if Commission policy was to require site assurance on site moves, such a claim would be considered as seeking reconsideration on that site move and therefore would be untimely.⁶

3. EB notes that while the Commission states in the *Admin Order* that the Media Bureau adds the site assurance questions to Schedules 318 and 340, it does not specifically add a new site assurance requirement to minor modification applications, including modification changes that do not involve construction at a new site, such as a channel change, an increase in effective radiated power based a recalculation of height above average terrain (HAAT) using a different terrain database, mainly due to an error in the CDBS and LMS automatic calculation of HAAT as well as coordinate corrections that do not require construction.⁷ If anything, the *Admin Order* focuses on “original” or “initial” Schedule 318 and Schedule 340 *construction permit* applications.⁸ We also note, that the official Form 2100, Schedule 318 instructions does not address these questions and the appropriate response for these questions.⁹ We do note that the site assurance questions do not appear on Form 2100, Schedule 319, even though this form can be used for the purpose of physical “construction”, such as switching out an antenna with a larger or smaller one as long as the radiation center height remains within 2 meters above or 4 meters below the authorized height or a change in feedline resulting in a change of antenna type; antenna bays; and/or transmitter power output. Unlike a minor channel change involving a broadband antenna, these Schedule 319 changes require some form of construction at the same site.¹⁰ Due to these various inconsistencies, 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.

⁵ See *e.g.*, *William F. Wallace and Anne K. Wallace*, Memorandum Opinion and Order, 49 FCC 2d. 1424, 1427, para. 6 (1974) (“Some indication from the property owner that he is favorably disposed to making an arrangement is necessary.”).

⁶ Even on original construction permit applications, site assurance applies only to the original site specified and not on different sites specified through amendments. See *Los Angeles Social Justice Radio Project*, Memorandum Opinion and Order, 31 FCC Rcd. 7506, 7508-7509 (2016) (“*Social Justice*”).

⁷ See *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, 12543-12544 (2019) (“*Admin Order*”).

⁸ See *Id.* at 12543 (“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* application should pose little to no burden on applicants.”) (*emphasis added*). We also note that in LMS, the nomenclature “construction permit” refers to original construction permits for new facilities where “modification of licensed facility” refers to minor modifications of an existing facility.

⁹ See *Instructions-Form 2100, Schedule 318-Low Power FM Station Construction Permit Application*, OMB Control Number 3060-0920 (May, 2019). Retrieved June 3, 2021 from: <https://fcc.gov/sites/default/files/lms-318-construction-permit-application.pdf>.

¹⁰ See 47 C.F.R. §73.875(e).

III. A CURABLE ERROR MADE OUTSIDE OF A FILING WINDOW DOES NOT CONSTITUTE A “FATAL” DEFECT.

4. EB disputes SDB’s suggestion that the use of “N/A” on a minor modification application for a channel change that does not require a site change or any kind of construction would be considered “fatal” during the application process for an already-licensed facility outside of a major change filing window.¹¹ In the LPFM service, application activities that are considered “fatal” include: an original construction permit application that does not meet the requirements of §73.807 and is not accompanied by a waiver request and an original construction permit application in which a party was engaged in the unauthorized operation of a “pirate” broadcast station in violation with 47 U.S.C. §301.¹² In *Shober*, the case involved an original Form 349 application in which site assurance was never obtained and an amendment was filed to specify a new site in hope that the problem would just go away, thus causing a “fatal defect”.¹³ In *Social Justice*, the amendment to an original construction permit was made to a location without site assurance (due to an error on the coordinates), but as there was site assurance at the originally applied-for site, the application was grantable upon an additional amendment to the corrected coordinates.¹⁴ SDB offers no example of any minor modification application, either involving the same or different site, where the Commission has “fatally” dismissed the application.

5. To address the instant issue, EB has filed an amendment to the minor modification application to indicate the agent for the owner of the site, this is despite a lack of instructions that have been reviewed and approved by the Office of Management and Budget (OMB) as part of the information collection process in accordance with the Paperwork Reduction Act. This makes the only argument made by SDB moot.¹⁵ We also note that even though it was not required at the time (or for that matter, now), there was a “meeting of the minds” between EB and the representatives for the site where the tower is constructed at, any attempt by SDB would not only be fruitless, as a result of long standing Commission policies that only apply actual site assurance requirements to original construction permits, but also untimely as the site was applied for nearly 5 years ago and granted shortly after that.

¹¹ Objection at 1-2.

¹² See 47 C.F.R. §§ 73.870(c) and 73.854.

¹³ *Schober* at 14265-14266.

¹⁴ *Social Justice* at 7508-7509.

¹⁵ See also, *Baton Rouge Hispanic Education Family Foundation*, Letter, File No. BNPL-20131114AQC (Dec. 16, 2016) at 4. (“Additionally, in light of the Second Amendment, we find the issues raised in the Supplement [to an *Informal Objection*] to be moot.”)

IV. CONCLUSION

6. The Commission's policies surrounding site assurance are intended to assure that applications filed during periods when there will be expected competition, such as during a designated filing window where applications will be treated as mutually exclusive and subject to a comparative review; will prevent speculative filings and others who have filed in bad faith. As no formal process by *Order* has been made to extend site assurance requirements to minor modification applications for simple channel changes at the same site that do not involve any construction, inconsistencies in other policies between Schedule 318 and Schedule 319 applications, a lack of any case law or regulation that would otherwise demonstrate that this filing would be rendered as "fatal" and due to a pre-dismissal amendment in order to correct what could be considered a mere clerical error, past cases permitting applications to be "cured" through amendment upon notification in an *Informal Objection*, and not an action made in bad faith; thus making SDB's entire argument moot; the *Objection* must be denied. The instant application demonstrates that EB would clearly be able to receive reduced interference on the new channel¹⁶ and therefore must be grantable.

Respectfully submitted,

/S/
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¹⁶ See 47 C.F.R. §73.870(a)(1) (permitting changes to "any channel" upon a technical showing of "reduced interference".)