

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of)	
)	
CROCODILE BROADCASTING CORP.,)	LMS File No. 0000105139
INC.)	Facility ID No. 203215
)	
Renewal of License for)	
W234DH, Baton Rouge, LA)	
)	

To: Office of the Secretary
Attn: Albert Shuldiner, Chief, Audio Division

REPLY

Radio & Investments, Inc. (“R&I”) submits its Reply to the August 6, 2020 “Opposition to Petition to Deny” filed by Crocodile Broadcasting Corp., Inc. (“Crocodile”). In support, R&I respectfully submits the following:

Background

On August 30, 2019, Crocodile filed a license to cover application (BLFT-20190830AAN) which was granted on September 30, 2019. On October 15, 2019, R&I filed a Petition for Reconsideration of that grant. Therein, R&I submitted that the antenna installed by Crocodile did not match the antenna specified in W234DH’s underlying construction permit (BNPFT-20180419AAA). R&I Also argued that Crocodile made a misrepresentation to the Commission in its Renewal Application because the constructed facility was not what had been granted by the Commission in W234DH’s construction permit.

In its Opposition to the Petition for Reconsideration, Crocodile admitted that it had erroneously stated in the license application that it had completed construction of W234DH's authorized facilities – but argued this was a result of a gross oversight.

To date, the Commission has not acted on R&I's Reconsideration Petition.

Crocodile argues in its "Opposition to Petition to Deny" the W234DH renewal, that R&I does not have standing to file its Petition; does not have factual evidence of intent to deceive the Commission; the Petition is premised upon faulty measurements; and the Petition is untimely.

Argument

At the outset, as stated in its Petition, R&I is the licensee of KDDK(FM), Addis, Louisiana (Facility ID No. 22310), which is in the same market as W234DH, and, thus, is a competitor in the market. It is axiomatic that there is a finite number of advertising dollars in the market. Accordingly, the economic harm is obvious.

Crocodile is correct that R&I's submission is tardy relative to a Petition to Deny. The Commission could nevertheless consider it in spite of its untimeliness or treat it as an Informal Objection. As Crocodile is aware, the treatment by the Commission of Petitions filed out-of-time as Informal Objections is commonplace.

Crocodile's attempted refutation of R&I's misrepresentation allegations are circular to say the least. Crocodile states the following on page 7:

"R&I's arguments here completely fail because: (1) R&I's claim that W234DH is operating at variance from its license was based on faulty measurements; and (2) Crocodile Broadcasting did not – nor did it previously – make a misrepresentation to the Commission regarding W234DH's operational status."

At the outset, it should be noted that attached to the instant submission is an Engineering Statement of Jeremy Ruck (Attachment A). Mr. Ruck provides, in great detail, that the measurements performed were correct and consistent with the FCC's rules. Mr. Ruck states, at page 2, *inter alia*:

"Rather as has been stated in this engineering statement, and in the original R&I petition, the field strength measurements serve only to call into question the apparent discrepancies between the proposed, claimed, and apparent antenna performance."

The Crocodile assertion relative to the misrepresentation is essentially that there is no misrepresentation because Crocodile did not make a misrepresentation. This argument is devoid of any substance and self-serving to say the least.

As previously proffered, and worth repeating due to its applicability to the instant situation, The Communications Act explicitly makes the applicant's character an element in licensing. Applications must "set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station."¹ Even in the absence of such guidance, the Commission could scarcely ignore evidence of bad character in making its ultimate determination whether a grant will serve the "public convenience, interest, or necessity."² The Act mentions the related problem of misrepresentation only in connection with the Commission's power to revoke licenses.³

¹ 47 U.S.C. § 308(b) (1952).

² 47 U.S.C. § 307(a) (1952).

³ Section 312 originally provided that "any station license may be revoked for false statements either in the application or in the statement of fact which may be required by section 308 hereof..." 48 STAT. 1086 (1934). The 1952 amendments changed this to read "false statements *knowingly made*..." 66 STAT. 716, 47 U.S.C. § 312(a) (1952), apparently as part of a general intention to restrict the revocation power to cases of "acts willfully, knowingly, or repeatedly committed." *Communications Act Amendments, 1952*, H.R. Rep. No. 2426, 82d Cong., 2d Sess. 20 (1952). The little-used revocation power, in either version, seems to have had no influence on application and renewal policies.

Misrepresentation, or lack of candor, may, nevertheless, be treated as a defect of character, or as an independent ground for finding that public interest does not call for licensing someone who deceives the licensing authority. There is, it will appear, not much question about the Commission's power to demand high standards of truthfulness and candor as well as of character.

Though the varieties of misrepresentation are infinite and its detection is sometimes difficult, identification of what constitutes misrepresentation is ordinarily not too difficult. The licensee (taking original, renewal, and transfer proceedings as the same for this purpose) will have submitted the prescribed forms, and, if there was a hearing, will have given testimony. Suppose the application recites that a corporation has paid-in capital, in the form of cash, in the amount of \$10,000. It has 100 shares of stock, held in certain proportions by Doe, Moe, and Roe. Investigation, by the Commission's Broadcast Bureau or by a competitor, discloses that the bank balance is in fact only \$1,000, and that Moe and Roe are nominees of Woe, with no beneficial interest themselves in the enterprise. Unless, as is unlikely, the applicant can satisfy the Commission that these misstatements are the result of innocent error, there is a recurrent pattern of deception designed to mislead the Commission about the financial adequacy of the applicant and the identity of its principals.⁴

These are both matters of concern to the Commission, though it is perhaps not necessary that they should be to justify denying the application. In the landmark case of *FCC v. WOKO*, the Supreme Court said that "the fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and

⁴ *E.g.*, both applicants were disqualified on such grounds in *Balboa Radio Corp.*, 9 Pike & Fischer Radio Reg. 649 (1953) [hereinafter cited as "R.R."]

useless deceptions as well as by material and persuasive ones."⁵ In this case, the Court gave great emphasis to the Commission's power to demand complete candor. Unknown to majority shareholders, the general manager of WOKO had repeatedly concealed from the Commission something he either knew or should have known, that 24 percent of the stock was beneficially held by Pickard, a vice president of CBS. Pickard's supposed motive in causing his interest to be concealed was "to prevent the facts from becoming known to Pickard's Columbia colleagues."⁶ The Commission denied a renewal of the license on this ground alone, refusing to hear any evidence about the station's performance, or to approve a reorganization that would have preserved the financial equity of the other shareholders. The Court of Appeals for the District of Columbia ruled that the Commission had acted arbitrarily, especially since there was no showing that Pickard would not have been acceptable to it as a stockholder.⁷ But the Supreme Court held that the Commission did not have to give weight to the various mitigating factors. "We agree," Justice Jackson commented, "that this is a hard case, but we cannot agree that it should be allowed to make bad law."⁸ Another element that made the case a hard one was that the Commission, in a number of earlier renewal cases, had been forgiving of similar concealments, even when they went so far as to effect transfers of control. But, the Court said, "the very fact that temporizing and compromising with deception seemed not to discourage it, may have led the

⁵ 329 U.S. 223, 227 (1946).

⁶ *Id.* at 225-26.

⁷ 153 F.2d 623 (D.C. Cir. 1946). Some of the facts are taken from this opinion.

⁸ 329 U.S. at 229.

Commission to the drastic measures here taken to preserve the integrity of its own system of reports."⁹

Following this clear mandate, the Commission has been rather exacting in its assessment of misrepresentation. Sometimes it is taken as a sufficient sole ground for denying an application. More often there will be other grounds as well. Only occasionally will the Commission excuse a misrepresentation, as when there is a clear showing that some of the parties in an application have been imposed on by an associate, and have corrected the situation. Thus, shortly after *WOKO*, a misrepresentation about ownership was attributed to bad advice from a lawyer; the principals dispensed with his services, and the renewal was granted.¹⁰ But when two lawyers experienced in Commission practice concealed their interest, with the connivance of another stockholder (who had been a member of the old Federal Radio Commission), renewal was denied.¹¹

It is unnecessary to accumulate examples of what may be considered routine deception. The considerable number of cases chiefly involve matters that are clearly called for by the Commission's questionnaires-financing, control, and broadcast experience. "Immaterial and useless deceptions," which the Supreme Court said could be considered because of their bearing on "willingness to deceive," have rarely been considered.¹² This statement assumes that

⁹ *Id.* at 228. See Note, *Broadcast License Revocation for Deception and Illegal Transfer*, 15 Geo. Wash. L. Rev. 425 (1947), for the cases before *WOKO*.

¹⁰ *Kanawha Valley Broadcasting*, 3 R.R. 1977 (1948); *cf.* *Lycoming County Broadcasting*, 4 R.R. 264 (1948).

¹¹ *Broadcasting Service Organization (WORL)*, 3 R.R. 979 (1947).

¹² 329 U.S. at 227. See 2 R.R. ¶ 53.24 (digest of FCC misrepresentation decisions). An exceptional case which was remanded to the Commission for failure to take account of an alleged misrepresentation with respect to antenna location and network affiliation is *Hall v. FCC*, 237 F.2d 567 (D.C. Cir. 1956). The Commission affirmed its earlier decision. *Spartan Radiocasting*, 13 R.R. 610a (1957).

materiality is initially determined simply by the Commission's call for the information. Whether the correct information would have altered the disposition of the case is not the test of materiality. Such a test was suggested by the Court of Appeals in *WOKO*; but it would lead to endless speculation, and cannot be correct.

To be sure, "willingness to deceive" may be inferred from evasive answers, faltering recollection, and other aspects of a witness's demeanor, no matter what the questions. This is related to credibility, which the Commission must appraise for any witness.

As R&I previously pointed out to the Commission, it is clear that Crocodile made a misrepresentation to the Commission in its license to cover application. The constructed facility was not what had been granted by the Commission. The licensee had to have known. It would be impossible for Crocodile not to have known. This was not an inadvertent error. The principal(s) of the licensee had the duty and obligation to be candid in submissions to the Commission. A principal may not sign an application without knowledge of the facts represented. Now, the Commission must determine whether the instant renewal can be granted. Crocodile is again not operating consistent with the W234DH license. Moreover, its submissions are misleading and contain inaccurate information.

Virtually since the beginning of radio and television licensing, the Federal Communications Commission has encountered the problem of misinformation. *See Note, Broadcast License Revocation for Deception and Illegal Transfer*, 15 Geo. Wash. L. Rev. 425 (1947); Brown, *Character and Candor Requirements for FCC Licenses*, 22 Law & Contemp. Probs. 644 (1957). Crucial agency decisions often turn on such information. When an applicant submits misstatements -- deliberately, recklessly, negligently, or innocently -- the effect is to

diminish the agency's power to reach informed administrative decisions. The FCC has often voiced this concern -- that the integrity of its work depends on the objective accuracy of individual submissions. *See, e.g. RKO General, Inc. v. FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981). The Commission must rely heavily on the completeness and accuracy of the submissions made to it, and its applicants in turn have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate. *See Sea Island Broadcasting Corp.*, 60 FCC 2d 146, 37 R.R.2d 1235 (1976), *recon. denied*, 64 FCC 2d 721, 40 R.R.2d 1053 (1977), *aff'd sub nom. Sea Island Broadcasting Corp. v. FCC.*, 627 F.2d 240 (D.C. Cir. 1980); *Grenco, Inc.*, 39 FCC 2d 726, 732, 26 R.R.2d 1046, 1051 (1973).

The FCC's central interest has been the "character" of the individual and whether the act of supplying the misinformation amounted to a misrepresentation. *See, e.g., WOKO, Inc.*, 10 FCC 454 (1944), *rev'd sub nom. WOKO, Inc. v. FCC*, 153 F.2d 623 (D.C. Cir. 1946) *rev'd*, 329 U.S. 223 (1946); *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 53 R.R.2d 44 (1983).

In light of the licensee's execution of the renewal application, which did not reveal that the constructed facility was once again at variance with its license, Crocodile would be hard pressed to make the argument that it did not have intent. Thus, a misrepresentation must be found.

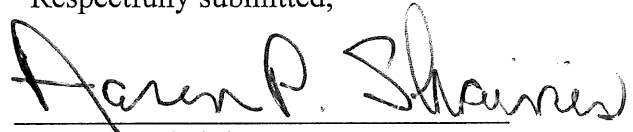
Conclusion

It is clear from the foregoing that Crocodile has done little to address the allegations contained in R&I's Petition. Crocodile has blatantly ignored the operating requirements of the permit which was issued to it. The failure to build in conformance with the permit was admitted to by Crocodile.

The Crocodile certification in its renewal application is false. Specifically, it knew that the W234DH facility was not operating legally. Thus, the certification as to no violations was a misrepresentation.

Thus, the Commission should not grant the W234DH renewal.

Respectfully submitted,

A handwritten signature in black ink, reading "Aaron P. Shainis". The signature is written in a cursive style with a horizontal line underneath the name.

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August 31, 2020

ATTACHMENT A

ENGINEERING STATEMENT

The following engineering statement has been prepared for **Radio & Investments, Inc.** ("R&I"), licensee of FM broadcast station KDDK at Addis, Louisiana, and is in support of their reply to Opposition to Petition to Deny a license renewal application filed by the licensee of FM translator station W234DH, Crocodile Broadcasting Corp., Inc. ("Crocodile") formerly at Norco, Louisiana, now at Baton Rouge, Louisiana.¹ In their opposition to the R&I petition, both counsel and the technicians hired by Crocodile purport to refute the engineering statement submitted by R&I. This reply to their pleading demonstrates that their fabrication is based on selective reading and misrepresentation of the R&I statement and other documentation, as well as a probable misunderstanding of simple electrical engineering theories and Commission Rules and procedures.

Crocodile states that the engineering statement of the undersigned engineer claims, based on field strength measurements, that W234DH "...was operating at a higher power than authorized under its license." No such claim was ever made by this engineer. Such a claim would only be made when there was supporting evidence, none of which was available or provided. Rather, the engineering statement specifically stated, in multiple places, that the limited set of field strength measurements performed by R&I, plus anecdotal and subjective evidence provided by others appear to call into question the accuracy of the directional pattern envelope, and its compliance with the authorized directional pattern envelope. This envelope is that proposed by Crocodile, approved by the Staff, and purportedly constructed by the vendor.

¹ The Facility ID for W234DH is 203215.

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Next, Crocodile claims that the field strength measurements were taken too close to the antenna. To support this claim, the technician hired by Crocodile applies the provisions of Section 73.314 of the Commission's Rules to this set of measurements. Section 73.314(a) outlines that these procedures are to be utilized for attempting to demonstrate cases where the Commission's standard contour model may not accurately reflect specific circumstances, in rule making proceedings, or at the request of the Commission. None of these cases are applicable in this instance.

In fact, the R&I statement never calls into question the Commission's well-established contour propagation methodology, as that is not its focus or concern. Rather as has been stated in this engineering statement, and in the original R&I petition, the field strength measurements serve only to call into question the apparent discrepancies between the proposed, claimed, and apparent antenna performance.

As part of this claim, Crocodile also states that since the measurements were acquired at a distance of 61 meters, or 200 feet, from the tower base, they are inadmissible, as the antenna is not a point source. This is not really correct. Measurements of an antenna of this sort are valid when they are acquired in the far-field region of the antenna. Measurements in the near field are usually chaotic in nature, are not typically repeatable, and as such are not useful for such purposes as these. The boundary between the near-field and the far-field is known as the *Fraunhofer distance*. This distance is defined by the following relationship.

$$d_F = \frac{2D^2}{\lambda}$$

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In this relationship, the quantity “D” corresponds to the largest dimension of the radiator, which in this case is the bay spacing at three-quarters of a wavelength, or 7.79 feet in English units. The “ λ ” quantity is of course the wavelength, which at 94.7 MHz is 10.39 feet. Substituting in the quantities for the variables and solving yields a *Fraunhofer distance* for the W234DH antenna of 11.69 feet. Thus, the measurement locations are clearly outside the *Fraunhofer distance*.

Two additional criteria exist to ensure that a particular location is within the far field region. First, the *Fraunhofer Distance* is to be substantively larger than the largest dimension of the radiator i.e. “D”, and must be substantively greater than the wavelength i.e. “ λ ”. It should be noted that the distance from the tower base at which the field strength measurements were taken of 200 feet is the *horizontal* distance from the tower, and not the actual distance from the transmit antenna to the measurement antenna.² The actual distance from the antenna of the field strength locations is the hypotenuse of the right triangle that is formed by the horizontal distance from the tower, and the elevation above ground level of the center of radiation.

This distance from the antenna to the measurement apparatus is calculated through the use of the *Pythagorean Theorem*, which states that the length of the hypotenuse of a right triangle is the square root of the sum of the squares of the lengths of the individual legs. In this case, the

² The statement by Mr. Surette, a well-known and respected expert in this field, notes the diagonal slant distance from the antenna to the measurement apparatus. Nowhere in his statement does he claim that such locations or techniques are invalid. Rather, his concerns deal with equipment and the potential overloading of the same, which is subsequently addressed in this engineering statement

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horizontal distance is 200 feet, and the center of radiation elevation, as contained in the Commission's database, is 143 meters, or 469 feet above ground.

The distance then from the antenna to the measurement location is 510 feet, or 155.4 meters, based on a measurement antenna height of 25 feet AGL. This works out to 49 wavelengths, 43 times the *Fraunhofer distance*, and 65 times the element spacing. These values would certainly seem to comply with all requirements so as to place the measurement locations in the far-field, making the distance at which measurements were performed valid.

It should be noted that Shively Labs, the former employer of Mr. Surette, performs directional pattern proof of performance measurements with a receive antenna spaced 50 feet from the transmit antenna. At their stated scale of 1:4.5, this equates to 225 feet at full scale. Similarly, Propagation Systems, Inc. (PSI), the vendor for the Crocodile antenna installed for W234DH also uses a 225-foot full scale distance for measuring directional patterns at their test facility. In their case, however, the receive antenna is at a distance of 75 feet, which results in a 1:3 scale. Thus, it seems inconsistent for Crocodile's technicians on one hand to state that the measurement distance utilized by R&I is too short to yield accurate measurements, while on the other hand accepting measurements made at a shorter distance from their vendor. The same can be said for their *de facto* acceptance of historical data and procedures personally utilized by Mr. Surette.

Crocodile discusses the aggregation of the antenna components, and that the antenna is to be considered a whole radiating system. It is not certain the rationale for the inclusion of this paragraph, item #5 in the technician's statement, but there is no disagreement from the

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undersigned engineer. It should be noted, however, that the text of this statement neglects mentioning guy wires in the antenna aperture. The photographs in the Crocodile response at the end of Attachment B appear to illustrate that the guy wires are in the aperture of the antenna, and although the perspective of the photographs is conveniently skewed, it appears that the guy wires may have been neglected in the analysis of the structure utilized for the creation of the directional pattern, once again calling into question the accuracy of the pattern envelope.

The second portion of section five of the Harvey statement discusses polarization of the antenna. It is well known that the antenna is indeed circularly polarized. The measured field data provided to the undersigned engineer for analysis was represented as being the maximum of the horizontal and vertical polarization. This is consistent with the concept of a directional pattern envelope, wherein the relative field at all azimuths, regardless of polarization, is contained within the specified maximum values. Although the antenna data in Attachment C of the Crocodile response provides some data from the antenna manufacturer, it curiously does not provide the relative field values for the individual polarization components. Additionally, it does not share with the reader the techniques and processes for measurements, which indicate it is not a proof of performance despite the representation by Bromo to the contrary in their statement.

Furthermore, the Harvey statement contains email correspondence to the Commission specifically stating that the "...instruction manual..." for the antenna is attached. In fact, the PSI documentation submitted by Harvey in his statement is identical to the version submitted by Bromo, with the exception of limited pattern data. It should be noted that both the Harvey and Bromo instruction manuals appear to have been scanned from paper documents, whereas, the pattern data supplied by Bromo appears to be a computer generated pdf file. Thus, it may be

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reasonable to assume that no actual proof of performance was created by the manufacturer, but rather the Bromo pattern data were hastily created subsequent to the Petition to Deny in order to be included as an exhibit for the response.

Mr. Surette, in his statement, raises the possibility of an overload of the measurement equipment. Although not stated in the original engineering statement, the procedure used by Mr. Karl Fontenot for the acquisition of measured data followed a precise methodology. In all previous discussions prior to the acquisition of these measurements, Mr. Fontenot was advised of the absolute necessity of being consistent i.e. precise with his measurements. In other words, the technique used to identify locations and perform measurements must be identical at each location in order to make an effective comparison.

Mr. Fontenot measured the signal strength at each location using the Audemat Golden Eagle HD FM Monitor last calibrated by Audemat on March 19, 2020. It has been represented to the undersigned engineer that in conversations with Staff members of the Enforcement Bureau, there was some surprise concerning Crocodile questioning measurements with the Audemat. Indeed, this is an accepted piece of equipment utilized by many stations and groups.

Specifications for the Golden Eagle HD indicate that saturation of the receiver occurs at a received power level of approximately -30 dBm. For a 50-ohm system, this would equate to a field strength of 77 dBu. As the original engineering statement indicated, the highest field strength measured was 64.2 dBu. Thus, the highest field strength measured is approximately 13 dB below the saturation point of the equipment. Mr. Surette's concerns of equipment overloading are thus unfounded.

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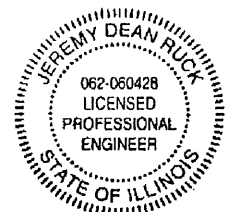
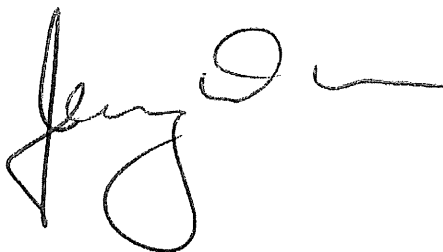
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Finally, the undersigned engineer will concede that the use of "accuracy" was not contextually an ideal choice of words in the text of the original petition. Accuracy in that context was utilized in the technical sense, such as the degree to which the result of a measurement conforms to a standard or specific value. Each of the representatives of Crocodile, however, chose to interpret it in a non-technical sense as being free from error or defect. This is hardly surprising given the other examples of their selective reading of sections of the Commission's Rules and the text of the Petition to Deny. Nevertheless, for clarification, the original intent of that section of the Petition was to point out that the actual value of the field strength at each location was not crucial so long as the measurement procedures at each location remained the same i.e. a high degree of precision was maintained. Maintaining a high level of precision with the techniques allows a comparison to be made between all of the measured values through normalization. This leads to a determination of the relative field at each location, which is directly correlated to the pattern envelope.

The preceding statement has been prepared by me, and is true and accurate to the best of my belief and knowledge.



Above signature is digitized copy of actual signature
License Expires November 30, 2021

Jeremy D. Ruck, PE
August 27, 2020

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CERTIFICATE OF SERVICE

I, Malinda Markland, hereby certify that on this 31st day of August, 2020, copies of the foregoing REPLY were sent to the following parties via electronic mail:

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