8 FCC Rcd 4627 56 Fed Reg. 38145 8/12/91

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-205

In Re Applications of

RADIO LAKE GENEVA CORPORATION — File No. BPH-900611MG

TOM KWIATKOWSKI — File No. BPH-900613MA

For Construction Permit for a
New FM Station on Channel 241A
in Lake Geneva, Wisconsin

MEMORANDUM OPINION AND ORDER

Adopted: March 18, 1993; Released: March 26, 1993

By the Commission:

1. The Commission has under consideration an Application for Review (Application) filed by Radio Lake Geneva Corporation (RLGC) on October 5, 1992 seeking reversal of the Review Board's *Decision* (7 FCC Rcd 5586 (Rev. Bd. 1992)) in this proceeding. The Board affirmed the *Initial Decision* (7 FCC Rcd 1388 (ALJ 1992)(*I.D.*) of the Administrative Law Judge (ALJ) awarding Tom Kwiatkowski (Kwiatkowski) the construction permit for a new FM station in Lake Geneva, Wisconsin.[1] We agree with the Board's resolution of this proceeding. However, several matters warrant brief comment.

2. In conjunction with its argument that Kwiatkowski did not show good cause for an amendment reducing the height of its proposed tower in response to the FAA's August 28, 1991 air hazard determination,[2] RLGC argues that the rulings below accepting Kwiatkowski's amendment and granting summary decision on an air hazard issue are inconsistent with past cases where transmitter site amendments have been rejected.[3] In contrast to those cases, precedent establishes that an applicant dealing with the FAA need not "switch rather than fight," and we agree with the Board that Kwiatkowski's dealings with the FAA in this case were sufficiently reasonable, prudent and diligent to establish good cause for his amendment reducing his tower height to meet the FAA's concerns. 7 FCC Rcd at 5589-90 ¶ ¶ 13-14.[4]

3. RLGC also claims that the integration criterion is no longer valid, citing *Susan M. Bechtel v. FCC,* 957 F.2d 873 (D.C. Cir. 1992). In this regard, RLGC contends that, when Kwiatkowski is deprived of this advantage, its own application is "in a prime position to be granted." Application for Review at 10. We disagree. In contrast to *Bechtel,* RLGC does not argue that its non-integrated proposal would serve the public interest as well as, if not better than, if it proposed integration. In any event, RLGC's general reliance on *Bechtel,* standing alone, provides no basis for overturning the Board's *Decision.* See *Anchor Broadcasting Limited Partnership,* 8 FCC Rcd _____ (1993).

4. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. § 1.115(i), the Application for Review filed October 5, 1992 by Radio Lake Geneva Radio Corporation IS DENIED.

5. IT IS FURTHER ORDERED, That the Motion to Strike Non-Record Material filed October 28, 1992 by Radio Lake Geneva Corporation IS DISMISSED, and that the Motion to Reopen the Record filed November 23, 1992 by Tom Kwiatkowksi IS GRANTED, as reflected herein.

6. IT IS FURTHER ORDERED, That the application of Tom Kwiatkowksi (File No. BPH-900613MA) for a construction permit for a new FM broadcast station on Channel 241A at Lake Geneva, Wisconsin IS GRANTED, and the application of Radio Lake Geneva Corporation (File No. BPH-900611MG) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[1] Also under consideration is an Opposition to the Application for Review filed by Kwiatkowski on October 20, 1992, a Motion to Strike Non-Record Material filed by RLGC on October 28, 1992, and a Motion to Reopen the Record filed by Kwiatkowski on November 23, 1992.

[2] Kwiatkowski's Motion to Reopen the Record submits the FAA's October 28, 1992 No Hazard to Air Navigation determination concerning Kwiatkowski's original 220 foot tower proposal. Kwiatkowski's motion will be granted to the extent of accepting his submission for reporting purposes under 47 C.F.R. § 1.65.

[3] RLGC relies on *Goodlettsville Broadcasting Company, Inc.,* 5 FCC Rcd 4593 (1990), where the applicant specified a short-spaced site, but, rather than curing or contesting the short-spacing determination, initially relied on engineering guidelines for directional antennas that were not yet effective and only sought to amend to a fully spaced site six months later; and *National Communications Industries,* 6 FCC Rcd 1978 (Rev. Bd. 1991) rev. den. 7 FCC Rcd 1703 (1992), where the applicant, after learning that its proposed site had been sold, took no steps to obtain permission to use the site from the new owner and waited until it was notified, at least six months later, that the site was unavailable to propose an amendment of its transmitter site. Accord *Eugene Walton,* 6 FCC Rcd 6071, 6074-75 ¶ ¶ 14-17 (Rev. Bd. 1991), rev. den. 7 FCC Rcd 3237 (1992), where the applicant, rather than immediately remedying a short-spacing problem upon learning of it, did not submit a curative amendment until more than ten months later after its clearly deficient waiver request was denied.

[4] RLGC's assertion that the Board's statement, 7 FCC Rcd at 5589 ¶ 14, that Kwiatkowski submitted a supplemental showing, is unsupported by record evidence is frivolous in light of the clear efforts by Kwiatkowski to obtain a modification of the FAA's preliminary adverse determination. 7 FCC Rcd at 5586-87 ¶ ¶ 4-6. Similarly, RLGC's request before the Board and again here to strike a statement in Kwiatkowski's pleadings concerning a comparative coverage preference based on his original tower proposal, which is merely an argument of counsel having no bearing on the good cause finding for Kwiatkowski's amendment, warrants no action.