

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

In re Application of

Idaho
Broadcasting
Consortium, Inc.

File No. BPH-930802IF

For Modification of Construction Permit
for Station KRMR(FM), Ketchum, ID

MEMORANDUM OPINION AND ORDER

Adopted: April 10, 1996;

Released: May 2, 1996

By the Commission:

1. This case stems from a November 15, 1993 staff decision which granted the above-referenced application, thereby allowing construction of unbuilt broadcast station KRMR(FM) at a different transmitter site, over the informal objection of B&B Broadcasting, Inc. ("B&B").¹ B&B is the licensee of stations KEJZ(AM)/FM, Twin Falls, Idaho, with which station KRMR will compete for listeners and revenue. The staff dismissed B&B's Petition for Reconsideration on January 30, 1995 for failure to comply with our procedural rules. B&B now seeks Commission review. We deny B&B's Application for Review for the reasons discussed below.

2. The sole issue that B&B raised previously and on review is whether a mountain that lies between KRMR's new transmitter site and its community of license is a major obstruction that will prevent KRMR from placing city grade signal coverage over Ketchum, Idaho, the station's community of license. B&B maintains that the mountain is a major obstruction that would block KRMR's radio signals and that KRMR's modified transmitter site is therefore contrary to the engineering requirements in Section 73.315(a) and (b) of our rules. B&B further maintains that failure to take account of this alleged obstruction is contrary to the public interest because the obstruction will prevent Ketchum from receiving the first local radio service allotted to that community.

3. The staff found that B&B's informal objection did not provide sufficient information to support B&B's contentions. The objection was supported only by a line drawing (a single terrain profile) showing the existence of a mountain that would block a line of sight between the transmitter and Ketchum. The staff found this insufficient to raise a *prima facie* case that the signal strength will be less than required.

4. On reconsideration, B&B attempted to submit additional engineering information in support of the same argument. The staff denied that attempt as procedurally

deficient under Section 1.106(c) of our rules. Specifically, the staff found that B&B sought to submit new facts but had not, as required by our rules, shown that this new information arose from any changed circumstance, that this information could not have been submitted previously, or that consideration of the information was required by the public interest. See 47 C.F.R. § 1.106(c).

5. On review B&B now argues that the staff erred. It believes that the staff applied an incorrect standard to B&B's submission, requiring it to prove engineering violations rather than just to raise *prima facie* evidence of such violations. B&B further states that the staff incorrectly characterized the information in its engineering study as "new facts." According to B&B the engineering information merely detailed facts already alleged. B&B also maintains that the staff failed to address whether the mountain constituted a major obstruction and whether the station could provide adequate service to Ketchum from the new transmitter site.

6. We have considered B&B's arguments, but find no staff error. KRMR, using the Commission's standard engineering methodology, demonstrated in its application that its newly selected site would comply with our technical rules, including the requirement that it provide service to Ketchum, Idaho. B&B did not submit *prima facie* evidence to the contrary. Although more than three months elapsed between the time that KRMR filed its modification application and the time that B&B filed its informal objection, that informal objection took the position that the existence of a mountain is sufficient *prima facie* evidence of obstruction and consequent failure to provide required signal coverage. That position is contrary to Commission case law, and to sound engineering principles. See *Rush County Broadcasting Co., Inc.* 26 FCC 2d 480, 482 (1970). B&B itself stated that it would submit further engineering information in support of its informal objection but, as the staff noted, B&B never submitted the information in connection with its objection.

7. Not until the reconsideration stage did B&B attempt to support its allegations with a 19-page engineering study. B&B argues that the staff was required to consider this study because it contained no "new facts" for purposes of our procedural rules. Specifically, B&B maintains that the study merely provides additional support for a previously argued engineering matter "that should have been immediately obvious [to the staff] without the benefit of the technical study." As discussed earlier, the engineering matters involved here are not as simplistic as B&B believes, and could not be considered without adequate documentation. The staff correctly characterized the study as "new facts," which could not be submitted for the first time on reconsideration, absent a sufficient showing pursuant to Section 1.106(c) of our rules. We agree with the staff that B&B did not make such a showing. See 47 C.F.R. §1.106(c).

8. We further find that consideration of B&B's supplemental showing, under the circumstances presented here, would have been contrary to the public's interest in an orderly process for authorization of broadcast service. See generally, *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941) ("We cannot allow the applicant to sit

¹ No formal petitions to deny lie against applications such as this one seeking to make minor modifications to construction permits. 47 U.S.C. § 309(b) and (d)(1).

back and hope that a decision will be in its favor and, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed."). Essentially, B&B argues that we should allow objectors to make unsubstantiated arguments initially and then attempt to prove those allegations anew at later stages. That position would render the initial stages of our proceedings meaningless, unnecessarily delay construction of broadcast stations, and possibly open the door to abuse of our processes.²

9. We note that the staff, in a footnote, also pointed out several flaws in B&B's technical study, and that B&B now defends the study. However, we need not reach B&B's arguments because the study was submitted too late to be considered, B&B did not make a special Section 1.106(c) showing, and there is no basis, on the facts of this case, to conclude that overriding public interest concerns require consideration of B&B's technical study. *See generally Central Coast Television*, 3 FCC 2d 524 (1966) (Commission need not examine terrain obstruction/coverage study on reconsideration, when original petition to deny did not include that study).

10. Accordingly, IT IS ORDERED that the Application for Review filed February 21, 1995 by B&B Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

² For example, objectors might routinely file deficient showings making every allegation imaginable, but supporting few or none. This might result in "fishing expeditions" by objectors to gauge which arguments they might best attempt to

support on reconsideration. Or the objector might present evidence in a piecemeal fashion as a means to delay competing projects.