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

LETTER
March 22, 1996

Released: April 12, 1996

In reply refer to:
1800B3-BCD

Tanja L. Kozicky, Esq.
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Re: WMNN(AM), Minneapolis, Minnesota
File No. BMP-940802DA
Application for Extension of
Construction Permit

File No. BMP-950216AA
Application for Modification of
Construction Permit

Dear Ms. Kozicky:

We have on file the above-referenced applications to extend and modify a previously authorized construction permit (File No. BMP-930513AA) granted to Minnesota Public Radio ("MPR"), licensee of WMNN(AM), Minneapolis, MN, (formerly KNOW(AM).[1] We also have on file a September 6, 1994, informal objection filed by Tanja Kozicky ("Kozicky") on behalf of parties who have challenged construction of the radio towers under applicable provisions of Minnesota law.[2] The U.S. Department of Interior, Fish and Wildlife Service ("USFWS") also filed, on September 16, 1994, comments objecting to the subject extension application. Additionally, we have received comments on the extension application from the Minnesota Department of Natural Resources, Minnesota River Audubon Chapter and Minnesota River Audubon Council ("Audubon"), and the City of Savage.[3] No objections have been filed against the subject modification application. As set forth below, we deny Kozicky's objection and grant the subject extension application. We also grant the subject modification application.

BACKGROUND

On May 13, 1993, MPR filed an application for a construction permit to modify WMNN(AM)'s antenna system, increase its power, and change its transmitter location (File No. BMP-930513AA). In particular, the application sought authorization to construct three towers at Site A, adjacent to the Minnesota River, near Savage, Minnesota. Because MPR proposed locating antenna towers in the 100-year floodplain of the Minnesota River,[4] it acknowledged the proposed construction represented a major environmental action under the Commission's environmental rules, 47 C.F.R. § 1.1307. MPR attached to its application a section entitled "Environmental Assessment" ("EA"). In the EA, MPR asserted that the towers would not have an adverse impact on the natural water flow patterns of the floodplain. Additionally, MPR stated that "[t]he proposed site is not located within or in the vicinity of any wildlife, wilderness, historic, archeological or scenic areas," and that "[t]he site is not located within any known natural bird flyway." This application was unopposed and on February 28, 1994, the Commission granted the Site A construction permit. On May 17, 1994, MPR notified the Commission that they had recently learned that Site A was, indeed, located across the river from a small portion of a designated wildlife refuge.

On August 2, 1994, MPR filed the subject extension application in which MPR states that completion of construction of the WMNN(AM) towers has been delayed because it has not secured the necessary approval from local zoning authorities for construction of the antenna towers. On August 24, 1994, MPR amended this application to indicate that opposition, on environmental grounds, has been raised by Kozicky, USFWS, the Minnesota Department of Natural Resources, and the Audubon Society, among others, in the context of a local zoning proceeding. Relevant environmental issues raised in these local oppositions include: the impact of the guyed towers on migratory birds, including the bald eagle, an endangered species; the impact of construction on the towers in the floodplain; and historic preservation issues. Kozicky and USFWS have filed their objections to the extension application raising, *inter alia*, many of the same environmental concerns.

Kozicky raises two issues with respect to the subject extension application. Kozicky first contends that MPR made a "business decision to disregard the potential environmental impacts and likely community opposition to the towers," and that the construction delays were therefore not beyond MPR's control. Second, Kozicky argues that MPR lacked candor in failing to reveal to the Commission that Site A was adjacent to the Minnesota Valley Wildlife

[1] MPR currently holds a construction permit to relocate WMNN(AM)'s tower facilities to a site adjacent to the Minnesota River and to operate directionally with 9.7 kW daytime and 5.1 kW nighttime using a three-tower array ("Site A"). The subject applications request an extension of the Site A permit and a modification to further relocate to a site .72 kilometers southeast of Site A with substantially the same facilities ("Site B").

[2] Those parties are the Minnesota Masonic Home ("MMH") and other residents of Savage, Minnesota, where MPR proposes to construct the WMNN(AM) towers.

[3] These comments generally support grant of the extension application pending completion of an environmental review of the WMNN(AM) towers' construction.

[4] The "100-year floodplain" is that portion of low-lying land adjoining inland and coastal waters that is, on average, likely to flood every 100 years (i.e., has a one percent chance of flooding in any given year). *Shanty Town Associates Ltd. Partnership v. E.P.A.*, 843 F.2d 782, 786 n.3 (4th Cir. 1988).

Refuge and in representing in the EA that it knew of no local opposition to the construction project on environmental grounds. Kozicky states that at the time MPR filed the subject extension application, MPR was aware that a local Environmental Assessment Worksheet petition had been filed and "it was evident that there was broad-based opposition to the proposed project."

USFWS also raises two objections against MPR's extension application. USFWS contends that because the construction site is located within the Minnesota River floodplain, it has urged the City of Savage to reject the tower construction project, as "the towers will have a negative impact on the natural resources and aesthetic qualities of the Minnesota River Valley." USFWS's second objection concerns avian matters. It notes that the Minnesota River Valley is used by the bald eagle, an endangered species, and that the proposed construction project would have a "high potential for bird strikes." USFWS also indicates that the proposed site for WMNN(AM)'s towers is between two units of the Minnesota Valley Wildlife Refuge and could have a negative impact upon migratory birds.

In light of the environmental concerns raised in both of the objections, the Commission staff, on November 29, 1994, issued a letter of inquiry ("LOI") to MPR. The staff requested that MPR submit (1) a complete and detailed list of alternative sites for the tower, and the reasons why those sites are unacceptable; (2) a complete and detailed list of the effects this tower construction will have on the environment; (3) specific and documented information about the floodplain in regard to its history of flooding and the results of that flooding; and (4) a detailed explanation of how the construction of the towers will affect the floodplain at the time of flooding.

On February 16, 1995, MPR filed the subject modification application to relocate the proposed towers to an alternative site (Site B) located on the same parcel of land, but approximately 1/4 mile farther from the Minnesota River than Site A. MPR explains that the application to relocate to Site B was filed in response to USFWS and Audubon concerns about the potential impact of the tower and guy wires upon local and migratory bird populations and that the new site was specifically suggested by Audubon as a way to minimize the potential for avian strikes.

On March 23, 1995, MPR filed its response to the LOI providing a detailed description of its search efforts and its reasons for rejecting alternatives to Site B. MPR also addresses the potential environmental impact, and includes an extensive explanation of its efforts to address and meet the objectors' concerns regarding the potential for avian strikes and the possible effects on the floodplain. Regarding the potential for avian strikes, MPR concludes that "the proposed towers are not expected to present any significant environmental hazard to migratory and resident bird populations." MPR bases this conclusion on a review of the relevant published literature and an MPR-commissioned field study conducted by Frank J. Svoboda and Associates ("Svoboda study"). With respect to the floodplain concerns, MPR details the "careful considerations" that were taken in siting and designing the project and explains that the towers would be built to withstand the 100-year flood level. MPR therefore contends that the towers would "have no impact on existing wetlands." MPR also indicates that it has obtained approval from the Minnesota Lower Minnesota River Watershed District which, under Minnesota law, is responsible for reviewing floodplains construction. Additionally, in response to Kozicky's allegation that MPR's EA failed to reveal that Site A was adjacent to the Minnesota Valley Wildlife Refuge, MPR explains that it had relied upon maps that omitted the refuge. MPR states that once it learned that portions of the Minnesota Valley Wildlife Refuge were located close to Site A, it notified the Commission on May 17, 1994, prior to the filing of any objections.

The Commission received letters from Kozicky and USFWS in reaction to MPR's LOI response. On April 27, 1995, Kozicky submitted a letter asserting that MPR has not adequately addressed the risk of avian deaths. Kozicky also contends that MPR has not fully addressed the potential "negative impact" of the proposed towers on the Dan Patch Race Track and on the Minnesota Masonic Home, an issue that Kozicky raised in the local environmental review process. Kozicky asserts that although neither the Dan Patch Race Track nor the Minnesota Masonic Home is currently listed on the National Register of Historic Places, they "may" be eligible for registration and "ought to be considered historically significant." Kozicky also argues that the proposed towers may, despite conformity to Commission regulations, "cause electromagnetic interference with medical devices and security systems." Lastly, Kozicky asserts that the lighting on the proposed towers will disrupt the controlled environment of the new "dementia care facility" located at the Minnesota Masonic Home. On April 28, 1995, USFWS submitted a letter maintaining that it is opposed to any construction within the Minnesota River floodplain and again suggests that the proposed tower construction might pose a potential for bald eagle strikes.

On May 24, 1995, MPR filed a supplement to the subject extension application informing the Commission that the Savage City Council had decided to conduct further environmental review of the proposed construction. Additionally, MPR submitted a letter from the Minnesota Historical Society, Minnesota's designated State Historic Preservation Office, indicating that neither the Dan Patch Race Track nor the Minnesota Masonic Home is eligible for registration in the National Register of Historic Places. Kozicky responded to this supplement stating that it is likely that the further environmental review, now required by the City of Savage, would include an additional study of the impact on historical sites.

On January 11, 1996, MPR filed a supplement to both of the subject applications indicating that "after exhaustive review of the environmental issues raised by the proposed construction, the City of Savage has resolved the matter in MPR's favor and issued a conditional use permit for construction at [Site B]." MPR explains that after it had brought suit in Minnesota State Court against the City of Savage's additional environmental assessment, on December 11, 1995, MPR and the City of Savage entered into a court-approved settlement agreement requiring that MPR finance "a long-term scientific monitoring program to assess any impact of the subject towers on migratory and resident bird populations" and also requiring that MPR conduct an engineering study on the effects of the proposed towers on medical devices used at the Minnesota Masonic Home. Additionally, MPR asserts that the City of Savage engaged its own avian expert, Dr. Robert M. Zink, whose opinion was included in the settlement agreement, and based on that opinion "local authorities have determined that the proposed construction will not have an adverse impact on resident or migratory bird populations."

DISCUSSION

A. *The Extension Application.* When contemplating applications for extension of construction permits, the Commission examines the record to determine whether the permittee's application satisfies one of the three factors set forth under 47 C.F.R. § 73.3534(b). That subsection provides, in pertinent part, that the Commission will grant an application for extension where a permittee can show that: (a) construction is complete and testing is underway; or (b) substantial progress has been made (i.e., demonstration that equipment is on order or on hand, site acquired, site cleared and construction proceeding toward completion); or (c) no progress has been made for reasons clearly beyond the control of the permittee (such as delays caused by governmental budgetary processes and zoning problems) and the permittee has taken all possible steps to expeditiously resolve the problem and proceed with construction. See 47 C.F.R. § 73.3534 (b).

We find Kozicky's allegation--that the delays in construction were not beyond MPR's control--are without merit. The Commission granted the Site A construction permit February 28, 1994, for a period of six months. During that six-month period MPR applied for a conditional use permit from the relevant local authorities and diligently sought assistance in the approval process from local authorities and agencies. MPR also participated in several local hearings. Based on the record, we find that MPR has taken all possible steps to conform to the local zoning procedures and has sufficiently established that its difficulties in obtaining zoning approval, despite its diligent efforts, have caused delays in construction that were beyond its control. Moreover, the filing of the subject modification application (to relocate to Site B) in response to environmental concerns, and the settlement agreement which resolves the zoning issues, is a clear indication of MPR's diligence in pursuing zoning approval.

B. *Lack of Candor.* Lack of candor is a concealment, evasion or other failure to be fully informative accompanied by an intent to deceive the Commission. *Fox River Broadcasting, Inc.*, 93 FCC2d 127, 129 (1983), recon. dismissed, FCC 831-43 (released Apr. 20, 1983). The *sine qua non* of lack of candor is fraudulent or deceitful intent. *See Leflore Broadcasting v. FCC*, 636 F.2d 454, 461 (D.C. Cir.1980); *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC2d 1179, 1196 (1986). There is no evidence in the record of MPR's intent to deceive the Commission. Moreover, the record indicates that MPR has fully informed the Commission of all relevant environmental matters. For example, on August 24, 1994, several days before the Kozicky objection was filed, MPR filed an amendment to the subject extension application informing the Commission of the "local controversy on environmental grounds" surrounding the proposed construction site. Similarly, on May 17, 1994, MPR informed the Commission of Site A's adjacency to the Minnesota Valley Wildlife Refuge, shortly after MPR learned of its mistake from USFWS.

C. *Environmental Issues.* In accordance with sections 1.1307(a)h)§and (b) of the Commission's rules, a Commission action with respect to the authorization of facilities may require environmental processing under the National Environmental Protection Act of 1969 ("NEPA")[5] if that action may have a significant impact on the quality of the human environment. 47 C.F.R. § 1.1303. If an action falls within one of the eight categories enumerated in § 1.1307(a),[6] an applicant is required to prepare and submit an EA.[7] The Commission then reviews the EA, as well as information submitted by other interested parties and makes a determination as to whether the action will likely have a significant impact that would necessitate agency preparation of Environmental Impact Statements under NEPA. *See* 47 C.F.R. § 1.1308. As set forth below, we find that construction of the WMNN(AM) tower, as proposed in the subject modification application, will not have a significant impact on the environment.

(1) *Floodplain.* We conclude that the proposed construction will not have a significant environmental impact on the Minnesota River floodplain. When MPR originally filed its application to modify its construction permit to relocate WMNN(AM)'s towers to Site A, it indicated that the application proposed construction in a floodplain, an enumerated category in § 1.1307. *See* 47 C.F.R. § 1.1307(a)(6). Accordingly, MPR submitted an EA asserting that the proposed construction would not have an adverse impact on the floodplain. MPR has also filed, as directed by the LOI, another EA with additional information regarding the floodplain. MPR explains that each tower will be built to withstand flooding up to twenty-two feet above ground level, a level that is three feet in excess of the 100-year flood level and that the Lower Minnesota River Watershed District, the agency responsible under Minnesota law for reviewing floodplain construction projects, has approved the project. The City of Savage Zoning Ordinance specifically allows the construction of radio towers at the proposed construction site and has now specifically issued a conditional use permit for construction at Site B. In the environmental area, it is appropriate for the Commission

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[5] 42 U.S.C. §§ 4321-35.

[6] Section 1.1307(a) states, in pertinent part, that:

Commission actions with respect to the following types of facilities may significantly affect the environment and thus require the preparation of EAs by the applicant and may require further Commission environmental processing:

(1) Facilities that are to be located in an officially designated wilderness area.

(2) Facilities that are to be located in an officially designated wildlife preserve.

(3) Facilities that: (i) may affect listed threatened or endangered species or designated critical habitats; or (ii) are likely to jeopardize the continued existence of any proposed endangered or threatened species or likely to result in the destruction or adverse modification of proposed critical habitats, as determined by the Secretary of the Interior pursuant to the Endangered Species Act of 1973.

(4) Facilities that may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places . . .

(6) Facilities to be located in a floodplain . . .

(8) Antenna towers and/or supporting structures that are to be equipped with high intensity white lights which are to be located in residential neighborhoods, as defined by the applicable zoning law.

47 C.F.R § 1.1307(a)

[7] *See* 47 C.F.R. § 1.1311 which sets forth the information to be included in an EA.

staff to defer to such local decisions. *See Amendment to the Environmental Rules,* 60 R.R. 2d 13, 17-18 (1986), *Decatur Telecasting, Inc.,* 7 FCC Rcd 8622 (MMB 1992) (floodplain construction is appropriate when local zoning regulations specifically permit such use).

(2) *Historic Sites.* Consistent with the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470(f) and its implementing regulations contained in 36 C.F.R. Part 800, the Commission's environmental rules subject applications that "may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archaeology, engineering or culture, that are listed or are eligible for listing in the National Register of Historic Places" to environmental review and mandatory inter-agency consultation procedures.[8] *See* 47 C.F.R. § 1.1307(a)(4); *see also* 47 C.F.R. § 1.1308. MPR has submitted a letter from the Minnesota State Historic Preservation Officer which concludes that "there are no properties listed on or eligible for listing on the National Register of Historic Places within the area of potential effect for this project."[9] We find this evidence conclusive, and therefore determine that no further review is warranted with respect to 47 C.F.R. § 1.1307(a)(4), 36 C.F.R. § 801.1(c). (3) *Lighting.* Although Kozicky has alleged that the lighting on the proposed towers will disrupt residents at the Minnesota Masonic Home, there is no indication in the record that the towers are to be located in an area zoned residential and that the towers will have high intensity white light. Thus, construction of the WMNN(AM) facilities does not implicate 47 C.F.R. § 1.1307(a)(8), an enumerated category dealing with possible significant environmental effects due to high intensity white lighting in zoned residential areas, and no environmental review with respect to this allegation is required.

(4) *Bald Eagles.* In accordance with the Endangered Species Act of 1973, 16 U.S.C. § 1531, and the Interagency Cooperation-Endangered Species Act of 1973, 50 C.F.R. Part 402, the Commission's environmental rules subject applications that may affect listed threatened or endangered species or critical habitats to environmental review and mandatory inter-agency consultation. *See* 47 C.F.R. § 1.1307 (a)(3). Thus, based on the potential for the proposed towers to affect the bald eagle, an endangered species, we are required to consult with the Department of the Interior, Fish and Wildlife Service in an effort to determine whether the proposed towers are likely to jeopardize the continued existence of the bald eagle. *See* 47 C.F.R. § 1.1308. In this case, USFWS received copies of all relevant applications, pleadings and amendments and has informed us of its concerns. USFWS has not, however, made any explicit finding with respect to bald eagle strikes. In granting the conditional use permit, the City of Savage consulted with Dr. Robert M. Zink, a professor of ornithology at the University of Minnesota, who concluded that the proposed towers are not likely to jeopardize the continued existence of the bald eagle. In the absence of a specific finding by USFWS, and in light of the conclusion reached by the Zink study, we conclude that the proposed towers are not likely to jeopardize the continued existence of any endangered species and thus no further consultation with the USFWS is required. *See* 50 C.F.R. § 402.10(a) (Joint Regulations on Endangered Species require that Federal agencies consult with the United States Fish and Wildlife Service when an action is likely to jeopardize the continued existence of any endangered species).

(5) *Impact on Migratory and Resident Bird Populations.* Based on the record, we determine that the proposed towers will not pose a significant adverse impact on migratory and resident bird populations.[10] In making this conclusion, we have relied upon the Zink study which concluded that "there will be a negligible impact on *populations* of either resident or migrant birds" as a result of the proposed towers. Furthermore, this conclusion confirms the conclusions of the Svoboda study which found that "[c]ollission mortality would likely be very low and infrequent." Additionally, we note that, pursuant to the settlement agreement between MPR and the City of Savage, MPR is obligated to conduct "a long-term scientific monitoring program to assess any impact of the subject towers on migratory and resident bird populations." Therefore, we find that construction of the proposed towers will not result in a significant loss of migratory or resident birds.

CONCLUSION

Based on the record, and in accordance with the National Environmental Protection Act of 1969, we have determined that construction of the WMNN(AM) tower, as proposed in the subject modification application, will not have a significant impact on the environment. Therefore, no further environmental review is required. Accordingly, Tanja Kozicky's informal objection to the subject extension application IS DENIED. The application for extension of construction permit (File No. BMP-940802DA) IS GRANTED. Additionally, the application for modification of construction permit (File No. BMP-950216AA), being otherwise technically conforming, is GRANTED without further environmental considerations. Pursuant to 47 C.F.R. § 1.1308(d), IT IS ORDERED that MPR provide the community notice of our finding that construction of the towers at the site specified in the subject application will have no significant impact on the environment.

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[8] The record contains a July 14, 1994 letter to MPR from the Minnesota Historical Society which requests initiation of environmental review and consultation pursuant to Section 106 of NHPA.

[9] *See* letter dated May 9, 1995, from Britta L. Bloomberg, Deputy State Historic Preservation Officer, Minnesota Historical Society, to Mr. Rolfe Larson, Minnesota Public Radio, attached to MPR supplement filed May 24, 1995.

[10] The Commission's environmental rules do not specifically require us to make a determination as to whether the proposed construction will likely have a significant impact on migratory and resident bird populations. Nevertheless, because the proposed site for WMNN(AM)'s towers is located between two units of the Minnesota Valley National Wildlife Refuge, and consistent with our overall obligations to consider the impact of our authorized facilities on the environment, we will address these concerns.

Sincerely,

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cc: Todd M. Stansbury, Esq.
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APPENDIX A

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