

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

In the Matter of)	
)	
Christopher Falletti)	
)	
Application for Construction Permit for)	File No. BNPH-20120518AAE
New FM Station)	Facility ID No. 190421
Medina, North Dakota)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: January 20, 2015

Released: January 22, 2015

By the Commission: Commissioner Pai issuing a statement.

1. In this Memorandum Opinion and Order, we deny the Application for Review filed by Two Rivers Broadcasting, Inc. (“Two Rivers”) on August 3, 2012 (“Application for Review”).¹ Two Rivers seeks review of a July 6, 2012, action by the Media Bureau (“Bureau”) granting the above-captioned application (“Application”) of Christopher Falletti (“Falletti”) for a new FM station at Medina, North Dakota (“Station”) and dismissing a Petition to Deny filed by Two Rivers on June 21, 2012, as moot.²

I. BACKGROUND

2. Two Rivers and Falletti each submitted bids for the Medina, North Dakota, permit in FM Broadcast Auction 93 (MM-FM810-C). Falletti was the winning bidder, with a final net bid of \$21,000.³ Falletti filed his long-form application on May 18, 2012, and made all final payments. On June 21, 2012, Two Rivers filed its Petition to Deny, claiming that Falletti lacked reasonable assurance of site availability for the transmitter site specified in the Application, a tower owned by Two Rivers’ principal, Janice M. Ingstad (“KXGT Tower”).⁴ On June 29, 2012, Falletti filed a minor amendment to specify a new transmitter site. On July 6, 2012, in the *Letter Decision*, the Bureau granted the Application, stating that Two Rivers’ Petition to Deny was moot because Falletti had “addressed this concern [site availability] by amending its application to specify a tower site at another location.”⁵

3. On review, Two Rivers reiterates its argument that Falletti never had reasonable assurance of site availability for the KXGT Tower. According to Two Rivers, the Application thus suffered from a “fatal defect” that cannot be cured by amendment.⁶ In support of this argument, Two

¹ Two Rivers is the licensee of Station KXGT(FM), Carrington, North Dakota.

² *Christopher Falletti*, Letter, Ref. No. 1800B3-HC (rel. July 6, 2012) (“*Letter Decision*”). On July 2, 2012, Falletti filed an Opposition to the Petition to Deny. On July 13, 2012, Two Rivers filed a Reply to the Opposition.

³ *See Auction of FM Broadcast Construction Permits Closes; Winning Bidders Announced for Auction 93*, Public Notice, 27 FCC Rcd 4056, 4065, Attachment A (MB 2012); *see also* “Auction Results,” available at http://wireless.fcc.gov/auctions/default.htm?job=auCTION_summary&id=93 (last accessed Oct. 17, 2014).

⁴ For convenience, “reasonable assurance of site availability” may be abbreviated herein to “site availability” and an amendment to cure an original site availability defect may be referred to as a “curative site amendment.”

⁵ *Letter Decision* at 1.

⁶ Application for Review at 7.

Rivers cites the Commission's 2008 *Schober* decision, in which the Commission rescinded the grant of an FM translator construction permit application due to lack of initial site availability, without permitting a curative amendment.⁷ Finally, Two Rivers claims that Falletti misrepresented that he had reasonable assurance of site availability while lacking a "good faith, factual basis" for such belief.⁸

4. Falletti did not respond to the Application for Review. However, in his earlier Opposition to the Petition to Deny, Falletti argued that the amendment should be permitted under the Commission's liberal amendment policy for auction winners, which established "a more lenient approach toward the processing of defective broadcast applications for new facilities . . . permitting multiple corrective amendments, if necessary."⁹

II. DISCUSSION

5. The Application for Review highlights the tension between our historical "fatal defect" approach to reasonable assurance of site availability and our liberal amendment policy for the auctioned broadcast services. The specific question presented here is whether an auction applicant can *amend* to cure a site availability defect—in other words, whether the liberal amendment policy for auctioned services applies to site availability defects in the same way that it does to other application defects. For the reasons stated below, we hold that it does.

6. *Historical prohibition on curative site amendments.* Our case law disallowing curative site amendments stems back to the days of comparative hearings for the commercial broadcast services. At that time, any applicant seeking to amend after designation for hearing had to show "good cause."¹⁰ Specifically, the applicant had to demonstrate that it had acted with due diligence, that the amendment was not required by its voluntary act, that no additional issues or parties would be required, that the hearing process would not be disrupted, that there would be no prejudice to competing applicants, and that the applicant would not gain a competitive advantage.¹¹ In addition, for engineering amendments, Section 73.3522(b)(1) of the Rules provided that the applicant must show that the amendment was necessitated by events that the applicant could not have reasonably foreseen.¹² The purpose of this good cause showing was to "secure the most expeditious disposition of hearing cases by freezing proposals of the applicants, thereby clearly delineating the issues and the scope of hearing and permitting adequate preparation and presentation by all the parties."¹³

⁷ Application for Review at 5-7 (citing *Edward A. Schober*, Memorandum Opinion and Order, 23 FCC Rcd 14263 (2008)) ("*Schober*").

⁸ Application for Review at 8 (citing *Mark Van Bergh, Esq.*, Letter, 26 FCC Rcd 15135 (MB 2011)).

⁹ Opposition at 2 (quoting *Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses*, First Report and Order, 13 FCC Rcd 15920, 15986 (1998), *recon. denied*, 14 FCC Rcd 8724 (1999), *aff'd sub nom. Orion Communications, Ltd. v. FCC*, 213 F.3d 761 (D.C. Cir. 2000)) ("*Auction Order*").

¹⁰ See *Erwin O'Conner Broadcasting Co.*, Memorandum Opinion and Order, 22 FCC 2d 140, 143 (Rev. Bd. 1970).

¹¹ *Id.*

¹² 47 C.F.R. § 73.3522(b)(1) (1984). Hereinafter we refer to the combined *Erwin O'Conner/Section 73.3522(b)(1)* test as the "Section 73.3522(b)(1) good cause test."

¹³ *South Florida Broadcasting Co., Inc.*, Memorandum Opinion and Order, 99 FCC 2d 840, 845 n.12 (1984) (citing *Belo Broadcasting Corp.*, 68 FCC 2d 1313, 1320 (1978), *recon. granted in part*, 88 FCC 2d 922 (1981)) ("*South Florida*"); see also *WCAX Broadcasting Corp.*, Decision, 18 FCC 520, 525 (1954) ("For the purposes of orderly administration, it is necessary to put a limitation upon the freedom of amendment by applicants when a matter has been designated for hearing. Were a contrary rule to apply, the Commission's procedures would degenerate to a point where in hotly contested cases, all parties would wait until the last minute to file amendments, thus revealing for the first time important details of their applications . . .") (quoting *Hamtramck Radio Corporation*, 6 RR 43, 46 (1950)).

7. Like other post-designation engineering amendments, amendments to specify new transmitter sites were subject to the Section 73.3522(b)(1) good cause test.¹⁴ Typically, if the applicant had reasonable assurance of the availability of its original site, the good cause analysis regarding an amendment turned on the due diligence factor—i.e., whether the applicant had amended within a reasonable amount of time after losing the original site.¹⁵ However, in cases where the applicant did not have reasonable assurance of the availability of the original site, the Section 73.3522(b)(1) good cause test was rarely, if ever, satisfied: “Where it appears that an applicant did not have “reasonable assurance” of a site to begin with, it is not permitted to amend late in the process because it cannot meet the vigorous “good cause” test specified in 47 CFR Sec. 73.3522.”¹⁶ Specifically, such an applicant would likely fail the foreseeability and voluntariness prongs of the test.¹⁷ It is in this context that, in the frequently cited *South Florida* case, the Commission concluded that “an applicant will not be permitted to amend where it does not have the requisite ‘reasonable assurance’ to begin with.”¹⁸ Although this statement has been quoted as a standalone proposition,¹⁹ in *South Florida* itself the Review Board clearly articulated that, in remanding for an evidentiary hearing, it was in fact applying the Section 73.3522(b)(1) good cause test: “Only after these issues [initial site availability] are tried can we determine if ‘ . . . the amendment is necessitated by events which the applicant could not reasonably have foreseen. . . .’ 47 CFR Sec. 73.3522(b)(1)(i).”²⁰ Thus, the case law shows that the prohibition on curative site amendments was a result of the application of the Section 73.3522(b)(1) good cause test.

8. *Liberal amendment policy.* In 1998, the Commission revised Section 73.3522. With the advent of competitive bidding, two separate amendment procedures were created.²¹ New Section 73.3522(a) established an application amendment procedure applicable only to broadcast services subject to competitive bidding—i.e., auctioned services.²² Section 73.3522(b) was modified and reduced in scope, applying only to reserved channel FM and reserved noncommercial educational (“NCE”) services.²³ Although Section 73.3522(b) retained the “good cause” requirement, new Section 73.3522(a) eliminated this test for “winning bidders or non-mutually exclusive applicants for a new station or a major

¹⁴ See *infra* notes 17-19.

¹⁵ See, e.g., *Mableton Broadcasting Co., Inc.*, Memorandum Opinion and Order, 5 FCC Rcd 6314, 6320 (Rev. Bd. 1990) (“The sole remaining question—usually critical and so considered by the ALJ here—is whether [the Applicant] exercised “due diligence” in amending to its new site.”); *Progressive Communications, Inc.*, Decision, 3 FCC Rcd 5758, 5760 (Rev. Bd. 1988) (“[Applicant’s] more-than-one-year delay . . . has not been shown to have been accompanied by even a modicum of due diligence, was dilatory, prejudicial and ‘foreseeable,’ and thus was properly denied by the ALJ for lack of ‘good cause.’”)

¹⁶ *Adlai E. Stevenson IV*, Decision, 5 FCC Rcd 1588, 1589 (Rev. Bd. 1990); see also *Magdalene Gunden Partnership*, Decision, 2 FCC Rcd 5513, 5513-14 (Rev. Bd. 1987) (“*Magdalene Gunden*”).

¹⁷ *Magdalene Gunden*, 2 FCC Rcd at 5513-14 (“[The applicant] did not demonstrate good cause to support its petition for leave to amend. That is, [the applicant’s] need to amend was both foreseeable and voluntary, because it never had any contact or negotiations with the site owner concerning the availability of its original site and consequently no reasonable basis to believe that it could rely on that site.”) (internal citation omitted); see also *Shoblom Broadcasting, Inc.*, Decision, 93 FCC 2d 1027, 1031-32 (Rev. Bd. 1983) (“An applicant’s lack of due care in choosing a transmitter site cannot be equated with either unforeseeability or involuntariness when the need to resolve *pre-existing* site problems finally becomes apparent.”).

¹⁸ *South Florida*, 99 FCC 2d at 845, n.12.

¹⁹ See, e.g., *Schober*, 23 FCC Rcd at 14265 (citing *Classic Vision, Inc.*, Memorandum Opinion and Order, 104 FCC 2d 1271 (1986), *review denied*, 2 FCC Rcd 2376 (1987) (citing *South Florida*, 99 FCC 2d at 845 n.12 (1984))).

²⁰ *South Florida*, 99 FCC 2d at 845, n.12.

²¹ 47 C.F.R. § 73.3522 (1998); *Auction Order*, 13 FCC Rcd at 16028 (Appendix C).

²² 47 C.F.R. § 73.3522(a). Previously, Section 73.3522(a) governed pre-designation amendments.

²³ 47 C.F.R. § 73.3522(b).

change in an existing station.” In its place, the Commission established a liberal amendment policy, permitting auction applicants to file amendments to cure “any defect, omission or inconsistency identified by the Commission, or to make minor modifications to the application”²⁴ In the *Auction Order*, the Commission explained the reason for the new procedure:

We believe the relatively smaller volume of long-forms requiring processing permits us to accomplish our operational goals in a less restrictive manner and warrants liberalization of the procedures now applied to defective broadcast and secondary broadcast service applications. Accordingly, we shall adopt a more lenient approach toward the processing of defective broadcast applications for new facilities and major changes, employing staff deficiency letters, and permitting multiple corrective amendments, if necessary.²⁵

The Commission went on to specifically discuss the treatment of previously “fatal” defects under the new regime: “Long-form applications for new facilities and for major changes in existing facilities in all broadcast services will no longer be immediately returned for defects pertaining to completeness or technical or legal acceptance criteria, without ample opportunity to correct the deficiency . . . the new processing standards for broadcast long-form applications will enable applicants for new facilities and for major changes to avoid dismissal and to liberally correct heretofore fatal defects in application information.”²⁶

9. *Post-1998 case law.* Commission case law since 1998 is divided on which of these two policies properly controls auction-related site amendments. In the 2001 *Liberty* decision, the Commission accepted a curative site amendment under the liberal amendment policy, observing that “Sections 73.3522(a) and 73.3573, governing post-auction amendments, do not require that an amendment be supported by good cause and the unavailability of the original site would not, in any event, be a basis to reject a site amendment”²⁷ Subsequently, however, in the 2008 *Schober* decision, the Commission disallowed an amendment filed by a non-mutually exclusive applicant (“singleton”) for an FM translator station, citing to comparative hearing cases but making no mention of the Section 73.3522(a) liberal amendment policy.²⁸ More recently, in the 2014 *Able* decision, the Commission held that an auction applicant could amend to cure a site availability issue relating to a previous amendment, explaining that under the liberal amendment policy, the Commission “expressly and deliberately” treats auction winners dissimilarly to other, non-auction, applicants because “the competitive bidding process itself [lessens] the incentive for insincere application filings.”²⁹

10. *Conclusion.* As explained in the case history and policy goals outlined above, the historical prohibition on curative site amendments has little utility or justification in the auction context and for this reason was eliminated for applications in the auctioned services when the Commission amended Section 73.3522 in 1998.³⁰ The original rationale for the prohibition—the Section 73.3522(b) good cause test—does not apply to applications for auctioned services.³¹ Because we are statutorily

²⁴ 47 C.F.R. § 73.3522(a)(2).

²⁵ *Auction Order*, 13 FCC Rcd at 15986.

²⁶ *Id.* at 15986-87.

²⁷ *Liberty Productions, A Limited Partnership*, Memorandum Opinion and Order, 16 FCC Rcd 12061, 12071-72 (2001) (accepting a site amendment by winning bidder).

²⁸ *Schober*, 23 FCC Rcd at 14265.

²⁹ *Able Radio Corporation*, Memorandum Opinion and Order, 29 FCC Rcd 4363, 4364 (2014); *contra Colorado Television, Inc.*, 98 FCC 2d 513, 518 n.6 (Rev. Bd. 1984) (holding that denial of first site amendment requires rejection of a second site amendment because “the chain of good cause had long been broken”).

³⁰ *Auction Order*, 13 FCC Rcd at 15986-87.

³¹ *Id.*

prohibited from holding comparative hearings to resolve mutual exclusivities in these services, there is no longer a need to “secure the most expeditious disposition of hearing cases by freezing proposals of the applicants.”³² To the contrary, the Commission has found that the competitive bidding process results in a relatively small number of applicants filing long-forms, who are already financially invested in the successful licensing and construction of their newly-acquired stations.³³ We affirm that the liberal amendment policy established in the *Auction Order* applies to site availability defects in the same way that it does to all other application defects in the auctioned services, for the reasons set out in the *Auction Order*.³⁴ To the extent that our decision in *Schober* is inconsistent with this holding, it is overruled.

11. *Misrepresentation.* Misrepresentation is a false statement of fact made with intent to deceive the Commission.³⁵ Errors submitted through carelessness, inadvertence, or even gross negligence, do not constitute misrepresentation.³⁶ In this case, we find that Two Rivers’ claim that Falletti lacked reasonable assurance of site availability, standing alone, fails to establish a prima facie case under Section 309(d)(1) that Falletti deliberately intended to mislead the Commission.³⁷ Without such evidence, there is an insufficient basis to warrant further inquiry.³⁸

12. Accordingly, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended,³⁹ and Section 1.115(g) of the Commission’s rules,⁴⁰ the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³² See *supra*, ¶ 6; 47 U.S.C. § 309(j); *Auction Order*, 13 FCC Rcd at 15924 (“We find that, except for certain pending applications that are subject to Section 309(l), our auction authority is mandatory, rather than permissive, for all full power commercial radio and analog television stations.”)

³³ *Auction Order*, 13 FCC Rcd at 15986.

³⁴ See *supra*, ¶ 8.

³⁵ See, e.g., *Swan Creek Communications v. FCC*, 39 F3d 1217, 1222 (D.C. Cir. 1994); *Fox River Broadcasting, Inc.*, Order, 93 FCC 2d 127, 129 (1983).

³⁶ See, e.g., *High Country Communications*, Memorandum Opinion and Order, 4 FCC Rcd 6237 (1989).

³⁷ See 47 U.S.C. § 309(d)(1); see also *LUJ, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 16980, 16982 (2002) (finding that although the subject certifications were in fact false, there was nothing on the record as a whole sufficient to raise a substantial and material question of fact whether the applicant intended to deceive the Commission).

³⁸ See, e.g., *Schober*, 23 FCC Rcd at 14266 n. 28 (“The burden is on the petitioner to demonstrate motive to deceive or conceal. The Commission will not infer improper motive from application errors, inconsistencies or omissions accompanied by speculation that lacks factual support”).

³⁹ 47 U.S.C. § 155(c)(5).

⁴⁰ 47 C.F.R. § 1.115(g).

**STATEMENT OF
COMMISSIONER AJIT PAI**

Re: *Christopher Falletti Application for Construction Permit for New FM Station, Medina, North Dakota*, File No. BNPB-20120518AAE, Facility ID No. 190421.

Although today's item reaches the correct result, the path to denying this Application for Review is far more complicated than it should have been. In 1998, the Commission stated that it was "eliminat[ing] the reasonable assurance of site certification requirement for all broadcast and secondary broadcast new and major change applicants."¹ Instead, it indicated that it would "rely on the strict enforcement of our existing construction requirements to ensure that winning bidders in future broadcast auctions construct their facilities in a timely manner."² Currently, however, the instructions for the application for a construction permit to build a commercial broadcast station advise: "All applicants for broadcast facilities must have a reasonable assurance that the specified site will be available **at the time they file FCC Form 301.**"³

In my view, it is the tension between the Commission's 1998 order and the instructions for filling out FCC Form 301 that is primarily responsible for the conflicting Commission precedents discussed in this item⁴ and the number of ongoing disputes regarding this issue. As a result, I hope that we will take steps forthwith to amend the instructions for FCC Form 301 to bring them in line with the policy set forth in today's item.

¹ *Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Televised Fixed Services Licenses et al.*, MM Docket No. 97-234 et al., First Report and Order, 13 FCC Rcd 15920, 15982, para. 174 (1998).

² *Id.* at 15981, para. 172.

³ Instructions for FCC Form 301, Section 1.L, <http://transition.fcc.gov/Forms/Form301/301.pdf> (visited Jan. 20, 2014).

⁴ *See Order* at para. 9.