

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

In the Matter of)	
)	
Edward A. Schober)	
)	
Application for Construction Permit for)	File No. BNPFT-20030825AIW
New FM Translator Station W250BA, at)	Facility ID No. 142127
Manahawkin, New Jersey)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 2016

Released: April 27, 2016

By the Commission:

1. In this Memorandum Opinion and Order, we grant in part the Application for Review filed by Edward A. Schober (Schober) on May 6, 2013 (Application for Review). Schober seeks review of an April 25, 2013, decision by the Audio Division, Media Bureau (Bureau) that: (1) granted a Petition for Reconsideration filed by Jersey Shore Broadcasting Corporation (Jersey Shore) on January 11, 2005 (Petition for Reconsideration); (2) rescinded the grant of Schober’s above-captioned application (Application) for a new FM translator station at Manahawkin, New Jersey (Station); and (3) dismissed the Application.¹ On May 20, 2013, Jersey Shore filed an Opposition to the Application for Review (Opposition) and on June 4, 2013, Schober filed a Reply to the Opposition (Reply).

I. BACKGROUND

2. On March 11, 2003, Schober filed a Form 175 short-form application proposing a new FM translator station at Manahawkin, New Jersey, during the filing window for FM Translator Auction 83.² Schober’s proposal was not mutually exclusive with any other Auction 83 application; accordingly, after the Bureau directed him to do so,³ on August 25, 2003, Schober filed the above-captioned Form 349 long-form Application. On January 30, 2004, Jersey Shore filed a Petition to Deny the Application, claiming that it owned and operated the tower site specified in the Application and had not authorized Schober to use the site. On August 3, 2004, Schober amended the Application to specify a new site. On August 5, 2004, Schober filed an Opposition to the Petition to Deny, acknowledging that he had not contacted Jersey Shore regarding the use of its tower, but claiming that, when he filed the Application, he had the requisite reasonable assurance of site availability because there was space available on the Jersey Shore tower, as well as at other nearby sites.

3. On December 10, 2004, the Bureau granted the Application and issued a construction permit, concluding that “Schober has amended its application to specify a different tower site. Thus,

¹ *Edward A. Schober*, Letter Order, Ref. No. 1800B3-ATS (MB Apr. 25, 2013) (*Reconsideration Decision*). In the *Reconsideration Decision*, the Bureau also dismissed as moot a Petition for Reconsideration filed by Press Communications, LLC on January 14, 2005.

² See BNPFT-20030311AAD; *FM Translator Auction Filing Window and Application Freeze*, Public Notice, 18 FCC Rcd 1565 (MB/WTB 2003).

³ See *FM Translator Auction No. 83 Non-Mutually Exclusive Applications*, Public Notice, 18 FCC Rcd 12702 (MB 2003).

availability of Jersey Shore's tower site is no longer an issue."⁴ On January 11, 2005, Jersey Shore filed the Petition for Reconsideration, arguing again that a lack of reasonable assurance of site availability is a fatal deficiency that cannot be cured by amendment.⁵ On reconsideration, the Bureau rescinded its grant of the Application, agreeing with Jersey Shore that an applicant "may not cure its lack of site assurance by amending its application to specify a different transmitter site."⁶

4. On review, Schober contends that in the 1998 *Auction Order*, the Commission eliminated the reasonable assurance of site availability requirement for auction participants.⁷ Schober further submits that the instructions to the FCC Forms 301 and 349 are incorrect and misleading and should be amended to remove "any mention of requirements for assurance of site availability [for auction applicants]."⁸ Schober also argues that even if the requirement still applies, the *Auction Order* established a liberal amendment policy that allows auction applicants to amend their applications to cure defects, including site availability defects.⁹

5. In its Opposition, Jersey Shore argues that the Application for Review is procedurally unacceptable because it relies upon questions of fact or law upon which the designated authority has had no opportunity to pass, namely, that the site availability requirement was "no longer in force" for auction applicants.¹⁰ Substantively, Jersey Shore contends that the *Auction Order* did not eliminate the underlying site availability requirement and that an initial site availability defect is fatal and may not be amended, citing to a 2008 decision also involving Schober.¹¹

6. In his Reply, Schober argues that the Application for Review should be considered by the Commission because conflicting decisions at the Bureau level indicate the need for Commission-level resolution of the matter.¹² Schober also urges procedural leniency because he is represented *pro se* and has "been waiting for over ten years for a final decision on this application."¹³

II. DISCUSSION

7. *Procedural issues.* No application for review will be granted if it relies upon questions of fact or law upon which the designated authority has been afforded no opportunity to pass.¹⁴ Here, the Bureau was not presented with the argument that the *Auction Order* eliminated the site availability requirement for auction applicants. Therefore, we dismiss the Application for Review to the extent that it relies upon this argument. However, the Bureau did have the opportunity to pass upon the dispositive issue of whether an auction applicant may amend to cure a site availability defect. In the *Reconsideration Decision*, the Bureau directly stated that "an applicant may not cure its lack of site assurance by amending

⁴ *Edward A. Schober*, Letter Order, Ref. No. 1800B3-TB (MB Dec. 10, 2004) at 2.

⁵ Petition for Reconsideration at 3. Schober did not file a response to the Petition.

⁶ *Reconsideration Decision* at 3.

⁷ Application for Review at 1; *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 (1998) (*Auction Order*).

⁸ Application for Review at 3-4.

⁹ *Id.* at 2, 4-6.

¹⁰ Opposition at 1-2.

¹¹ Opposition at 3-5 (citing *Edward A. Schober*, Memorandum Opinion and Order, 23 FCC Rcd 14263 (2008)) (*2008 Schober Decision*).

¹² Reply at 1-2.

¹³ *Id.* at 2.

¹⁴ 47 CFR § 1.115(c).

its application to specify a different transmitter site.”¹⁵ Therefore, we find that the site amendment issue is now properly before the Commission on review.

8. *Substantive issue.* In *Christopher Falletti*,¹⁶ issued after Schober filed his Application for Review, we considered the issue of whether an FM auction applicant may amend to specify a new transmitter site where it lacked reasonable assurance of the availability of its originally-specified transmitter site. Therein, we noted that, in the 1998 *Auction Order*, the Commission adopted a liberal amendment policy for auction applicants, under which “[l]ong-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.”¹⁷ This liberal amendment policy was codified at Section 73.3522(a)(2) of the Rules, which states that amendments to any long form application filed by “a winning bidder or a non-mutually exclusive applicant for a new station . . . in all broadcast services subject to competitive bidding” may be filed to “cur[e] any defect, omission or inconsistency identified by the Commission, or to make minor modifications to the application, or pursuant to § 1.65.”¹⁸

9. In *Falletti*, we clarified that the liberal amendment policy applies to site availability defects in the same way that it does to all other application defects in the auctioned services.¹⁹ In so holding, we ruled, “To the extent that our decision in [the *2008 Schober Decision*] is inconsistent with this holding, it is overruled.”²⁰ Because Schober was allowed under the liberal amendment policy to amend the Application to cure the alleged site availability defect, we reinstate and grant the Application effective with the release of this Order.²¹

10. Accordingly, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended,²² and Sections 1.115(c) and (g) of the Commission’s Rules,²³ the Application for Review filed by Edward A. Schober on May 6, 2013, IS DISMISSED to the extent described in paragraph 7 of this Order and IS OTHERWISE GRANTED.

¹⁵ *Reconsideration Decision* at 3.

¹⁶ *Christopher Falletti*, Memorandum Opinion and Order, 30 FCC Rcd 827 (2015) (*Falletti*).

¹⁷ *Auction Order*, 13 FCC Rcd at 15986-87.

¹⁸ 47 CFR § 73.3522(a)(2)

¹⁹ To the extent that the Instructions to FCC Forms 301 and 349 do not reflect our holding in *Falletti*, we direct the Bureau to modify the relevant language as necessary when these forms are transitioned to the new License and Management System (LMS). See generally, *Media Bureau Announces Completion of First Phase of Licensing and Management System for Full Power TV Stations*, Public Notice, 29 FCC Rcd 11585 (MB 2014).

²⁰ *Falletti*, 30 FCC Rcd at 831.

²¹ We note that Schober was granted tolling based on administrative review on December 10, 2007. *Edward A. Schober*, Letter, Ref. No. 1800B3-IB (MB Dec. 10, 2007). At the time tolling was granted, there were two months and five days remaining before expiration of the Construction Permit. *Id.* When tolling ends, the expiration date will be modified to reflect this remaining time on the Construction Permit, unless Schober requests and receives further tolling.

²² 47 U.S.C. § 155(c)(5).

²³ 47 CFR § 1.115(c),(g).

11. IT IS FURTHER ORDERED that Schober's Application to construct a new FM translator station at Manahawkin, New Jersey (File No. BNPFT-20030825AIW) IS REINSTATED and GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary