

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

In re Applications of

DECATUR TELECASTING, INC.

For Modification File No. BMPCT-880616KE
of Construction Permit
for Station KMPX(TV),
Decatur, Texas

For Extension of File No. BMPCT-890614KG
Time to Construct
Station KMPX(TV),
Decatur, Texas,

DECATUR TELECASTING, INC.
(Assignor)

and File No. BAPCT-890303KM

WORD OF GOD
FELLOWSHIP, INC.
(Assignee)

For Assignment of Construction Permit
for Station KMPX(TV),
Decatur, Texas

MEMORANDUM OPINION AND ORDER

Adopted: December 3, 1992; Released: December 7, 1992

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it for consideration: (a) the above-captioned application of Decatur Telecasting, Inc. (DTI) for the modification of facilities of unbuilt Station KMPX(TV), Channel 29, Decatur, Texas; (b) separate informal objections to that applica-

tion, filed by Dallas Media Investors Corp. (Dallas Media), licensee of Station KDFI-TV, Dallas, Texas, and by Sammy Thornton (Thornton);¹ (c) the above-captioned application for extension of time to construct the station; (d) the above-captioned application of DTI to assign the construction permit to Word of God Fellowship, Inc. (Word of God);² (e) a petition to deny the assignment application, filed jointly by Way of the Cross, Inc. and one of its principals, Ed Bowlds (Bowlds); and (f) related pleadings.³

APPLICATION FOR MODIFICATION OF FACILITIES

2. The underlying construction permit for this station was issued on June 16, 1987. Shortly thereafter, the tower on which DTI was authorized to locate was sold, and the new owner would not allow DTI to lease space on it. Even were the authorized site available, however, DTI recognized that operating from there would not be economically feasible. Consequently, the permittee immediately started searching for an alternate site that would allow for service to a greater population, while at the same time, provide principal-community coverage to Decatur. On June 16, 1988, exactly one year after the underlying construction permit was issued, DTI filed the instant modification application to move the transmitter site approximately 50 miles to the southwest in an effort to serve the Dallas-Ft. Worth area.⁴

3. The site proposed on June 16, 1988, and several subsequent ones, however, were later found to be unavailable, and on January 6, 1992, the permittee amended its application to specify the site currently proposed. The application as amended now proposes a directional antenna 183 meters (600 feet) above ground level on a tower located in Dallas, Texas, and utilizing visual effective radiated power of 3980 kilowatts. Grant of the application would result in a Grade B gain area encompassing more than 2,100,000 persons with a corresponding loss area including approximately 150,000 persons. Included in the proposed loss area would be a "white area" of approximately 24 square miles and 621 persons with no other off-the-air television signals and a "gray area" of 21 square miles and 1,365 persons with only one such service.

4. On June 10, 1992, Dallas Media filed an informal objection to the modification application as presently amended. Thornton's informal objection followed on November 26, 1990, arguing many of the same points. Specifically, Dallas Media maintains that the application violates the Commission's environmental rules in that the proposed site would be located in a floodplain and an Environmen-

¹ Thornton is an applicant for a new television station to operate on Channel 68 in Arlington, Texas. His application (BPCT-850422KR), however, was denied by the Commission's Review Board on May 14, 1991, and his application for review is pending. *Charisma Broadcasting Corporation*, 6 FCC Rcd 3411 (Rev. Bd. 1991).

² On February 28, 1989, DTI and Word of God agreed to substitute Karen Hicks, the president and sole stockholder of DTI, for DTI in their contract for sale of the station. Without a conforming *pro forma* assignment application filed on FCC Form 316 assigning ownership of the permit from DTI to Hicks, however, Hicks cannot personally serve as the assignee. Consequently, the February 28, 1989, amendment has no effect.

³ On April 3, 1991, Susquehanna Radio Corporation (Susquehanna) and its subsidiary, KLIF Co., licensee of standard broadcast station KLIF in Dallas, filed an informal objection against

DTI's modification application. That objection, however, was premised on Station KMPX operating from a different site than the one it now proposes, and Susquehanna's objection is no longer germane. Consequently, its informal objection will be dismissed as moot.

⁴ Because the unavailability of DTI's transmitter site constituted a circumstance beyond its control and because it was diligent in seeking and proposing an alternate site, we find that DTI has complied with Section 73.3534(b) of the Commission's Rules and that grant of its extension application is warranted. For the same reason, we find that consideration of DTI's assignment application, which was filed more than one year after the issuance of DTI's underlying permit, is in order.

tal Assessment was not prepared. Second, both Dallas Media and Thornton contend that the instant proposal would not only fail to provide principal community coverage of Decatur, as required by Section 73.685 of the Commission's Rules, but that the town would also lie outside the station's predicted Grade B contour. Moreover, Dallas Media asserts that operation of the station as proposed would cause objectionable interference to the viewers of Station KDFI-TV in a wide area. In a subsequent pleading, Dallas Media argues that the permittee's proposal to move its transmitter site 51 miles in order to serve the already well served Dallas-Fort Worth area has resulted in significant Grade B losses. Dallas Media contends that a change of such magnitude should be considered in a rulemaking proceeding to reallocate the channel to the Dallas area, and Thornton also asserts that Word of God intends to serve Dallas and not its community of license. Thornton further reasons that if Word of God does not want to serve Decatur, he is willing to apply for the station upon notification of the channel's availability. Dallas Media also notes the permittee's failure to provide an economic showing to support its claim that it must relocate to the Dallas area in order to compete with the existing stations in the market. Moreover, Dallas Media contends that the relocation of the Decatur station to Dallas would have an adverse impact on future implementation of high-definition television in the Dallas area.

5. In opposition, the permittee submits a letter from the City of Dallas acknowledging that the proposed tower site is located in a floodplain, but noting that the erection of television towers is a specified permitted use in that area. The permittee further adds that no objections have been expressed by applicable governmental agencies. With respect to the contention that the station would not provide an 80 dBu signal to Decatur, the permittee submits an engineering showing based on NBS Tech Note 101 prediction methods to demonstrate that the proposed operation would provide a median signal level of 86.2 dBu to Decatur. Additionally, the permittee argues that its proposal meets all of the Commission's spacing requirements and that there is therefore no basis to presume that additional objectionable interference would likely occur. In any event, Word of God, the proposed assignee of the permit, states that it will undertake appropriate corrective action regarding interference should it be needed. With respect to Dallas Media's assertion of significant loss areas created by the proposed move, the permittee states that only nine percent of its authorized service area would comprise the loss area and that the area is well served by other television stations and has a significant cable television penetration. The permittee further argues that it is not abandoning Decatur in favor of Dallas. It notes that the station's main studio will be located within the station's predicted principal community contour and that the station will comply with Commission requirements as to public file and telephone access. The permittee further asserts that the proposed move would have no impact on the initiation of high-definition television service in Dallas, due to the fact that KMPX(TV) is an existing construction permit.

6. *Discussion.* At the outset, we find that the proposed site is appropriate for the construction of a television tower, despite its location in a floodplain. In this connection, we note that the City of Dallas has stated that television towers are a specified permitted use in that area. The question then becomes whether the station will provide the requisite 80 dBu signal to Decatur. In that connection, the

application shows that, operating as proposed, the permittee would not provide a predicted Grade B signal to Decatur. Because the terrain between the proposed transmitter site and the community of Decatur is typified by rolling hills sloping upward toward Decatur, however, the permittee utilized an alternative engineering method to demonstrate that the requisite 80 dBu signal would be provided to Decatur. Dallas Media has not contested the propriety of utilizing the Tech Note 101 method for computing principal community coverage but does argue that principal community coverage of Decatur will not be provided. In that respect, Dallas Media takes exception to some of the assumptions DTI made in making its calculations, but has not stated what it believes to be the "correct" assumptions, does not quantify the extent of the alleged error, and does not provide any alternate calculations or measurements. The Commission's engineers, however, have confirmed the applicant's showing under Tech Note 101 that the median signal level in Decatur will be in excess of the required 80 dBu. Thus, we find that the permittee would provide principal community coverage to Decatur. With respect to Dallas Media's contention that operation of Station KMPX(TV) as proposed would cause objectionable interference to its signal, we note that proposal meets all Commission spacing requirements, and Dallas Media is not entitled to any greater protection than that provided by our rules. See 47 C.F.R. Section 73.612(a). In any event, Word of God states that it will undertake appropriate corrective action to eliminate any interference, should it be needed.

7. While grant of the proposed modification application would result in a Grade B loss area of 150,000 persons, most of the loss area would be well served by stations from the Dallas-Fort Worth area, Wichita Falls, Texas, the Lawton-Ada-Ardmore, Oklahoma, area, or a combination of those markets. There would, however, be a very small "white area" of 621 persons with no off-the-air signals and a "gray area" of 1,365 persons receiving the off-the-air signal of only Station KXII(TV) in Ardmore. Nevertheless, we note that both of these areas have cable television penetration of at least 70 percent of the households. Moreover, KMPX(TV) is not an operating station, and any projected losses would only be theoretical and not actual. We further note that grant of the application would result in a Grade B gain area encompassing more than 2,100,000 persons.

8. We reject Dallas Media's contention that the proposal is an attempt by Word of God to implement a "de facto" reallocation of the channel from Decatur to Dallas. The Commission abolished its "de facto" reallocation policy in 1983, stating that a licensee would presumptively serve its designated community of license if it provides the requisite signal to the community, if it locates its main studio there, and if it proposes programming that will serve the needs of the community of license. *Suburban Community Policy, Berwick Doctrine and De Facto Reallocation Policy*, 93 FCC 2d 436, 456 (1983), *recon. denied*, 56 RR 2d 835 (1984). Since that time, the Commission has further amended its rules to allow a licensee to locate its main studio anywhere within the station's principal community contour. *Main Studio and Program Origination Rules*, 2 FCC Rcd 3215 (1987). Word of God has stated that it intends to locate its main studio within its predicted principal community service contour, and, as noted previously, the proposed facilities will provide the requisite principal community signal to Decatur. Additionally, Word of God has stated that it "intends to be aware of the problems and issues facing the

service area and will address them through news and public affairs programs." In that connection, the move of the transmitter does not change the licensee's responsibility to be primarily responsive to the needs of its community of license, Decatur. Accordingly, we find that the instant proposal meets the Commission's basic licensing requirements.

9. Dallas Media also contends that grant of the proposed application would effectively circumvent the Commission's "freeze" on the filing of certain television applications in preparation for the advent of high-definition television. The Commission has imposed a "freeze" on the filing of applications for new television stations in many areas of the country, including the vicinity of Dallas; however, the "freeze" does not apply to changes requested by existing stations or to applications on file at the inception of the "freeze". *Advanced Television Systems*, 52 Fed. Reg. 28346 (July 29, 1987), Mimeo No. 4074 (released July 17, 1987). By that, the Commission intended to limit the "freeze" to applications for allocated but unapplied for channels. Because Station KMPX(TV) has already been authorized, any minor modification applications it might subsequently file, consistent with existing spacing requirements, will not be subject to the "freeze", nor will the move adversely affect the Commission's ability to implement ATV in the Dallas area.

10. For the reasons stated above, we do not believe that either Dallas Media or Thornton have raised any substantial and material questions of fact with respect to the modification application. Consequently, that application will be granted.

APPLICATION FOR ASSIGNMENT OF CONSTRUCTION PERMIT

11. On December 27, 1988, DTI entered into an agreement with Word of God for assignment of the construction permit, and the assignment application was filed with the Commission on March 3, 1989. On April 14, 1989, Bowlds filed a petition to deny that application. In support of his petition, Bowlds argued that, on October 11, 1986, he entered into an agreement whereby he would acquire 49 percent of a new corporation that was to serve as the station's permittee. Consequently, he contends that the agreement between DTI and Word of God constitutes a breach of his contract with Hicks and that the instant assignment application should be denied. In that connection, Bowlds asserts that he has filed suit in the state and federal courts claiming breach of contract and seeking specific performance and damages.

12. The Commission has long held that it is not the proper forum for the resolution of private contractual disputes and that any redress should be sought in a local court of competent jurisdiction. *John L. Runner, Receiver*, 36 R.R. 2d 773, 778 (1976). Although we acknowledge the fact that Bowlds has sought judicial action in the matter, at this juncture we are only presented with general, unsupported and conclusory allegations of a breach of contract that have not yet been adjudicated by the courts. Further, Bowlds has not obtained an injunction against the sale of the station requiring deferral of action on the application.

With respect to Thornton's statement that he is willing to acquire the station and operate it in Decatur, Section 310(d) of the Communications Act provides that "the Commission may not consider whether the public interest, convenience or neces-

Carnegie Broadcasting Co., 5 FCC 2d 882, 885 (1966). Moreover, while the pendency of a lawsuit does not enjoin the Commission from acting on applications, it is our practice to condition the grant of an application on the outcome of the suit so as to remove any possible impact on the litigants' interests. *Chief Washakie TV*, 46 R.R. 2d 1594, 1598, n.7 (1980). Finally, Bowlds has not alleged any other facts which, in any way, reflect adversely upon the qualifications of the assignor or assignee, and we find Word of God qualified to be a Commission licensee.⁵ Consequently, we will grant the assignment application.

CONCLUSION

13. Accordingly, for the reasons stated, the informal objection of Susquehanna Radio Corporation IS DISMISSED as moot, the informal objections of Dallas Media Investors Corp. and Sammy Thornton and the joint petition to deny of Way of the Cross and Ed Bowlds ARE DENIED, the above-captioned extension, modification, and assignment applications ARE GRANTED. Grant of the assignment application, however, is without prejudice to whatever action the Commission may deem appropriate as a result of the proceedings in *Way of the Cross, Inc. and E.C. Bowlds v. Karen L. Hicks*, File No. 89 CVS 785 (Gen. Ct. of Justice, Super. Ct. Div., State of North Carolina, filed April 14, 1989); and in *Way of the Cross, Inc. and E.C. Bowlds v. Karen L. Hicks*, Civil Action File No. 2:91 CV00348 (U.S. Dist. Ct. for the Mid. Dist. of North Carolina, Greensboro Div., filed July 15, 1991).

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman, Chief
Video Services Division
Mass Media Bureau

sity might be served by the transfer, assignment or disposal of the permit or license to a person other than the proposed transferee or assignee." Consequently, we cannot accede to Thornton's wishes in this respect.