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Washington, D.C. 20554

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**DA 08-1536**

In Reply Refer to:

1800B3-KD

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In re: KLFF-FM, San Luis Obispo, CA  
Facility ID No. 38281  
Logos Broadcasting Corporation

Application for License  
File No. BLH-19950929KC  
Informal Objection

Application for Extension of Time to Construct  
File No. BMPED-19940706JA  
Informal Objection

Petition to Revoke Construction Permit

Dear Counsel:

We have before us: (1) the referenced application of Logos Broadcasting Corporation ("Logos") for an extension of time to construct noncommercial educational ("NCE") Station KLFF-FM, San Luis Obispo, California ("Station"); (2) a "Formal Opposition to Application" filed by Radio Representatives, Inc. ("RRI") on October 27, 1994 ("Objection");<sup>1</sup> (3) a "Petition to Revoke Construction

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<sup>1</sup> Logos filed an Opposition to Formal Opposition to Application on December 8, 1994 ("Opposition"). RRI submitted a reply to the Opposition on January 18, 1995 ("Reply"). RRI filed a Supplement to Formal Opposition to Application on February 9, 1998.

Permit” filed by RRI on January 26, 1995 (“Petition to Revoke”);<sup>2</sup> (4) an Application for License, filed by Logos on September 29, 1995 (“Application”);<sup>3</sup> and (5) related pleadings.

## I. Background

Despite the voluminous pleadings filed in this proceeding, the main arguments advanced by RRI can be distilled to the following issues: (1) whether Logos made misrepresentations regarding the availability of the tower site proposed in its extension application; (2) whether Logos had reasonable assurance of the tower site’s availability; (3) whether Logos misrepresented the nature of its NCE programming in its permit application; (4) whether Logos is qualified to be an NCE licensee based on its current programming; (5) whether Logos was financially qualified to construct and operate the Station when it filed its application; (6) whether Logos misrepresented facts or lacked candor in certifying that it was financially qualified to construct and operate the Station; and (7) whether Logos’ operation of the Station is in compliance with the Commission’s radiofrequency (“RF”) radiation safety standards.

## II. Discussion

Informal objections must, pursuant to Section 309(e) of the Communications Act of 1934, as amended (the “Act”),<sup>4</sup> provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the Application would be *prima facie* inconsistent with Section 309(a) of the Act,<sup>5</sup> which governs our evaluation of license to cover applications. Specifically, Section 309(a) provides that we are to grant an application if, upon consideration of the application and pleadings and other such matters of which we may officially take notice, we find that the public interest, convenience, and necessity will be served by the granting of such application. If, however, the applicant fails to meet that standard, the Commission may deny the application after notice and opportunity for a hearing under Section 309(e) of the Act. After consideration of the totality of the evidence before us, we find that RRI has failed to raise a substantial and material question of fact calling into question Logos’

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<sup>2</sup> Logos filed an Opposition to Petition to Revoke on February 27, 1995 (“Opposition to Petition to Revoke”). RRI filed a “Supplement to Petition to Revoke Construction Permit” on April 20, 1995 (“April 20<sup>th</sup> Supplement”). Logos filed an “Opposition to Supplement to Petition to Revoke Construction Permit” on May 30, 1995 (“Opposition to April 20<sup>th</sup> Supplement”). RRI filed a “Reply to Opposition to Supplement to Petition to Revoke Construction Permit” on July 24, 1995. Logos filed a further “Supplement to Petition to Revoke Construction Permit and Opposition to Application for License” on April 9, 1996 (“April 9<sup>th</sup> Supplement”). Logos filed an “Opposition to [Further] Supplement to Petition to Revoke Construction Permit and Opposition to Application for License” on May 22, 1996, and filed a “Correction” to this pleading on June 13, 1996. Logos filed a “Supplement to Opposition to Supplement to Petition to Revoke Construction Permit and Opposition to Application for License” on June 24, 1996. RRI filed a “Supplement to Petition to Revoke Construction Permit” on April 30, 1998. Logos filed an “Opposition to Supplement to Motion to Revoke Construction Permit” on May 22, 1998. RRI filed a “Reply to Opposition to Supplement to Petition to Revoke Construction Permit” on June 8, 1998. RRI requests that its pleadings be treated as informal objections pursuant to Section 73.3587 of the Rules. *See* 47 C.F.R. 73.3587

<sup>3</sup> File No. BLED-19950929KC.

<sup>4</sup> 47 U.S.C. § 309(e).

<sup>5</sup> 47 U.S.C. § 309(a). *See, e.g., WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff’d sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *rehearing denied* (Sept. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (informal objections, like petitions to deny, must contain adequate and specific factual allegations sufficient to warrant the relief requested).

character or its basic qualifications as a licensee as to require an evidentiary hearing. Accordingly, we deny RRI's objections and grant the Application.

#### A. Site Issues

*Misrepresentation Claim.* Logos filed its initial permit application on February 19, 1991.<sup>6</sup> The application originally specified a transmitter at a height of 87 meters on the tower of Station KSBY-TV, San Luis Obispo. On September 30, 1991, Logos amended its application, proposing a height of 53 meters on the KSBY-TV tower. Attached to the amendment was a September 26, 1991, letter to Logos from the tower owner (the "Brodsky Letter") indicating that, although it had previously leased space at 87 meters (to the permittee of Station KWWV(FM), Morro Bay, California), Logos, nevertheless, could negotiate for space at 53 meters and could continue to specify the tower in its permit application. The letter also indicated that since the tower was fully loaded, in order to add KLFF(FM), any necessary analysis and reinforcement would be at Logos' expense. In early February 1992, KWWV(FM) commenced operations at Logos' former 87-meter elevation.

Logos' permit application, as amended, was granted January 27, 1993, with a July 27, 1994, completion deadline. On July 6, 1994, Logos filed: (1) an application to modify its permit to specify a new, nearby site at Cuesta Peak;<sup>7</sup> and (2) an application for extension of time to construct.<sup>8</sup> As justification for the proposed move, Logos stated the following:

After long negotiations, Logos Broadcasting Corporation has discovered within the last few months that the site specified in its original application is no longer available because the site owner leased the space to another tenant.

Despite filing the modification application, Logos constructed its facility and commenced operations in September 1995 pursuant to program test authority at the 53-meter location on the KSBY-TV tower. On February 10, 1999, Logos' construction permit was extended through August 16, 2000, by virtue of the *Streamlining Report and Order*.<sup>9</sup> Its extension application was subsequently dismissed on February 16, 1999.<sup>10</sup>

RRI first alleges that Logos' assertion in the extension application that it "discovered *within the last few months* that the site specified in the original application is *no longer available because the owner . . . leased the space to another tenant*" (emphasis added) constitutes a misrepresentation.<sup>11</sup> According to RRI, Logos was aware as far back as September 30, 1991, that KWWV(FM) was to locate at its previously specified elevation.<sup>12</sup> RRI maintains that since the 53-meter location was unoccupied and thus

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<sup>6</sup> File No. BPED-910219MJ.

<sup>7</sup> File No. BMPED-940706IA.

<sup>8</sup> File No. BMPED-940706JA.

<sup>9</sup> The Commission's *Streamlining Order* gave all broadcast permittees with valid authorizations or extensions on the effective date of the order additional time to construct. See *1998 Biennial Regulatory Review - Streamlining of Mass Media Applications, Rules, and Processes*, Report and Order, MM Docket No. 98-43, 13 FCC Rcd 23056 (1998); Memorandum Opinion and Order, 14 FCC Rcd 17525 (1999).

<sup>10</sup> *Letter to Logos Broadcasting Corp. from Linda Blair*, reference 1800B3-MFW (MB Feb. 16, 1999).

<sup>11</sup> See Objection at 3.

<sup>12</sup> See *id.* at 2.

not, as represented, unavailable, Logos' move to a new tower was not forced, but voluntary. RRI alleges that Logos achieved no significant construction progress and misrepresented that it only recently lost its site in order to demonstrate circumstances beyond its control to justify an extension and relocation. RRI adds that Logos was motivated to avoid spending \$10,000 to \$50,000 to analyze and reinforce the KSBY tower.<sup>13</sup>

Logos admits that its representation that it needed to change sites because its designated location on the KSBY tower was occupied by another tenant, while "not literally accurate," is "accurate in a larger sense."<sup>14</sup> According to Logos, it sought another site because, as a practical matter, installation of the KWWV(FM) facilities meant that the tower was fully loaded and no longer available to it. Logos adds that the tower owner expressed doubt whether the structure could be strengthened to accommodate KLFF(FM) and recently required that any lease be subject to an "unacceptable" six-month cancellation provision.<sup>15</sup> Finally, Logos argues that its ability to receive an extension grant was not dependent on site availability since Logos had already substantially constructed the Station when the extension application was filed.<sup>16</sup> As such, it asserts that it had no motive to deceive the Commission regarding site availability.<sup>17</sup>

Section 1.17(a) of the Rules provides that no person, in any written or oral statement of fact, may provide material factual information that is incorrect or misleading.<sup>18</sup> It also provides that no person may provide in any written statement of fact, "material factual information that is incorrect or omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading without a reasonable basis for believing that any such material factual statement is correct and not misleading."<sup>19</sup> Any applicant for a Commission authorization is subject to this rule.<sup>20</sup> Recently, the Commission expanded the scope of Section 1.17 of the Rules,<sup>21</sup> with respect to investigations and adjudications, to prohibit written and oral statements of fact that are intentionally incorrect or misleading and written statements that are made without a reasonable basis for believing the statement is correct and not misleading.<sup>22</sup> Misrepresentation involves false statements made with an intent to deceive.<sup>23</sup> Lack of candor involves concealment, evasion, or other failure to be fully forthcoming, accompanied by an intent

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<sup>13</sup> *See id.* at 4.

<sup>14</sup> *See* Opposition at 6.

<sup>15</sup> *Id.* at 7.

<sup>16</sup> Specifically, Logos claims the following construction progress at the KSBY site: execution of a three year satellite program contract; purchase of satellite dish and associated hardware; commencement of studio construction; purchase and storage of transmitter; and substantial down payment towards purchase of antenna, remote control, monitoring, and EBS equipment. *See* Opposition at 4.

<sup>17</sup> *See* Opposition at 10.

<sup>18</sup> 47 C.F.R. § 1.17(a).

<sup>19</sup> 47 C.F.R. § 1.17(a)(2).

<sup>20</sup> *See* 47 C.F.R. §1.17(b)(1).

<sup>21</sup> 47 C.F.R. §1.17.

<sup>22</sup> *In the Matter of Amendment of Section 1.17 of the Commission's Rules Concerning Truthful Statements to the Commission*, Report and Order, 18 FCC Rcd 4016 (2003).

<sup>23</sup> *Fox River Broadcasting, Inc.*, Order, 93 FCC 2d 127, 129 (1983) ("*Fox River*").

to deceive.<sup>24</sup> However, “a false statement, even absent an intent to deceive, may constitute an actionable violation of Section 1.17 of the Rules.”<sup>25</sup>

We agree with Logos that the extension would have been warranted on the basis of substantial construction.<sup>26</sup> While nothing in the record evidences an intent to mislead the Commission, we find, however, that Logos’ representation regarding the availability of the KSBY tower site in its extension application was demonstrably false. By Logos’ own admission and as demonstrated by the fact that it ultimately utilized the KSBY tower site, the KSBY tower site was available. As such, we believe there was no reasonable basis for Logos’ representation that the KSBY tower site was no longer available.

The Commission and the courts have recognized that “[t]he FCC relies heavily on the honesty and probity of its licensees in a regulatory system that is largely self-policing.”<sup>27</sup> Full and clear disclosure of all material facts in every application is essential to the efficient administration of the Commission’s licensing process, and proper analysis of an application is critically dependent on the accuracy and completeness of information and data which only the applicant can provide. Because the violation here occurred more than one year ago, the statute of limitations prohibits us from initiating a forfeiture proceeding in this case.<sup>28</sup> For this reason, we admonish Logos for its violation of Section 1.17 of the Rules. But for the running of the statute of limitations, we would have proposed a forfeiture in this case. We remind Logos that we expect it to provide full disclosures in its communications with the Commission and caution it that we will not hesitate to impose appropriate sanctions against it for any further violations.

*Site Assurance Issue.* RRI next argues that inasmuch as Logos failed to satisfy the structural analysis and reinforcement contingencies for the KSBY tower as outlined in the Brodsky Letter, it lacked reasonable site assurance.<sup>29</sup> RRI further argues that in light of the owner’s expressed doubt whether the tower could accommodate KLFF(FM), Logos had only an indeterminate chance of obtaining a lease and, thus, misrepresented its site assurance from as far back as February 1992.

Reasonable assurance ordinarily requires only a clear indication from the owner that it is amenable to entering a future arrangement for use of the property as a transmitter site.<sup>30</sup> Where a site

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<sup>24</sup> *Id.*

<sup>25</sup> See e.g., *Southern Skies Corporation*, Memorandum Opinion and Order, 11 FCC Rcd 19176, 19182 (1996).

<sup>26</sup> Under Commission Rules in effect at the time Logos filed its extension application, in order to establish an entitlement to an extended construction permit, Logos was required to establish either that construction had not been completed due to circumstances “beyond the control of the permittee”, that “substantial progress” had been made, or that construction was “completed.” 47 C.F.R. § 73.3634(b). 47 C.F.R. §73.3534(a)(2) (“i.e., demonstration that equipment is on order or on hand, site acquired, site cleared and construction proceeding toward completion”). We find that the circumstances here are similar to past cases in which we granted permit extensions based on substantial construction of the station. See *Benko Broadcasting Co.*, 5 FCC Rcd 1301 (MMB 1991); *Horseshoe Bay Centrex Broadcasting Co.*, Memorandum Opinion and Order, 5 FCC Rcd 7125 (1990). We note, however, that extension requests filed since 1999 are currently evaluated under the stricter standard set forth in revised Section 73.3598(b) of the Rules. See 47. C.F.R. § 73.3598(b).

<sup>27</sup> See *Commercial Radio Service, Inc.*, Order to Show Cause, 21 FCC Rcd 9983, 9986 (2006)(citing, e.g., *Contemporary Media, Inc., v. FCC*, 214 F.3d 187, 193 (D.C. Cir. 2000)).

<sup>28</sup> See 47 U.S.C. § 503(b)(6)(B).

<sup>29</sup> See Reply at 9.

<sup>30</sup> *Elijah Broadcasting Corp.* Memorandum Opinion and Order, 5 FCC Rcd 5350, 5351 (1990). See *Cuban-American Limited*, Decision, 2 FCC Rcd 3264, 3264 (Rev. Bd. 1987) (“*Cuban-American*”) (touchstone for reasonable assurance is owner’s express approval of site specification); *Shirley Marchant*, Initial Decision, 5 FCC

owner establishes conditions precedent to negotiating a lease, the applicant cannot ignore the conditions and still claim reasonable assurance.<sup>31</sup> However, given the KSBY-TV tower owner's amenability to leasing space to Logos, in particular as evidenced by the current KLFF(FM) operations at 53 meters on the KSBY-TV tower, it does not appear that the analysis and reinforcement were conditions precedent for consent to designate the site in applications to the Commission.<sup>32</sup> Accordingly, we conclude that Logos had reasonable assurance of the KSBY tower site when it filed its application.

## **B. NCE Programming Issues**

RRI alleges that Logos misrepresented its programming plans to obtain an NCE permit.<sup>33</sup> In support of its permit application Logos specified that it would broadcast programming geared to the educational needs of local prison inmates, educational and instructional programming geared to a local school, and religious instruction. It also stated that it would develop a student internship program. Referencing 1994 promotional/fundraising materials, RRI asserts that Logos abandoned the programming proposed in its permit application in favor of predominately music and entertainment programming with little or no educational component.<sup>34</sup> According to RRI, Logos on several occasions in 1994 indicated to its supporters that KLFF(FM)'s format would include a significant Christian music component, if not exclusively music programming.<sup>35</sup> Moreover, RRI, in its "Supplement" to its revocation petition, references a November 4, 1994 "Position Statement" of Logos which indicates: "KLFF(FM) is being developed to broadcast contemporary Christian Music . . . ."<sup>36</sup> According to RRI, this shows that the Logos' purpose is not educational and that its programming does not fulfill its programming responsibilities as the holder of an NCE authorization.

Logos asserts that its references to KLFF(FM) as a "Christian music station" are merely format descriptions which do not accurately reflect its programming.<sup>37</sup> A March 12, 1998, staff inquiry letter<sup>38</sup> requested evidence that programming since commencement of operations pursuant program test authority in late September 1995 has been consistent with representations in Logos' permit application. In its April 8, 1998, response, Logos indicates several reasons for not adhering to the programming plans outlined in its permit application.<sup>39</sup> First, it suggests that Station KGDP, Santa Maria, California, provides religious and Christian programming. Second, Logos references a subsequent decision to reach a younger audience through a more music-oriented format with shorter programs. Third, Logos asserts that some proposed programming proved to be unavailable. Fourth, Logos states that it does, in fact, broadcast some biblical

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Rcd 2616, 2619 (I.D. 1990) (owner's conduct in permitting site specification, among other things, mislead applicant into believing she had reasonable assurance).

<sup>31</sup> *Cuban-American*, 2 FCC Rcd at 3266.

<sup>32</sup> *See Puopolo Communications, Inc.*, Order, 60 RR 2d 964 (Rev. Bd. 1986) (owner's express assurances of availability provided tower was strong enough to support additional antenna were sufficient, although owner later concluded tower wouldn't be strong enough).

<sup>33</sup> *See* Petition to Revoke at 8.

<sup>34</sup> *See id.* at 6-7.

<sup>35</sup> *See* Petition to Revoke Attachments 6-9.

<sup>36</sup> *See* April 20<sup>th</sup> Supplement at 3.

<sup>37</sup> *See* Opposition to Petition to Revoke at 2-3.

<sup>38</sup> *Letter to Logos Broadcasting Corporation from the Chief, Audio Services Division, Mass Media Bureau* (reference 1800B3-JR).

<sup>39</sup> *See* April 8, 1998 Response to Commission Inquiry, Verified Statement of Dan M. Lemburg.

and educational programming. Specifically, Logos states that the Station has been broadcasting at least one educational program referenced in its permit application, called "Focus on the Family," Monday through Friday since the Station commenced operation. It also regularly broadcasts an educational program called "Family Life Today." According to Logos, program topics have included "the absolute quickest way to help your child change," "the secrets of a lasting marriage," and "how to be your mate's best friend." Similarly, Logos points to a daily program called "How to Manage Your Money," which offers financial advice from a spiritual perspective. Logos admits that it has not broadcast programs geared to the curriculum of the local Christian School, referencing a lack of resources and unforeseen problems of the school, specifically, allegations of child abuse. Citing a lack of staff resources, Logos also admits to a lack of programming geared to the local prison inmate population, although it stresses that its programming fills a need in the prison community.

In 1981, the Commission adopted rules substantially deregulating programming requirements.<sup>40</sup> The *Deregulation Order* removed the formal ascertainment requirements, quantitative programming guidelines, and the "promise vs. performance" programming standard. These rule changes were intended to increase a licensee's flexibility in meeting the changing needs of the community. Since that time, radio stations have been directed to use their good faith discretion in determining the type of programming that they will offer and the Commission does not prescribe the nature or amount of non-entertainment programming that each radio broadcast station should broadcast.<sup>41</sup> The Commission will not substitute its judgment for that of the station regarding programming matters.<sup>42</sup> With certain limited exceptions not applicable here, licensees are afforded broad discretion in the scheduling, selection, and presentation of programs aired on their stations. Moreover, Section 326 of the Act and the First Amendment of the Constitution prohibit any Commission actions which would improperly interfere with the programming decisions of licensees.<sup>43</sup>

Based on the record before us, we find insufficient evidence that Logos intentionally misrepresented its programming plans.<sup>44</sup> While it may have departed from its initial programming plans, there is no evidence that Logos was disingenuous when it described in its initial permit application how the Station would be used to advance educational purposes. It also has adequately explained its departure from its initial programming objectives.

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<sup>40</sup> *Deregulation of Radio*, Report and Order, 84 FCC 2d 968, *recon. granted in part*, 87 FCC 2d 797 (1981) ("*Deregulation Order*"). *Accord*, *Programming Information in Broadcast Applications*, Memorandum Opinion and Order, 3 FCC Rcd 5467, 5468 (1988) (the Commission deleted the requirement for applicants to submit detailed programming proposals that established "promises" from which to later evaluate a licensee's performance, replacing it with a requirement to provide a brief narrative description of proposed community programming. "To mandate a specific, detailed proposal from applicants would be inconsistent with the flexibility accorded licensees to adapt programming to changing marketplace incentives without regulatory intrusion." *Id.*)

<sup>41</sup> *Id.*

<sup>42</sup> *See Entertainment Formats*, Memorandum Opinion and Order, 60 FCC 2d 858 (1976), *recon. denied*, 66 FCC 2d 78 (1977) and *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 595-98 (1981) ("Commission has provided a rational explanation for its conclusion that reliance on the market is the best method of promoting diversity in entertainment formats.").

<sup>43</sup> Section 326 of the Act states in part: "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship ... and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." 47 U.S.C. § 326.

<sup>44</sup> *See Fox River*, *supra* n.23.

Moreover, we find that the programming offered by Logos fulfills its responsibilities as the holder of an NCE authorization. In applying Section 73.503 of the Rules, the Commission has required that NCE applicants be: (a) a government or public educational agency, board or institution; (b) a private, nonprofit educational organization; or (c) a nonprofit entity with a demonstrated educational purpose.<sup>45</sup> We require that an applicant described in (a) or (b) above have an educational program and demonstrate how its programming will be used for the advancement of that program. An applicant applying as (c) above must specifically show: (i) that it is, in fact, a nonprofit educational organization, (ii) that it has an educational objective, and (iii) how its programming will further that objective.<sup>46</sup> The requirement that NCE licensees provide programming that advances an educational objective may be satisfied by a variety of programs, including, but not limited to, “instructional programs, programming selected by students, bible study, cultural programming, in-depth news coverage, and children’s programs such as Sesame Street that entertain as they teach.”<sup>47</sup> We have also stated that “in order to qualify as an educational station, it is not necessary that the proposed programming be exclusively educational.”<sup>48</sup> Finally, we note that the Commission historically “has had the appropriately limited role of facilitating the development of the public broadcasting system rather than determining the content of its programming.”<sup>49</sup>

Given these considerations, we find that Logo has adequately satisfied its programming requirements as a nonprofit entity with a demonstrated educational purpose. The Station broadcasts several educational programs, as well as short teachings. Moreover, Logos has demonstrated that it has not abandoned its efforts to coordinate internship programs with area schools. Finally, as established by the numerous letters sent to the Station from prison inmates and submitted by Logos in support of its programming, Logos clearly has created a relationship with the local men’s prison and appears to serve a need in that community. Accordingly, we conclude that Logos’ programming sufficiently advances its educational purpose.

### C. Financial Qualifications Issue

RRI alleges that Logos falsely certified as to its financial qualifications in its permit application. It bases this contention on that fact that, subsequent to grant of its permit, Logos relied on donor support for construction and initial operating funds.<sup>50</sup> RRI cites to funding appeals directed to Logos’ supporters indicating a need for contributions for construction and initial operations.<sup>51</sup>

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<sup>45</sup> 47 C.F.R. 73.503.

<sup>46</sup> See, e.g., *Music Ministries, Inc.*, Hearing Designation Order, 9 FCC Rcd 3628 (MMB 1994).

<sup>47</sup> *In the Matter of Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Further Notice of Proposed Rulemaking, 13 FCC Rcd 21167, 21169 (1998).

<sup>48</sup> *Lower Cape Communications, Inc.*, Memorandum Opinion and Order, FCC 80-453, 47 RR 2d 1577, 1579 (1980). See also *Florence Bridges*, Memorandum Opinion and Order, FCC 78-719, 44 RR 2d 667, 668 (1978), and *LPFM Report and Order*, 15 FCC Rcd at 2214.

<sup>49</sup> *Revision of Programming Policies and Reporting Requirements Related to Public Broadcasting Licensees*, Notice of Proposed Rule Making, 87 FCC 2d 716, 732 (1981). See also *License Renewal Applications of Certain Commercial Radio Stations Serving Philadelphia, Pennsylvania*, Memorandum Opinion and Order, 8 FCC Rcd 6400, 6401 (1993) (licensees have broad discretion over programming decisions).

<sup>50</sup> See Petition to Revoke Attachments 8, 9, 11, and 12.

<sup>51</sup> See Petition to Revoke at 12.

In its March 20, 1998, response to a staff letter<sup>52</sup> inquiring about its initial estimates of construction and initial operating funds as well as its funding source, Logos points to a bank letter from Mid-State Bank indicating a willingness to consider a \$250,000 loan for construction and initial operation "based on the financial strength and credit-worthiness of all five principals. . . ." as well as the establishment "a full banking relationship (by the principals)."<sup>53</sup> The letter also stated the loan term, interest rate, and estimated monthly payments. In response to a subsequent staff inquiry asking for evidence that the conditions set forth in the letter had been fulfilled, Logos states it never actually took out a loan but always planned to construct with donated funds, keeping open its option to secure a bank loan if necessary.<sup>54</sup> It further states that at least two of Logos' directors had private banking relationships with the bank and that the bank was well-aware of their creditworthiness - one director was a "substantial shareholder in the bank" at the time, had been a bank customer for almost 30 years, had a balance sheet showing assets of nearly 3 million dollars, and had previously received at least one loan from the bank.<sup>55</sup> In terms of providing evidence of a "full banking relationship" Logos submits a copy of a bank statement demonstrating that Logos had a checking account with the bank. Finally, as evidence that it made the certification in good faith, Logos provides copies of its correspondence with legal counsel discussing at length the financial certification requirement and Logos' effort to come into compliance.

In order to be financially qualified at the time of its application filing, an applicant must have reasonable assurance of having sufficient funds to construct and then operate the station for three months.<sup>56</sup> The Commission has defined "reasonable assurance" as "[a] present firm intention to make a loan, future conditions permitting...."<sup>57</sup> Where an applicant relies on a bank loan, it is not Commission "practice to second guess the bank's lending judgment."<sup>58</sup> Rather, the Commission's concern is whether the bank letter affords "reasonable assurance." To determine whether the "reasonable assurance" standard has been met, the Commission considers the following factors: "whether the borrower's qualifications have been preliminarily reviewed by the bank; whether adequate collateral has been demonstrated; and whether the tentative terms are specifically identified and acceptable to the lender as well as the borrower."<sup>59</sup> Preliminary review by the bank of the borrower's individual qualifications can be established either by a showing that the bank has a long and established relationship with the borrower or that the borrower has provided the bank with appropriate information as to its current business proposal, its assets, and credit history.<sup>60</sup>

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<sup>52</sup> *Letter to Logos Broadcasting Corporation from the Chief, Audio Services Division, Mass Media Bureau*, March 12, 1998 (reference 1800B3-JR).

<sup>53</sup> See March 20, 1998 Response to Commission Inquiry.

<sup>54</sup> See August 31, 1998 Response to Commission Inquiry, Verified Statement of Dan M. Lemburg.

<sup>55</sup> See *id.*, Verified Statement of Leon Maksoudian.

<sup>56</sup> When it filed its construction permit application, Logos certified that it had sufficient net liquid assets on hand or that sufficient funds were available from committed sources to construct and operate the Station for three months without additional funds. See File No BPED-19910219MJ.

<sup>57</sup> *Merrimack Valley Broadcasting, Inc.*, Hearing Designation Order, 82 FCC 2d 166, 167 (1980)

<sup>58</sup> *Liberty Productions*, Memorandum Opinion and Order, 7 FCC Rcd 7581, 7584 (1992); see also *Harrison County Broadcasting Co.*, Decision, 6 FCC Rcd 5819, 5821-5822 (Rev.Bd.1991); *Annette B. Godwin*, Decision, 8 FCC Rcd 4098, 4101 (Rev.Bd.1993).

<sup>59</sup> *Liberty Productions*, 7 FCC Rcd at 7584.

<sup>60</sup> *Scioto Broadcasters*, Decision, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990)

We find that Logos failed to establish that it had reasonable assurance of sufficient funds on hand or available to it at the time of its application filing. While the bank letter outlined certain terms and conditions of the proposed loan, it did not demonstrate its “present firm intention” to commit to the proposed financing. Moreover, the record in this case does not support a finding that Logos’ qualifications were preliminarily reviewed by the bank, that it passed initial muster for a loan, or that the bank relied on its banking relationships with two of Logos’ principals in establishing Logos’ creditworthiness. Accordingly, we find that the financial certification was false, and we admonish Logos for its violation of Section 1.17 of the Rules.<sup>61</sup>

Despite our finding of false certification, there is no evidence of any intent to deceive by Logos when it certified its financial qualifications and, thus, no basis for finding any misrepresentation to the Commission. The correspondence between Logos and its counsel clearly indicates that its certification was made in good faith.<sup>62</sup> Logos’ attorney reviewed the bank letter but never questioned its sufficiency. Instead, the attorney advised Logos to revise its estimated budget in order to comport with the \$250,000 commitment outlined in the letter, which Logos promptly did.<sup>63</sup> Moreover, the Station has been constructed and operating for nearly thirteen years, demonstrating that Logos is currently financially qualified.<sup>64</sup> Thus, given the facts of this case, it would serve no useful purpose to designate the application for hearing at this late date on a financial qualifications issue.<sup>65</sup>

#### **D. RF Compliance Issue**

RRI, opposing the license application, argues that Logos should be required to discontinue its current "illegal" operations from the KSBY tower.<sup>66</sup> According to RRI, Logos in November 1995 abandoned its application to change sites and completed construction at the KSBY tower in order to evade Commission monitoring of RF radiation.<sup>67</sup> RRI argues that Logos’ operation of the Station causes the

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<sup>61</sup> See 47 C.F.R. § 1.17. Because the violation here occurred more than one year ago, the statute of limitations prohibits us from initiating a forfeiture proceeding in this case. See n.28, *supra*.

<sup>62</sup> See *Abacus Broadcasting Corp.*, Decision, 8 FCC Rcd 5110, 5113 (Rev.Bd. 1993) (noting that the Commission is reluctant to impute a disqualifying lack of candor to an applicant where the record shows good faith reliance on counsel) (*citing WEBR, Inc. v. FCC*, 420 F.2d 158, 167-78 ( D.C. Cir. 1969) (good faith reliance on counsel is relevant to determining who is acting with candor); *Professional Radio, Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 6666 (1987) (applicant not penalized for giving name of new site owner without first getting his consent where amendment was made on advice of counsel and site owner later gave consent); *Broadcast Associates of Colorado*, Memorandum Opinion and Order, 104 FCC 2d 16 (1986) (applicant who improperly certified application on advice of counsel not disqualified)).

<sup>63</sup> See March 20, 1998 Response to Commission Inquiry.

<sup>64</sup> See *Cannon Communication Corp.*, Order, 6 FCC Rcd 570, 573 (1991) (fact that licensee constructed and operated station for three years dispelled any doubts regarding its financial qualifications).

<sup>65</sup> See *Georgia Public Telecommunications Commission*, Decision, 7 FCC Rcd 2942, 2949 (Rev.Bd.1992), *rev. denied*, Memorandum Opinion and Order, 7 FCC Rcd 7996 (1992) (no useful purpose served by remanding to determine whether applicant was financially qualified at the time the application was filed since applicant is currently financially qualified).

<sup>66</sup> See Further Supplement at 7-8.

<sup>67</sup> See *id.* at 9-10. RRI also takes issue with the fact that Logos commenced PTA despite the fact that its construction permit had expired. We note, however, that the construction permit was not expired, but was in fact extended through August 16, 2000, pursuant to the *Streamlining Order*. See note 9, *supra*. Moreover, contrary to RRI’s argument that Logos failed to give the Commission notice of its commencement of equipment tests and PTA

generation of RF radiation in excess of the Commission's permitted guidelines.<sup>68</sup> RRI is wrong in this regard. Specifically, the Commission's engineering staff has determined that all operations at the KSBY site appear to be in compliance with Commission RF radiation exposure requirements.

RRI further asserts that members of the Cuesta Peak Broadcasters Group (of which Logos is a member) have not been allowed to commence operations pursuant to PTA. Rather, states RRI, upon completion of construction of their facilities and before commencing operations, they have been required to take RF field strength measurements and submit to the Commission documentation that they have taken measures to protect workers from excessive RF radiation. RRI claims that these requirements are "consistent" with the restrictions set forth in a January 5, 1995, letter from the Commission to the Cuesta Peak Broadcasters Group, and asserts that Logos unilaterally commenced operations in contravention of the Commission's directives.<sup>69</sup> We disagree. Neither the January 5<sup>th</sup> letter<sup>70</sup> nor the Station construction permit require Logos to submit a report regarding its RF compliance before commencing operations pursuant to PTA.<sup>71</sup> Accordingly, we will not consider this issue further.

### III. Conclusion

Based on the above, we find that RRI has failed to raise a substantial and material question of fact warranting further inquiry. We further find grant of the Application is consistent with the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, that Logos Broadcasting Corporation IS ADMONISHED for its violations of Section 1.17 of the Rules.

IT IS FURTHER ORDERED, that the objections filed by Radio Representatives, Inc., ARE GRANTED to the extent indicated herein and ARE DENIED IN ALL OTHER RESPECTS.

IT IS FURTHER ORDERED that the application for license to cover Station KLFF-FM, San Luis Obispo, CA (File No. BLH-95029KC) IS GRANTED.

Sincerely,

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

cc: Logos Broadcasting Corp.

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as required by the Rules, Commission records show that Logos in fact notified the Commission on September 29, 1995, that it had commenced service pursuant to PTA on September 26, 1995.

<sup>68</sup> See April 9<sup>th</sup> Supplement at 6.

<sup>69</sup> See *id.* at 5.

<sup>70</sup> See *Letter to KCEX, Inc. et al. from the Chief, Audio Services Division, Mass Media Bureau*, reference 1800B3-MFW (January 5, 1995).

<sup>71</sup> Logos' construction permit stated that Logos could not commence operations pursuant to automatic PTA if it used an antenna other than the Harris FML-4E. Because Logos purchased and installed the specified antenna, it was not required to request PTA.