



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

November 14, 2008

DA 08-2509

In Reply Refer to:

1800B3-SS

Released: November 14, 2008

David D. Oxenford, Esq.
Davis Wright Tremaine, LLP
1919 Pennsylvania Ave., N.W., Suite 200
Washington, DC 20006

Richard A. Helmick, Esq.
Cohn and Marks, LLP
1920 N Street, N.W., Suite 300
Washington, DC 20036

Henry A. Solomon, Esq.
Garvey Schubert Barer
1000 Potomac Street, N.W., 5th Floor
Washington, DC 20037

Rock 'n Roll Preservation Society
109B 34th Street
Newport Beach, CA 92663

International Crusade of the Penny
12501 Jane Drive
Garden Grove, CA 92663

Re: Second Samoan Congregational Church
Newport Beach, California
Facility ID No. 123994
File No. BNPL-20000602ADY

Newport Beach Community
Radio Station 284, Inc.
Newport Beach, California
Facility ID No. 124428
File No. BNPL-20000605AJG

International Crusade of the Penny
Fountain Valley, California
Facility ID No. 124655
File No. BNPL-20000608ADB

Rock 'n Roll Preservation Society
Newport Beach, California
Facility ID No. 124193
File No. BNPL-20000601ADQ

Applications for New Low Power FM Station Construction Permits

Petitions to Deny

Dear Counsel and Applicants:

We have before us the captioned, mutually exclusive applications of Second Samoan Congregational Church (“Samoan”); Newport Beach Community Radio Station 284, Inc. (“NBCR”); International Crusade of the Penny (“ICOP”);¹ and Rock ‘n Roll Preservation Society (“RNR”),² each seeking a construction permit for a new low power FM (“LPFM”) station in the Newport Beach, California, area.³ In accordance with our procedures,⁴ we tallied the comparative point totals claimed by each applicant and listed those point totals in a Public Notice accepting the applications for filing, establishing a petition to deny period, and specifying the applications’ tentative selectee status.⁵ Therein, Samoan, NBCR, and ICOP were designated as tentative selectees for the subject authorization.⁶ As part of this proceeding, the staff later listed RNR as an additional tentative selectee for the subject authorization.⁷ In this action, we find that all of the captioned applications were inadvertently accepted for filing.

¹ This applicant originally filed the captioned application under the name “Ambrosio Pascualy aka Victor Mendez” and filed notification of its name change on February 24, 2004.

² The application of Shepherd of the Hills Church of Laguna Niguel (“Shepherd”) (File No. BNPL-20000605ALE) was initially included in this mutually exclusive group but later removed by Media Bureau staff. The application was granted on December 20, 2006. *See Letter to Shepherd of the Hills Church of Laguna Niguel*, Ref. 1800B3 (Deputy Chief, Audio Division, Media Bureau, Dec. 20, 2006). The applications of Our Lady of Fatima Church (File No. BNPL-20000605AJX), Vanguard University of Southern California (File No. BNPL-20000605AKS), and Calvary Chapel of Laguna Beach (File No. BNPL-20000605AJD), which were also members of this mutually-exclusive group, were dismissed by the staff on March 23, 2004, November 4, 2003, and November 4, 2003, respectively.

³ The captioned applications of Samoan and ICOP for the subject authorization were dismissed by the staff on October 5, 2005, and on reconsideration, reinstated by the staff on October 2, 2006.

⁴ *See Creation of a Low Power Radio Service*, Report and Order, 15 FCC Rcd 2205 (2000) (“*LPFM Report and Order*”); *recon. generally denied*, Memorandum Opinion and Order on Reconsideration, 15 FCC Rcd 19208 (2000); *regulation modification granted by* Second Report and Order, 16 FCC Rcd 8026 (2001); Third Report and Order and Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 21912 (2007).

⁵ *See Closed Groups of Pending Low Power FM Mutually Exclusive Applications Accepted for Filing*, Public Notice, 19 FCC Rcd 1034 (MB Jan. 28, 2004).

⁶ Two settlement agreements filed by the tentative selectees were denied by the staff for not being “universal.” *See Letter to Shepherd, Samoan, NBCR, ICOP, and RNR*, Ref. 1800B3-SS, (MB rel. Jan. 21, 2004).

⁷ *See Broadcast Applications*, Public Notice, Report No. 26744, (MB rel. May 27, 2008).

Background. NBCR filed a Petition to Deny (“NBCR Petition”) the ICOP application on February 27, 2004, which ICOP opposed on May 3, 2004.⁸ On February 27, 2004, Gold Coast Broadcasting, LLC (“Gold Coast”), licensee of KCAQ(FM), Oxnard, California, filed Petitions to Deny (collectively, the “Gold Coast Petitions”) the ICOP, NBCR, and Samoan applications.⁹ On February 27, 2004, RNR and its president John Spencer jointly filed Petitions to Deny (collectively, the “RNR Petitions”) the ICOP and Samoan applications.¹⁰ On December 20, 2007, the staff requested information from Samoan regarding its site assurance.¹¹ Samoan filed its response on January 18, 2008, to which Gold Coast provided comments on January 28, 2008. Samoan submitted a follow-up response on February 4, 2008, to which Gold Coast provided further comments on February 14, 2008. On June 26, 2008, Gold Coast and ICOP each filed a Petition to Deny (“Gold Coast Petitions” and “ICOP Petition,” respectively) the RNR application.¹² On August 6, 2008, the staff requested that RNR provide further evidence that the site specified by RNR in the captioned application was available to it on the date the subject application was filed.¹³ RNR responded on September 5, 2008.¹⁴ For the reasons set forth below, we grant in part the Gold Coast Petitions against the RNR, ICOP, NBCR, and Samoan applications; we dismiss as moot the NBCR and RNR Petitions against ICOP; we dismiss as moot the RNR Petition against Samoan; and we dismiss as moot the ICOP Petition against RNR. We also dismiss the applications of RNR, Samoan, NBCR, and ICOP.

Discussion. *Gold Coast Petitions.* Gold Coast argues, among other matters, that Samoan, NBCR, ICOP and RNR failed to obtain reasonable site assurance for their proposed transmitter sites. Specifically, Gold Coast maintains that none of the applicants contacted the respective site owners to secure space on the towers.¹⁵ NBCR argues that it did “obtain reasonable site assurance.”¹⁶ RNR also

⁸ NBCR filed a Reply on May 27, 2004.

⁹ Gold Coast filed an updated Petition on March 1, 2004, correcting “minor typographical errors” in its Petition to Deny the ICOP application. ICOP filed an Opposition on May 3, 2004, to which Gold Coast replied on May 27, 2004. Gold Coast filed a Supplement to its Petition to Deny the Samoan application on March 2, 2004. Samoan filed an Opposition on April 5, 2004, to which Gold Coast replied on April 29, 2004. NBCR filed an Opposition on March 12, 2004, to which Gold Coast replied on March 24, 2004.

¹⁰ Samoan filed an Opposition on April 5, 2004, and a Supplement to its Opposition on April 8, 2004, to which RNR replied on April 22, 2004. ICOP filed an Opposition on May 3, 2004. RNR did not reply to ICOP’s Opposition.

¹¹ See *Letter to Misipouena Tagaloa, Second Samoan Congregational Church*, Ref. 1800B3-SS (MB rel. Dec. 20, 2007).

¹² RNR filed separate Oppositions to the ICOP and Gold Coast Petitions on August 1, 2008. On August 12, 2008, Gold Coast filed a Reply.

¹³ See *Letter to Brian Spencer, Rock ‘n Roll Preservation Society*, Ref. 1800B3-SS (MB rel. Aug. 6, 2008).

¹⁴ See *Letter from Brian Spencer*, filed Sep. 5, 2008 (“*Spencer Letter*”). On September 5, 2008, RNR also filed a “Rebuttal” (“*RNR Rebuttal*”) to Gold Coast’s Reply. On September 12, 2008, Gold Coast submitted comments (“*Gold Coast Spencer Comments*”) to the *Spencer Letter*. On September 30, 2008, RNR filed an “Addendum” (“*RNR Addendum*”) to the *RNR Rebuttal*. On October 14, 2008, Gold Coast filed a response to the *RNR Addendum*.

¹⁵ Gold Coast (NBCR) (Samoan) Petitions at 5; Gold Coast (ICOP) Petition at 6; Gold Coast (RNR) Petition at 7.

¹⁶ See NBCR Opposition at 2.

argues that “it had received assurance.”¹⁷ Samoan and ICOP argue that in the LPFM/noncommercial educational (“NCE”) context, site assurance is not required because the FCC Form 318 does not require a site availability certification.¹⁸

Initially, we disagree with ICOP and Samoan that LPFM applicants are not required to have reasonable assurance that their specified sites are available for their use. The Commission does not require (and has never required) NCE broadcast applicants to certify the availability of the transmitter site in its application procedures.¹⁹ It is well established, however, that the specification of a transmitter site in an application is an implied representation that the applicant has obtained reasonable assurance that the site will be available.²⁰ While some latitude is afforded such “reasonable assurance,” there must be, at a minimum, a “meeting of the minds resulting in some firm understanding as to the site’s availability.”²¹ A mere possibility that the site will be available is not sufficient.²² Nonetheless, when an LPFM applicant proposes a site, it must do so with reasonable assurance in good faith that the site will be available.²³

Individual Applications. *ICOP.* Gold Coast argues that ICOP did not have reasonable site assurance at the time ICOP filed its captioned application. Gold Coast contends that there is no evidence that ICOP ever contacted Clear Channel Communications, Inc. (“Clear Channel”), whose subsidiary owned the tower at the time of filing, or the City of Newport Beach, which owns the land beneath the tower.²⁴ Initially, ICOP claims that it has reasonable assurance of the use of its proposed transmitter site. We disagree. ICOP provides a copy of a 2004 e-mail written by ICOP Secretary/Treasurer Mary Luna (“Luna”) to a representative at Entravision Holdings, LLC (“Entravision”), the tower owner with whom it negotiated, describing the nature of the negotiations, and the date on which such negotiations occurred.

¹⁷ See RNR Opposition at 2.

¹⁸ See Samoan and ICOP Oppositions at 3 and 5, respectively.

¹⁹ See, e.g., *Carnegie-Mellon Student Government Corp.*, Hearing Designation Order, 7 FCC Rcd 3914 (MB 1992).

²⁰ See, e.g., *William F. Wallace and Anne K. Wallace*, Memorandum Opinion and Order, 49 FCC 2d 1424, 1427 (1974) (“*Wallace*”); *South Florida Broadcasting Co.*, Memorandum Opinion and Order, 99 FCC 2d 840, 842 (1984).

²¹ *Edward A. Schober*, Memorandum Opinion and Order, FCC 08-225 (rel. Sep. 26, 2008); see also *Genesee Communications, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 3595 (1988). The applicant need not own the proposed site and may even work out the final details for a lease sometime in the future. The “reasonable assurance” standard is satisfied by “[s]ome clear indication from the landowner that he is amenable to entering into a future arrangement with the applicant for use of the property as its transmitter site, on terms to be negotiated” *Elijah Broadcasting Corp.*, Memorandum Opinion and Order, 5 FCC Rcd 5350, 5351 (1990).

²² See *Wallace*, 49 FCC 2d at 1425.

²³ See, e.g., *Midland Educational Broadcasting Foundation*, Hearing Designation Order, 4 FCC Rcd 5207 (MB 1989) (holding that applicant for NCE FM station had reasonable assurance of site availability because it paid for a lease option on transmitter site). Cf. *Alabama Citizens for Responsive Public Television, Inc.*, Memorandum Opinion and Order, 62 FCC 2d 755 (Rev. Bd. 1977) (NCE television broadcast application designated for hearing on issue of whether applicant had reasonable assurance of the site proposed in its application).

²⁴ Gold Coast (ICOP) Petition at 7; see also n.33, *infra*.

Importantly, however, Luna states in the e-mail: “I’ve attempted getting an OK way back in the year 2000 but never really got a definite answer.”²⁵ This 2004 statement by an ICOP official suggests that ICOP and Clear Channel, the tower owner at that time, had not reached an agreement on the use of the specified site at the time ICOP filed its application in 2000. ICOP states in its Opposition that it has assurance of a site that it hopes to share with Samoan, noting that it will have to amend its application.²⁶ However, the Commission has repeatedly held that “an applicant will not be permitted to amend where it did not have the requisite reasonable assurance to begin with”²⁷ Accordingly, we will not permit ICOP to amend to cure this fatal defect.²⁸ Thus, we find that ICOP’s application was inadvertently accepted for filing and must be dismissed.

NBCR. There is a conflict in the declarations provided by Gold Coast and NBCR regarding whether NBCR had permission to use the site NBCR proposed in its application. We note that the “mere existence of conflicts in affidavits does not require a hearing.”²⁹ In this case, Gold Coast states that, at the time the NBCR application was filed, the tower on which the NBCR antenna was to be mounted was owned by Clear Channel Communications, and it provides an affidavit from a Clear Channel representative to the effect that Clear Channel had not received an inquiry from anybody regarding use of the tower for any new LPFM station.³⁰ In Opposition, although NBCR provides a conclusory declaration that it did have reasonable assurance to use the site,³¹ it has failed to provide any specific factual details of its efforts to procure such assurance. For example, NBCR does not provide any indication that it contacted Clear Channel. NBCR also does not provide the names of the representatives at Entravision whom it contacted, nor does it describe the nature of the negotiations, or the exact date, time or location at which such negotiations allegedly occurred.³² In its reply, Gold Coast provides a copy of a 2004 e-mail

²⁵ ICOP Opposition at Exhibit 10.

²⁶ *Id.* at 5.

²⁷ *See Classic Vision, Inc.*, Memorandum Opinion and Order, 104 FCC 2d 1271, 1273 (1986), *review denied*, 2 FCC Rcd 2376 (1987); *see also REM Malloy Broadcasting*, Memorandum Opinion and Order, 6 FCC Rcd 5843 (1991); *Family Broadcasting, Inc.*, Initial Decision, 10 FCC Rcd 3174 (1995).

²⁸ *See, e.g., 62 Broadcasting, Inc.*, Memorandum Opinion and Order, 4 FCC Rcd 1768 (1989) (applicant which knew it did not have reasonable assurance of the transmitter site at the time it filed its application could not cure fatal defect by amending to specify a new site). Conversely, where there is evidence that an applicant has proceeded in good faith, we have permitted curative amendments. *See Great Lakes Broadcasting, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 4331 (1991) (applicant permitted to amend to a new site where it reasonably believed it had assurance of the proposed site when it certified).

²⁹ *K.O. Communications, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 12765, 12777-78 (WTB 1998) (*citing Broadcast Enterprises, Inc. v. FCC*, 390 F.2d 493, 495 (D.C. Cir. 1968)).

³⁰ *See* Gold Coast (NBCR) Petition at 4-5 and Exhibit C.

³¹ *See* NBCR Opposition at 2 and at Attachment.

³² Gold Coast notes in its Reply that NBCR’s Todd LaPlante claims to have negotiated on behalf of NBCR in May 2000 – one month before he became controlling board member of NBCR and one month before NBCR came into existence. Further, Gold Coast notes that Entravision did not become owner of the site in question until three months after LaPlante claims to have had discussions with Entravision. *See* Gold Coast Reply at 7; *see also* n.36, *infra*.

(continued . . .)

from the current tower owner – Entravision – stating that Entravision representatives were never contacted by any representatives of NBCR to discuss NBCR’s use of its site.³³ The issue of these conflicting declarations is, we believe, resolved by the fact that Clear Channel, not Entravision, apparently was the tower owner at the time the application was filed.³⁴ Therefore, even were we to accept NBCR’s claim that it contacted Entravision for permission to use the specified tower, it does not counter Gold Coast’s extrinsic evidence indicating that NBCR did not have reasonable assurance that it could use the site specified in its application at the time that application was filed. Accordingly, we find that NBCR’s application was inadvertently accepted for filing and must be dismissed.

Samoan. Samoan specifies a site located at the University of California at Irvine (“UCI”). Gold Coast provides a declaration under penalty of perjury from a “Rena Ross,”³⁵ stating that Brian Chrisman and Teresa Barns, representatives of tower owner UCI, stated to her that they were never contacted by any representatives of Samoan to discuss Samoan’s use of the UCI site.³⁶ Samoan, in response to Gold Coast’s allegations, flatly and without further elaboration, states that it was “not required to meet [a] criterion” of reasonable site assurance.³⁷ As a result of this erroneous assertion, on December 20, 2007, the staff requested that Samoan establish that the site specified by Samoan in the captioned application was available to it on the date the application was filed.³⁸

On January 18, 2008, Samoan’s Pastor and President Misipouena Tagaloa filed a response, stating that before the application was filed, he had spoken with his then engineering consultant Michael Celenza. Rev. Tagaloa states that Mr. Celenza said he had spoken with Jim Hay, an official of UCI, who told Mr. Celenza that UCI would be “willing to negotiate a site lease but that serious negotiations could not begin until after the FCC issued . . . an authorization.”³⁹ On January 28, 2008, Gold Coast provided its “comments” on Samoan’s response. Gold Coast attaches a letter signed by Mr. Hay stating that he was “not involved in any way in discussing an FM antenna location on campus with Second Samoan or any of its representatives.”⁴⁰ On February 4, 2008, on behalf of its client, Samoan’s counsel filed a response arguing that Mr. Hay, in his letter, “does not deny that he was contacted by Mr. Celenza prior to June 2, 2000. Nor does [Mr. Hay] deny that he told Mr. Celenza that antenna space on campus was then

(Continued from previous page)

³³ See Gold Coast (NBCR) Reply at Exhibit B.

³⁴ Gold Coast concurs that the City of Newport Beach owned only the land in which the tower was located and that, at the time, Clear Channel Communications, Inc.’s subsidiary, Citicasters, Co., owned the tower. See *RNR Addendum* at Attachment 2.

³⁵ Identified in the *Gold Coast Spencer Comments* as “an independent consultant who was retained by Gold Coast.” The Comments also state that her current name is Rena Hwang.

³⁶ See Gold Coast (Samoan) Petition at Exhibit B.

³⁷ See Samoan Opposition at 3.

³⁸ See n.11, *supra*.

³⁹ See *Letter from Rev. Misipouena Tagaloa, Second Samoan Congregational Church*, filed Jan. 18, 2008.

⁴⁰ See Gold Coast Comments, filed Jan. 28, 2008, at Attachment 1. The Hay letter is signed but unsworn.

available.”⁴¹ Counsel’s letter provides no documentation or other extrinsic evidence to support Rev. Tagaloa’s statements. Commenting on Samoan’s February 4, 2008, response, Gold Coast states that Samoan’s counsel is straining “to draw a distinction that simply does not exist,” and Samoan still has not provided “first hand evidence whatsoever of its claim” that it obtained reasonable site availability from UCI.⁴²

We find that Rev. Tagaloa’s statements amount to hearsay and are not probative of the availability of Samoan’s specified antenna location on the UCI tower. While hearsay that is relevant and material may be admissible,⁴³ the weight to be accorded any such statement depends on its truthfulness, reasonableness, and credibility.⁴⁴ A prime indicium of probity is whether the declarants are disinterested witnesses.⁴⁵ Here, we can accord little weight to Samoan’s statements, as they were recounted by Samoan’s own President. For the same reason, we accord little weight to the assertions of Samoan’s counsel. We also note that neither Samoan nor its counsel provided affidavits from Messrs. Celenza or Hay, making Rev. Tagaloa’s statements, which themselves were not made as declarations under penalty of perjury, appear even less reliable.⁴⁶ We acknowledge that the declaration of “Renae Ross” in Gold Coast’s petition also contains hearsay accounts of conversations Ms. Ross had with UCI’s Brian Crisman and Teresa Barns. However, in this case, the insufficiency of Samoan’s responses, coupled with the fact that the facts regarding Samoan’s permission to use the specified site are uniquely within Samoan’s possession, lend credence to Gold Coast’s allegations. Accordingly, on this record we are unable to conclude that Samoan had reasonable assurance to locate its antenna at the specified UCI site when it filed its application.⁴⁷ Accordingly, we find that Samoan’s application was inadvertently accepted for filing and must be dismissed.

RNR. Although RNR specifies a site which it states is located on the City of Newport Beach Public Works Department (“NBPWD”) tower⁴⁸ – the same site specified by ICOP -- there is a conflict between the declaration provided by Gold Coast and RNR’s contention in its Opposition⁴⁹ regarding

⁴¹ See *Letter from Henry A. Solomon, Esq.*, filed Feb. 4, 2008. With respect to Mr. Hay’s statement that he was not the correct person to approve placement of an FM antenna on UCI’s campus, Samoan’s counsel asserts, curiously, that “SSCC’s consultant, Michael Celenza, did not seek such approval from Mr. Hay.” Rather, he notes, Mr. Celenza told Rev. Tagaloa that “UCI would be willing to consider negotiating a lease if SSCC received an authorization.” *Id.*

⁴² See Gold Coast Comments, filed Feb. 14, 2008.

⁴³ See, e.g. *Johnson v. United States*, 628 F.2d 187, 190 (D.C. Cir. 1980).

⁴⁴ *Id.* at 190-91.

⁴⁵ *Id.* at 191.

⁴⁶ See, e.g., *Wine Country Radio*, Memorandum Opinion and Order, 11 FCC Rcd 2333, 2334 (1996).

⁴⁷ Although Samoan filed two subsequent amendments changing its transmitter site, we note, as we did in ICOP’s case, that if an applicant does not have reasonable site assurance of its original site, it may not amend its application to specify a new site. See n.28, *supra*.

⁴⁸ See n.36, *supra*.

⁴⁹ See RNR Opposition to Gold Coast at 2.
(continued . . .)

whether RNR had permission to use the site RNR proposed in its application. Gold Coast provides another declaration made under penalty of perjury from “Rena Ross,” now Rena Hwang,⁵⁰ stating that Teresa Moritz, a representative of NBPWD, stated to her that NBPWD was never contacted by “anyone seeking authority to use the Tower as an LPFM . . . site.”⁵¹ Conversely, RNR alleges in its Opposition that it was given a “personal tour of the facilities” and that it did have reasonable assurance to use the site.⁵² However, RNR failed to provide any specific factual details of its efforts to procure such assurance. As a result of these conflicting factual accounts, on August 6, 2008, the staff requested that RNR establish that the site specified by RNR in the captioned application was available to it on the date the application was filed.⁵³

On September 5, 2008, RNR’s President Brian Spencer filed a response, stating that before the application was filed, former RNR President John Spencer had spoken with NBPWD’s Moritz, who referred him to her colleague Tim Deutch, who met with John Spencer at the tower site.⁵⁴ Brian and John Spencer also state that John Spencer spoke several times with tower engineer “Rick Hunt”⁵⁵ regarding use and leasing of the tower.⁵⁶ In addition, both Spencers state that they met with Ms. Moritz on August 21, 2008, and that she “agreed”⁵⁷ to send a “statement” to the Commission because she states that the “Rena Ross” declaration “contains inaccurate and untruthful information.” The Spencers state that Ms. Moritz now does remember fielding several inquiries in 2000 regarding use of the tower site by LPFM applicants.⁵⁸

(Continued from previous page)

⁵⁰ See n.37, *supra*.

⁵¹ See Gold Coast (RNR) Petition at Exhibit 3.

⁵² See RNR Opposition to Gold Coast at 2.

⁵³ See n.13, *supra*.

⁵⁴ See *Spencer Letter* at 2. Attached to the *Spencer Letter* is a Statement (“*Spencer Statement*”), not made under penalty of perjury, by former RNR President John Spencer reiterating Brian Spencer’s response.

⁵⁵ Spencer later states that the correct name is “Ron Hunt.” See *RNR Rebuttal* at 3.

⁵⁶ See *id.*; see also *Spencer Statement*.

⁵⁷ Brian Spencer states that Ms. Moritz “has prepared [a] statement, but is awaiting clearance from the City Attorney . . . [and] if the City Attorney does not allow her to send a statement in her official capacity, that she will try to send something as an individual.” See *Spencer Letter* at 2. On September 30, 2008, RNR submitted two declarations made under penalty of perjury by Teresa Moritz, not in her official capacity, but as an individual. See *RNR Addendum* at Attachments 1 and 2.

⁵⁸ See *Spencer Letter* at 2; see also *Spencer Statement*. Conversely, Gold Coast submits a September 11, 2008, Rena Hwang declaration made under penalty of perjury stating that Ms. Moritz stated to Hwang on September 4, 2008, that she does not explicitly recall having spoken to RNR or ICOP in 2000 or Ross (Hwang) in 2004. See *Gold Coast Spencer Comments* at Attachment.

We find that Brian and John Spencer's statements amount to hearsay and are not probative of the availability of the specified antenna site on the NBPWD tower. As noted earlier, the weight to be accorded hearsay depends on its truthfulness, reasonableness, and credibility;⁵⁹ a prime indicium of probity is whether the declarants are disinterested witnesses.⁶⁰ Here, we can accord little weight to RNR's statements, as they were made by RNR's current and former Presidents. Again, although the declaration of Ms. Hwang in Gold Coast's petition also contains hearsay accounts of conversations Ms. Ross had with NBPWD's Terresa Moritz. However, in this case, the insufficiency of RNR's responses, coupled with the fact that the facts regarding RNR's permission to use the specified site are uniquely within RNR's possession, lend credence to Gold Coast's allegations. Neither Brian nor John Spencer provided affidavits from Mr. Hunt,⁶¹ making the Spencer statements, which themselves were not made as declarations under penalty of perjury, appear even less reliable.⁶²

Ms Moritz, in her declaration made under penalty of perjury dated September 17, 2008,⁶³ states that she was incorrectly quoted in the "Renae Ross" declaration. Ms. Moritz declares that she never said that she "[had] not been contacted by anyone seeking authority to use the Tower as an LPFM . . . transmitter site."⁶⁴ Furthermore, in an additional declaration made under penalty of perjury dated September 19, 2008,⁶⁵ Ms. Moritz declares that if anyone had contacted her in 2000 about use of vacant space on the tower, she states that she "would have replied that the City of Newport Beach owns the land, and that the radio station (KBCD) owns the tower. [She states that she] would have referred them to . . . engineer (Rick Hunt) or the owner of the tower (KBCD) [now KDLE]."⁶⁶ Because Ms. Moritz was never employed by the tower owner, we find that her affidavits are not probative of RNR's claim that it had authority to use the site. Indeed, RNR has not provided an affidavit from either an agent or employee of the tower owner.⁶⁷ For these reasons, we are unable to conclude on this record that RNR had reasonable assurance to locate its antenna on the tower at the specified site when it filed its application. Accordingly, we find that RNR application was inadvertently accepted for filing and must be dismissed.

⁵⁹ See n.46, *supra*.

⁶⁰ See n.47, *supra*.

⁶¹ Gold Coast argues that this "engineer [was] employed by Entravision Communications Corporation, which acquired [the tower] three months after the [RNR] application was filed." See *Gold Coast Spencer Comments* at 3; see also n.33, *supra*.

⁶² See n.45, *supra*.

⁶³ See n.56, *supra*.

⁶⁴ See *RNR Addendum* at Attachment 1. Ms. Moritz's declaration states nothing else.

⁶⁵ See n.56, *supra*.

⁶⁶ See n.33, *supra*. We note that Gold Coast argues that KBCD licensee Citicasters, Co. was never contacted by RNR. See *Gold Coast Spencer Comments* at 2 and at nn.3 and 4.

⁶⁷ For instance, John Spencer notes that he has been "unable to contact [tower owner representative] Rick Hunt to see if he still may have any old e-mails." See *Spencer Statement*.

NBCR, RNR, and ICOP Petitions. We have evaluated the merits of NBCR's and RNR's Petitions to Deny⁶⁸ the captioned ICOP application, as well as ICOP's responsive pleadings. In light of our findings above regarding the Gold Coast Petitions and our determination that the ICOP application was inadvertently accepted for filing and must be dismissed, we dismiss as moot NBCR's and RNR's Petitions against the ICOP application.

Similarly, we have also evaluated the merits of RNR's Petition to Deny⁶⁹ the captioned Samoan application, as well as the responsive pleadings. In light of our findings above regarding the Gold Coast Petitions and our determination that the Samoan application suffers from a fatal defect and must be dismissed as inadvertently accepted for filing, we dismiss RNR's Petition against the Samoan application as moot.

Finally, we have evaluated the merits of ICOP's Petition to Deny⁷⁰ the captioned RNR application, as well as the responsive pleading. In light of our findings above regarding the Gold Coast Petitions and our determination that the RNR application suffers from a fatal defect and must be dismissed as inadvertently accepted for filing, we dismiss ICOP's Petition against the RNR application as moot.

Conclusion/Actions. Based on the record before us, we conclude that none of the tentative selectees are qualified to hold an LPFM authorization. Implementation by the Commission of the LPFM comparative-point determination process is therefore unnecessary.⁷¹ With the dismissal of the Samoan, ICOP, RNR and NBCR applications, we remind any of these tentative selectees who may be thinking of applying for reinstatement on reconsideration that the *sine qua non* for granting reinstatement on reconsideration is an affidavit from the site owner or agent of the site owner describing discussions it had

⁶⁸ In its Petition, RNR argues that ICOP is not entitled to a grant of its application because it has failed to demonstrate that it is eligible to own and operate an LPFM station. In its Petition, NBCR argues that ICOP is not entitled to a point for "established community presence" because it has not met the requirements of Section 73.872 (b)(1) as well as alleging that the ICOP application was filed by and "individual" rather than an NCE organization, pursuant to Section 73.853(a) of the Commission's Rules.

⁶⁹ In its Petition, RNR argues that Samoan is not entitled to a grant of its application because it has failed to demonstrate that it is eligible to own and operate an LPFM station and that the "wholesale replacement" of Samoan's board constitutes an unauthorized transfer of control. RNR also submitted a technical study claiming that 75 percent of Samoan's board members at the time of filing did not live within 10 miles of the proposed transmitter site. See RNR Petition at Exhibit C. In response to RNR's technical submissions, Bureau engineers conducted a technical study confirming that Samoan correctly certified that at the time it filed its application, 75 percent of its board members resided within 10 miles of the original and currently proposed transmitter site. See Samoan captioned application at Section II, Question 4(b).

⁷⁰ In its Petition, ICOP argues that RNR is not entitled to a grant of its application because, among other matters, RNR has failed to demonstrate that it is non-profit educational organization pursuant to Section 73.853(a)(1) of the Commission's Rules.

⁷¹ Because the Samoan, ICOP, RNR and NBCR applications are dismissed as inadvertently accepted for filing, we need not consider Samoan's, ICOP's, RNR's or NBCR's comparative point totals. Moreover, Samoan and ICOP submitted a time-share agreement on March 15, 2004. However, with the dismissal of ICOP's and Samoan's applications as being inadvertently accepted for filing, the agreement thus includes ineligible applicants; therefore, the agreement is invalid and must be dismissed. See 47 C.F.R. § 73.872.

with an applicant prior to the filing of the application and the site owner's or its agent's inclination to permit the applicant to use the site.⁷²

Accordingly, IT IS ORDERED that the petitions to deny filed by Gold Coast Broadcasting, LLC, against the applications of NBCR, RNR, ICOP, and Samoan ARE GRANTED in part and ARE DENIED in all other respects.

IT IS FURTHER ORDERED that the NBCR petition to deny the ICOP application IS DISMISSED as moot.

IT IS FURTHER ORDERED that the RNR petition to deny the ICOP application IS DISMISSED as moot. IT IS FURTHER ORDERED that the RNR petition to deny the Samoan application IS DISMISSED as moot. IT IS FURTHER ORDERED that the ICOP petition to deny the RNR application IS DISMISSED as moot.

IT IS FURTHER ORDERED that the voluntary time-share agreement filed on March 12, 2004, by ICOP and Samoan IS DISMISSED.

IT IS FURTHER ORDERED that the applications of Second Samoan Congregational Church (File No. BNPL-20000602ADY); International Crusade of the Penny (File No. BNPL-20000608ADB); Newport Beach Community Radio Station 284, Inc. (File No. BNPL-20000605AJG); and Rock 'n Roll Preservation Society (File No. BNPL-20000601ADQ) ARE DISMISSED AS INADVERTENTLY ACCEPTED FOR FILING.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Second Samoan Congregational Church
Newport Beach Community Radio Station 284, Inc.
Gold Coast Broadcasting, LLC

⁷² See *Keith Lamonica, Esq.*, Letter, 21 FCC Rcd 1417, 1418 (MB 2006) (affidavit stating that the affiant is the land owner, that he discussed with the applicant leasing his land for use as a site, that he was amenable to doing so on commercially reasonable lease terms, and that he agreed to notify applicant if he were to change his mind, is all that is necessary to establish a reasonable assurance of site availability).