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Washington, D.C. 20554

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DA 09- 2379

In Reply Refer to:

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In re: KDRW(FM), Hewitt, Texas
Prophecy Media Group, LLC
Facility ID No. 170995
File No. BMPH-20071212AAX
Informal Objection

Dear Mr. McVeigh:

This letter concerns the construction permit application (the "Application"), amended, filed by Prophecy Media Group, LLC ("Prophecy")¹ for minor modification of the facilities of Station KDRW(FM), Hewitt, Texas. Also on file is an "Informal Objection" filed on behalf of Munbilla Fort Hood, Ltd. ("MFHL"), on June 26, 2008 ("Objection"). For the reasons set forth below, we deny the Objection and grant the Application.

Background. On December 12, 2007, Prophecy filed the Application, seeking modification of its existing permit² to relocate KDRW(FM) to a new location where Prophecy planned to construct a new tower for the station's antenna. As indicated in its filing, Prophecy proposed to construct the tower on land owned by Walter C. Winters ("Winters").³ On June 26, 2008, MFHL filed an Informal Objection to the Application, asserting that: 1) at the time of the filing of the Application, Prophecy lacked a reasonable assurance of site availability; and 2) Prophecy later failed to comply with Section 1.65 of the Commission's Rules ("the Rules")⁴ by failing to inform the Commission that the FAA had issued a Notice of Presumed Hazard (the "Notice") in connection with the Prophecy proposal. MFHL also accused Prophecy of making false and material misrepresentations to the Commission and called upon the staff to investigate Prophecy.

In response, Prophecy filed a "Response to Informal Objection" ("Response") on September 4, 2008, stating that: 1) Prophecy did in fact have reasonable assurance that the proposed site was available; and 2) Prophecy was not required to inform the FCC of the FAA's Notice as it did not constitute a "material change" in its application. Prophecy argues that MFHL has failed to make a *prima facie* case that Prophecy has deceived the Commission and that no investigation is warranted.

¹ The initial construction permit in the matter was assigned to Mr. William W. McCutchen III ("McCutchen"), who subsequently assigned his interest to Prophecy, a company he owns and controls. See BAPH-20071231AFF.

² See BNPB-20070502AEC.

³ Subsequently, on September 25, 2008, Prophecy filed an amendment seeking to change the proposed tower site to a location one-third of a mile from the proposed site to accommodate the landowner's request. The new site, however, is still on Winters' property.

⁴ See 47 C.F.R. § 1.65.

Discussion. Informal objections must, pursuant to Section 309(e) of the Communications Act of 1934, as amended (“Act”),⁵ 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,⁶ which governs our evaluation of minor change 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.

Site Availability. In support of its claim that Prophecy did have not reasonable assurance of site availability, MFHL submitted an “Affidavit of Fact” by Winters (“Winters Affidavit”).⁷ In the affidavit, Winters states that he had been approached by a realtor, who is not named in the affidavit, at some point in 2007 to discuss the possibility of putting a radio station on his land, and that he had indicated he was not interested in selling a portion of the property, but would sell the entire property. He further states that he had no further contact with this realtor or any other realtor, except for a Mr. Joe Hutchinson, with whom he was negotiating an Option to lease the property in question.

In its Response, Prophecy produced three affidavits which purportedly contradict Winters’ assertion that he had only spoken once with a realtor regarding the availability of his property for a tower: the Declaration of Patrick Farrar, the Declaration of Richard Keith McAnulty, and the Declaration of William W. McCutchen III. Farrar works for The Reid Company, a real estate firm hired by McCutchen. Farrar states in his declaration that he is a real estate broker and performed work on behalf of McCutchen. He states that between July and December 2007 he met three times with Winters to discuss options for the sale or lease of his property for use by McCutchen.⁸ Farrar also states he had numerous telephone conversations with Winters, who repeatedly stated that his property was available to McCutchen to buy or lease.⁹ Farrar further states that following MFHL’s submission of the Winters Affidavit, he spoke with Winters about perceived inaccuracies in the affidavit. According to Farrar, Winters explained to him that he was pressured into signing the affidavit by Hutchinson as part of a \$5,000 option agreement with MFHL.¹⁰ Included in Farrar’s declaration is a Letter of Intent (“Letter”) signed by Farrar and Winters and dated August 26, 2008. In the Letter, Winters asserts that he and Farrar had in fact met several times in the period from July to December 2007 and that Winters had offered McCutchen the use of his property for the tower. The Letter formalizes Winters’ offer to McCutchen.

⁵ 47 U.S.C. § 309(e).

⁶ 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).

⁷ *See* Objection at Exhibit B.

⁸ Response at Declaration of Patrick Farrar, pg 1.

⁹ *Id.* at Declaration of Patrick Farrar, pg. 2.

¹⁰ *Id.* at Declaration of Patrick Farrar, pg. 3-4.

McAnulty is a consultant for McCutchen. He states in his declaration that he helped McCutchen evaluate properties on which to locate the subject tower.¹¹ As part of his services, he states that he traveled to Texas to visit several proposed tower locations, including the land owned by Winters. He further states that Farrar told him that Winters had indicated that he would either sell or lease land to McCutchen for use as a tower site.¹²

McCutchen is the manager and sole member of Prophecy. He states in his declaration that he traveled to Texas to visit proposed tower sites and to discuss his proposal with members of the community. He also states that Farrar informed him of his numerous meetings and conversations with Winters regarding the use of the Winters property for the proposed tower.¹³ McCutchen also relates his conversation with Farrar and Winters following the submission of the Objection, during which Winters indicated that he was not aware of what MFHL intended to do with his affidavit.¹⁴ Lastly, McCutchen states that he has had numerous communications with the FAA regarding the Notice and is currently awaiting its reply regarding his most recent submission.¹⁵

We find that the totality of circumstances supports Prophecy's assertion that it had reasonable assurance of site availability at the time it filed the Application.¹⁶ The circumstances under which Winters signed the Winters Affidavit, particularly the requirement that Winters sign such a statement in order to receive the \$5,000 option payment¹⁷, vitiate the credibility and probative value of the Winters Affidavit. The Letter, signed by Winters and McCutchen on August 26, 2008, states that the parties had previously intended to enter into an agreement by which McCutchen would purchase or lease land from Winters.¹⁸ The Letter further states that Winters had spoken with Farrar, who was acting as Prophecy's agent, numerous times in the period between July and December 2007 and that Winters had agreed to either sell or lease McCutchen the land necessary for the radio transmitter.¹⁹ Moreover, the Letter confirms that the Winters land was and remains available for the construction of a tower for KDRW(FM).²⁰ This is sufficient to establish a reasonable assurance of site availability.²¹

¹¹ *Id.* at Declaration of Richard Keith McAnulty, pg. 1.

¹² *Id.* at Declaration of Richard Keith McAnulty, pgs. 1-2.

¹³ *Id.* at Declaration of William W. McCutchen III, pg. 2.

¹⁴ *Id.* at Declaration of William W. McCutchen III, pg. 3-4.

¹⁵ *Id.* at Declaration of William W. McCutchen III, pgs. 4-6.

¹⁶ We reject the declarations of Farrar, McAnulty, and McCutchen with regard to disputed issues of fact. These declarations are essentially hearsay accounts of conversations and have limited probative value. *See, e.g. Johnson v. United States*, 628 F.2d 187, 190-191 (D.C. Cir. 1980) (the weight to be accorded to a hearsay statement depends on its truthfulness, reasonableness, and credibility). However, we will accept them to the extent that their factual assertions are uncontested. Because our decision largely rests on our analysis of the Letter of Intent, we need not address this issue further.

¹⁷ MFHL admits that Hutchinson required Winters to sign the Winters Affidavit in order to receive the \$5,000. *See Reply* at pg. 5 ("The Declaration of Mr. Farrar further asserts that Mr. Hutchinson informed Mr. Winters [he] would pay \$5,000 for the option and required Mr. Winters to execute an affidavit as a condition to entering in the Option. That is also true."). This is a material fact that MFHL should have disclosed at the outset.

¹⁸ *Response* at Letter of Intent, pg. 1

¹⁹ *Id.*

²⁰ *Id.*

Section 1.65. In support of its argument that Prophecy violated Section 1.65 of the Rules, MFHL provided a copy of the Notice issued by the FAA regarding the proposed KDRW(FM) tower. The Notice states that a study conducted by the FAA determined that if the height of the tower exceeds 422 feet above ground level it would warrant a Determination of Hazard to Air Navigation. The Notice further states that the study determined that the tower would interfere with the operations of nearby Killeen Skylark Airport.

We find that Prophecy did not violate Section 1.65 by not reporting the FAA's Notice. Section 1.65(a) requires an applicant to inform the Commission within 30 days of any significant changes as to any matter that may be of decisional significance in the consideration of its application.²² We believe that the Notice is not of "decisional significance" within the meaning of Section 1.65 of the Rules insofar as it is a preliminary, non-final assessment. We have previously found an applicant did not violate Section 1.65 of the Rules when it did not inform the FCC of a tentative FAA decision finding that the applicant's proposed tower would be a hazard to navigation.²³ The plain wording of the Notice indicates that it is not the FAA's final decision on the matter and that Prophecy is able to remedy any defects in its proposal. Specifically, the Notice states that if the height of the tower is reduced so as to not exceed 422 feet above ground level "a favorable determination could subsequently be issued."²⁴ The attachment to the Notice also plainly states that the FAA would "hold this case in abeyance until we have been notified of your decision."²⁵ The FAA's Notice was not a significant change in the status of the Application because it was explicitly an interim analysis rather than a conclusive determination. In fact, the FAA approved the facilities specified in the amended Application on November 19, 2008.²⁶

We have examined the amended Application and find that it complies with all pertinent statutory and regulatory requirements and that its grant would further the public interest, convenience, and necessity. We will grant the Application below.

²¹ See, e.g., *National Innovative Programming Network, Inc. of the East Coast*, Memorandum Opinion and Order, 2 FCC Rcd 5641, 5643 (1987) (all that is ordinarily necessary for reasonable assurance is some 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, and that he would give notice of any change of intention; reasonable assurance may be acquired by informal telephone contacts by the applicant's agent).

²² See *Kralowec Childrens Family Trust*, Memorandum Opinion and Order, 12 FCC Rcd 19690, n.4 (Video Services Division, 1997).

²³ *Radio Lake Geneva Corporation*, Decision, 7 FCC Rcd 5586, 5591 (Rev. Bd. 1992) ("... nor do we expect separate notification of all intermediate correspondence between the FAA and an FCC applicant...").

²⁴ See Objection at Exhibit C, pg. 1

²⁵ *Id.* at Exhibit C, pg. 3.

²⁶ See *Antenna Structure Registration No. 1266659*, referencing *FAA studying 2008-ASW-6178-OE*.

Conclusion/Actions. Accordingly, for the reasons set forth above, the Informal Objection IS DENIED. The Application (File No. BMPH-20071212AAX) for minor modification of facilities for station KDRW(FM) Hewitt, Texas IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: John M. Pelkey, Esq.
William W. McCutchen III