



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

February 27, 2009

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In Reply Refer to:

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In re: **NCE MX Group 980911**

NEW(NCE-FM), Bernardsville, NJ
New Jersey Public Broadcasting Authority
Facility ID 93886
File No. BPED-19990716MB

Informal Objection

NEW(NCE-FM), Chatham, NJ
World Revivals, Inc.
Facility ID 91708
File No. BPED-19980923MB

Dear Counsel:

We have before us: (1) the referenced application of New Jersey Public Broadcasting Authority (“NJPBA”) for a new noncommercial educational (“NCE”) FM station in Bernardsville, New Jersey; (2) the referenced application of World Revivals, Inc. (“WRI”) for a new NCE FM station in Chatham, New Jersey; (3) WRI’s September 1, 2005, Petition to Deny (the “Petition”) the NJPBA application; and (4) related responsive pleadings.¹ For the reasons stated below, we grant the Motion to Strike, treat the Petition as an Informal Objection and deny it, grant NJPBA’s application and dismiss WRI’s application.

Background. The group of mutually exclusive applications designated as NCE MX Group 980911 was comprised of the referenced applications for permits to construct new NCE FM stations serving two different communities. NJPBA proposed to serve Bernardsville, New Jersey, and WRI proposed service to Chatham, New Jersey. In such situations, the Commission is required to make a

¹ NJPBA filed an Opposition on September 28, 2005, and WRI filed a Reply on October 3, 2005. Additionally, on October 18, 2005, NJPBA filed a Motion to Strike WRI’s Reply.

threshold determination as to whether grant of any of the applications would further the fair, efficient, and equitable distribution of radio service among communities.²

An NCE FM applicant is eligible to receive a Section 307(b) preference if it would provide a first or second NCE aural service (in the aggregate) to at least ten percent of the population, provided that this constitutes at least 2,000 people, within the proposed station's 60 dBu contour.³ If more than one applicant in a mutually exclusive group qualifies for a preference, we compare first service population coverage totals.⁴ An applicant will receive a dispositive fair distribution preference by proposing to serve at least 5,000 more potential listeners than the next highest applicant's first service total.⁵ If no applicant is entitled to a first service preference, we will consider combined first and second service population totals and apply the same 5,000-listener threshold.

Each applicant in NCE MX Group 980911 claimed that it is eligible for a fair distribution preference.⁶ Only NJPBA, however, asserted that it was entitled to a first service preference.⁷ Based on NJPBA's submissions and calculations, it appeared to qualify for a dispositive first-service preference, so no second service analysis was undertaken. Accordingly, pursuant to Section 73.7004 of the Commission's Rules (the "Rules"),⁸ we identified NJPBA as the tentative selectee, in NCE MX Group 980911.⁹ On August, 3, 2005, the staff placed the NJPBA application on a *Public Notice* announcing its acceptance for filing and establishing a 30-day period for filing petitions to deny.¹⁰ On September 1, 2005, WRI timely filed its Petition.

Petition to Deny. In its Petition, WRI states that NJPBA does not have permission to use the proposed transmitter site, and that current local policies prevent NJPBA from obtaining such permission. WRI states that NJPBA's proposed transmitter site, which was specified in its initial 1999 application, is a water tower located in the Basking Ridge section of Bernards Township, on the property of the Veteran's Affairs ("VA") Hospital in Lyons, New Jersey. WRI asserts that Rev. Steve Hare, a WRI principal, and Clarence M. Beverage, WRI's technical consultant, "contacted several people" associated with the management of the subject site, as well as the VA Hospital. In this regard, Beverage states that he was told that communications antennas are no longer allowed on that water tower, and he submits information that this has been so since at least March 6, 2002.¹¹ Similarly, Rev. Hare states he contacted

² See 47 U.S.C. § 307(b); 47 C.F.R. § 73.7002(a).

³ See 47 C.F.R. § 73.7002(b). With respect to population information, applicants were to use the 2000 Census data, if available by June 4, 2001. See "*Supplements and Settlements to Pending Closed Groups of Noncommercial Educational Broadcast Applications Due by June 4, 2001*," *Public Notice*, 16 FCC Rcd 6893 (MB Mar. 22, 2001). Applicants were also to base their "fair distribution" analysis on the "snap shot" date of June 4, 2001, which is applicable unless the applicant subsequently makes engineering changes that would diminish its comparative position. *Id.* In this case, neither of the applicants had made such engineering changes. In addition, each applicant timely supplemented its application with a Section 307(b) showing; each purported to be based on 2000 Census data and a "snap shot" date of June 4, 2001.

⁴ See 47 C.F.R. § 73.7002(b). See also "Deadline for NCE Settlements and Supplements Extended to July 19, 2001; Date for Calculating Comparative Qualifications Remains June 4, 2001," *Public Notice*, 16 FCC Rcd 10892, 10893 (MB May 24, 2001).

⁵ *Id.*

⁶ NJPBA's 60 dBu contour encompasses 229,983 people. NJPBA's claimed aggregated first and second service is 100,527 people. WRI's 60 dBu contour encompassed 114,198 people. WRI's claimed aggregated first and second service is 24,511 people.

⁷ NJPBA claims to provide 52,813 people with new first service.

⁸ 47 C.F.R. § 73.7004.

⁹ See *Letter to New Jersey Public Broadcasting Authority and World Revivals, Inc.*, 20 FCC Rcd 12926 (MB 2005).

¹⁰ See *Broadcast Actions*, *Public Notice* (Aug. 3, 2005), p. 16.

¹¹ Petition, Exhibit No. 2. August 26, 2005, e-mail from Beverage to WRI's attorney:

Sandra B. Warren (“Warren”), Public Affairs Officer of the VA New Jersey Health Care System (“NJHCS”), whose “office has final say” over the use of the subject water tower. Rev. Hare asserts that Warren states NJHCS does not have an agreement with NJPBA to use the proposed site, which, Rev. Hare maintains, “confirms” that NJPBA does not have permission to construct its facilities on the site proposed.¹² WRI concludes that NJPBA has been prosecuting an application without a viable transmitter site, which “raises several important issues,” including the violation of Section 1.65 of the Commission’s Rules (the “Rules”).¹³

In its Opposition, NJPBA states that WRI is seeking to apply a more stringent site assurance standard than is required by the Commission and that WRI’s evidentiary showing “falls woefully short” of the site assurance standard applicable in the instant case. NJPBA states that Beverage’s assertion that communications antennas are no longer allowed on the water tower refers to a zoning matter concerning the location of cellular phone antennas, “not a broadcast antenna,” and, as such, “is largely irrelevant,” and “in no way” stands for the proposition “that at no time and under no circumstances” will the site be available “to an entity such as NJPBA . . . such that NJPBA lacks reasonable assurance of its availability.” Also, NJPBA submits an email from VA counsel that states, among other things, that “Warren is not involved in negotiation or approval or the placement of antennas on VA property . . . [and that] entities wishing to enter such agreements with the VA should contact the office of the Health Care System Director.”¹⁴ Additionally, NJPBA states that even if Warren was authorized to speak for the VA, an “agreement” is not required to demonstrate the availability of the site, and that Rev. Hare’s “Certification Statement”¹⁵ that “[d]uring the past week [he] spoke to several VA people concerning the subject water tower, and had two telephone conversations with Warren,” without reciting his version of those conversations” suggest they do not support WRI’s allegations. NJPBA also submits a declaration from Charles W. Loughery (“Loughery”), NJPBA’s RF Systems Manager, wherein he states that “For at least 20 years, [he has] been directly involved in negotiations between NJPBA and other . . . entities for antenna space. To the best of [his] knowledge, NJPBA has never failed to secure such an agreement [for antenna space].”¹⁶

This morning I spoke with Mike Mikulicz, telecommunications facilities manager for the VA, 973-676-1000, ext. 4011. He says that there were cell phone antennas on the Lyons VA water tower in Basking Ridge where NJ Public plans to go. However, the local residents raised so much concern about RF radiation and health issues that the VA had the antennas removed.

John Byrnes at the VA Hospital in Lyons is the person that we have to speak to about leasing on this tower according to Mikulicz, 908-647-0180, ext. 4200. When I spoke to Mr. Byrnes and told him why I was calling he said "no antennas on that tower". He then explained that the Secretary of the VA issued an order saying that would be the case after pressure from the local Congressman as a result of local concern about radiation.

Cary, if you don't mind I will let you go direct to Mr. Byrne if you need an affidavit - sounds like the history is a matter of public record. See quote below off the Bernards Township web site, "Town Reports".

Omnipoint Cell Tower Application Denied - March 6, 2002

¹² Petition, Exhibit 3, e-mail dated August 29, 2005, from Warren to Rev. Hare:

As discussed a few moments ago, the Department of Veterans Affairs New Jersey Health Care System does not have an agreement with New Jersey Public Broadcasting to place FM radio antennae on the water tower at our Lyons Campus facility located at 151 Knollcroft Road in Lyons, New Jersey. Please let me know if you require additional information.

¹³ See 47 C.F.R. § 1.65.

¹⁴ Opposition, Exhibit 1, also states that VA has statutory authority to sell the use of space of antennas on VA property.

¹⁵ Petition, Exhibit 4.

¹⁶ Opposition, Exhibit 2.

In its Reply, WRI reiterates that NJPBA does not qualify to be the winning applicant because it has not demonstrated that it has permission to use the proposed site. WRI also states that NJPBA “can not demonstrate” that it has had any “discussions or understandings whatsoever” concerning the use of the proposed site. WRI submits that NJPBA’s “lack of information ... speaks volumes.”

Discussion. Procedural Matters. Procedural Sufficiency of Petition. As observed above, a petition to deny a broadcast application must be supported by allegations showing that grant of the subject application would be *prima facie* inconsistent with the public interest. “Such allegations of fact, except for those of which official notice may be taken, shall be supported by affidavit of a person or persons with personal knowledge thereof.”¹⁷ Although WRI’s Petition contains a general declaration from Rev. Hare that “the facts and statements therein are true and correct to the best of my information and belief,” the factual allegations contained in the Petition were not supported by an affidavit¹⁸ or declaration under penalty of perjury of either Rev. Hare, Mr. Beverage, or Ms. Warren. Accordingly, we will consider this filing as an informal objection under Section 73.3587 of the Commission’s Rules.¹⁹

NJPBA Motion to Strike. In its Motion to Strike WRI’s Reply, NJPBA states that WRI’s Reply improperly raises a “wholly new claim” that NJPBA never had permission to use the proposed site, based solely on the fact that NJPBA did not address it in its Opposition.²⁰ We agree. Accordingly, we will grant the Motion to Strike.

Site Availability. In the Motion to Strike, NJPBA also contends that the Commission should not infer that NJPBA does not have an assurance of site availability based on unrelated developments the occurred subsequent to filing the subject application. It asserts:

Of course, should the Commission believe that information regarding NJPBA's initial securing of site assurance is necessary to resolve [the Petitioner's] claim, NJBPA will provide it.²¹

Accordingly, on October 2, 2007, the staff requested that NJPBA provide evidence that the specified VA water tower site was available to it on the date the subject application was filed, *i.e.*, on July 16, 1999.²² In response, on October 10, 2007, NJPBA filed a “Supplement to Motion to Strike (the “Supplement”), attaching a Declaration under penalty of perjury from Loughery (the “Declaration”). NJPBA maintains that the Declaration “establishes” that Loughery contacted the owner of the water tower regarding “possible specification” of the tower in its application, prior to the filing of the application, and that Loughery’s inquiry was made at the express invitation of the local township and water tower owner, which were actively soliciting tenants for the site.

The Declaration. Loughery attests that:

On June 8, 1999 I visited the Bernards Township Municipal Building to inquire about the existence of any known antenna support structures in the township such as radio towers and monopoles. I explained that the New Jersey Public Broadcasting Authority planned to

¹⁷ 47 U.S.C. § 309(d)(1).

¹⁸ For our purposes, an affidavit is a written statement, the truth of which is sworn to or affirmed before an officer who has authority to administer an oath, such as a notary public. *Broadcast Procedure Manual*, 49 FCC 2d 1, 11 (1974).

¹⁹ See, e.g., *Action Community Television Network, Inc.*, Letter, 23 FCC Rcd 9331, 9331-2 (MB 2008).

²⁰ Section 1.45(c) of the Rules indicates that replies “shall be limited to matters raised in the oppositions.”

²¹ October 13, 2005, Motion to Strike at 2, Note 3.

²² See e-mail from Michael Wagner, Associate Chief, Audio Division to Malcolm Stevenson, Esq. (October 2, 2007).

apply to the FCC for a new Noncommercial Educational FM radio station to bring public radio to the area. The clerk provided me with a copy of a letter (attached) to the Mayor from New Jersey-American Water Company. The letter details the availability of the Knollcroft-VA water tower for leasing for telecommunications equipment.

On June 9, 1999 I contacted Ms. Lendel G. Jones, author of the letter, at NJ American Water who confirmed that the water tower was in fact available for uses such as the proposed NJPBA Noncommercial FM broadcast antenna. Ms. Jones advised me to contact Mr. Ken Long of Adler Engineering to discuss specifics of antenna mounting and ground located equipments requirements. She further indicated that Adler would be the one to provide site assurance. Adler Engineering was NJ American's contracted engineering firm.

On June 9, 1999 I contacted Ken Long of Adler Engineering and discussed what NJPBA proposed in the way of FM broadcast and STL antennas for the water tower. *He indicated that the tower was available for the proposed FM installation and that if approved by the FCC the station could construct its antennas on the water tower.* I contacted Mr. Long again on July 20, 1999 to advise him that the application for the station had been filed with the FCC the week before.

In further support of the Declaration, NJPBA submits, *inter alia*, a May 12, 1999, letter from Ms. Lendel G. Jones of the New Jersey-American Water Company to Diana Boquist, Mayor of Bernards Township (the “Jones Letter”).²³

The Jones Letter. The Jones Letter provides, in pertinent part, that:

After extensive research and analysis, New Jersey-American Water Company has created an opportunity for a new partnership with cellular and PCS companies by making a number of its water tanks available for wireless telecommunication equipment. In Bernards Township, access to the Knollcroft -VA tank is currently being offered through this leasing program . . .

Rather, it will make efficient use of underused space, while providing benefits for New Jersey-American's customers, cellular telephone customers, and residents in the communities where the equipment will be located.

We are enthusiastic about our new wireless telecommunications equipment program . . . and we are confident that it will be advantageous for everyone involved. If you have any questions or would like more information about this program, please contact me at the above number.

An applicant seeking a new broadcast facility must, in good faith, possess “reasonable assurance” of a transmitter site at the time it files its application.²⁴ It is well established that the specification of a

²³ Supplement to Motion to Strike, Attachment 3.

²⁴ See, e.g., *Port Huron Family Radio, Inc.*, Decision, 66 RR 2d 545 (1989); *Radio Delaware, Inc.*, Memorandum Opinion and Order, 67 RR 2d 358 (1989). The Commission does not require (and has never required) NCE broadcast applicants to certify the availability of the transmitter site in its application procedures. See, e.g., *Carnegie-Mellon Student Government Corp.*, Hearing Designation Order, 7 FCC Rcd 3914 (MB 1992). Nonetheless, when an NCE applicant proposes a site, it must do so with reasonable assurance in good faith that the site will be available. See, e.g., *Midland Educational Broadcasting Foundation*, Hearing Designation Order, 4 FCC Rcd 5207 (MB 1989) (holding that applicant for noncommercial educational FM station had reasonable assurance of site availability because it paid for a lease option on transmitter site). Cf. *Alabama Citizens for Responsive Public*

transmitter site in an application is an implied representation that the applicant has obtained reasonable assurance that the site will be available.²⁵ 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.”²⁶ 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 does not require a signed agreement between the applicant and the site owner, and can be 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....”²⁷ A mere possibility that the site will be available is not sufficient.²⁸

Under Section 309(e) of the Communications Act of 1934, as amended, (the “Act”),²⁹ informal objections, like petitions to deny, must 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 the public interest, convenience and necessity.³⁰ After reviewing the information submitted by NJBPA, we find that WRI has not raised a substantial and material question of fact regarding whether NJPBA had reasonable assurance of the availability of the proposed transmitter site at the time it filed the subject application. The Loughery declaration is decisive. It is also partially corroborated by the Jones Letter, which clearly evidences New Jersey-American’s willingness generally to allow communication facilities to locate on its Knollcroft VA water tower. WRI, on the other hand, provides no probative evidence to counter Loughery’s declaration.

We find, upon due consideration of all the evidence in the record, that WRI has not raised a substantial and material question of fact regarding whether NJPBA possessed reasonable assurance of the availability of its proposed transmitter site at the time it filed its Bernardsville application. We therefore will deny the Informal Objection and grant the NJPBA application.

Conclusion/Actions. We have examined the NJPBA application, and we find that it fully complies with all pertinent statutory and regulatory requirements and that grant of the application would further the public interest, convenience, and necessity.

Accordingly, pursuant to Sections 0.283 and 73.7004(d) of the Commission’s rules,³¹ the Motion to Strike filed by New Jersey Public Broadcasting Authority IS GRANTED.

IT IS FURTHER ORDERED that the Petition to Deny filed by World Revivals, Inc., treated herein as an Informal Objection, IS DENIED, and the application of New Jersey Public Broadcasting

Television, Inc., Memorandum Opinion and Order, 62 FCC 2d 755 (Rev. Bd. 1977) (noncommercial educational television broadcast application designated for hearing on issue of whether applicant had reasonable assurance of the site proposed in its application).

²⁵ 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).

²⁶ *Genesee Communications, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 3595 (1988).

²⁷ *Elijah Broadcasting Corp.*, Memorandum Opinion and Order, 5 FCC Rcd 5350, 5351 (1990).

²⁸ See *Wallace*, 49 FCC 2d at 1425.

²⁹ 47 U.S.C. § 309(e).

³⁰ See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 note 10 (1990), *aff’d sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 D.C. Cir. 1993, rehearing denied (Sep. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (informal objection must contain adequate and specific factual allegations sufficient to warrant the relief requested).

³¹ 47 C.F.R. §§ 0.283, 73.7004(d).

Authority (File No. BPED-19990716MB) for construction permit for a new noncommercial educational FM station in Bernardsville, New Jersey IS HEREBY GRANTED.

IT IS FURTHER ORDERED that the application of World Revivals, Inc. (File No. BPED-19980923MB) for a construction permit for a new noncommercial educational FM station in Chatham, New Jersey IS HEREBY DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau