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In re: **New NCE FM, Moscow, ID**
Facility ID No. 172586
Radio Free Moscow, Inc.
File No. BNPED-20071018BDS

Petition to Deny

Gentlemen:

This letter concerns the above-referenced application (the "Application") of Radio Free Moscow, Inc. ("RFM") for a new noncommercial educational ("NCE") FM station at Moscow, Idaho. On March 13, 2010, Country Roots Preservation Group ("Country") filed a Petition to Deny (the "Petition") the Application.¹ For the reasons set forth below, we deny the Petition and provide RFM the opportunity to file an amendment to the Application either specifying a new transmitter site or establishing the availability of the current site.

Background. The Application was part of NCE Mutually Exclusive ("MX") Group 83.² Where, as here, applicants propose to serve different communities,³ the Commission, consistent with Section 307(b) of the Communications Act of 1934, as amended,⁴ determines whether grant of any particular application

¹ On March 31, 2010, RFM filed an Opposition ("Opposition") to the Petition. On April 26, 2010, Country filed a Reply to Opposition ("Reply").

² See *Comparative Consideration of 59 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations filed in the October 2007 Filing Window* ("Comparative Consideration"), Memorandum Opinion and Order, 25 FCC Rcd 1681 (2010).

³ RFM and Fire Media Corp. both proposed to serve Moscow, Idaho, while Country proposed to serve Palouse, Washington.

⁴ See 47 U.S.C. § 307(b).

would best further the fair, efficient, and equitable distribution of radio service.⁵ In the NCE context, the Commission determines whether any applicant should receive a dispositive fair distribution preference.⁶ No applicant in Group 83 was entitled to a dispositive fair distribution preference.⁷ Consequently, the Commission engaged in a point system selection process to determine a tentative selectee. As a result, the Commission tentatively selected the RFM Application to receive a construction permit for a new NCE FM station at Moscow, Idaho.⁸ The Commission accepted the Application for filing and announced a 30-day period for filing petitions to deny the Application.⁹ On March 13, 2010, Country filed the Petition.

RFM proposes to side-mount its antenna on the existing tower of and share transmitter space with Station KHTR(FM), Pullman, Washington. In its Petition, Country argues that the Commission should dismiss the Application because RFM lacked reasonable assurance of its proposed transmitter site's availability when it filed the Application.¹⁰ Country includes a sworn statement from Madlynn Kinzer, who maintains that she is business manager of J&E Brewer Family LLC ("J&E"), which claims to own the land upon which RFM proposes to place its antenna and transmitter.¹¹ Kinzer states that "the leaseholders who have towers on [J&E's] land do not have our permission to sublet space on their towers without [J&E's] knowledge and approval."¹² She also asserts that J&E does not intend to grant permission to RFM to locate towers, antennas, or any other equipment on its property.¹³

In its March 31, 2010, Opposition, RFM argues that it did in fact have reasonable assurance of the availability of the transmitter site on the KHTR(FM) tower when it filed the Application.¹⁴ The Opposition includes a letter from Bill Weed, manager of KHTR(FM), dated October 8, 2007 (the "Weed Letter"), prior to filing the Application.¹⁵ The Weed Letter indicates that Weed is "willing, should [RFM's] FCC application be granted, to enter a long term lease with [RFM] . . . for the purpose of co-locating an antenna on [KHTR(FM)'s] existing tower and providing necessary space in [KHTR(FM)'s] transmitter building"¹⁶ Weed also specifies the lease's monthly rate and duration.¹⁷ RFM maintains that the Weed Letter constitutes reasonable assurance of site availability.¹⁸

⁵ *Id.*

⁶ *See* 47 C.F.R. § 73.7002(b).

⁷ *Comparative Consideration* at ¶ 76.

⁸ *Id.* at ¶ 77.

⁹ *Id.* at ¶ 172.

¹⁰ Petition at 2.

¹¹ *Id.* at Attachment 1, Declaration of Madlyn Kinzer.

¹² *Id.*

¹³ *Id.*

¹⁴ Opposition at 1.

¹⁵ *Id.* at Attachment 1.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 2.

In its April 26, 2010, Reply, Country discusses numerous unsuccessful attempts to obtain RFM's public inspection file and requests that we consider this information and "take appropriate action."¹⁹ It also claims the Weed Letter should have been included in the Application as originally filed, but was not.²⁰ As a result, Country asks the Commission to disregard the Weed Letter.²¹

Discussion. Preliminary Matters. We decline to consider Country's arguments regarding its alleged difficulties in viewing RFM's public inspection file. Country raises this argument for the first time in its Reply. Pursuant to Section 1.45(c) of the Commission's Rules, the scope of argument in a reply pleading "shall be limited to matters raised in the oppositions."²² Country's argument regarding RFM's public inspection file is therefore procedurally defective and will not be considered.

Additionally, Country's claim that we must disregard the Weed Letter because it was not contained in the Application or RFM's public inspection file is unfounded. As discussed below, when an NCE applicant proposes a site, it must do so with reasonable assurance in good faith that the site will be available. However, the Commission does not require (and has never required) NCE broadcast applicants to certify the availability of the transmitter site in its application procedures.²³ NCE applicants therefore are not required to supply (or retain in their public inspection files), documentation establishing their reasonable assurance of site availability, but RFM is free to submit the Weed Letter in support of its claim that it had reasonable assurance to locate its antenna on the KHTR(FM) tower.

Reasonable Assurance of Site Availability. An applicant seeking a new NCE broadcast facility must possess reasonable assurance of the availability of a transmitter site when it files its application.²⁴ When an applicant seeks to locate facilities on an existing structure, it may obtain reasonable assurance by determining "that there is space available . . . and that it is reasonable to anticipate that it may use this space."²⁵ The Commission has held that applicants who misplace their reliance on someone who lacks

¹⁹ Country states that it sought to verify that RFM's Public Inspection File included: 1) a copy of its original application and any amendments; 2) a statement that the Petition had been filed against the Application; 3) the Weed Letter; and 4) a copy of the Commission's manual, "The Public and Broadcasting: How to Get the Most Service from Your Local Station." It states that its attempts to examine the RFM public inspection file were unsuccessful because the RFM studio was closed during regular business hours and because the file had been moved from its original location and in fact had been relocated twice. *Id.*

²⁰ *Id.* at 1.

²¹ *Id.* Country also requests that if RFM submits a minor amendment to change its proposed site location, that the Commission rule on the minor amendment before addressing the Petition Reply at 2. RFM has not submitted such an amendment. Therefore, we need not address this argument.

²² 47 C.F.R. § 1.45(c). *See, e.g., Fourteen Hundred, Inc.*, Letter, 25 FCC Rcd. 4486, 4488 (MB 2010).

²³ *See, e.g., Mark van Burgh, Esq. and Donald E. Martin, Esq.*, Letter, 25 FCC Rcd 4474, 4477, n.24 (MB 2010) (citing *Carnegie-Mellon Student Government Corp.*, Hearing Designation Order, 7 FCC Rcd 3914 (MB 1992)).

²⁴ *See, e.g., Midland Educational Broadcasting Foundation*, Hearing Designation Order, 4 FCC Rcd 5207 (MB 1989) (holding that applicant for an 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). *See also Port Huron Family Radio, Inc.*, Decision, 66 RR 2d 545 (1989).

²⁵ *In re Application of State of New Hampshire*, Memorandum Opinion and Order, 11 FCC Rcd 5258, 5261 (WTB 1996) (citing *Public Mobile Radio Services Rules*, Report and Order, 95 FCC 2d 769, 778 (1983)).

authority have still obtained reasonable assurance.²⁶ An applicant has obtained reasonable assurance of site availability if it, in good faith, “accepts the representation of an individual apparently in a position to know the availability of [a] tower.”²⁷

Here, prior to filing the Application, RFM received the Weed Letter indicating the willingness of KHTR(FM)’s manager to lease space on KHTR(FM)’s existing tower and transmitter site.²⁸ Weed made no indication that a tower lease might require the land owner’s approval or that she might withhold her consent.²⁹ Based on the Weed Letter and RFM’s interactions with Weed, RFM reasonably believed that he possessed authority to enter into a lease of tower and transmitter space.³⁰ Weed indicated that there was space available on the tower, and RFM reasonably anticipated using that space.³¹ Therefore, RFM possessed reasonable assurance of site availability when it filed the Application.

RFM indicates that if its proposed site is unavailable, it will “submit a minor amendment, to relocate to a new site.”³² Given our finding that RFM had reasonable assurance of the availability of its originally specified site, and the likelihood that the original site is unavailable based on the site owner’s representations, we will provide RFM a period of 60 days to file an amendment specifying a new transmitter site or establishing the availability of the current site.³³

Action. For the reasons set forth above, IT IS ORDERED that the Petition to Deny filed by Country Roots Preservation Group on March 13, 2010, IS DENIED.

²⁶ See, e.g., *Millard V. Oakley*, 42 RR 2d 1495 (1978) (holding that the recipient of a construction permit for an AM station, whose real estate broker erroneously informed him that a site was available and would assist with the sale, had obtained reasonable assurance of site availability) (“*Oakley*”); *In re Application of Charles Mitchell Dant*, Memorandum Opinion and Order, 2 FCC Rcd 5584 (MSD 1987) (finding that the selected applicant in a non-wireline lottery had reasonable assurance of site availability where the person who resided on the property in question had written a letter permitting the applicant to use the land).

²⁷ *In re Application of Robert and Patricia Gardner*, Order on Reconsideration, 2 FCC Rcd 4686 (CCB 1987) (citing *Oakley*).

²⁸ Opposition at Attachment 1.

²⁹ *Id.* at Attachment 2.

³⁰ *Id.*

³¹ See *In re Application of State of New Hampshire*, Memorandum Opinion and Order, 11 FCC Rcd 5258, 5261 (WTB 1996) (citing *Public Mobile Radio Services Rules*, Report and Order, 95 FCC 2d 769, 778 (1983)).

³² Opposition at 4.

³³ See, e.g., *Mr. William B. Clay and Mark N. Lipp, Esq.*, Letter, 23 FCC Rcd 8412, 8417-18 (MB 2008) (permittee allowed to specify new site when it had established reasonable assurance of the availability of its original site); cf. *Les Seraphim and Mana 'O Radio*, Memorandum Opinion and Order, 25 FCC Rcd 2785, 2789 (MB 2010) (applicant that did not establish reasonable assurance will not be permitted to amend to specify a new site). If applicable, RFM may also file an amendment affirming that it has reached an agreement with the site owner to remain at the currently specified site.

IT IS FURTHER ORDERED, that further processing of the Radio Free Moscow application (File No. BNPED-20071018BDS) will be held in abeyance for a period of 60 days to enable the applicant to file an amendment either specifying a new transmitter site or establishing that the currently specified site is available for its use.

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau