

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
LES SERAPHIM)	Facility ID No. 175755
)	File No. BNPED-20071018AMQ
and)	
)	
MANA'O RADIO)	Facility ID No. 174896
)	File No. BNPED-20071016AHV
Applications for Construction Permits for a New)	
Noncommercial Educational FM Stations at)	MX Group No. 71
Lahaina and Wailuku, Hawaii)	

MEMORANDUM OPINION AND ORDER

Adopted: March 23, 2010

Released: March 24, 2010

By the Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. We have before us: (1) the referenced application, filed by Les Seraphim (“LS”) for a new, noncommercial educational (“NCE”) FM station at Lahaina, Hawaii (“LS Application”); (2) the referenced application, filed by Mana’o Radio (“MOR”) for a new NCE FM station at Wailuku, Hawaii (“MOR Application”); and (3) a Petition to Deny the LS Application (“Petition”), filed by MOR on January 14, 2010.¹ The LS and MOR Applications were mutually exclusive and were designated as NCE MX Group 71. In its Petition, MOR contests the Commission’s tentative decision to grant the LS Application, as proposed in the Commission’s December 15, 2009, *Comparative Consideration Order*.² For the reasons set forth below, we grant MOR’s Petition, dismiss the LS Application, and accept the MOR Application for filing.

II. BACKGROUND

2. In the *Comparative Consideration Order*,³ the Commission applied NCE comparative selection criteria⁴ to twenty-two groups of mutually exclusive NCE FM applications and tentatively selected one winner in each group. A threshold “fair distribution” analysis is performed on mutually exclusive NCE FM groups if, as here, applicants within the group propose to serve different communities and will provide a new first and/or second NCE aural service to a substantial population. In such cases, the Media Bureau (the “Bureau”), consistent with Section 307(b) of the Communications Act of 1934, as

¹ LS filed an Opposition to the Petition on February 2, 2010, to which MOR filed a Reply on February 16, 2010.

² See *Comparative Consideration of 22 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 24 FCC Rcd 14531, 14533-4 (MB 2009) (“*Comparative Consideration Order*”).

³ *Id.*

⁴ See 47 C.F.R. §§ 73.7000 – 05.

amended (the “Act”),⁵ determines whether grant of any of the applications would best further the fair, efficient, and equitable distribution of radio service among communities.⁶

3. In Group 71, the Bureau tentatively selected the LS Application for grant based on its fair distribution preference claim.⁷ It then accepted the LS Application for filing and announced a 30-day period for filing petitions to deny that application. MOR timely filed its Petition on January 14, 2010. MOR asserts that LS lacked reasonable or any assurance of access to the proposed tower site listed in the LS Application.⁸ MOR also asserts that LS did not submit an acceptable programming proposal and was not entitled to points for local ownership regarding the alternative selection procedure.⁹ MOR therefore argues that LS must be “disqualified” as a tentative selectee.¹⁰

4. In its Opposition, LS contends that it did, indeed, have reasonable site assurance regarding its proposed transmitter site.¹¹ LS also contends that its educational programming proposal is similar to a programming proposal already approved by the Commission regarding another LS NCE-FM station.¹² Finally, LS argues that it is entitled to localism points because it has been in existence for more than two years.¹³ Accordingly, LS requests that the Petition be denied.

III. DISCUSSION

5. Pursuant to the Section 309(d) of Act, a petition 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

⁵ 47 U.S.C. § 307(b).

⁶ See 47 U.S.C. § 307(b) (“In considering applications for licenses . . . when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.”); 47 C.F.R. § 73.7002(a). An NCE FM applicant is eligible to receive a Section 307(b) preference if it would provide a first or second reserved band channel NCE aural service to at least ten percent of the population (in the aggregate), within the proposed station's service area, provided that such service is to at least 2,000 people. An applicant must support its fair distribution claim with an exhibit identifying the population residing within the proposed station's 60 dBu service contour and the number of people that would receive a new first or second NCE aural service. See FCC Form 340, Instructions for Section III, Questions 1 and 2; Exhibit 6.

⁷ *Comparative Consideration Order*, 24 FCC Rcd at 15433. See also LS Application, Questions III(1), III(2), and associated exhibits. LS's 60 dBu contour encompasses 21,603 people. LS claims aggregated first and second NCE service to all 21,603 people. Thus, it would provide combined first and second NCE service to at least ten percent of the population within its 60 dBu contour and to more than 2,000 people. MOR did not make a fair distribution claim in the original MOR Application, but MOR attempted to make such a claim in an amendment filed in January 2008, approximately three months after close of the filing window. The Bureau rejected MOR's tardy comparative amendment. See *Comparative Consideration Order* at 3.

⁸ Petition at 2.

⁹ *Id.* at 2, 7.

¹⁰ *Id.* at 9.

¹¹ Opposition at 2; see also Attachment 2.

¹² *Id.* at 3.

¹³ *Id.* at 4.

application would be *prima facie* inconsistent with Section 309(a).¹⁴ We find that MOR presents specific factual allegations sufficient to meet this standard.

6. *Site Assurance.* 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.¹⁵ It is well established 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.¹⁶ 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.”¹⁷ A mere possibility that the site will be available is not sufficient.¹⁸

7. In its Petition, MOR submits a declaration by tower owner Mark Harmer made under penalty of perjury. In it, Harmer states that he only received one call about prospective space on his tower – Harmer states that he cannot recall the caller’s name – and that he told the caller that the “tower was full, that there isn’t any room [on it to add an antenna].”¹⁹ MOR also submits a sworn declaration by consulting engineer Donald E. Mussell, Jr., who states that he personally visited the Harmer tower site and opines that “the tower facility is full and there is no additional room for new antenna systems.”²⁰

¹⁴ 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) (petitions to deny must contain adequate and specific factual allegations sufficient to warrant the relief requested).

¹⁵ 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).

¹⁶ See, e.g., *William F. Wallace and Anne K. Wallace*, Memorandum Opinion and Order, 49 FCC 2d 1424, 1427 (1974) (“*Wallace*”) (“Some indication by the property owner that he is favorably disposed toward making an arrangement is necessary.”).

¹⁷ *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).

¹⁸ See *Wallace*, 49 FCC 2d at 1425. 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 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).

¹⁹ See Petition, Attachment 1, Mark Harmer Declaration.

²⁰ Petition at Attachment 2, Donald E. Mussell Declaration. Mussell includes a photograph of the Harmer Tower. *Id.* We note that in its Reply, MOR submits another declaration made under penalty of perjury by Mussell, who states that upon inspecting the tower on December 10, 2009, he found that there was “no additional room for new antenna systems. . . . [T]his tower was equally occupied and full in May of 2007 when . . . [Mussell] first visited the site.” See Reply at Attachment D.

8. In its Opposition, LS maintains that it did have reasonable assurance to use the proposed site. LS submits a declaration by LS local counsel Nathan Choi also made under penalty of perjury. In it, Choi states that in a phone conversation “[tower owner Harmer] indicated space was then available for a new antenna.”²¹ In support of this claim Choi includes a purported email “exchange”²² between Choi and Harmer. The first “contemporaneous email,” dated October 24, 2007,²³ is from Harmer.

Please be advised that availability of space is limited by your equipment physical requirements, of which is now unknown, as well as this location being a first come first serve basis. We are in discussion with existing tenants in which desire to expand (sic), that could limit my ability to accommodate your [*i.e.*, LS’s] needs. Basically what I am telling you is that I cannot guarantee space for your proposed project at any given time. It is only a possibility at this time.²⁴

The “exchange,” dated October 19, 2007, is from Choi: “Thank you very much informing us (sic) that you have space at your tower site.”²⁵

9. In its Reply, MOR also attaches copies of this e-mail exchange between Harmer and Choi as well as an October 24, 2007, email response from Choi to Harmer’s email, above, of the same date. MOR contends, and proffers evidence, that the e-mail exchange as it appears in the Choi attachment is in reverse order; *i.e.*, Choi’s October 19, 2007, e-mail was written *before* the Harmer e-mail, contributing to a “totally false and deceptive impression.” MOR also claims that the Choi attachment omits the October 24, 2007, 1:09:45 pm (PDT) e-mail from Choi to Harmer in which Choi states: “Thank you for the heads up. After your current tenants (sic) are done expanding, please let me know how much space is available (sic) and maybe we can work around it. Thank you.”²⁶

10. It is clear from Harmer’s declaration and these contemporaneously created emails that there was no meeting of the minds between Harmer and Choi resulting in a firm understanding of the proposed site’s availability. To the contrary, it appears that Harmer informed Choi that the site was not available, to which Choi responded that when the current tenants had completed future improvements,

²¹ See Opposition, Nathan Choi Declaration.

²² See Opposition, Nathan Choi Declaration.

²³ This date has been supplied by MOR. See Reply at Attachments B and C. (MOR supplies a single exhibit labeled both “Attachment B” and “Attachment C.”) Reply at 3; see also n.26, *infra*.

²⁴ See Opposition, Nathan Choi Declaration at Attachment.

²⁵ See Opposition, Nathan Choi Declaration at Attachment.

²⁶ Reply at 3-4 and at Attachments B and C. MOR submits a printout of the purported e-mail chain between Choi and Harmer in which the order is as follows:

- Friday, October 19, 2007, 9:15 am: Choi thanks Harmer for “informing us that you have space at your tower site.”
- Wednesday, October 24, 2007, 6:59 am: Harmer indicates that he “cannot guarantee space for your proposed project at any given time. It is only a possibility at this time.”
- Wednesday, October 24, 2007, 1:09 pm: Choi thanks Harmer for the “heads up” and asks that he be notified after the tower’s current tenants are done expanding, “and maybe we can work around it.”

“maybe we could work around [the current unavailability of the site].”²⁷ As stated earlier, a mere possibility that the site will be available is not sufficient.²⁸ The “reasonable assurance” standard is a liberal one,²⁹ but LS has failed to meet it. Moreover, LS may not amend to cure this fatal defect following the close of the 2007 NCE FM filing window.³⁰ Thus, we must dismiss the LS Application for a permit to construct a new NCE FM station, as proposed in the *Comparative Consideration Order*.³¹ Under these circumstances, the other arguments in the Petition against the LS Application need not be considered.

11. *Mana’o Radio Application.* In light of our dismissal of the LS Application, we have studied the MOR Application and have determined that it is acceptable for filing. We therefore will accept the MOR Application for filing and tentatively conclude that the public interest would be served by grant of the MOR Application for a construction permit for a new NCE FM station at Wailuku, Hawaii. If, after a 30-day petition to deny period has run,³² there is no substantial and material question concerning the grantability of the tentative selectee’s application, we intend, by public notice, to grant the MOR Application with appropriate conditions.

IV. ORDERING CLAUSES

12. IT IS ORDERED, that the tentative selection of the application of Les Seraphim (File No. BNPED-20071018AMQ) for a permit to construct a new NCE FM station, IS DISMISSED.

13. IT IS FURTHER ORDERED, that the January 14, 2010, Petition to Deny filed by Mana’o Radio, IS GRANTED to the extent indicated herein.

14. IT IS FURTHER ORDERED, that the Application filed by Mana’o Radio (File No. BNPED-20071016AHV) is ACCEPTED FOR FILING and TENTATIVELY SELECTED to be awarded a construction permit for a new NCE FM station at Wailuku, Hawaii. If, after a 30-day petition to deny period has run, there is no substantial and material question concerning the grantability of the tentative

²⁷ See *id.*

²⁸ See, e.g., *Wallace*, 49 FCC 2d at 1425; *El Camino Broadcasting Corp.*, Memorandum Opinion and Order, 12 FCC 2d 25, 12 RR 2d 720 (1968) (“[T]he mere fact that the property owner has indicated that he would discuss the possibility of a lease at some future date does not . . . provide . . . assurance. . . .”); *South Florida Broadcasting Co.*, Memorandum Opinion and Order, 99 FCC 2d 840, 845-6 (Rev. Bd. 1984) (“[W]here the site owner expressly conditions access to the site and those conditions are not met or unlikely to be met, it cannot be glossily claimed that one has ‘reasonable access’ of the site nonetheless.”); *Family Broadcasting, Inc.*, Decision, 11 FCC Rcd 3052, 3053-54 (Rev. Bd. 1996) (where tower owner’s agent requests formal written proposal from applicant, and does not “say yes or . . . no,” Review Board finds that “permission to use the site was not unambiguously given.”); *World Revivals, Inc.*, Letter, 24 FCC Rcd 2835, 2839-40 (MB 2009) (Bureau finds clear indication of a meeting of the minds resulting in some firm understanding as to site’s availability when tower owner states: “[T]he 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.”).

²⁹ *Elijah Broadcasting Corporation*, Memorandum Opinion and Order, 5 FCC Rcd 5350, 5351 (1990); *Anderson Radio Broadcasting, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 578 n.46 (2008).

³⁰ *Edward A. Schober*, Memorandum Opinion and Order, 23 FCC Rcd 14263, 14265 (2008) (“The Commission, however, has repeatedly held that ‘an applicant will not be permitted to amend where it did not have the requisite reasonable assurance to begin with. . . .’”).

³¹ See n.2, *supra*.

³² 47 C.F.R. § 73.7004(d); see also *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386, 7423-24 (2000).

selectee's application, we intend TO GRANT the referenced Mana'o Radio application CONDITIONED UPON that selectee's compliance with Section 73.7002(c) of the Rules,³³ which sets forth a four-year period of on-air operations substantially as proposed.

FEDERAL COMMUNICATIONS COMMISSION

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³³ 47 C.F.R. § 73.7002(c).