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DA 10-699

In Reply Refer to:

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Mark Van Burgh, Esq.  
2538C South Arlington Mill Drive  
Arlington, VA 22206

Donald E. Martin, Esq.  
P.O. Box 8433  
Falls Church, VA 22041

In re: **New NCE-FM, Bishop, CA**  
Facility ID No. 175321  
File No. BNPED-20071016AJF

**Petition for Reconsideration**

Dear Counsel:

This letter concerns the referenced application (the "Application") of Nevada-Utah Conference of Seventh Day Adventists ("Nevada-Utah") for a new noncommercial educational ("NCE") FM station at Bishop, California. On September 12, 2008, Benett Kessler ("Kessler")<sup>1</sup> filed a Petition for Reconsideration (the "Petition")<sup>2</sup> seeking reconsideration of the staff's grant of the Application.<sup>3</sup> For the reasons set forth below, we dismiss the Petition.

**Background.** The Application was part of NCE Mutually Exclusive ("MX") Group No. 23 that would serve two different communities in California. 1 A Chord, Inc. ("Chord") proposed to serve Mammoth Lakes, California. Nevada-Utah proposed to serve Bishop, California. Pursuant to the Communications Act of 1934, as amended (the "Act"), where timely filed applications for full service stations on reserved FM channels are mutually exclusive and will serve different communities, the Commission is required to make a threshold determination as to whether grant of any of the applications would further the fair, efficient, and equitable distribution of radio service among communities.<sup>4</sup> Only

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<sup>1</sup> Kessler is licensee of KSRW(FM), Independence, California.

<sup>2</sup> Nevada-Utah opposed (the "Opposition") the Petition on October 16, 2008, to which Kessler replied (the "Reply") on October 22, 2008.

<sup>3</sup> See *Threshold Fair Distribution Analysis of 32 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 23 FCC Red 10213, 10225 (MB 2008) ("Comparative Consideration Order"); see also *Broadcast Actions*, Public Notice, Report No. 46800 (rel. Aug. 14, 2008).

<sup>4</sup> See 47 U.S.C. § 307(b); 47 C.F.R. § 73.7002(a).

Nevada-Utah asserted that it was eligible for a fair distribution preference. Accordingly, Chord was eliminated, and Nevada-Utah was named the tentative selectee in NCE MX Group No. 23.<sup>5</sup>

On June 27, 2008, the staff accepted the Application for filing and established a 30-day period for filing petitions to deny.<sup>6</sup> No petitions or objections were filed, and on August 11, 2008, the staff granted the Application.<sup>7</sup> On September 12, 2008, Kessler timely filed her Petition, arguing that Nevada-Utah's proposed operation would cause significant blanketing interference problems to the listeners of Bishop, California, and that Nevada-Utah did not have reasonable assurance of site availability when it filed the Application.

**Discussion.** Reconsideration is appropriate only where the petitioner either demonstrates a material error or omission in the underlying order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters. A petition for reconsideration that reiterates arguments that were previously considered and rejected will be denied. For the reasons set forth below, we find that Kessler has failed to demonstrate that reconsideration is warranted on either procedural or substantive grounds.

*Procedural Issues.* Kessler states that she did not previously raise matters addressed in the Petition because she was not "aware of the circumstances."<sup>8</sup> Pursuant to 47 C.F.R. § 1.106(b)(1) of the Commission's Rules (the "Rules"),<sup>9</sup> Kessler was required to file an objection to the Application prior to its grant, and if she did not, she was required to show good cause why it was not possible for her to participate at the earlier stages of the proceeding.<sup>10</sup> There was more than a one-month period between the June 27, 2008, *Comparative Consideration Order* announcing the acceptance of the Application and the staff grant of the Application. This time period constituted sufficient opportunity for Kessler to object to

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<sup>5</sup> See *Comparative Consideration Order*, 23 FCC Rcd at 10216 ¶ 13 (MB 2008). 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 the population served is at least 2,000 people. See 47 C.F.R. § 73.7002(b). Nevada-Utah's 60 dB $\mu$  contour encompasses 12,946 people. Nevada-Utah's claimed aggregated first and second NCE service is all 12,946 people within its proposed 60 dB $\mu$  contour. See Nevada-Utah's Application, Questions III(1), III(2), and associated exhibits. The staff found that the proposed facilities would provide combined first and second NCE service to more than ten percent of the population within its 60 dB $\mu$  contour and to more than 2,000 people, and awarded a dispositive Section 307(b) preference to the Application on this basis.

<sup>6</sup> *Comparative Consideration Order*, 23 FCC Rcd at 10225..

<sup>7</sup> *Public Notice* of the grant was released on August 14, 2008. See n. 3, *supra*.

<sup>8</sup> Petition at 2.

<sup>9</sup> 47 C.F.R. § 1.106(b)(1), which states, in pertinent part:

. . . any party to the proceeding, or any other person whose interests are adversely affected by any action taken by the Commission or by the designated authority, may file a petition requesting reconsideration of the action taken. If the petition is filed by a person who is not a party to the proceeding, it shall state with particularity the manner in which the person's interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding.

<sup>10</sup> See *Michael Radio Group*, Memorandum Opinion and Order, 15 FCC Rcd 421 (2000).

the proposal,<sup>11</sup> and Kessler does not identify any facts that arose too late for her to participate earlier, or explain why she could not, through the exercise of ordinary diligence, have ascertained such facts earlier.<sup>12</sup> For the reasons set forth above, we find that the Petition is procedurally defective and must be dismissed.

*Substantive Issues. Blanketing Interference.* Even were we to reach the merits of the Petition, we would not overturn the staff's grant of the Application. In the Petition, Kessler first argues that the proposed operation of Nevada-Utah would cause interference to the reception of Kessler's station as well as other stations serving Bishop.<sup>13</sup> Specifically, Kessler contends that Nevada-Utah's proposal to construct an antenna at "6kW effective radiated power with a radiation center 15 meters above ground" on a tower in the center of Bishop would cause interference to the reception of Kessler's station.<sup>14</sup> In Opposition, Nevada-Utah argues that Kessler's interference allegation is unsupported. We agree. Pursuant to Section 1.106(e) of the Rules,<sup>15</sup> at the petition for reconsideration stage, the Commission requires that interference claims be supported by an affidavit from a qualified radio engineer.<sup>16</sup> Because the Petition is lacking this affidavit, we find that the Petition is also procedurally defective on this issue.

Additionally on this point, a complaint alleging blanketing interference is, at this time, premature. Blanketing interference occurs when an FM station's signal strength is of such magnitude that it causes receivers near the transmitting antenna to be partially or completely blocked from receiving other broadcast stations.<sup>17</sup> Nevada-Utah received a construction permit for the Bishop facility on August 11, 2008, and it has not yet commenced operation with that facility. When it does so, Nevada-Utah will be subject to the blanketing interference provisions of Section 73.318 of the Rules.<sup>18</sup>

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<sup>11</sup> *Compare Aspen FM, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 17,852, 17,854 (1997) (five-day period between notice of acceptance and grant "effectively precludes" participation during initial consideration of application); *accord, Rainbow Broadcasting Company*, Memorandum Opinion and Order, 9 FCC Rcd 2839, 2844 (1994) (petition permitted in light of 11-day period between filing and grant of extension application).

<sup>12</sup> *See, e.g., Fleet Call*, Memorandum Opinion and Order, 6 FCC Rcd 6989 (1991); *Whidbey Broadcasting Service, Inc.*, Memorandum Opinion and Order, 4 FCC Rcd 8726 (1989) (affirming Mass Media Bureau's dismissal of petition for reconsideration under § 1.106(b)(1)); *Ted Tucker and Jana Tucker*, Memorandum Opinion and Order, 4 FCC Rcd 2816 (1989); *University of North Carolina*, Memorandum Opinion and Order, 4 FCC Rcd 2780 (1989); *Press Broadcasting Company*, Memorandum Opinion and Order, 3 FCC Rcd 6640 (1988), *aff'd on other grounds sub nom. United Church of Christ v. FCC*, 911 F.2d 803 (D.C. Cir.1990).

<sup>13</sup> Petition at 2.

<sup>14</sup> *Id.* at 1-2.

<sup>15</sup> 47 C.F.R. § 1.106(e).

<sup>16</sup> *See, e.g., 116 Late-Filed Applications for Renewal of Educational Broadband Service Stations*, Memorandum Opinion and Order, 24 FCC Rcd 8108 n.49 (WTB 2009) ("At the petition for reconsideration stage, the Commission requires that interference claims be supported by an affidavit from an engineer.").

<sup>17</sup> *See Calvary Educational Broadcasting Network, Inc.*, Hearing Designation Order, 7 FCC Rcd 4037 n.3 (1992); *see also Greater Boston Radio, Inc.*, Memorandum Opinion and Order, 8 FCC Rcd 4065 (1993).

<sup>18</sup> 47 C.F.R. § 73.318.

Site Availability. In her Petition, Kessler argues that Nevada-Utah filed the Application without reasonable assurance of site availability because Kessler contends that Nevada-Utah never contacted the site owner about use of its site. Specifically, Kessler submits a declaration which she made under penalty of perjury declaring the following: “Daniel McClenaghan [representative for tower owner Living Proof, Inc.] . . . informed me that the Seventh-Day Adventists do not have permission from Living Proof to use Living Proof’s tower, that the Seventh-Day Adventists never contacted Living Proof regarding possible use of the tower for their proposed new FM station, and that Living Proof never gave its consent for the Seventh-Day Adventists to use this tower or propose to use this tower in the Seventh-Day Adventists’ FCC application or for its new Bishop station.”<sup>19</sup> In addition, Kessler states that McClenaghan did not provide his declaration because he “did not want to get involved in this proceeding.”<sup>20</sup>

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.<sup>21</sup> 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.<sup>22</sup> 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.”<sup>23</sup> A mere possibility that the site will be available is not sufficient.<sup>24</sup>

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<sup>19</sup> See Kessler Petition at Attachment 1.

<sup>20</sup> Reply at 3.

<sup>21</sup> 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).

<sup>22</sup> 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.”).

<sup>23</sup> *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).

<sup>24</sup> 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 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).

We find that Kessler's statements amount to unpersuasive hearsay. While hearsay that is relevant and material is admissible, for example, in administrative proceedings,<sup>25</sup> the weight to be accorded it depends on its truthfulness, reasonableness, and credibility.<sup>26</sup> A prime indicium of probity is whether the declarants are disinterested witnesses.<sup>27</sup> Here, we can accord little weight to Kessler's statements, because she is the petitioner. Notwithstanding McClenaghan's alleged desire to not get involved, Kessler's failure to provide a timely affidavit from the tower owner or its representative made under penalty of perjury, and her reliance instead on her uncorroborated hearsay account of her conversation with McClenaghan, are fatal to her claim.<sup>28</sup>

**Conclusion/Actions.** For the reasons set forth above, IT IS ORDERED that the Petition for Reconsideration filed by Benett Kessler on September 12, 2008, IS DISMISSED.

Sincerely,

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

cc: Benett Kessler  
Nevada-Utah Conference of Seventh Day Adventists

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<sup>25</sup> See, e.g. *Johnson v. United States*, 628 F.2d 187, 190 (D.C. Cir. 1980).

<sup>26</sup> *Id.* at 190-91.

<sup>27</sup> *Id.* at 191.

<sup>28</sup> See, e.g., *Wine Country Radio*, Memorandum Opinion and Order, 11 FCC Rcd 2333, 2334 (1996) (without affidavit from tower owner, statements made by petitioner in affidavit even less reliable).