



**Federal Communications Commission
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In Reply Refer to:

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Melodie A. Virtue, Esq.
Garvey Schubert Barer
1000 Potomac Street, N.W.
Washington, DC 20007

Harry C. Martin, Esq.
Lee G. Petro, Esq.
Fletcher, Heald & Hildreth, P.L.C.
1300 North 17th Street, 11th Floor
Arlington, VA 22209

In re: NCE MX Group 338

New NCE (FM), Pavo, Georgia
Calvary Chapel of Thomasville, Inc.
Facility ID No. 173221
File No. BNPED-20071015AHD

Petition for Reconsideration

New NCE (FM), Moultrie, Georgia
Colquitt Community Radio, Inc.
Facility ID No. 172461
File No. BNPED-20071015AAM

Petition to Deny

Dear Counsel:

We have before us the: (1) referenced application filed by Calvary Chapel of Thomasville, Inc. ("CCT"), on October 15, 2007, for a construction permit for a new noncommercial educational ("NCE") FM station at Pavo, Georgia, and (2) referenced application of Colquitt Community Radio, Inc. ("Colquitt"), filed on October 15, 2007, for a construction permit for a new NCE FM station at Moultrie, Georgia. We also have before us CCT's Petition to Deny Colquitt's application, filed on December 17, 2010; a Petition for Reconsideration of the Letter Decision ("Letter Decision") issued by the Media Bureau ("Bureau") on November 19, 2010; and an Opposition to Petition for Reconsideration ("Opposition") filed by Colquitt on December 23, 2010.¹ For the reasons stated below we deny both the Petition for Reconsideration and the Petition to Deny, and grant Colquitt's application.

¹ CCT filed a Reply to the Opposition on January 11, 2011.

Background. CCT's application was part of NCE mutually exclusive ("MX") Group 338, which included five applications proposing to serve various locations in Georgia.² Pursuant to established procedures,³ the Commission tentatively selected CCT to receive a construction permit for a new NCE FM station at Pavo, Georgia.⁴ The Commission accepted CCT's application for filing and announced a 30-day period for filing petitions to deny.⁵ Colquitt timely filed a Petition to Deny on July 28, 2010.

On November 19, 2010, the Bureau released the Letter Decision finding that, at the time of filing, CCT did not have reasonable assurance of a transmitter site because it failed to contact the tower owner specified in its application regarding use of the site.⁶ Accordingly, the Bureau granted Colquitt's Petition to Deny; dismissed CCT's application; accepted for filing Colquitt's application, the runner-up points winner; tentatively selected Colquitt's application to be awarded a construction permit for a new NCE FM station at Moultrie, Georgia; and announced a 30-day period for filing petitions to deny.

On December 17, 2010, CCT concurrently filed its Petition to Deny and Petition for Reconsideration. The Petition for Reconsideration alleges that the Letter Decision, as it relates to the dismissal of CCT's application, made material errors in ignoring Commission precedent, namely, *State of New Hampshire*,⁷ *Radio Free Moscow*,⁸ *Millard V. Oakley*⁹ and *Great Lakes Broadcasting, Inc.*¹⁰ CCT also recounts the efforts made by its engineer in finding a suitable site for the station, including a review of (1) the tower owner's website to determine if the tower owner was leasing space; (2) other publicly-available information regarding the tower site; and (3) aerial and ground photographs of the tower to determine whether there was available space at the necessary height on the tower, and whether there were any visible impairments that would preclude the successful use of the tower site.¹¹ The Petition to Deny does not make any arguments *per se*; rather, it incorporates by reference the arguments CCT made in its Petition for Reconsideration and its August 6, 2010, Opposition to Colquitt's Petition to Deny.

On December 23, 2010, Colquitt filed its Opposition, arguing that the cases cited by CCT do not support a finding that CCT had reasonable assurance of a transmitter site because Commission precedent

² See *Media Bureau Identifies Groups of Mutually Exclusive Applications*, Public Notice, 23 FCC Rcd 9508 (MB 2008).

³ See 47 C.F.R. § 73.7003 (point system selection procedures); see also *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000), Memorandum Opinion and Order, 16 FCC Rcd 5074, 5105 (2001), *reversed in part on other grounds*, *NPR v. FCC*, 254 F.3d 226 (D.C. Cir. 2001).

⁴ The Commission awarded CCT three points for being an established local applicant, two points for diversity of ownership, and one point for presenting the best technical proposal, for a total of six points. Colquitt, the runner-up, was awarded three points for being an established local applicant and two points for diversity of ownership, for a total of five points. See *Comparative Consideration of 52 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations filed in the October 2007 Filing Window*, Memorandum Opinion and Order, 25 FCC Rcd 8793, 8817 (2010) ("Tentative Selectee Order").

⁵ See *Tentative Selectee Order*, 25 FCC Rcd at 8843.

⁶ See Letter to Melodie A. Virtue, Esq., and Harry C. Martin, Esq., from Peter H. Doyle, Chief, Audio Division, Media Bureau (Nov. 19, 2010).

⁷ *State of New Hampshire*, Memorandum Opinion and Order, 11 FCC Rcd 5258 (WTB 1996).

⁸ *Radio Free Moscow*, Letter, 25 FCC Rcd 10111 (MB 2010).

⁹ *Millard V. Oakley*, Memorandum Opinion and Order, 42 RR 2d 1495 (1978).

¹⁰ *Great Lakes Broadcasting, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 4331 (1991).

¹¹ Petition for Reconsideration at 3, 6.

requires a third party or agent to have direct contact with the site owner or an individual with personal knowledge of the site.¹²

Discussion. Petition for Reconsideration. Reconsideration is warranted only if the petitioner sets forth an error of fact or law, or presents new facts or changed circumstances which raise substantial or material questions of fact that otherwise warrant reconsideration of the prior action.¹³ CCT has not met this burden.

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.¹⁴ 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.¹⁵ 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.”¹⁶ A mere possibility that the site will be available is not sufficient.¹⁷

CCT alleges that Commission precedent in *State of New Hampshire* and *Radio Free Moscow* has established that applicants are not required to discuss use of a tower site with the tower owner.¹⁸ Colquitt argues, on the other hand, that these cases show that the Commission requires contact with individuals apparently in a position to know about the availability of existing structures.¹⁹ We agree with Colquitt, and find the cases cited by CCT are either not controlling or can be easily distinguished from the present case.

As an initial matter, we find that we are not bound by, and decline to follow, the Wireless Telecommunications Bureau’s decision in *State of New Hampshire*. This approach is particularly warranted where, as here, the Media Bureau case law on the relevant legal standard is well developed and settled. In any event, we note that the applicant in *State of New Hampshire* contacted persons with various relationships to the sites there at issue.²⁰ In *Radio Free Moscow*, the applicant, prior to filing the application, received a letter from the lessee, which it assumed was the tower site owner, indicating its willingness to lease space on the tower and transmitter site. The Bureau held that it was reasonable to rely on the letter, as it had indicated that the tower owner was “willing...to enter a long term lease with [applicant] . . . for the purpose of co-locating an antenna on [KHTR(FM)’s] existing tower and providing

¹² Opposition at 2.

¹³ See 47 C.F.R. § 1.106.

¹⁴ 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).

¹⁵ See, e.g., *William F. Wallace and Anne K. Wallace*, Memorandum Opinion and Order, 49 FCC 2d 1424, 1427 (1974); *South Florida Broadcasting Co.*, Memorandum Opinion and Order, 99 FCC 2d 840, 842 ¶ 3 (1984).

¹⁶ *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).

¹⁷ See, e.g. *William F. Wallace and Anne K. Wallace*, Memorandum Opinion and Order, 49 FCC 2d 1424, 1427 (1974) (“Some indication by the property owner that he is favorably disposed toward making an arrangement is necessary”).

¹⁸ Petition for Reconsideration at 6-7.

¹⁹ Opposition at 2.

²⁰ *State of New Hampshire*, 11 FCC Rcd at 5260-61.

necessary space in [KHTR(FM)'s] transmitter building....”²¹ The letter also specified the lease's monthly rate and duration.²² Here, CCT did not contact the tower owner or anyone connected with or in a position to know about the site prior to filing.²³ Without such contact, CCT’s collection of general information is insufficient to provide reasonable assurance of site availability.

Next, CCT argues that it was reasonable and in keeping with Commission precedent in *Millard V. Oakley* and *Great Lakes Broadcasting, Inc.* to rely on third party confirmation of site availability, even if the third party is in error. Colquitt argues that the Commission requires the third party or agent to have direct contact with the site owner or personal knowledge of the site.²⁴

We agree with Colquitt. In *Millard V. Oakley*, the applicant relied on a real estate agent. Although it is disputed whether applicant should have relied wholly on the agent, the Commission found the applicant had reasonable assurance of a transmitter site because the property owner recalled “a previous discussion with the former owner of the property concerning the possibility of locating a radio station thereon” and advised the applicant’s former partner of the “availability for sale of the property.”²⁵ In *Great Lakes Broadcasting, Inc.*, the applicant’s non-voting stockholder had discussions with the site owner about a reasonable rental rate and averred he received permission from the site owner.²⁶ The site owner, affiliated with a competing applicant, acknowledged a rental figure had been discussed, although a question remained about how the same conversation should be interpreted.²⁷

Here, neither CCT nor its agent contacted the owner of the tower site. We disagree with CCT that its precedent finds reasonable assurance of site availability in cases where applicants rely, in good faith, on erroneous information from a third party.²⁸ Although good faith reliance on a third party’s assurance plays a part in these cases, it does so only to bolster a reasonable and diligent effort by an applicant or its agent to negotiate details of site availability with site owners or individuals in a position to provide confirmation that the site is available for the proposed use.

Ordering Clauses. For the reasons set forth above, IT IS ORDERED that the Petition for Reconsideration and the Petition to Deny filed by Calvary Chapel of Thomasville, Inc., on December 17, 2010, are DENIED.

²¹ *Radio Free Moscow*, 25 FCC Rcd at 10112.

²² *Id.*

²³ See *Second Samoan Congregational Church*, Letter, 23 FCC Rcd 16630, 16634 (MB 2008) (dismissing application for lack of reasonable site assurance where negotiations regarding use of the site continued after the application filing date). See also *Les Seraphim and Mana’O Radio*, Memorandum Opinion and Order, 25 FCC Rcd 2785, 2789 (MB 2010) (NCE FM applications will be dismissed if applicant did not have reasonable assurance of site availability at time of filing). Accordingly, we will not consider CCT’s argument that, one month after CCT’s application was filed, the tower owner affirmed the availability of the transmitter site.

²⁴ Opposition at 2.

²⁵ *Millard V. Oakley*, 42 RR 2d at 1498-99.

²⁶ *Great Lakes Broadcasting, Inc.*, 6 FCC Rcd at 4332.

²⁷ *Id.* at 4332-33.

²⁸ Petition for Reconsideration at 7.

IT IS FURTHER ORDERED, that the application of Colquitt Community Radio, Inc. (File No. BNPED-20071015AAM), IS GRANTED, CONDITIONED UPON its compliance with Section 73.7005 of the Commission's Rules,²⁹ which sets forth a four-year holding period for applicants that are awarded permits by use of a point system.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Calvary Chapel of Thomasville, Inc.
Colquitt Community Radio, Inc.

²⁹ 47 C.F.R. § 73.7005.