



Federal Communications Commission
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DA 11-709

In Reply Refer to:

1800B3-JK

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Michael Couzens, Esq.
6536 Telegraph Avenue, Suite B201
Oakland, CA 94609

Margaret Miller, Esq.
Dow Lohnes PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, DC 20036

Re: **NCE MX GROUP 337A**

NEW NCE (FM), Sasser, Georgia
Southwest Georgia Project for Community
Education, Inc.
Facility ID No. 172608
File No. BNPED-20071015ABU

Petition for Reconsideration

NEW NCE (FM), Albany, Georgia
Darton College
Facility ID No. 173442
File No. BNPED-20071018AUL

Dear Counsel:

We have before us: (1) a December 30, 2010, Petition for Reconsideration of the staff's December 1, 2010, dismissal¹ of the application of the Southwest Georgia Project for Community Education, Inc. ("Southwest") for a new noncommercial educational ("NCE") FM station to serve Sasser, Georgia (the "Southwest Application");² and (2) the application of Darton College ("Darton") for a new NCE FM station to serve Albany, Georgia (the "Darton Application"). For the reasons set forth below, we grant the Petition for Reconsideration, reinstate and grant the Southwest Application, and dismiss the Darton Application.

¹ *Letter to Michael Couzens, Esq. and Margaret L. Miller, Esq.*, Reference No. 1800B3-TH (MB Dec. 1, 2010); *Public Notice* of the dismissal of the Southwest Application was published on December 6, 2010. *See Broadcast Actions*, Public Notice, 2010 WL 4928927 (2010).

² Darton College filed an Opposition to the Petition for Reconsideration on January 12, 2011, to which Southwest filed a Reply on January 25, 2011.

Background. Southwest was one of four parties to submit applications proposing service to three different communities in Georgia during a filing window for NCE FM applications in October of 2007. On October 9, 2008, the Media Bureau (“Bureau”) issued a public notice that identified these four applications as mutually exclusive and designated them NCE MX Group 337A.³ In the *Comparative Consideration Order*⁴ released on June 28, 2010, the Commission applied NCE comparative selection criteria⁵ to 52 groups of mutually exclusive NCE FM applications, including Group 337A, and tentatively selected one winner in each group. In Group 337A, the Bureau staff tentatively selected Southwest, applying a tie-breaker analysis in which Southwest’s application prevailed over an application submitted by Darton.⁶

The *Comparative Consideration Order* accepted Southwest’s application for filing and announced a 30-day period for filing petitions to deny that application, indicating that, if after that 30-day period had run there was no substantial and material question concerning the Southwest Application, it would dismiss the other mutually exclusive applications by Public Notice and grant the Southwest Application.⁷ Darton timely filed a Petition to Deny the Southwest Application on July 28, 2010, claiming that Southwest lacked reasonable or any assurance of access to the proposed tower site listed in the Southwest Application. This assertion was based on a sworn declaration dated July 28, 2010, from Erin Entrekin, the business development manager for Diamond Towers (“Diamond”), the tower owner.⁸ In its Opposition to Darton’s Petition to Deny, Southwest provided a letter signed by Sarah L. Berry, Diamond’s Director of Compliance, dated October 11, 2007 (the “Diamond Letter”). The Diamond

³ See *Media Bureau Identifies Groups of Mutually Exclusive Applications Submitted in the October 2007 Filing Window for Noncommercial Educational FM Stations*, Public Notice, 23 FCC Rcd 14730 (MB 2008). Two of the four applications in MX Group 337A were dismissed on August 9, 2010, and those dismissals are final orders.

⁴ *Comparative Consideration of 52 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations File in the October 2007 Filing Window*, Memorandum Opinion and Order, 25 FCC Rcd 8793, 8815-16 (2010) (“*Comparative Consideration Order*”).

⁵ See 47 C.F.R. § 73.7000 – 05. See also *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Notice of Proposed Rule Making, 10 FCC Rcd 2877 (1995), *further rules proposed*, Further Notice of Proposed Rule Making, 13 FCC Rcd 21167 (1998), *rules adopted*, Report and Order, 15 FCC Rcd 7386 (2000), *vacated in part on other grounds sub nom. National Public Radio v. FCC*, 254 F.3d 226 (D.C. Cir. 2001), *clarified*, Memorandum Opinion and Order, 16 FCC Rcd 5074 (“*Comparative MO&O*”), *Erratum*, 16 FCC Rcd 10549, *recon. denied*, Memorandum Opinion and Second Order on Reconsideration, 17 FCC Rcd 13132 (2002), *aff’d sub nom. American Family Ass’n v. FCC*, 365 F.3d 1156 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 10004 (2004) (history pertaining only to non-reserved band FM channels omitted).

⁶ Applicants tied with the highest number of comparative points awarded in a particular group proceed to a tie-breaker round, in accordance with Section 73.7003(c) of the Commission’s Rules. 47 C.F.R. § 73.7003(c). The first tie-breaker for NCE FM applicants is the number of radio station authorizations attributable to each applicant. 47 C.F.R. § 73.7003(c)(1). Southwest prevailed over Darton based on that factor. *Comparative Consideration Order*, 25 FCC Rcd at 8816.

⁷*Id.*

⁸ Darton Petition to Deny at 3-5 and Attachment B. Entrekin stated, in part, that “Diamond has not provided any assurance of the current availability of the Tower for use by Southwest Project for Community Education, Inc.” She also indicates that, “[t]o [her] knowledge,” (1) Diamond has never been contacted by Southwest with regard to the proposed use of the Diamond tower; (2) Diamond does not have any existing or previous agreements for any FM stations to use the tower; and (3) Diamond has no record of Southwest filing an application with Diamond for use of the tower. *Id.*

Letter states that the heights “currently available for equipment installations are 300 ft, 280 ft and 260 ft” above ground level.⁹ In reply, Darton argued that the Southwest Application specified an antenna height of only 50 meters, or 164 feet, above ground level. The Diamond Letter, however, did not specify that such a height was available. Further, Darton submitted a statement from a radio engineer who argued that, when accounting for needed spacing, Southwest’s proposed 4-bay antenna would occupy space on Diamond’s tower from 141 feet to 187 feet above ground level;¹⁰ that space, argued Darton, was not available. Darton therefore argued that the Southwest Application must be dismissed and the Darton Application granted as the next best proposal.¹¹

On December 1, 2010, finding that it was insufficient for Southwest to show that space was available on the proposed tower at a different height than is proposed in its application, the staff granted Darton’s petition and dismissed the Southwest Application. In response, Southwest timely filed the Petition for Reconsideration.

In its Petition for Reconsideration, Southwest states that it never received any indication from Diamond that there were any antenna height restrictions on the Diamond tower.¹² Southwest argues that the Diamond Letter stated only that equipment was installed on the tower on the 250-foot level, but otherwise did not explicitly state that the three available heights listed in the letter were the only ones offered for lease on the tower.¹³ Southwest submits a declaration made under penalty of perjury by its telecommunications engineering consultant, Alexandra Johnson,¹⁴ stating that she contacted representatives from Diamond in both 2007 and 2010. On both occasions, she indicates, the Diamond representatives told her that space was available for Southwest’s proposed use.¹⁵ In support of this claim, Southwest submits a printed copy of an email dated December 23, 2010, from Orazio Russo, the Senior Vice President of Marketing and Business Development for Diamond, to Johnson.¹⁶ In the email, Russo confirms there was space available on its tower at heights between 144 feet and 184 feet above ground level at the time of the drafting of the Diamond Letter on October 11, 2007, “and said space is still available today.”¹⁷ Southwest therefore argues that it met the “reasonable assurance” standard of availability of the proposed tower height necessary to be granted a license.

Southwest also addresses two arguments in Darton’s petition to deny that were not considered by the Commission in its December 1, 2010, dismissal of the Southwest Application: (1) that its corporate documents are sufficient to support an award of comparative points for diversity of ownership; and (2) an

⁹ Southwest Petition for Reconsideration, Attachment A, Exhibit 1.

¹⁰ Darton Reply to Opposition to Petition to Deny, Statement of William J. Getz.

¹¹ Darton Petition to Deny at 9. The Petition also argues that Southwest’s corporate documents are insufficient to support an award of comparative points for diversity of ownership. *Id.* at 5-8 and Attachment C. The Petition further argues that the Southwest Application violates Section 73.509 of the Rules. *Id.* at 8-9 and Attachment D.

¹² Southwest Petition for Reconsideration at 3.

¹³ *Id.*

¹⁴ Southwest Petition for Reconsideration, Attachment A.

¹⁵ *Id.*

¹⁶ Southwest Petition for Reconsideration, Attachment A, Exhibit 2.

¹⁷ *Id.*

August 10, 2010, amendment¹⁸ to the technical portion of the Southwest Application designed to eliminate a slight overlap with WJSP-FM, Warm Springs, Georgia, did not affect its fair distribution preference.

In its Opposition to Southwest's Petition for Reconsideration, Darton argues that the declaration by Johnson and accompanying email submitted by Southwest does not amount to either a new fact or changed circumstance warranting reconsideration.¹⁹ Further, Darton argues that these submissions by Southwest do not meet the Commission's standards for proof.²⁰ Finally, Darton argues that Southwest's Petition for Reconsideration is procedurally defective because "it attempts to argue issues that the FCC decision did not even address."²¹ In reply, Southwest claims that the Bureau staff issued its ruling based on an incomplete record, that Southwest always had reasonable assurance of the availability of the contested antenna height at issue and, therefore, that consideration of the evidence of Russo's email and Johnson's sworn statement is in the public interest.²²

Discussion. The Commission will consider a Petition for Reconsideration only when the petitioner shows either a material error in the Commission's original order or raises changed circumstances or unknown additional facts not known or existing at the time of petitioner's last opportunity to present such matters.²³ 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 Southwest has demonstrated that reconsideration is warranted.

Although Darton is correct in its claim that the submissions provided by Southwest in the Petition for Reconsideration do not constitute new facts or changed circumstances, we are persuaded by Southwest's argument that our decision dismissing the Southwest Application was in error. We therefore will accept the material submitted with the Petition for Reconsideration.

Site Availability. 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 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

¹⁸ See Southwest Opposition to Petition to Deny, Attachment C.

¹⁹ Darton Opposition to Petition for Reconsideration at 1.

²⁰ *Id.* at 2. Darton specifically argues that since Russo's email was not a sworn statement made under penalty of perjury, it should be dismissed as part of a submission by Southwest of "post-hoc rationalizations, provided late and without any explanation as to why these facts could not have been raised at the proper time."

²¹ *Id.* at 4.

²² See Southwest Reply to Opposition to Petition for Reconsideration.

²³ See 47 C.F.R. § 1.106, *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sum nom.*, *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966), and *In re National Association of Broadcasters*, Memorandum Opinion and Order, 18 FCC Rcd 24414, 24415 (2003).

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).

²⁵ 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.").

“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 A mere possibility that the site will be available is not sufficient.²⁷

On substantive grounds, it is clear from Johnson’s sworn declaration and the email from Russo that there was, in fact, a meeting of the minds between Southwest and Diamond resulting in a firm understanding of the availability of space at the 164-foot level on the Diamond tower.²⁸ As Russo’s email establishes, the proposed antenna height sought by Southwest was available in 2007 and remains available today. Without citing any legal authority, Darton claims that the Southwest Petition for Reconsideration “suffers from a failure of proof” because the email from Russo was not a sworn statement made under penalty of perjury. We disagree with this contention. Russo is a disinterested third party and, in connection with the sworn declaration from Johnson and the earlier Diamond Letter, the Russo email is sufficiently probative on the issue of whether the particular antenna height was available for lease to warrant admission.

We recognize that our finding here directly contradicts Entrekin’s conclusory assertion that “Diamond has not provided any assurance of the current availability of the Tower for use by Southwest Project for Community Education, Inc.”²⁹ However, “reasonable assurance” of site availability is a legal determination that can only be made by the Commission, not by the parties or declarants in a contested application proceeding. Moreover, Entrekin’s statement is qualified by her statements that, “[t]o [her] knowledge,” Diamond has never been contacted by Southwest with regard to the proposed use of the Diamond tower, had no existing or previous agreements for any FM stations to use the tower, and had no record of Southwest filing an application with Diamond for use of the tower. The Diamond Letter and the

²⁶ *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).

²⁷ *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).

²⁸ We acknowledge that Johnson’s declaration concerning her discussions with Diamond’s Sarah Berry constitute hearsay statements recounting representations made to Johnson by those principals. The Commission has stated that while the Federal Rules of Evidence generally govern Commission hearings, these rules may be “relaxed if the ends of justice will be better serviced by so doing.” 47 C.F.R. § 1.351. To that end, the Commission has stated that hearsay evidence may be admissible in administrative proceedings if there are some indicia of reliability. *See, e.g., Echostar Communications Corp. v. FCC*, 292 F.3d 749, 753 (D.C. Cir. 2002); *Wine Country Radio*, Memorandum Opinion and Order, 11 FCC Rcd 2333, 2334 (1996). We believe that in the instant proceeding, Russo’s email corroborates Johnson’s declaration and provides a sufficient indication of reliability – even though it was not made under penalty of perjury – that we will accept the sworn Johnson declaration as admissible evidence of the statements related therein.

²⁹ *See* Note 8, *supra*.

Russo email demonstrate that Entrekin's knowledge was not comprehensive and, as observed at n.26, *supra*, "reasonable assurance" does not require a signed agreement with or written application to the site owner. We believe that, notwithstanding the conflicting declarations of Entrekin and Johnson, the preponderance of the evidence³⁰ in this case warrants a finding that Southwest did possess reasonable assurance that the specified location on the Diamond tower was available for its use.³¹ For this reason, we find that Southwest has demonstrated that our prior determination was in error, and we will grant Southwest's petition for reconsideration and reinstate its application.

Further, we reject Darton's claim that the Southwest Petition for Reconsideration was procedurally defective because it argued issues not addressed in the staff's December 1, 2010, dismissal of the Southwest Application. We find that consideration of the issues "is required in the public interest."³²

Localism and Diversity of Ownership. The Commission compares mutually exclusive groups of NCE FM applications under the point system set forth in Section 73.7003 of the Rules.³³ Three points are awarded to applicants that certify that they have been local and established for at least two years. Applicants with a headquarters, campus, or 75 percent of their board members residing within 25 miles of the reference coordinates of the community of license are considered local. The applicant also must certify that it has placed documentation supporting its certification in a local public inspection file, and that it has submitted that documentation to the Commission. Any applicant awarded localism points by the Commission must provide such support for its certification.³⁴ Additionally two points are awarded for local diversity of ownership if the principal community contours of the applicant's proposed station and any other station in which any party to the application holds an attributable interest do not overlap.³⁵ Any applicant awarded diversity of ownership points by the Commission must submit copies of pertinent governing documents to support its certification.³⁶

Darton argues in its Petition to Deny that the corporate resolution included in the Southwest Application is insufficient to meet the requirements of applicants claiming both localism and diversity of ownership points under Section 73.7003(b) of the Rules. This resolution, which was signed by all seven

³⁰ See *American Communications Services, Inc.* Memorandum Opinion and Order, 14 FCC Rcd 21579, 21614 (1999) ("The standard of proof applicable in most administrative and civil proceedings, unless otherwise prescribed by statute or where other countervailing factors warrant a higher standard, is the 'preponderance of the evidence' standard.").

³¹ See *Broadcast Enterprises v. FCC*, 390 F.2d 483, 485 (D.C.Cir.1968) (contradictory allegations and affidavits do not invariably necessitate evidentiary hearing regarding a contested license assignment); see also *Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 394 (D.C.Cir. 1985) (evidentiary hearing not required where no substantial and material question of fact presented).

³² 47 C.F.R. § 1.106(c)(2).

³³ See 47 C.F.R. § 73.7003.

³⁴ See *Comparative Consideration Order*, 25 FCC Rcd at 8797-98, ¶ 11.

³⁵ See 47 C.F.R. § 73.7003(b)(2). Parties with attributable interests are defined as the applicant, its parent, subsidiaries, their officers, and members of their governing boards. See 47 C.F.R. §§ 73.7000 and 73.3555. Interests of certain entities providing more than 33 percent of the applicant's equity and/or debt are also attributable. *Id.*; see also Section IV, Question 2, FCC Form 340.

³⁶ *Comparative Consideration Order*, 25 FCC Rcd at 8797-98, ¶ 11.

parties to the application on September 7, 2007, states that Southwest “shall at all times maintain the characteristics necessary” to be an established local entity and provide local diversity of ownership pursuant to Section 73.7003. The resolution indicates that at least 75 percent of its board members reside within 25 miles of the community to be served by the proposed station and that Southwest and any of its principals are precluded from obtaining any future ownership interest in a station whose principal community contour overlaps with the proposed facility.³⁷

The *Comparative Consideration Order* clearly states that applicant point claims must be readily ascertainable from timely-filed application exhibits.³⁸ Certifications which require the applicant to submit documentation, but which are not supported with any such documentation cannot be credited.³⁹ The order further states that “[w]hile there is some flexibility in the type of documentation an applicant may provide, an applicant submitting no timely documentation at all cannot have made a valid certification.”⁴⁰ We find that the signed corporate resolution included with the Southwest Application was sufficient to justify awarding Southwest points for both localism and diversity of ownership.

Technical Amendment. Darton also claimed in its Petition to Deny that the Southwest Application would cause prohibited overlap with the protected service contour of Station WJSP(FM), Warm Springs, Georgia.⁴¹ On August 10, 2010, Southwest filed an amendment to the technical portion of its application designed to eliminate a purported overlap with WJSP-FM. The staff has reviewed the amendment and determined that it did in fact cure the defect and did not affect Southwest’s fair distribution preference.⁴² We therefore reject this argument.

Southwest Application. We have examined the Southwest Application and find that it fully complies with all pertinent statutory and regulatory requirements and that its grant will further the public

³⁷ Southwest Application, Attachment 2A. In its Opposition to Darton’s Petition to Deny, Southwest provided a copy of its revised by-laws “to corroborate the fact (if necessary) that the resolution was legally effective.” Southwest Opposition to Petition to Deny at 7. The revised by-laws include the verbatim language of the corporate resolution signed and attached in the Southwest Application.

³⁸ See *Comparative Consideration Order*, 25 FCC Rcd at 8797-98, ¶ 11 (“[E]very applicant claiming points for diversity of ownership must certify that no party to the application has an attributable interest in a station with an overlapping service contour to the proposed station, that its governing documents require that such diversity be maintained, and ‘that it has placed documentation of its diversity qualifications in a local public file and has submitted to the Commission copies of that documentation.’”).

³⁹ *Id.*

⁴⁰ *Comparative Consideration Order*, 25 FCC Rcd at 8797-98, ¶ 11.

⁴¹ Darton Petition to Deny at 8.

⁴² See 47 C.F.R. § 73.3522(b)(1) (if any fair distribution selectee’s application is determined to be unacceptable, “the application will be returned and the Selectee will be provided one opportunity for curative amendment by filing a petition for reconsideration requesting reinstatement of the application. All amendments filed in accordance with this paragraph must be minor and must not alter the [fair distribution] preference.”). The amended Southwest Application would provide a service area of 1,662 square kilometers within the proposed facility’s 60 dBu contour, an increase 131 square kilometers over its original proposal. We will not, of course, credit Southwest with this post-filing window improvement in its comparative position. See *Media Bureau Announces NCE FM New Station and Major Change Filing Procedures for October 12 – October 19, 2007 Window; Limited Application Filing Freeze to Commence on September 8, 2007*, Public Notice, 22 FCC Rcd 15050, 15052 (MB 2007) (“the Commission will not take into account any enhancement in an applicant’s comparative position after the close of the window”).

interest, convenience, and necessity by bringing a new noncommercial educational radio service to residents of Sasser, Georgia.

Conclusion/Actions. Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed by Southwest Georgia Project for Community Education, Inc. on December 30, 2010, is GRANTED.

IT IS FURTHER ORDERED, that the application for a new noncommercial educational FM station at Sasser, Georgia (File No. BNPED-20071015ABU) filed by Southwest Georgia Project for Community Education, Inc. is REINSTATED *NUNC PRO TUNC*.

IT IS FURTHER ORDERED that the Petition to Deny filed by Darton College on July 28, 2010 IS DENIED.

IT IS FURTHER ORDERED that the application for a new noncommercial educational FM station at Sasser, Georgia (File No. BNPED-20071015ABU) filed by Southwest Georgia Project for Community Education, Inc. IS GRANTED.

IT IS FURTHER ORDERED, that the application for a new noncommercial educational FM station at Albany, Georgia (File No. BNPED-20071018AUL) filed by Darton College IS DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau