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

In the Matter of	)	
	)	
NCE MX Group 430	)	
	)	
Marfa Public Radio	)	
	)	
Application for a Construction Permit for a New NCE-FM Station at Marfa, Texas	)	File No. BNPED-20071017AEC Facility ID No. 174131
	)	
Houston Christian Broadcasters	)	
	)	
Application for a Construction Permit for a New NCE-FM Station at Alpine, Texas	)	File No. BNPED-20071018AJM Facility ID No. 173348

MEMORANDUM OPINION AND ORDER

Adopted: July 1, 2016 **Released: July 1, 2016**

By the Chief, Media Bureau:

1. We have before us the Petition for Reconsideration (Petition), filed on May 13, 2016, by Marfa Public Radio (MPR).[1] The Petition seeks reconsideration of the Commission's Memorandum Opinion and Order[2] that denied MPR's Application for Review (AFR) of the Media Bureau decision[3] that granted Houston Christian Broadcasters (HCB) a permit to construct a new noncommercial educational (NCE) FM station. For the reasons set forth below, we dismiss the Petition pursuant to Section 1.106(p) of the FCC's rules (Rules).[4]

2. In the *Staff Decision*, the Bureau rejected MPR's argument that HCB lacked reasonable assurance of site availability. MPR supported its argument by stating that it owned and controlled the site referenced on HCB's application and had never given HCB assurance or authorization for site availability. However, the Bureau found that HCB procured reasonable assurance of site availability from the site's previous owner Matinee Radio, LLC (Matinee) in January 2008.[5] The Bureau also noted that none of the evidence in the record suggested HCB had previously known its site assurance was no longer valid.[6] It therefore denied the Petition to Deny and granted the HCB application.

[1] HCB filed an Opposition to the Petition on May 23, 2016, to which MPR filed a reply on May 31, 2016.

[2] *NCE MX Group 430*, Memorandum Opinion and Order, 31 FCC Rcd 4241 (2016) (*AFR Order*).

[3] *MX Group 430*, Letter Order, (MB Nov. 17, 2015) (*Staff Decision*).

[4] 47 CFR § 1.106(p).

[5] *Staff Decision* at 4, citing Letter from Robert Walker, President, Matinee (Oct. 15, 2007); *see also* Opposition at Attach. A.

[6] The Rules require an owner to "immediately notify the Commission" upon any change in ownership information. 47 CFR § 17.57. MPR waited over seven years to notify the Commission.

3. MPR sought Commission review of that ruling, which the Commission denied "for the reasons stated in the *Staff Decision*."[7] The Commission held that that HCB had reasonable assurance of site availability, that there was no evidence that HCB intentionally concealed or had motive to conceal a site loss,[8] and that there was no indication that HCB's permission to use the tower site (granted by Matinee) had been revoked by MPR.[9]

4. In the Petition, MPR asserts that "[t]he Commission must grant a Petition for Reconsideration when the petitioner can demonstrate the existence of material errors in a decision."[10] MPR's argument relies entirely on "recently discovered" evidence, *viz.*, a sworn declaration dated May 12, 2016, from former Matinee President Robert Walker (Walker Declaration) stating that in 2007 he told HCB's president that Matinee "could not provide more than a temporary assurance of tower site availability" and that "HCB would have to discuss any tower availability assurance and formal lease agreement terms with MPR once MPR became the new facilities owner."[11] MPR argues that this "new factual evidence" disproves the Commission's finding that there was no evidence of HCB concealing that it had no reasonable assurance of site availability, and that the Commission must reconsider its decision accordingly.

5. Section 1.106(p) of the Rules provides that "Petitions for reconsideration of a Commission action that plainly do not warrant consideration by the Commission may be dismissed or denied by the relevant bureau(s) or office(s)."[12] Among the specific examples of petitions that do not warrant consideration are those failing to meet the requirements of Section 1.106(b)(2). That provision describes petitions which rely on facts or arguments that were not previously presented to the Commission and are not the result of either changed circumstances or matters that could not have previously been learned by ordinary diligence.[13]

6. MPR claims that the Walker Declaration is "in no way untimely, stale, or irrelevant," because HCB waited over seven years to disclose its site assurance letter from Walker.[14] MPR is once again misguided. HCB introduced the site assurance letter in a timely manner in its opposition to MPR's Petition to Deny, and had no reason to do so earlier. MPR, conversely, acknowledges that "only this week, MPR located Mr. Walker and secured the . . . declaration from him."[15] MPR provides no explanation for why it could not have previously raised evidence of Walker's 2007 interaction with HCB.[16] The Petition thus does not warrant consideration under Section 1.106(p).

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[7] *AFR Order*, 31 FCC Rcd at 4242, para. 4.

[8] *Id.* at 4242-4243, para. 4.

[9] *Id.* at 4243, para. 4.

[10] Petition at 4.

[11] *Id.* at 3 and Walker Declaration.

[12] 47 CFR § 1.106(p); *see, e.g., LPFM MX Group 198*, Order on Reconsideration, 30 FCC Rcd 14317, 14320, para. 9 (MB 2015) (dismissing new arguments that plainly did not warrant consideration by the Commission because petitioner could have presented them previously, but did not); *see also Able Radio Corp.*, Order on Reconsideration, 29 FCC Rcd 9126, 9128, para. 5 (MB 2014).

[13] *See* 47 CFR § 1.106(b)(2).

[14] Petition at 4.

[15] *Id.*

[16] Our finding is underscored by evidence in the record which indicates that MPR has a history of business relationships with Walker dating back to 2005. For example, Walker was a member on MPR's original board of directors. *See* Opposition at Attach. D. Walker also conveyed station KRTS(FM), Marfa, Texas to MPR in January

(continued….)

7. ACCORDINGLY, IT IS ORDERED that pursuant to the authority contained in Section 1.106(p) of the Rules,[17] the Petition for Reconsideration filed by Marfa Public Radio, on May 13, 2016, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief, Media Bureau

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2008. See BAPH-20070911AAW (granted October 24, 2007 and consummated January 4, 2008). *See* File No. BAPH-20070911AAW (granted Oct. 24, 2007 and consummated Jan. 4, 2008). Moreover, Walker and MPR have an ongoing agreement concerning the transmission site at issue. See Opposition at Attach. B, Donation Agreement, para. 3 (MPR will pay Matinee $215,250 if the station is used commercially or sold without Matinee's consent within fifty years).

[17] 47 CFR § 1.106(p).