

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

In the Matter of )  
 )  
EDWARD A. SCHOBER ) Facility ID No. 142130  
 )  
Application for a Construction Permit for a New ) File No. BNPFT-20030821ADP  
FM Translator Station at Manahawkin, New Jersey )

MEMORANDUM OPINION AND ORDER

Adopted: September 24, 2008

Released: September 26, 2008

By the Commission:

1. The Commission has under consideration an Application for Review filed by Greater Philadelphia Radio, Inc. ("GPR").<sup>1</sup> GPR seeks review of the Media Bureau's ("Bureau") decision to deny GPR's petition for reconsideration of the grant of Edward A. Schober's ("Schober") application for a construction permit for a new FM translator station at Manahawkin, New Jersey.<sup>2</sup> For the reasons set forth below, we grant GPR's Application for Review, rescind the grant of Schober's construction permit application, and dismiss that application.

I. BACKGROUND

2. On March 11, 2003, Schober filed a Form 175 short-form application proposing a new FM translator station at Manahawkin, New Jersey, during the filing window for FM Translator Auction No. 83 ("Auction 83").<sup>3</sup> The staff determined that Schober's proposal was not mutually exclusive with any other Auction 83 applicants and directed Schober to file a complete Form 349 long-form application.<sup>4</sup> Schober timely filed his complete Form 349 application on August 21, 2003 (the "Application").<sup>5</sup> GPR subsequently filed a Petition to Deny Schober's Application (the "Petition"), asserting that Schober never obtained reasonable assurance of the availability of his proposed transmitter site, a site owned and controlled by GPR's ultimate parent company, Greater Media, Inc.<sup>6</sup> Schober did not respond to the

<sup>1</sup> GPR filed its Application for Review on December 29, 2004.

<sup>2</sup> Letter to Edward A. Schober, Reference 1800B3-Gates (MB November 30, 2004) (the "Staff Decision").

<sup>3</sup> See BNPFT-20030311AAF; see also FM Translator Auction Filing Window and Application Freeze, Public Notice, 18 FCC Rcd 1565 (2003).

<sup>4</sup> See FM Translator Auction No. 83 Non-Mutually Exclusive Applications, Public Notice, DA 03-2095 (June 30, 2003) ("June 30, 2003, Public Notice").

<sup>5</sup> See FCC File No. BNPFT-20030821ADP.

<sup>6</sup> GPR timely filed its Petition on November 12, 2003. In its Petition, GPR also contended that the proposed translator would cause interference to Station WMGK(FM), Philadelphia, Pennsylvania. The Bureau denied this allegation, and GPR does not seek review of that determination.

allegations in GPR's Petition, but instead filed a minor amendment to his Application to change the transmitter site.<sup>7</sup> Subsequently, on February 6, 2004, GPR filed an "Opposition to Amendment," arguing that because Schober never obtained reasonable assurance of his initial site and misrepresented this fact in his Application, he cannot "cure this fundamental defect ... by blithely specifying a new site."<sup>8</sup>

3. On October 29, 2004, the Bureau staff denied GPR's Petition and granted Schober's Application.<sup>9</sup> On November 24, 2004, GPR filed a Petition for Reconsideration of the grant (the "Reconsideration Petition"), asserting that the staff's rationale for denying the Petition, that "[t]he Commission eliminated the requirement for new translator applications to have site assurance,"<sup>10</sup> was erroneous. The Bureau staff denied GPR's Reconsideration Petition, concluding that: (1) Schober's short-form application, which proposed to locate the antenna on GPR's tower, was not required to have site assurance; and (2) Schober's long-form application, which proposed to locate the antenna on a different tower, was in compliance with all site assurance requirements.<sup>11</sup>

4. In its Application for Review, GPR reiterates the arguments presented in its Reconsideration Petition and asserts that the "factual underpinning of the Staff Action is erroneous and ... contradicts established rules and precedents."<sup>12</sup> Specifically, GPR states that in both Schober's short-form and long-form applications he proposed the same tower site owned and controlled by GPR's parent company. GPR argues that Schober never had reasonable assurance of this tower site, misrepresented this fact in his application, and was therefore precluded from amending his application to cure this fatal defect. Accordingly, GPR urges the Commission to reverse the *Staff Decision* and dismiss or deny Schober's Application.<sup>13</sup>

## II. DISCUSSION

5. 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>14</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>15</sup> While some latitude is afforded such "reasonable assurance," there must be, at a minimum, a "meeting of the minds resulting in some firm

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<sup>7</sup> See January 17, 2004, Amendment to FCC File No. BNPFT-20030821ADP.

<sup>8</sup> See GPR Opposition to Amendment at 2.

<sup>9</sup> See Letter to Edward A. Schober, Reference 1800B3-Gates (MB October 29, 2004).

<sup>10</sup> *Id.* at 1.

<sup>11</sup> See *Staff Decision* at 1.

<sup>12</sup> GPR Application for Review at 3.

<sup>13</sup> Section 1.115 of the Commission's Rules specifies the factors that warrant Commission consideration of the issues presented in an application for review of action taken pursuant to delegated authority. The Commission considers, among other things, whether the action taken is in conflict with case precedent or established Commission policy, whether it was based upon an erroneous finding as to an important or material question of fact, or whether there was prejudicial procedural error. See 47 C.F.R. § 1.115(b)(2).

<sup>14</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>15</sup> See, e.g., *William F. Wallace and Anne K. Wallace*, Memorandum Opinion and Order, 49 FCC 2d 1424, 1427 (1974) ("*Wallace*"); *South Florida Broadcasting Co.*, Memorandum Opinion and Order, 99 FCC 2d 840, 842 (1984) ("*South Florida*").

understanding as to the site's availability."<sup>16</sup> A mere possibility that the site will be available is not sufficient.<sup>17</sup>

6. Although the Commission repealed the requirement that broadcast applicants certify the availability of the transmitter site when it adopted its competitive bidding procedures,<sup>18</sup> the Commission's basic "reasonable assurance" standard remains unaltered.<sup>19</sup> The instructions to FCC Form 349 underscore this requirement and admonish applicants that "[a]ll applicants for broadcast facilities must have a reasonable assurance that the specified site will be available at the time they file FCC Form 349."<sup>20</sup>

7. We agree with GPR that the Bureau staff erred in concluding that Schober's Application was properly granted because Schober's long-form application complied with the site assurance requirements. Schober specified the same tower site, a site owned and controlled by GPR's ultimate parent company, in both his short-form and long-form applications.<sup>21</sup> GPR has declared unequivocally through its numerous pleadings that neither it, its parent company, nor any of its affiliates was ever contacted by Schober or authorized Schober to utilize the site. Schober never responded to GPR's allegations. He submitted nothing to controvert GPR's unambiguous statements and demonstrate that he even attempted to secure site assurance before filing his long-form application. Although the "reasonable assurance" standard is a liberal one, Schober has provided no basis for us to conclude he ever had such assurance.<sup>22</sup>

8. In response to GPR's site assurance allegations, Schober merely amended his Application to specify a different site.<sup>23</sup> 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...."<sup>24</sup>

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<sup>16</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>17</sup> See *Wallace*, 49 FCC 2d at 1425.

<sup>18</sup> See *Implementation of Section 309(j) of the Communications Act*, First Report and Order, 13 FCC Rcd 15920 (1998) ("Auction Order").

<sup>19</sup> See Instructions to FCC Form 349 at 2 ("the Commission's substantive site availability requirements are unchanged").

<sup>20</sup> *Id.* (emphasis in original).

<sup>21</sup> In both his original short-form and long-form applications Schober specified coordinates of 39 41' 57" North Latitude and 74 14' 04" West Longitude and ASR Registration Number 1027616. See Section III-A, Questions 4 and 5 of BNPFT-20030311AAF and BNPFT-20030821ADP. The staff's assertion that Schober's long-form application "proposed to locate [his] antenna on a different tower" was incorrect. *Staff Decision* at 1.

<sup>22</sup> We recognize that in the auction context, the Commission decided to adjudicate unresolved site issues only to the extent there is a question of false certification. Schober's Application, however, was a "singleton" application, which is "exempt from the Commission's auction procedures." See *June 30, 2003, Public Notice* at 1. Moreover, even if the Application had proceeded to auction, we would still adjudicate the issue of site assurance since it involves an allegation of misrepresentation. See *Auction Order*, 13 FCC Rcd at 15956 (explaining that candor concerns the Commission whether it awards broadcast licenses after comparative proceedings or through a system of competitive bidding procedures).

<sup>23</sup> See January 17, 2004, Amendment to FCC File No. BNPFT-20030821ADP.

Accordingly, because there is no evidence that Schober, in good faith, believed he had secured site assurance, he should not have been permitted to amend to cure this fatal defect.<sup>25</sup> We thus reverse the *Staff Decision* and rescind the grant of Schober's Application.

9. Finally, as to GPR's allegation that Schober misrepresented the availability of his proposed site, we find that no substantial and material question exists requiring further inquiry. Misrepresentation is a false statement of material fact made with the intent to deceive the Commission.<sup>26</sup> Errors submitted through carelessness, inadvertence, or even gross negligence, do not constitute misrepresentation.<sup>27</sup> While we find that Schober did not comply with the Commission's site assurance requirements, GPR has provided no evidence to support its misrepresentation accusation or lead us to conclude that Schober deliberately misrepresented facts or otherwise intended to deceive the Commission.<sup>28</sup>

### III. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, That Greater Philadelphia Radio, Inc.'s December 29, 2004, Application for Review IS GRANTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That the grant of a construction permit to Edward A. Schober for a new FM translator station at Manahawkin, New Jersey (FCC File No. BNPFT-20030821ADP) IS RESCINDED, and the application IS DISMISSED.

### FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>24</sup> See, *Classic Vision, Inc.*, Memorandum Opinion and Order, 104 FCC 2d 1271, 1273 (1986), *review denied*, 2 FCC Rcd 2376 (1987), *citing South Florida Broadcasting Co.*, 99 FCC 2d 840, 845 n.12 (Rev. Bd. 1984); *see also REM Malloy Broadcasting*, Memorandum Opinion and Order, 6 FCC Rcd 5843 (1991); *Family Broadcasting, Inc.*, Initial Decision, 10 FCC Rcd 3174 (1995).

<sup>25</sup> See, e.g., *62 Broadcasting, Inc.*, Memorandum Opinion and Order, 4 FCC Rcd 1768 (1989) (applicant which knew it did not have reasonable assurance of the transmitter site at the time it filed its application could not cure fatal defect by amending to specify a new site). Conversely, where there is evidence that an applicant has proceeded in good faith, we have permitted curative amendments. See *Great Lakes Broadcasting, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 4331 (1991) (applicant permitted to amend to a new site where it reasonably believed it had assurance of the proposed site when it certified).

<sup>26</sup> See, e.g., *Swan Creek Communications v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994); *LUJ, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 16980, 16982 (2002); *Fox River Broadcasting, Inc.*, Order, 93 FCC 2d 127, 129 (1983).

<sup>27</sup> See, e.g., *High Country Communications*, Memorandum Opinion and Order, 4 FCC Rcd 6237 (1989); *Garrett, Andrews, & Letzia, Inc.*, Decision, 86 FCC 2d 1172 (Rev. Bd. 1981), *mod. on other grounds*, 88 FCC 2d 620 (1981) ("Garrett").

<sup>28</sup> The burden is on the petitioner to demonstrate motive to deceive or conceal. The Commission will not infer improper motive from application errors, inconsistencies or omissions accompanied by speculation that lacks factual support. See, e.g., *Garrett*, 86 FCC 2d at 1180.