

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

In re Applications of

WINE COUNTRY RADIO File No. BPH-920122MA

RICHARD T. and DELLA R. MORING

For Construction Permit
for a New FM Station on Channel 254A
at Middletown, California

MEMORANDUM OPINION AND ORDER

Adopted: November 30, 1995; Released: February 22, 1996

By the Commission:

1. The Commission has under consideration an application for review filed by Richard T. & Della R. Moring ("Moring") of a December 19, 1994 letter ("Bureau Letter") from the Chief, Audio Services Division, Mass Media Bureau ("Bureau"). The Bureau Letter denied reconsideration of the grant of the above-referenced application filed by Wine Country Radio ("Wine") to construct new station KRSH(FM) at Middletown, California.¹ Opposition and reply pleadings have been submitted. As set forth below, we affirm the Bureau's action.

2. *Background.* Wine filed the above-captioned application for construction permit on January 22, 1992.² In that application, Wine certified that it had reasonable assurance of a transmitter site and listed the site owners as Millicent and Winfree Horne ("Hornes"). On June 4, 1992, Moring filed a petition to deny challenging Wine's site certification. Moring contended that the proposed transmitter site was not located on the Horne's property and that Wine had notice of this prior to filing its application. Moring also claimed that the Hornes stated that they had not given Wine assurance that their property was available for a transmitter site and that the Hornes had instead referred Wine to the owner of an abutting parcel of land. Moring supported its allegations with affidavits from Moring's engineer and counsel that were based on conversations between those parties and the Hornes. With its opposition, Wine submitted an Option to Lease ("Option"). The Option, executed on June 4, 1992 by Wine and the Hornes, recited that it "is intended to memorialize the

parties' agreement on issues first discussed in January of 1992." The Option identified, among other things, the parcel of land, the consideration for the Option and for the lease, the term of the lease, the intended use of the property as a transmitter site and what the parties believed the site's coordinates to be. By letter dated December 22, 1992 ("Staff Letter"), the Commission staff denied Moring's petition, finding that Moring had not raised a substantial and material question of fact with respect to Wine's certification of reasonable site assurance. The Staff Letter stated that the Option was the best evidence of Wine's receipt of reasonable assurance and noted that Moring did not submit an adverse written affidavit from the Hornes.

3. On January 21, 1993, Moring filed a petition for reconsideration of the Staff Letter. Moring again maintained that the staff erred in finding that Wine had reasonable assurance of the availability of its transmitter site because the site specified in its application was not located on the property owned by the Hornes. Moring contended that the submission of the Option after the filing of Wine's application did not demonstrate that Wine had reasonable assurance prior to filing its application. Moring also claimed that the staff disregarded facts that showed misrepresentation by Wine in certifying assurance of a site that is on land belonging to someone other than the Hornes. The Bureau Letter denied Moring's petition, finding that the staff letter correctly accepted the Option as providing the "best evidence" of the site assurance given by the Hornes. The Bureau noted that, although the parties were uncertain of the site's exact coordinates, that issue was not decisively determinative to whether the Hornes had given Wine reasonable assurance of a site. The Bureau also concluded that the affidavits from Moring's engineer and counsel concerning a purported contrary conversation with the Hornes were not sufficient to raise a substantial and material question of fact when balanced against the Hornes' intent as expressed in the Option.

4. Moring's application for review renews its allegations regarding the sufficiency of Wine's site assurance. Specifically, Moring contends that the staff improperly granted Wine's application because the transmitter site specified in the application is not located on the property owned by the individuals who offered reasonable assurance on Wine's application. Moring also charges that the staff should have dismissed or designated the subject application for hearing on issues of misrepresentation with respect to site availability. In addition, Moring contends that the Bureau failed to give the proper weight to the evidence submitted by Moring.

5. *Discussion.* We find that the Bureau properly determined that Wine had reasonable site assurance at the time of the subject application's filing. Our decisions have "consistently held that an applicant need not enter into a final or binding agreement in order to demonstrate reasonable

¹ The Bureau Letter also denied a pleading styled "Petition for Revocation of Modified Construction Permit, Denial of Application for License and Recission of Program Test Authority" filed by Sonoma County Radio Broadcasters Association ("SCRBA") and a pleading styled "Request for Commission Action and Objection" filed by Redwood Empire Sportcasters ("RES"). On January 27, 1995, SCRBA and RES filed a joint petition for reconsideration of the Bureau Letter. Because both initial pleadings objected to a license application (BLH-931214KH) filed by Wine to cover a different construction permit, and thus were not germane to the issue of reasonable assurance herein, the

SCRBA and RES petition for reconsideration will be considered separately. It is noted, that on May 8, 1995, the Commission granted the assignment of license of KRSH(FM) from Wine to Independence Broadcasting Corporation (BALH-File No. 950119GF).

² The filing window for Middletown, California closed on December 26, 1991. Wine tendered its application on a "first come-first served" basis on January 22, 1992 (BPH-920122MA). Moring filed an application (BPH-920127MB) for the same allotment on January 27, 1992, thus reserving a place in the queue of eligible applicants should the first applicant be disqualified.

assurance of site availability." *Alden Communications Corp.*, 3 FCC Rcd 3937, 3938 (1988) (citations omitted). "All that is ordinarily necessary for reasonable assurance is some 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, and that he would give notice of any change of intention." *Elijah Broadcasting Corp.*, 5 FCC Rcd 5350, 5351 (1990). Here, Wine states that its certification of site assurance in the subject application was based upon its having contacted the Hornes and having received assurance of the availability of a transmitter site at specified coordinates. Wine's statement is further buttressed by the Option. That document, executed by Wine and the Hornes, provides that it is "intended to memorialize the parties' agreement on issues first discussed in January of 1992." As indicated by the Option, the parties "agreement" specifically encompassed the use of part of the Horne's property for a transmitter site. Although Moring contends that this "agreement" is somehow invalidated by Moring's and Wine's inability to agree upon the precise coordinates of the site, we concur with the Bureau that, under the attendant circumstances, the accuracy of the site's coordinates is not pivotal. Specifically, the Bureau noted that the parties expressly acknowledged, on the face of the Option, what they "believed" the site's geographic coordinates to be. Notwithstanding this mutual uncertainty of the precise coordinates of the site, the accuracy of the site's coordinates is not pivotal. The Bureau correctly noted that the pivotal matter was that Wine had received from the Hornes a reasonable assurance that the Hornes' property would be available for use as a transmitter site at the time of the instant application's filing. Finally, Moring provides no evidence that Wine intended to deceive the Commission in its application when it certified that the Hornes had given reasonable assurance of the use of a portion of that land as a transmission site. Therefore, no issue of misrepresentation exists. See *David Ortiz Radio Corp.*, 941 F.2d 1253 (1991)(misrepresentation issue is not warranted in the absence of substantial evidence of intention to deceive).

6. We also reject Moring's contention that the Bureau failed to give the proper weight to the evidence Moring submitted. Moring's proffered evidence consists of affidavits of Moring's counsel and engineer recounting alleged conversations in which the Hornes purportedly stated that they did not give anyone permission to use their land as a transmitter site. Moring argues that these statements constitute "clearly reliable" hearsay. While hearsay that is relevant and material is admissible in administrative proceedings, see, e.g. *Johnson v. United States*, 628 F.2d 187, 190 (D.C. Cir. 1980), the weight to be accorded it depends on its truthfulness, reasonableness, and credibility. *Id.* at 190-91. A prime indicium of probity is whether the declarants are disinterested witnesses. *Id.* at 191. The Bureau properly accorded little weight to these statements, as the affidavits come from Moring's own representatives. The Bureau also correctly noted that Moring did not provide an affidavit from the Hornes, which made the statements in the affidavits even less reliable. Therefore, the Bureau appropriately concluded that the Option, executed by the Hornes, constituted a more reliable evidentiary source on this issue. We agree with the Bureau that Moring's affidavits thus raise no substantial and material question of fact as to the validity of the site assurance that Wine received from the Hornes. See *Broadcast Enterprises, Inc v. FCC*, 390 F.2d 483, 485 (D.C. Cir. 1968) ("[c]ontradictory allegations

and affidavits which create some possibly unresolved factual issue do not invariably necessitate an evidentiary hearing").

7. *Conclusion.* Accordingly IT IS ORDERED, that the application for review filed by Richard T. & Della R. Moring Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary