



Federal Communications Commission
Washington, D.C. 20554

November 9, 2010

In Reply Refer to:
1800B3-VMM

Clean Air Broadcasting Corporation
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In re: **NCE MX Group 329**

New NCE FM, Key West, FL
Facility ID No. 175644
Clean Air Broadcasting Corporation
File No. BNPED-20071017AGO

New NCE FM, Key West, FL
Facility ID No. 174852
Call Communications Group, Inc.
File No. BNPED-20071019ADQ

New NCE FM, Key West, FL
Facility ID No. 176465
Cultural Renewal Radio, UA
File No. BNPED-20071022AME

Petition to Deny
Petitions for Reconsideration

Gentlemen:

This letter concerns the above-referenced application (the "Application") of Clean Air Broadcasting Corporation ("Clean Air") for a new noncommercial educational ("NCE") FM station at Key West, Florida. On July 28, 2010, Call Communications Group, Inc. ("Call") filed a Petition to Deny (the "Petition") the

Application.¹ On October 22, 2010, Clean Air filed an Opposition (“Opposition”) to the Petition.² For the reasons set forth below, we deny the Petition and grant Clean Air’s application.

Background. The Application was part of NCE MX Group 329 which included eight applicants all proposing to serve Key West, Florida.³ Pursuant to established procedures,⁴ the Commission tentatively selected Clean Air to receive a construction permit for a new NCE FM station at Key West, Florida.⁵ The Commission accepted the Application for filing and announced a 30-day period for filing petitions to deny the Application.⁶ On July 28, 2010, Call filed the Petition.

Clean Air proposes to mount its antenna on an existing tower owned by Adolphus Warfield, Inc.,⁷ at 527 Southard Street, Key West, Florida.⁸ The tower’s Antenna Structure Registration application at the Commission lists David Freeman, 513 Southard St., Key West, Florida as its contact representative. In its Petition, Call argues that the Commission should dismiss the Application because Clean Air lacked reasonable assurance of its proposed transmitter site’s availability when it filed the Application.⁹ Call includes a printout of a series of emails between Call and a person identified as Timothy Fahey, Regional Leasing Manager for Global Tower Partners, whom Call alleges is the tower owner’s leasing agent.¹⁰ Call argues that these emails show that Clean Air had no assurance of the tower’s availability.

In its Opposition, Clean Air argues that it did in fact have reasonable assurance of the availability of the transmitter site on the tower when it filed the Application.¹¹ The Opposition includes a sworn statement (“Statement”) of its technical consultant, Richard Van Zandt, who states that he spoke to Mr. Freeman prior to filing, and confirmed Mr. Freeman’s consent to list the tower as Clean Air’s proposed site and the site’s availability for Clean Air’s use.¹² The Opposition also includes a letter (“Letter”) from Mr. Freeman confirming that he gave prior permission to Mr. Van Zandt and Clean Air, and that the space continues to be

¹ Call filed a Supplement to its Petition on October 27, 2010. This pleading is dismissed as an unauthorized pleading under Section 1.45 of the Commission’s Rules (“Rules”). 47 C.F.R. § 1.45. *See, e.g., Colorado RSA 7(B)(2) Ltd. Partnership*, Order, 15 FCC Rcd 3403 (WTB 2000) (declining to consider unauthorized pleadings). On July 28, 2010, and September 13, 2010, respectively, Call and Cultural Renewal Radio UA (“CRR”) each filed a Petition for Reconsideration of the dismissal of its application as comparatively inferior to the Application, citing the pendency of the Petition. Because we are denying the Petition, we are also dismissing these Petitions for Reconsideration.

² As an explanation for its late filing, Clean Air states that it did not receive the Petition to Deny when it was originally filed because Call mailed it to the wrong address. We have accepted Clean Air’s Opposition.

³ *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 (2010) (“*Comparative Order*”).

⁴ *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).

⁵ *Comparative Order* at 8813, ¶ 61.

⁶ *Id.* at 8841, ¶ 161.

⁷ The tower is assigned ASR No. 1030880.

⁸ Opposition at Attachment A.

⁹ Petition at 2.

¹⁰ Petition, Exhibit A.

¹¹ Opposition at 2.

¹² *Id.* at Attachment B.

available for use.¹³ Clean Air does not dispute Global Tower Partners' authority over the tower, but notes that it is only a leasing agent and not the sole source of information and authority concerning the tower.¹⁴ As such, it maintains that the Statement and the Letter demonstrate that it had reasonable assurance at the time of filing.

Discussion. An applicant seeking a new NCE broadcast facility must possess reasonable assurance of the availability of a transmitter site when it files its application.¹⁵ When an applicant seeks to locate facilities on an existing structure, it may obtain reasonable assurance by determining "that there is space available . . . and that it is reasonable to anticipate that it may use this space."¹⁶ Here, prior to filing the Application, Clean Air received verbal assurance from Mr. Freeman indicating Adolphus Warfield, Inc.'s willingness to lease Clean Air space on its tower.¹⁷ Based on the Statement and the Letter, we find that Clean Air reasonably believed that the tower it specified would be available for its use when it filed its application.¹⁸ Freeman indicated that there would be space available on the tower, and Clean Air reasonably anticipated using that space.¹⁹ Therefore, Clean Air possessed reasonable assurance of site availability when it filed its application. Clean Air also has shown that the proposed transmitter site remains available.

Conclusion/Actions. Accordingly, IT IS ORDERED THAT the Petition to Deny filed by Call Communications Group, Inc. IS DENIED.

IT IS FURTHER ORDERED THAT the Petitions for Reconsideration filed by Call Communications Group, Inc. and Cultural Renewal Radio, UA, ARE DISMISSED.

IT IS FURTHER ORDERED THAT the application of Call Communications Group, Inc. (File No.BNPED-20071019ADQ) a construction permit for a new noncommercial educational FM station in Key West, Florida, IS HEREBY DISMISSED.

¹³ *Id.* at Attachment C.

¹⁴ *Id.* at 3.

¹⁵ 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). See also *Port Huron Family Radio, Inc.*, Decision, 66 RR 2d 545 (1989).

¹⁶ *In re Application of State of New Hampshire*, Memorandum Opinion and Order, 11 FCC Rcd 5258, 5261 (WTB 1996) (citing *Public Mobile Radio Services Rules*, Report and Order, 95 FCC 2d 769, 778 (1983)).

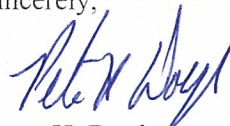
¹⁷ Opposition at Attachments B and C.

¹⁸ *Id.*

¹⁹ See *In re Application of State of New Hampshire*, Memorandum Opinion and Order, 11 FCC Rcd 5258, 5261 (WTB 1996) (citing *Public Mobile Radio Services Rules*, Report and Order, 95 FCC 2d 769, 778 (1983)).

Finally, IT IS FURTHER ORDERED THAT the application of Clean Air Corporation (File No. BNPED-20071017AGO) for a construction permit for a new noncommercial educational FM station in Key West, Florida, IS GRANTED conditioned upon Clean Air Corporation's compliance with Section 73.7005 of the Commission's Rules, 47 C.F.R. § 73.7005, which sets forth a four-year holding period for applicants that are awarded permits by use of a point system.²⁰

Sincerely,

A handwritten signature in blue ink, appearing to read "Peter H. Doyle".

Peter H. Doyle,
Chief, Audio Division
Media Bureau

²⁰ See 47 C.F.R. § 73.7005.