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Washington, D.C. 20554**

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In Reply Refer to:
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In Re: Reserved Allotment Group No. 19

NEW NCE FM, Weiser, Idaho

Blessed Sacrament Catholic Church of Ontario, Inc.
Facility ID No. 185010
File No. BNPED-20100226ACY

Petition to Deny

New NCE FM, Weiser, Idaho

Tool Shed PDX
Facility ID No. 185010
File No. BNPED-20100226AJX

Gentlemen:

We have before us: (1) the referenced application of Blessed Sacrament Catholic Church of Ontario, Inc. ("BSCC"), for a new noncommercial educational ("NCE") FM station to serve Weiser, Idaho ("BSCC Application"); (2) the referenced application of Tool Shed PDX ("TSP") for a new NCE FM station to serve Weiser, Idaho ("TSP Application"); (3) a Petition to Deny ("Petition") the BSCC Application filed by TSP on June 1, 2011;¹ and (4) a Petition for Reconsideration filed by TSP on July 7, 2011, seeking reinstatement of its dismissed application. For the reasons set forth below, we grant the Petition, dismiss the BSCC Application, grant the Petition for Reconsideration, and accept for filing the TSP Application.

Background. The BSCC Application was part of the NCE Reserved Allotment Group 19, which included BSCC, TSP, Hispanic Family Christian Network ("HFCN"), and Grace Public Radio ("GPR").

¹ BSCC filed an Opposition to the Petition ("Opposition") on June 30, 2011, to which TSP filed a Reply to Opposition to Petition to Deny ("Reply") on July 11, 2011.

Each of these applicants proposes to serve Weiser, Idaho.² Pursuant to established procedures,³ the Commission tentatively selected the BSCC Application as the winner of Reserved Allotment Group No. 19.⁴ In a subsequent Public Notice, the Bureau dismissed the applications of HFCN, TSP, and GPR.⁵ It therefore accepted the BSCC Application for filing and announced a 30-day period for filing petitions to deny.⁶ TSP filed the Petition to Deny on June 1, 2001, asserting that BSCC lacked reasonable or any assurance of access to the proposed tower site listed in the BSCC Application.⁷ In support of its Petition, TSP presents an email correspondence with a representative of the Baker City Field Office for the Department of Interior, Bureau of Land Management (“BLM”)⁸ that states that the proposed coordinates appear to be on BLM land, and that BLM has no record of an FCC application being proposed for this parcel.⁹ TSP therefore argues that the BSCC Application must be dismissed and TSP’s application granted as the next best proposal.¹⁰

In its Opposition, BSCC contends that it had, at minimum, a good faith belief that it had secured reasonable assurance regarding the availability of the proposed tower site.¹¹ To support this assertion, BSCC attached two authored letters from Keith Pettyjohn, a representative of BSCC, to Harry Bettis, the landowner where BSCC actually intended to construct a tower for its technical facilities.¹² These letters “constitut[e] a written memorialization of conversations between the individuals in the weeks leading up to the application window filing deadline in February of 2010.”¹³ BSCC further explains that there was a discrepancy between the precise coordinates cited in the BSCC Application and those cited in the letter, and that there was a typographical error in the original application.¹⁴ Contemporaneously with the Opposition, BSCC filed an amendment to its Application correcting the coordinate error.¹⁵ The new

² See *Comparative Consideration of 37 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 26 FCC Rcd 7008, 7027 (2011) (“*Comparative Consideration Order*”).

³ 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 (DC Cir. 2001).

⁴ After calculating all points, BSCC was credited with five points; HFCN with four points; TSP with two points; and GPR with zero points.

⁵ See *Broadcast Actions*, Public Notice, Report No. 47505 (June 10, 2011).

⁶ *Comparative Consideration Order* at ¶ 136.

⁷ Petition at 2.

⁸ The proposed tower site listed in the original BSCC Application is 44-22-57.4 N 117-24-52.1 W.

⁹ Petition at 2.

¹⁰ *Id.* at n.1.

¹¹ Opposition at 4.

¹² See Opposition at Exhibit A.

¹³ Opposition at 4.

¹⁴ *Id.* at 4.

¹⁵ The June 30, 2011, amendment specifies a tower location of 44-22-41.6N 117-24-39.9W. We have previously found that inadvertent typographical errors regarding tower location can be corrected by minor amendment. See *Union Valley Baptist Church*, Letter, 23 FCC Rcd 9161 (MB 2008) (finding that applicant’s clerical error misidentifying its proposed tower was not fatal to its application). We therefore accept the amendment. But see *Letter to Dennis J. Kelly, Esq. and Richard S. Myers, Esq.*, 24 FCC Rcd 2410 (MB 2009), *recon. denied*, 25 FCC Rcd (continued . . .)

coordinates reflect that the proposed tower site is on private land owned by Harry Bettis, and not the federally owned land managed by BLM.

In its Reply, TSP asserts that BSCC did not furnish proof of reasonable assurance of the amended tower coordinates at the time BSCC filed its initial application in February 2010.¹⁶

Discussion. Pursuant to Section 309(d) of the Communications Act of 1934, as amended (the “Act”), a petition to deny must provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with Section 309(a) of the Act.¹⁷ We find that the Petition presents specific factual allegations sufficient to meet this standard.

Site Assurance. 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.¹⁸ It is well-established that 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.¹⁹ While some latitude is afforded such reasonable assurance, there must be, at a minimum, a “meeting of the minds resulting in some firm understanding as to the site’s availability.”²⁰ A mere possibility that the site will be available is not sufficient.²¹

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14352 (MB 2010) (stating that a clerical error cannot be corrected if the corrective amendment would constitute a “major” amendment).

¹⁶ Reply at 2.

¹⁷ See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff’d sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (DC Cir. 1993), *rehearing denied* (Sept. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (petitions to deny must contain adequate and specific factual allegations sufficient to warrant the relief requested.).

¹⁸ See, e.g., *Les Seraphim and Mana’o Radio*, Memorandum Opinion and Order, 25 FCC Rcd 2785 (MB 2010); *Port Huron Family Radio, Inc.*, Decision, 66 RR 2d 545 (1989); *Radio Delaware, Inc.*, Memorandum Opinion and Order, 67 RR 2d 358 (1989).

¹⁹ See, e.g., *William F. Wallace and Anne K. Wallace*, Memorandum Opinion and Order, 49 FCC 2d 1424, 1427 (1974) (“*Wallace*”) (“Some indication by the property owner that he is favorably disposed toward making an arrangement is necessary”).

²⁰ *Genesee Communications, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 3595, 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).

²¹ 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 ¶ 4 (MB 1989) (holding that applicant for noncommercial educational 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) (issue designated against noncommercial educational television broadcast application as to whether applicant had reasonable assurance of the site proposed in its application).

We find that BSCC did not have reasonable assurance of its tower site when it filed the BSCC Application because Pettyjohn's letters to Bettis demonstrate that the parties did not reach an understanding as to the site's availability. For example, Pettyjohn's February 10, 2010, letter states, "[s]ince I have not heard otherwise from you or Mr. Bean, I trust that, in principle, you are amenable to discussing a leasehold of some kind, should the FCC grant the Construction Permit."²² Pettyjohn further states, "[t]o summarize our discussion *and the proposal*, please note the following points"²³ Pettyjohn's letters constitute an offer with no evidence of acceptance. They establish that a "meeting of the minds" never occurred between BSCC and Bettis; instead, we have simply an inquiry followed by a letter taking the position that there is a deal in principle unless the landowner affirmatively rejects the idea. The "reasonable assurance" standard is a liberal one,²⁴ but BSCC has failed to meet it. Therefore, we find that BSCC failed to obtain reasonable site assurance at the time of its original application filing. Moreover, BSCC may not amend to cure this fatal defect following the close of the NCE FM filing window.²⁵ Thus, we will dismiss the BSCC Application.

Tool Shed PDX Petition. TSP seeks reinstatement of its application pending the staff's review of its Petition. Because we had not ruled on TSP's Petition – and therefore had not made a finding that there was "no substantial and material question concerning the grantability of the tentative selectee's application" – dismissal of the competing applications was premature.²⁶ Therefore, we will grant TSP's petition for reconsideration and reinstate its application. Moreover, with the dismissal of the BSCC Application, TSP is the sole remaining applicant.²⁷ Accordingly, TSP is the new tentative selectee.

Conclusion/Actions. Accordingly, IT IS ORDERED, that the June 1, 2011, Petition to Deny filed by Tool Shed PDX, IS GRANTED.

IT IS FURTHER ORDERED, that the application of Blessed Sacrament Catholic Church of Ontario, Inc. (BNPED-20100226ACY), for a new noncommercial educational FM Station in Weiser Idaho, IS DISMISSED.

²² See Opposition at Exhibit B.

²³ *Id.* (emphasis added).

²⁴ *Elijah Broadcasting Corporation*, Memorandum Opinion and Order, 5 FCC Rcd 5350, 5351 (1990); *Anderson Radio Broadcasting, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 578, 584 n.46 (2008).

²⁵ *Edward A. Schober*, Memorandum Opinion and Order, 23 FCC Rcd 14263, 14265 (2008) ("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. . . .'"). See also *Indiana Community Radio Corp.*, Memorandum Opinion and Order, 23 FCC Rcd 10963 (MB 2008) (same).

²⁶ *Hawaii Public Radio, Inc.*, Letter, 25 FCC Rcd 3967 (MB 2010).

²⁷ Although HFCN had more points than TSP in the points hearing, HFCN did not file a petition for reconsideration of the dismissal of its application. That dismissal is now final.

IT IS FURTHER ORDERED, that the Petition for Reconsideration filed by Tool Shed PDX on July 7, 2011 IS GRANTED, and the application of Tool Shed PDX (BNPED-20100226AJX) for a new noncommercial educational FM station at Weiser, Idaho, IS REINSTATED AND ACCEPTED FOR FILING.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau