Federal Communications Commission
Washington, D.C. 20554

September 4, 2012

In Reply Refer to:
1800B3-ERC

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In re: **Reserved Allotment Group 43**
New NCE-FM, Amherst, New York
Lockport Seventh-Day Adventist Church
Facility ID No. 184990
File No. BNPED-20100226AFZ

New NCE-FM, Amherst, New York
Medaille College
Facility ID No. 184302
File No. BNPED-20100224AAO

Petition to Deny

Dear Counsel:

We have before us the: referenced applications, filed by Lockport Seventh-Day Adventist Church ("LSDA") and Medaille College ("MC") for a new, noncommercial educational ("NCE") FM station on Channel 221A at Amherst New York (the "LSDA Application" and "MC Application," respectively); and a Petition to Deny the LSDA Application, filed by MC on July 21, 2011 ("Petition").[1] For the reasons set forth below, we grant the Petition, rescind the prior tentative selection of the LSDA Application, and dismiss the LSDA Application.

Background. LSDA, MC, and seven other parties[2] filed mutually exclusive applications for a new NCE FM station on Channel 221A at Amherst, New York. The Commission subsequently designated these applications as NCE Reserved Allotment Group No. 43.[3] In the *Comparative Consideration Order,* the Commission concluded that each applicant would provide a first or second NCE service to at least ten

[1] LSDA filed an Opposition to Petition to Deny ("Opposition") on August 19, 2011. MC filed a Reply to Opposition to Petition to Deny ("Reply") on August 30, 2011.

[2] The other seven applicants were JMC Radio of NY, Inc. (File No. BNPED-20100222AAO), Triangle Foundation, Inc. (File No. BNPED-20100226ACA), Helen M. Randall Memorial Baptist Church (File No. BNPED-20100226AEE), Hispanic Family Christian Network, Inc. (File No. BNPED-20100226AHH), Call Communications Group, Inc. (File No. BNPED-20100226AIN), Smile FM (File No. BNPED-20100226AJM), and Calvary Chapel of the Niagara Frontier (File No. BNPED-20100226AGW) ("CCNF").

[3] *See Comparative Consideration of 33 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial FM Stations*, Memorandum Opinion and Order, 26 FCC Rcd 9058, 9070 (MB 2011) ("*Comparative Consideration Order*").

percent of the population and to at least 2,000 people within their proposed service areas.[4] The applicants therefore satisfied the third channel reservation criteria and proceeded to a point determination in which the LSDA, MC, and CCNF Applications tied for the highest total with five points. As a result, the LSDA, MC, and CCNF Applications were tentatively selected on a time-sharing basis, triggering a 30-day period to file petitions to deny against the tentative selectees.[5]

In the Petition, MC claims that the LSDA Application would not provide requisite coverage of the principal community of license of Amherst, New York, as required by Section 73.315(a) of the Commission's Rules ("Rules).[6] MC states that this defect cannot be remedied by a curative amendment because LSDA has already been amended once before to correct a defect identified by the staff.[7] MC also claims that LSDA failed to obtain reasonable site assurance for its proposed transmitter location.[8] MC provides the Declaration of Roy P. Stype, III, who states that Time Warner Cable ("TW"), the owner of the proposed tower, had not given LSDA reasonable assurance of the tower's availability.[9]

In its Opposition, LSDA concedes that its current proposal is defective because it does not adequately cover the community of license but argues that a curative amendment should be permitted.[10] LSDA claims that the coverage defect was created by the Amendment and was not present originally in the Application.[11] As such, LSDA claims the Commission should have rejected the Amendment as an invalid "suicide amendment."[12] LSDA argues that the Commission's policy, which limits the number of curative amendments, only applies to defects to the original application and not defects introduced by subsequent amendments.[13] LSDA also claims that the hearsay evidence contained in the Stype Declaration is insufficient to support MC's claim that LSDA lacked reasonable assurance that its

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[4] *Id.* Channel 221A at Amherst, New York was reserved under the third channel reservation criteria. Accordingly, applicants for this frequency must demonstrate that they are technically precluded from using a reserved channel and that they will provide first or second NCE service to at least ten percent of its covered population, which must total at least 2,000 persons.

[5] *Id.* at 9098. All of the other mutually exclusive applications were dismissed on July 29, 2011, *see Broadcast Actions,* Public Notice, Report No 4752 (Aug. 3, 2011), and those dismissals have become final.

[6] Petition at 2-3; *see* 47 C.F.R. § 73.315(a).

[7] Petition at 3. The LSDA Application was previously dismissed on October 29, 2010, for violating the *Agreement Between the Government of the United States of America and the Government of Canada Relating to the FM Broadcasting Service in the Band 88-108 MHz* ("USA-Canada Agreement") by creating prohibited overlap with a Canadian station. *See Letter to Lockport Seventh-Day Adventist Church*, Reference 1800B3 (MB Oct. 29, 2010), submitted as Exhibit 3 of the Petition; *see also Broadcast Actions*, Public Notice, Report No. 47355 (Nov. 3, 2010). The Media Bureau subsequently reinstated the LSDA Application *nunc pro tunc* on January 20, 2011, after LSDA submitted a curative amendment ("Amendment") to its technical proposal. *See Broadcast Applications*, Public Notice, Report No. 27409 (Jan. 25, 2011).

[8] *Id.*

[9] Petition, Exhibit 4 ("Stype Declaration").

[10] Opposition at 2-3.

[11] *Id.* at 2.

[12] *Id.* at 2-3 (claiming that "[i]t has long been Commission policy . . . to return such [suicide] amendments unprocessed . . . under the theory that no applicant would intentionally file an amendment that would lead to . . . dismissal of the application").

[13] *Id.* at 3 (citing *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, Public Notice, 49 Fed. Reg. 47331 (Aug. 2. 1984) ("*Policy Statement*")).

specified site was available for its use.[14] Additionally, LSDA provides an e-mail from a leasing agent representing TW as evidence that reasonable assurance was obtained.[15]

In the Reply, MC argues that LSDA misinterprets the *Policy Statement*, claiming that the aim of the *Policy Statement* was to ensure fairness to all applicants.[16] Furthermore, with respect to the reasonable assurance argument, MC provides a declaration under penalty of perjury of Tom De Seyn, Headend Manager of TW's Western New York Office, who states that TW has not given LSDA any assurance of the site's availability.[17] MC also highlights a disclaimer contained in the Leasing Agent-Email ("disclaimer"), which, in relevant part, states: "Nothing in this communication constitutes an offer or a promise on which any person may rely. KGI [the leasing agent] . . . is not authorized to make binding offers or promises on [TW's] behalf."[18] MC claims this statement is sufficient to establish LSDA did not receive reasonable assurance of site availability.[19]

Discussion. Section 309(d)(1) of the Communications Act of 1934, as amended,[20] provides that any party in interest may file a petition to deny an application. In order to assess the merits of a petition to deny, a two-step analysis is required.[21] First, the petition must make specific allegations of fact sufficient to demonstrate that the petitioner is a party in interest and that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity.[22] This threshold determination is made by evaluating the petition and the supporting affidavits. If the petition meets this threshold requirement, the Commission must then examine all of the material before it to determine whether there is a substantial and material question of fact calling for further inquiry and requiring resolution in a hearing.[23] If no such question is raised and if the Commission concludes that such grant otherwise serves the public interest, convenience, and necessity, the Commission will deny the petition and grant the application.

NCE applicants applying for reserved channels above Channel 220 must comply with the Commission's technical rules for commercial stations, including Section 73.315.[24] This rule requires that an applicant's "transmitter location shall be chosen so that, on the basis of the effective radiated power and antenna height above average terrain provide a minimum field strength of 70 dBμ (3.16

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[14] *Id.* 3-5.

[15] Opposition, Attachment 1 ("Leasing Agent E-mail"). The e-mail is from LeeAnn Giannuzzi, an employee of KGI Wireless, the leasing agent for TW, to Adrian Herritt, who LSDA identifies as "an engineering consultant [who] contacted a leasing agent about the use of the Time Warner tower on behalf of LSDA." Opposition at 5. We note that the coordinates listed in the "Tower Profile" accompanying the Leasing Agent E-mail – 42° 56' 46.2 NL; 78° 49' 38.1" WL – match the coordinates and antenna structure registration number listed in LSDA's original and amended applications.

[16] Reply at 2-3 (stating that allowing multiple curative amendments would be "unfair to other applicants . . . who have prepared properly executed applications) (citing *Policy Statement*, 49 Fed. Reg. at 47332).

[17] Reply, Attachment 2 ("De Seyn Declaration"). He states that TW "has not entered into an agreement to permit Lockport to use [the specified site] and I have no knowledge that Lockport has been given any assurance that Time Warner's site may be used for Lockport's proposed station."

[18] Reply at 4, citing Leasing Agent E-mail.

[19] *Id.* at 4-5.

[20] 47 U.S.C. § 309(d)(1).

[21] *See, e.g., Artistic Media Partners, Inc.*, Letter, 22 FCC Rcd 18676, 18676 (MB 2007).

[22] *See id.*; *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

[23] 47 U.S.C. § 309(d)(2).

[24] 47 C.F.R. § 73.315(a). *See* FCC Form 340, Section VII, Item 14.

mV/m) over the entire principal community to be served. As MC alleges and LSDA acknowledges, the LSDA Application currently fails to satisfy this requirement.[25] LSDA's argument that it should be entitled to submit a second curative amendment to correct this defect is flawed for several reasons. First, assuming *arguendo* that the Amendment constituted a "suicide amendment" and should have been rejected, had the staff not considered the Amendment, it could not have reinstated the LSDA Application because the original proposal violated the USA-Canada Agreement.[26] Second, LSDA claims that there is no limitation on the number of amendments an applicant may file to correct defects created by previous amendments.[27] However, this argument contradicts the language of the *Policy Statement*, which does not limit its discussion to only errors in the original application.[28] Rather, the *Policy Statement* expressly anticipated the possibility that applicants would repeatedly submit amendments to defective applications:

> In the situations in which we have granted reconsideration in the first instance, the curative amendment has not unduly delayed the processing of other applications. In the future, we will, however, expect such applicants to completely review all portions of a returned or dismissed application. Thereafter, if the same application is returned or dismissed a second time, it will not be afforded *nunc pro tunc* reconsideration rights. Repeating a procedure whereby applications are re-accepted *nunc pro tunc* is obviously unfair to other applicants in a comparative proceeding who have prepared properly executed applications. Furthermore, this process of repeatedly affording *nunc pro tunc* reconsideration rights leads to delay and tends to encourage the filing of incomplete and poorly prepared applications."[29]

LSDA may not now amend its application to cure additional acceptability defects, and we will dismiss the LSDA Application for failing to comply with Section 73.315(a) of the Rules.[30]

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[25] Our studies indicate that LSDA's 70 dBμ contour covers approximately 48% of Amherst, New York.

[26] *See Broadcast Applications*, Report No. 27409, *supra* n. 7.

[27] Opposition at 3 (stating that the "[one-amendment] policy is directed to correcting errors in the original application and should not bar the acceptance of this amendment because this subsequent amendment is addressing a problem in the first amendment -- and not in the original application").

[28] *See Policy Statement*, 49 Fed. Reg. at 47332.

[29] *Id. See also John Joseph McVeigh,* Letter, 25 FCC Rcd 3572, 3575 (MB 2010) ("The Commission's *nunc pro tunc* reconsideration procedures afford dismissed applicants one opportunity to file curative amendments that eliminate all application defects.")

[30] Because we are dismissing the LSDA Application for the defects in its technical proposal, we need not address the merits of MC's site availability argument claim. Were we to consider that claim, we would find that LSDA failed to obtain reasonable assurance of the original transmitter site's availability. 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. *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). 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." *Genesee Communications, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 3595, 3595 (1988). A mere possibility that the site will be available is not sufficient. *See, e.g., William F. Wallace and Anne K. Wallace,* Memorandum Opinion and Order, 49 FCC 2d 1424, 1425 (1974). We find that the De Seyn Declaration and the disclaimer, taken together, demonstrate that LSDA had not obtained reasonable assurance of site availability from the site owner, TW. The disclaimer clearly states that LSDA could not rely on statements made by the leasing agent, and, therefore, the communications from the leasing agent could not constitute reasonable assurance. The De Seyn Declaration confirms that TW, itself, never offered any assurance of the site's availability. Lack of reasonable assurance is an incurable fatal defect to an NCE application and an alternative ground for dismissing the LSDA Application.

Conclusions/Actions: Accordingly, IT IS ORDERED, that the Petition to Deny filed by Medaille College on July 21, 2011, IS GRANTED to the extent indicated above.

IT IS FURTHER ORDERED, that the tentative selection of Lockport Seventh-Day Adventist Church's application (File No. BNPED-20100226AFZ) IS RESCINDED and its application IS DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Lockport Seventh-Day Adventist Church
Medaille College
Calvary Chapel of the Niagara Frontier