



Federal Communications Commission
Washington, D.C. 20554

November 10, 2010

In Reply Refer To:
1800B3-MM

Mr. Randy Melchert
Immanuel Baptist Church
4020 N. 128th Street
Brookfield, Wisconsin 53005

Todd Stansbury, Esq.
Scott Woodworth, Esq.
Wiley Rein LLP
1776 K Street, N.W.
Washington, D.C. 20006

In re: New NCE(FM), Pine City, Minnesota
Facility ID No. 174666
Immanuel Baptist Church
File No. BNPED-20071022AWE

Petition to Deny

New NCE(FM), Hinckley, Minnesota
Facility ID No. 172667
Minnesota Public Radio
File No. BNPED-20071016AHJ

Gentlemen:

We have before us: (1) the referenced application filed by Immanuel Baptist Church (“Immanuel”) for a new, noncommercial educational (“NCE”) FM station at Pine City, Minnesota; (2) the referenced application filed by Minnesota Public Radio (“MPR”) for a new NCE FM station at Hinckley, Minnesota; and (3) an unopposed Petition to Deny the Immanuel Application (“Petition”), filed by MPR on July 23, 2010. The Immanuel and MPR applications were mutually exclusive with three other applications and were designated NCE MX Group 374.¹ The Petition contests the Commission’s tentative decision to grant Immanuel’s application, as proposed in the June 28, 2010, *Comparative*

¹ *Media Bureau Identifies Groups of Mutually Exclusive Applications Submitted in the October 2007 Filing Window for Noncommercial Educational FM Stations*, Public Notice, 23 FCC Rcd 14730 (MB 2008).

*Consideration Order.*² For the reasons set forth below, we grant the Petition, dismiss Immanuel’s application, and accept MPR’s application for filing.

Background. MX Group 374 consisted of five applications proposing service to four different communities in Minnesota and Wisconsin. As a result of the tie breaker mechanism following a partially decisive 307(b) analysis,³ the *Comparative Consideration Order* tentatively selected Immanuel’s application as the winner in the group.⁴ It then accepted Immanuel’s application for filing and announced a 30-day period for filing petitions to deny that application. MPR timely filed the Petition on July 23, 2010. It asserts that Immanuel lacked reasonable or any assurance of access to the proposed tower site listed in Immanuel’s application.⁵ MPR therefore argues that Immanuel’s application must be dismissed and MPR’s application granted as the next best proposal.⁶

Discussion. Pursuant to Section 309(d) of the Communications Act of 1934, as amended (“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.⁷ 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.⁸ It is well-established that

² See *Comparative Consideration of 52 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 25 FCC Rcd 8793, 8827 (2010) (“*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) (“*NCE Order*”), 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). An applicant receives one point if its proposed service area and population are ten percent greater than those of the next best area and population proposals. 47 C.F.R. § 73.7003(b)(4). If the best technical proposal does not meet the 10 percent threshold, no applicant is awarded points under this criterion. Applicants tied with the highest number of points awarded in a particular group proceed to a tie-breaker round, in accordance with Section 73.7003(c) of the Commission’s Rules. 47 C.F.R. § 73.7003(c). The first tie-breaker for NCE FM applicants is the number of radio station authorizations attributable to each applicant. 47 C.F.R. § 73.7003(c)(1).

⁴ Neither applicant was credited any points at the point hearing stage. Immanuel became the tentative selectee by implementation of the first round tie-breaker mechanism, as Immanuel had no attributable interests, compared to MPR’s 64 radio authorizations. The remaining applicants in MX Group 374 were dismissed. *Comparative Consideration Order*, 25 FCC Rcd at 8827, 8848.

⁵ Petition at 1.

⁶ *Id.*

⁷ 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 (D.C. 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.).

⁸ 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).

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.⁹ 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.”¹⁰ A mere possibility that the site will be available is not sufficient.¹¹

In its Petition, MPR submits a declaration made under penalty of perjury by tower owner Ro Grignon. In it, Grignon states that he is the president of Red Rock Radio Corporation (“Red Rock”), and that Red Rock owns the antenna structure referenced in Immanuel’s application. Although he has been president of Red Rock for many years prior to 2007 (when Immanuel filed its application), he states that he has “no recollection of ever discussing use of that antenna structure by Immanuel Baptist Church...”¹² In addition, he states that he reviewed the relevant documents of Red Rock and found no record that any right or assurance to use the antenna structure was ever granted to Immanuel.

Based on Grignon’s declaration, it appears that Immanuel never discussed use of the antenna structure with Red Rock. The “reasonable assurance” standard is a liberal one,¹³ but Immanuel has failed to meet it. Moreover, Immanuel may not amend to cure this fatal defect following the close of the 2007 NCE FM filing window.¹⁴ Thus, we dismiss Immanuel’s application.

Minnesota Public Radio Application. In light of our dismissal of Immanuel’s application, we

⁹ 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.”).

¹⁰ *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).

¹¹ 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).

¹² Response at Attachment 2.

¹³ *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).

¹⁴ *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).

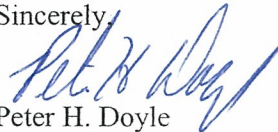
have studied MPR's application and have determined that it is acceptable for filing.¹⁵ We therefore accept MPR's application for filing and tentatively conclude that the public interest would be served by grant of MPR's application for a construction permit for a new NCE FM station at Hinckley, Minnesota. If, after a 30-day petition to deny period has run,¹⁶ there is no substantial and material question concerning the grantability of the tentative selectee's application, we intend, by public notice, to grant the MPR application with appropriate conditions.

Conclusion. Accordingly, IT IS ORDERED, that the July 23, 2010, Petition to Deny filed by Minnesota Public Radio, IS GRANTED.

IT IS FURTHER ORDERED, that the mutually-exclusive application of Immanuel Baptist Church (File No. BNPED-20071022AWE) IS DISMISSED.

IT IS FURTHER ORDERED, that the application filed by Minnesota Public Radio (File No. BNPED-20071016AHJ) is ACCEPTED FOR FILING and TENTATIVELY SELECTED to be awarded a construction permit for a new NCE FM station at Hinckley, Minnesota. If, after a 30-day petition to deny period has run, there is no substantial and material question concerning the grantability of the tentative selectee's application, we intend TO GRANT the referenced Minnesota Public Radio application CONDITIONED UPON that its compliance with Section 73.7002(c) of the Rules,¹⁷ which sets forth a four-year period of on-air operations substantially as proposed.

Sincerely,



Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Thomas J. Kigin, Minnesota Public Radio

¹⁵ Only MPR and Immanuel proceeded to a point hearing in MX Group 374. All but Immanuel's application had been dismissed. Without Immanuel's application, MPR's application would have competed with that of the State of Wisconsin-Educational Communications Board ("WEC"), which proposed service to Webster, Wisconsin. WEC certified first service to 25,207 people. When compared to MPR's 38,734 first service proposal to Hinckley, Minnesota, MPR would have received a 307(b) preference that was decisive over WEC's proposal. Accordingly, Bureau has delegated authority to tentatively select MPR's application. *NCE Order*, 15 FCC Rcd at 7420.

¹⁶ 47 C.F.R. § 73.7004(d); *see also NCE Order*, 15 FCC Rcd at 7423-24 (2000).

¹⁷ *See* 47 C.F.R. § 73.7002(c).