



**Federal Communications Commission
Washington, D.C. 20554**

April 1, 2011

In Reply Refer to:
1800B3-JO

Mr. Lanny Roy
Neighborhood Improvement Coalition ACORN
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In Re: NCE MX Group 103

NEW NCE FM, Moss Bluff, Louisiana
Neighborhood Improvement Coalition ACORN
Facility ID No. 174887
File No. BNPED-20071022AJV

Petition to Deny

New NCE FM, Moss Bluff, Louisiana
McNeese State University
Facility ID No. 172777
File No. BNPED-20071022BBJ

Gentlemen:

We have before us: (1) the referenced application of Neighborhood Improvement Coalition ACORN ("NICA") for a new noncommercial educational ("NCE") FM station to serve Moss Bluff, Louisiana (the "NICA Application"); (2) the referenced application of McNeese State University for a new NCE FM station to serve Moss Bluff, Louisiana (the "McNeese Application"); and (3) a March 18, 2010, Petition to Deny (the "Petition") the NICA Application filed by McNeese State University ("McNeese").¹ For the reasons set forth below, we grant the Petition, dismiss the NICA Application, and accept for filing the McNeese Application.

¹ At the request of the staff, *see Letter to Neighborhood Improvement Coalition ACORN*, reference 1800B3-RDH (MB Oct. 25, 2010), NICA filed a letter response to the Petition on November 3, 2010 ("Response"), to which McNeese filed a Reply on November 15, 2010 ("Reply"). McNeese also filed an Informal Objection to the NICA Application on April 10, 2009, raising an argument identical to one of those in its Petition. Because the Petition includes that argument as well as several others, we need not address the Informal Objection.

Background. The NICA Application was part of NCE MX Group 103, which included NICA and McNeese. Each of these applicants proposes to serve Moss Bluff, Louisiana.² Pursuant to established procedures,³ the Commission tentatively selected NICA to receive a construction permit for a new NCE FM station at Moss Bluff, Louisiana.⁴ The Commission accepted the NICA Application for filing and announced a 30-day period for filing petitions to deny.⁵ McNeese timely filed the Petition on March 18, 2010. The Petition asserts that NICA lacked reasonable or any assurance of access to the proposed tower site listed in the NICA Application, based on a sworn declaration from a representative of the Tower Company of Louisiana LLC (“TCOL”), which owned the tower when the NICA Application was filed.⁶ McNeese therefore argues that the NICA Application must be dismissed.⁷

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.⁸ We find that the Petition and Reply present 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.⁹ 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.¹⁰ While some latitude is afforded such reasonable assurance, there must be, at a minimum, a “meeting of the minds resulting in some firm

² See *Media Bureau Identifies Groups of Mutually Exclusive Applications*, Public Notice, 23 FCC Rcd 9508 (MB 2008).

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 (D.C. Cir. 2001).

⁴ See *Comparative Consideration of 59 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Education FM Stations filed in the October 2007 Filing Window*, Memorandum Opinion and Order, FCC 10-29 (rel. Feb. 16, 2010) (“*Tentative Selectee Order*”), at ¶¶96 and 181.

⁵ *Id.*

⁶ Petition at Exhibit A.

⁷ Petition at 2-3. The Petition also argues that NICA should receive no points under the point system, that NICA did not disclose the national ACORN organization as a real party in interest to its application, and that NICA lacked candor or misrepresented facts with respect to the date its unincorporated association was formed. See Petition. In light of our action on NICA’s site availability argument, we need not address these additional arguments.

⁸ 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.).

⁹ 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).

¹⁰ 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.”).

understanding as to the site's availability.”¹¹ A mere possibility that the site will be available is not sufficient.¹²

In its Petition, McNeese submits a declaration made under penalty of perjury by tower manager Lester Boihem.¹³ In it, Boihem states that he is the managing member of the TCOL, and that TCOL owned and managed the tower referenced in the NICA Application from 2006 to 2008.¹⁴ Boihem states that its records indicate that only McNeese contacted TCOL personnel through 2007 to request reasonable assurance that antenna space was available.¹⁵ In its response, NICA states that it received reasonable site assurance from SBA Towers, Inc. (“SBA”) through a verbal commitment.¹⁶ NICA reports that it reconfirmed the verbal commitment with Jonathon Roush of SBA on November 3, 2010.¹⁷ However, NICA provides no written documentation of either of these communications.¹⁸ Additionally, NICA does not contest McNeese’s contention that at the time of the initial application, TCOL – not SBA – owned the proposed antenna site.¹⁹

Based on Boihem’s declaration and the lack of any contrary documentation, it appears that NICA has not demonstrated that they discussed use of the tower specified in its application with either the tower owner or its agent. The “reasonable assurance” standard is a liberal one,²⁰ but NICA has failed to

¹¹ *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).

¹² 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).

¹³ Petition at Exhibit A.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Response at 1.

¹⁷ *Id.*

¹⁸ NICA states that many documents related to the original NICA Application filing and subsequent work were lost in the 2005 Hurricane Rita and 2008 Hurricane Gustav. *Id.* In the Response, NICA requested an extension of time to continue searching for documentation of the documentation of the initial verbal commitment NICA relies on for reasonable site assurance. NICA has provided no further documentation.

¹⁹ Petition at Exhibit A.

²⁰ *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).

meet it. Moreover, NICA may not amend to cure this fatal defect following the close of the 2007 NCE FM filing window.²¹ Thus, we will dismiss the NICA Application.


McNeese State University Application. With the dismissal of the NICA Application, McNeese is the sole remaining applicant. We have studied the McNeese Application and have determined that it is acceptable for filing. We therefore accept the McNeese Application for filing and tentatively conclude that the public interest would be served by grant of the application. If, after a 30-day petition to deny period has run, there is no substantial and material question concerning its grantability, we intend, by public notice, to grant the McNeese Application.

Conclusion/Actions. Accordingly, IT IS ORDERED, that the March 18, 2010, Petition to Deny filed by McNeese State University, IS GRANTED.

IT IS FURTHER ORDERED, that the application of Neighborhood Improvement Coalition ACORN (BNPED-20071022AJV) for a new noncommercial educational FM Station in Moss Bluff, Louisiana, IS DISMISSED.

IT IS FURTHER ORDERED, that the application of McNeese State University (BNPED-20071022BBJ) for a new noncommercial educational FM Station in Moss Bluff, Louisiana, IS ACCEPTED FOR FILING.

Sincerely,


for Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: McNeese State University

²¹ *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).