



Federal Communications Commission
Washington, D.C. 20554

January 9, 2015

In Reply Refer To:
1800B3-ATS

Alan Korn, Esq.
Law Office of Alan Korn
1840 Woolsey Street
Berkeley, CA 94703

Ms. Betty L. Jones
P.O. Box 605480
Cleveland, OH 44105

In re: LPFM MX Group 271

Burten, Bell, Carr Development, Inc.
New LPFM, Cleveland, Ohio
Facility ID Number: 192536
File Number: BNPL-20131113BLZ

Substance of Life Enterprises, Inc.
New LPFM, Garfield Heights, Ohio
Facility ID Number: 192091
File Number: BNPL-20131113BTG

Petition to Deny

Dear Counsel and Ms. Jones:

We have before us: 1) the application of Substance of Life Enterprises, Inc. ("SOLE"), for a new LPFM station at Garfield Heights, Ohio ("SOLE Application"); 2) the Petition to Deny the SOLE Application ("Petition") filed by Burten, Bell, Carr Development, Inc. ("BBCD"); and 3) the application of BBCD for a new LPFM station at Cleveland, Ohio ("BBCD Application").¹ For the reasons set forth below, we grant the Petition, dismiss the SOLE Application, and grant the BBCD Application.

Background. SOLE and BBCD filed their respective applications during the October 2013 LPFM filing window. The SOLE Application listed as its mailing address and the address for its sole director – Betty Jones – a post office box in Cleveland, and indicated that its transmitter and main studio would be constructed at a vacant lot located at the corner of Ferris Avenue and East 131st Street in Cleveland ("Ferris Lot").² The Bureau determined that the two applications were mutually exclusive and identified them as LPFM MX Group 271.³ On September 5, 2014, the Bureau identified the SOLE Application and the BBCD Application as tentative selectees of LPFM MX Group 271 on a time-share basis, began a 30-day period for filing petitions to deny against both applications, and began 90-day

¹ BBCD filed the Petition on October 3, 2014. SOLE filed an Opposition on November 14, 2014. BBCD filed a Reply on November 24, 2014.

² SOLE Application at Section III, Question 3, and Attachment 14.

³ *Media Bureau Identifies Mutually Exclusive Applications Filed in the LPFM Window and Announces 60-Day Settlement Period; CDBS Is Now Accepting Form 318 Amendments*, Public Notice, 28 FCC Rcd 16713 (MB 2013).

periods in which the applicants could file time-share agreements or major change amendments in order to resolve their mutual exclusivities.⁴

In the Petition, BBCD argues that the SOLE Application should be dismissed and the BBCD Application granted as a singleton because: 1) SOLE lacked reasonable assurance of site availability; and 2) SOLE has not demonstrated that it is a local entity eligible to hold an LPFM license.⁵ BBCD states that the Ferris Lot is currently owned by the City of Cleveland Land Reutilization Program (“City”), but the City never gave SOLE any assurance that it would be available to use as a transmitter site.⁶ In support, BBCD provides a letter from Daryl P. Rush, Director of the Department of Community Development at the City Cleveland, who states that the City “is not considering an application for the sale of the [Ferris Lot] for an FM transmitter.”⁷ BBCD further states that SOLE has only provided a post office box for its mailing address and the address of its sole director, Betty Jones, and that absent a physical address, SOLE has not demonstrated that it meets the localism requirements for the LPFM service.⁸

In the Opposition, SOLE argues that it “acted in good faith in securing permission from the City of Cleveland” to obtain the use of the Ferris Site for its transmitter and studio.⁹ SOLE provides copies of documents showing the steps it took to apply for use of the Ferris Lot, including correspondence with City employees Lili A. Roberts and Daniel DeAngelo.¹⁰ SOLE provides a copy of its completed application dated October 31, 2013, and submitted on December 2, 2013, and other documents supporting its application.¹¹ Finally, SOLE states that it is a local applicant because Jones is the sole director of the organization and lives within 10 miles of the proposed transmitter site, but SOLE does not provide an actual address for Jones.¹²

Discussion. Pursuant to Section 309(d) of the Communications Act of 1934, as amended, petitions 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 the public interest.¹³ BBCD has met this requirement and we will dismiss the SOLE Application.

Site 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.¹⁴ It is well established that the specification of a transmitter site in an application is an implied representation that the applicant has

⁴ *Commission Identifies Tentative Selectees in 11 Groups of Mutually Exclusive Applications Filed in the LPFM Window; Announces a 30-Day Petition to Deny Period and a 90-Day Period to File Voluntary Time-Share Proposals and Major Change Amendments*, Public Notice, 29 FCC Rcd 10847 (2014).

⁵ The Petition also argues that SOLE was not entitled to a point under the local main studio criterion. Because we are dismissing the SOLE Application on other grounds, we need not address this argument.

⁶ Petition at 2-3.

⁷ *Id.* at Exhibit C (“Rush Letter”).

⁸ Petition at 5-6.

⁹ Opposition at 1.

¹⁰ *Id.* at Exhibit 2 and Exhibit 3.

¹¹ *Id.* at Exhibit 3b-Completed App

¹² *Id.* at 2.

¹³ 47 U.S.C. § 309(d).

¹⁴ *Les Seraphim and Mana’o Radio*, Memorandum Opinion and Order, 25 FCC Rcd 2785, 2787 (MB 2010).

obtained reasonable assurance that the site will be available.¹⁵ 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.”¹⁶ A mere possibility that the site will be available is not sufficient.¹⁷

SOLE has not demonstrated that it obtained reasonable assurance of site availability because there is no indication that the City was ready to allow SOLE to construct on the Ferris Lot when SOLE filed the SOLE Application. The documents provided in the Opposition merely demonstrate that SOLE was in the process of submitting an application to obtain the Ferris Lot at the time it filed the SOLE Application. There is no indication at that point that the City had it expressed that it had any intention of granting SOLE use of the Ferris Lot. To the contrary, repeated emails indicate that City was not actively considering SOLE’s application.¹⁸ Additionally, the Rush Letter confirms that the City is not considering allowing SOLE use of the Ferris Lot. Thus, SOLE lacked reasonable assurance of site availability when it filed the SOLE Application and we will dismiss the SOLE Application.

Eligibility. Section 73.853(b) of the Commission’s Rules provides that “[o]nly local organizations will be permitted to submit applications and to hold authorizations in the LPFM service” and states that an applicant may demonstrate localism by satisfying the following criteria:

- (1) The applicant, its local chapter or branch is physically headquartered or has a campus within 16.1 km (10 miles) of the proposed site for the transmitting antenna for applicants in the top 50 urban markets, and 32.1 km (20 miles) for applicants outside of the top 50 urban markets;

¹⁵ 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.”).

¹⁶ *Genesee Communications, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 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).

¹⁷ 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, 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 (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).

¹⁸ The email from Roberts merely provides SOLE with information about the application process for acquiring the Ferris Lot. It does not indicate that filing of such an application would assure SOLE actual use of the Ferris Lot. Additionally, an email from DeAngelo on January 30, 2014, confirms that the City had not begun to review SOLE’s application for use of the Ferris Lot because it was missing required documentation. A subsequent email from DeAngelo on June 25, 2014, further indicated that the City had not begun its review because of still missing documentation. Opposition at Exhibit 3a. An email from DeAngelo on October 6, 2014, fails to indicate that City has reviewed SOLE’s application for the Ferris Lot.

(2) It has 75% of its board members residing within 16.1 km (10 miles) of the proposed site for the transmitting antenna for applicants in the top 50 urban markets, and 32.1 km (20 miles) for applicants outside of the top 50 urban markets . . .¹⁹

The SOLE Application only provides a post office box for SOLE's headquarters and the same post office box for Jones' address. In the full-service noncommercial context, the Commission has held that a headquarters must be a primary place of business and not, for example, a post office box, vacation home, attorney's office, or branch office, which would not provide sufficient contact between the station's decision makers and the area to be served,²⁰ nor can a post office box service as a residence. Thus, SOLE's post office box thus cannot be used to satisfy either criteria of Section 73.853(b) and we find that it has not demonstrated it is eligible to hold an LPFM license. This warrants dismissal of the SOLE Application independent of our finding that SOLE lacked reasonable assurance of site availability.

Conclusion. Accordingly, for the reasons set forth above, IT IS ORDERED, that the Petition to Deny filed by Burten, Bell, Carr Development, Inc. on October 3, 2014, IS DENIED.

IT IS FURTHER ORDERED, that the application of Substance of Life Enterprises, Inc. (BNPL-20131113BTG), for a new LPFM station at Garfield Heights, Ohio, IS DISMISSED.

IT IS FURTHER ORDERED, that the application of Burten, Bell, Carr Development, Inc. (BNPL-20131113BLZ) for a new LPFM station at Cleveland, Ohio, IS GRANTED.

Sincerely,



Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Burten, Bell, Carr Development, Inc.

¹⁹ 47 C.F.R §§ 73.853(b)(1); 73.853(b)(2). Sections 73.853(b)(3) and (4) provide for eligibility for public safety entities and Tribal Applicants, respectively.

²⁰ *Reexamination of Comparative Standards for Noncommercial Educational Applications*, Report and Order, 15 FCC Rcd 7386, 7410 (2000).