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BEFORE THE

FM EXAMINERS

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C.

93-52

In re Application of)

COMMUNITY EDUCATIONAL)
SERVICE COUNCIL, INC.)

File No. BPED-920511MB

For Construction Permit for)
A New Noncommercial)
Educational FM Radio Station)
on Channel 278A at Crozet,)
Virginia)

OCT 22 3 04 PM '92
AUDIO SERVICES
DIVISION

TO: Chief, Audio Services Division
STOP CODE 1800B

PETITION TO DENY

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October 21, 1992

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SUMMARY

The Board of Visitors of James Madison University petitions to deny the application of Community Educational Service Council, Inc. ("CESCI"). CESCI has no reasonable assurance of site availability. Further, CESCI falsely certified in an Exhibit to its application that it had contacted the tower owner about the availability of the site; and CESCI apparently plagiarized the site availability certification filed with James Madison University's application.

Exhibit 1 to the Petition is a Declaration from Henry Chiles, the transmitter site owner listed in the CESCI application. Mr. Chiles business records do not reflect that he gave CESCI reasonable assurance that the tower site would be available to it. Indeed, Mr. Chiles does not recall ever speaking with CESCI about use of the site, and his records reflect no contact with CESCI whatsoever.

CESCI's false certification is a misrepresentation sufficient to disqualify its application based on character. The facts and circumstances demonstrate that CESCI intended to deceive the Commission about the site's availability.

CESCI's application should be dismissed rather than designated for hearing. No hearing is needed because no "substantial and material question of fact is presented." 47 U.S.C. § 309(e). The facts show that its application falsely claims reasonable assurance of site availability. CESCI therefore lacks the character qualifications to become a Commission licensee. Moreover, the CESCI application is not entitled to Ashbacker rights because it is not bona fide, but rather is "suffused with fraud."

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PETITION TO DENY

The Board of Visitors of James Madison University ("JMU"), by its attorneys and pursuant to Section 309(d)(1) of the Communications Act of 1934, as amended (the "Communications Act"), and Section 73.3584 of the Commission's Rules, petitions to deny the application of Community Educational Service Council, Inc. ("CESCI").^{1/} CESCI does not have reasonable assurance of site availability. It misrepresented the site's availability in its application and

^{1/} CESCI filed an application that is mutually exclusive with JMU's application. See BPED-911101MA. Accordingly, JMU has standing to file this Petition to Deny. See Virginia Communications, Inc., 2 FCC Rcd 1985 (1987).

This Petition to Deny is timely filed. The CESCI application was placed on a cut-off list for petitions to deny ending on October 23, 1992. See Report No. B-149 (released September 22, 1992).

apparently plagiarized the site certification from JMU's previously filed application. CESCO's application is defective and its false statement demonstrates that it lacks the character qualifications to be a Commission licensee. Its application should be dismissed.^{2/}

INTRODUCTION

JMU sought to further its educational mission by establishing a new noncommercial educational FM station in Crozet, Virginia. When a search of the noncommercial educational reserved band in the area revealed no useable channels, JMU petitioned the Commission to allocate a commercial channel to Crozet and reserve the channel for noncommercial educational use. JMU successfully prosecuted its rulemaking petition in the face of opposition and ultimately prevailed. Once the channel was allotted, JMU promptly prepared and filed its application for a new noncommercial educational FM facility in Crozet, Virginia.

On JMU's cut-off date, May 11, 1992, CESCO filed a competing application for the same frequency. CESCO's application specified the same engineering site (the "Castle Rock Site"), the same antenna center of radiation, the same height above average terrain and the same effective radiated power as the JMU

^{2/} Under Revised Processing of Broadcast Applications, 72 F.C.C.2d 202 (1979), petitions to deny by competing applicants have at times been dismissed as premature motions to specify issues. However, in the exceptional circumstances presented here, which raise serious disqualifying issues, the Commission should consider the petition at this time. See Columbia Bible College Broadcasting Co., 6 FCC Rcd 516, 516-17 (Audio Serv. Div. 1991); Cf. Seven Locks Broadcasting Co., 94 F.C.C.2d 899, 899-90 (1983) (petition to deny considered in HDO due to allegations concerning potentially disqualifying unauthorized transfer of control).

application. In addition, the CESCO application repeated a typographical error contained in JMU's application exhibit demonstrating reasonable assurance of site availability.

Noting the identical site specifications on the two applications and the repeated typographical error, JMU contacted the site owner to confirm the availability of its proposed site. JMU discovered at that time that the site owner had no recollection of CESCO's request to use the Castle Rock Site, nor did the site owner's business records reflect any contact with CESCO or its principals.

1. CESCO Lacks Reasonable Assurance of Site Availability.

A. Factual Background.

In its application, CESCO certified that it had "reasonable assurance, in good faith, that the site or structure proposed in Item 2, Section V-B, FCC Form 340, as the location of its transmitting antenna, will be available to the applicant for the intended purpose herein." The site specified in the application is an existing broadcast tower four (4) kilometers south southeast of Batesville, Albemarle County, Virginia, at the peak of Castle Rock Mountain. In an unnumbered exhibit to its application dated May 9, 1992, signed by Peter R. Robinson and titled "Site Availability Certification," CESCO claims:

Because Community Educational Service Council, Inc. has no ownership interest in the proposed site and structure, the applicant certifies that it has obtained reasonable assurance from the owner possessing control of the site and structure. The owner of the proposed site is Henry Childs [sic]^{3/}

Attached as Exhibit 1 to this Petition is a declaration under penalty from Mr. Chiles, the site and tower owner, denying this claim. Mr. Chiles, an experienced broadcast site lessor, explains that he maintains records of persons contacting him about use of his broadcast site and the assurance of site availability that he provides to potential lessees. His routine business records do not reflect that any entity, other than JMU, contacted him about use of the Castle Rock Site. Moreover, Mr. Chiles does not recall any other entity contacting him about use of the Castle Rock site. Mr. Chiles reviewed a list of the CESCO Board of Directors and members, and he does not recall any of those people ever contacting him about the site's availability. CESCO never contacted Mr. Chiles.

B. The Legal Standard.

An applicant's specification of a transmitter site carries with it an implied representation that the applicant has obtained reasonable assurance that the site will be available. Professional Radio, Inc., 103 F.C.C.2d 429, 432 (Rev. Bd. 1986); see also South Florida Broadcasting Co., Inc., 99 F.C.C.2d 840, 842 (Rev. Bd. 1984); William F. and Anne K. Wallace, 49 F.C.C.2d 1424 (Rev. Bd. 1974). The Commission has dismissed numerous applications due to lack of reasonable

^{3/} The site owner's name is Henry Chiles. JMU's application contained a typographical error, spelling Mr. Chiles' name as Mr. Childs. CESCO's application mimicked this spelling error.

assurance of transmitter site availability. See REM Malloy Broadcasting, 6 FCC Rcd 5843, 5846 (Rev. Bd. 1991) (FCC has experienced "chronic problems concerning the purported 'reasonable assurance' of specified tower sites"). In those cases, the Commission repeatedly rejected the notion that a mere possibility or belief that a site will be available, or should be available, is sufficient to provide reasonable assurance. Id.; see also National Communications Indus., 6 FCC Rcd 1978 (Rev. Bd. 1991), modified on other grounds, 7 FCC Rcd 1703 (1992); Barry Skidelsky, 7 FCC Rcd 1, 7-8 (Rev. Bd. 1992).

It is axiomatic that an applicant must have reasonable assurance of the availability of its proposed transmitter site when it originally files its application. Although reasonable assurance may be acquired in numerous ways, it requires at minimum "a meeting of the minds resulting in some firm understanding as to the site's availability." Genesee Communications, Inc., 3 FCC Rcd 3595 (Rev. Bd. 1988)

Radio Delaware, Inc., 4 FCC Rcd 8630, 8631 (Rev. Bd. 1989) (citations omitted); see also Elijah Broadcasting Corp., 5 FCC Rcd 5350, 5351 (1990) (there must be "some clear indication from the landowner that he is amenable to entering into a future arrangement with the applicant for the use of the property as a transmitter site, on terms to be negotiated, and that he would give notice of any change of intention").

CESCI did not contact Mr. Chiles. Instead it simply plagiarized the site availability exhibit in JMU's application, even repeating the typographical error in JMU's site certification. CESCI never had reasonable assurance that its proposed site was available. It had no contact and no meeting of the minds with Mr. Chiles. As the Review Board explained in South Florida:

To permit subsequent applicants to merely "assume" a competing optionee's site or a right of succession would put a costly premium on being the first to secure a site and would perversely penalize the prudent. In our view, applicants should not be allowed to sit back while a competitor truly secures "reasonable assurance" of a site -- often at considerable expense -- and then languorously sits on their assumptions.

South Florida, 99 F.C.C.2d at 847-48 (footnotes omitted).

Without a proposed transmitter site, the CESCO application is clearly defective. Id. at 842 ("[A] prospective construction permittee must have, if little else, an antenna site, a technical keystone of the broadcasting operation." Id.). Furthermore, long-standing FCC policy bars an applicant from amending its application to specify a new site when it lacked reasonable assurance for its original site. Id. at 845 n.12. Accordingly, the CESCO application should be dismissed as ungrantable.

2. CESCO Lacks the Character Qualifications to Be a Commission Licensee.

A. Factual Background.

CESCO explicitly represented in its application:

the applicant certifies that it has obtained reasonable assurance from the owner possessing control of the site and structure. The owner of the proposed site is Henry Childs [sic]

Mr. Childs' declaration repudiates this assertion. CESCO submitted a false statement of fact to the Commission. It cannot be trusted to serve as a Commission licensee.

B. Legal Standard.

In Policy Regarding Character Qualifications in Broadcast Licensing, 102 F.C.C.2d 1179, 1196 (1986), the Commission explained: "We have recently observed that misrepresentation 'involves false statements of fact,' while lack of candor 'involves concealment, evasion, and other failures to be fully informative.'"^{4/} The Commission continued:

[T]he trait of "truthfulness" is one of the two key elements of character necessary to operate a broadcast station in the public interest. The Commission is authorized to treat even the most insignificant misrepresentation as disqualifying.

Id. at 1210 (footnote omitted).

4/ In Fox River Broadcasting, Inc., 88 F.C.C.2d 1132 (Rev. Bd. 1982), modified, 93 F.C.C.2d 127, 129 (1983) (lack of candor requires deceptive intent), lack of candor was described in these terms:

Lack of candor, unlike misrepresentation, does not arise directly out of the more universal requirement that intentionally false statements not be made in connection with an application or adjudicatory proceeding before any federal agency. It arises, rather, out of the "special status of licensees as trustees of a scarce public resource," and the courts have suggested that "the FCC would be derelict if it did not hold broadcasters to 'high standards of punctilio.'" [This] translated into the creed that: "[i]t does not seem too much to ask that federal licensees be scrupulous in providing complete and meaningful information provided for in forms and regulations." Thus, in proceedings before the Commission involving a licensee . . . misleading conduct which does not necessarily amount to a misrepresentation . . . may nonetheless warrant a penalty for breach of the standard of complete candor expected by the Commission, which must rely heavily on such candor to provide validity to processes on which that reliance is based. Lack of candor can be characterized in a number of ways: evasiveness, failure to provide "complete and meaningful information," "skirting" a question by providing information "'technically correct" but unedifying, or the playing of "procedural games." The core of lack of candor, then, is omission, *viz.*, failure to be completely forthcoming in the provision of information which could illuminate a decisional matter.

Id. at 1136-37 (citations and footnotes omitted; emphasis in original).

CESCI's false statement is "clearly relevant to the licensing process." *Id.* at 1181. For example, in Henry R. Malloy, Jr., 6 FCC Rcd 2247, 2251 (ALJ 1991) (citations omitted), the Presiding Judge explained:

The Commission's "scheme of regulation rests on the assumption that applicants will supply the Commission with accurate information" and that "[d]ishonest practices threaten the integrity of the licensing process. . . ." Absolute truth and candor is a basic duty of applicants. The Commission views "misrepresentation and lack of candor in an applicant's dealings with the Commission as serious breaches of trust." Such misconduct has consistently disqualified applicants.

Misrepresentation requires dual elements of a false statement and an intent to deceive. Pinelands, Inc., FCC 92-376 (Aug. 21, 1992). Both elements are present here. First, Mr. Chiles' declaration proves the CESCL site

separate site certification exhibit is evidence of an affirmative intent to deceive the Commission. CESCO had no idea whether the Castle Rock Site was available to it when it signed its exhibit.^{5/}

CESCI's false site certification contains the replicated misspelling of Henry Chiles' name. The logical inference under the circumstances is that CESCO plagiarized JMU's site certification, even down to misspelling the site owner's name. Its counterfeit certification provides further evidence of intent to deceive the Commission.

Applicants have been rejected for lesser improprieties. See 62 Broadcasting, Inc., 4 FCC Rcd 1768, 1774 (Rev. Bd. 1989) (applicant disqualified because it lacked reasonable assurance of transmitter site at time application was filed); Las Americas Communications, Inc., 1 FCC Rcd 786, 790-91 (Rev. Bd. 1986) (applicant disqualified for failure to file tax returns); Mid-Ohio Communications Inc., 104 F.C.C.2d 572, 598-99 (Rev. Bd. 1986) (applicant disqualified for failure to reveal manager's changed employment status); Washington's Christian Television Outreach, Inc., 99 F.C.C.2d 395, 400-01 (Rev. Bd. 1984) (applicant disqualified because principal failed to reveal history of bankruptcies); Old Time Religion Hour, Inc., 95 F.C.C.2d 713, 719-23 (Rev. Bd.

^{5/} CESCO's actions allow the Commission to infer that its financial qualifications certification in Section III of its application is similarly suspect. Without inquiring of Mr. Chiles about the cost of leasing his site, CESCO reasonably could not certify that it has the funds to construct and operate the station for three months. JMU asks that the Commission request documentation supporting the attestation of CESCO's financial qualifications.

1983) (applicant disqualified for falsification of evidence and deliberate false testimony). CESCO's application should be dismissed as well.

3. The CESCO Application Should Be Denied Rather Than Designated For Hearing.

Site availability questions (along with accompanying misrepresentation or lack of candor questions) are sometimes designated for hearing rather than addressed in the pre-designation stage. However, in this case, the CESCO application should be dismissed rather than designated for hearing for two reasons. First, ample precedent establishes that no hearing is needed where the material facts are not in question and those facts demonstrate that the applicant lacks the basic qualifications to hold the license. Second, under the Ashbacker doctrine, only bona fide applicants are entitled to a comparative hearing. See Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 333 (1945). The CESCO application is not a bona fide application, but rather is "suffused with fraud." Marc A. Albert, 6 FCC Rcd 13, 15 (Rev. Bd. 1991) (separate Statement of Board Member Blumenthal)^{6/}. CESCO is therefore not entitled to Ashbacker consideration.

^{6/} When requiring the transmitter site certification as part of Form 301 in 1985, the Commission sought to end "frivolous" and "speculative" FM applications. See FM Application Processing, 58 R.R.2d 776, 782 (1985). The Commission stated: "The certification will include a reference to the name and telephone number of the person contacted. This additional step simply requires verification of our current policy and will aid in deterring frivolous applications that frustrate our processing goals." Id. The Commission also stated: "[T]he reduction of frivolous and speculative applications will enable us to expedite the processing of applications tendered by serious candidates who are 'ready, willing and able' to rapidly bring service to the public." Id. at 783.

Sections 309(d)(1) and (2) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(d)(1) & (2), dictate the standards of sufficiency for a petition to deny CESCO's application. The petitioner must demonstrate by specific allegations of fact that grant of the application would be prima facie inconsistent with the public interest, convenience and necessity. See Astroline Communications Co. Ltd. Partnership v. FCC, 857 F.2d 1556, 1561 (D.C. Cir. 1988). The Communications Act requires an evidentiary hearing only if "a substantial and material question of fact is presented". 47 U.S.C. § 309(e). After weighing the evidence presented, the Commission must determine "whether the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for." Citizens for Jazz on WRVR, Inc. v. FCC, 775 F.2d 392, 395 (D.C. Cir. 1985). No comparative hearing is needed if the undisputed facts show that an application is invalid. See United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956) ("We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing."); Aeronautical Radio, Inc. v. FCC, 928 F.2d 428, 439 (D.C. Cir. 1991) (application that was "clearly inconsistent" with FCC rules properly dismissed without a hearing); Hispanic Info. & Telecommunications Network, Inc. v. FCC, 865 F.2d 1289, 1294 (D.C. Cir. 1989) (ITFS application dismissed without a comparative hearing where competing applicant enjoyed dispositive preference; hearing not required because "no substantial or material issue of fact remains to be resolved"); Guinan v. FCC, 297 F.2d 782, 785 (D.C. Cir. 1961) (no comparative hearing necessary "once it has been established that one of the competing applicants is basically

unqualified"): Ranger v. FCC, 294 F.2d 240, 242-43 (D.C. Cir. 1961) (where

Accordingly, JMU requests that the CESCO application be dismissed.

Respectfully submitted,

**THE BOARD OF VISITORS OF JAMES
MADISON UNIVERSITY**

By: 
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October 21, 1992

Exhibit 1
(Declaration of Henry Chiles)

DECLARATION OF HENRY CHILES

I, Henry Chiles, declare as follows:

1. I am the owner of Crown Orchard Company, Batesville, Virginia.

I am also the sole owner or person possessing control of the broadcast transmitting tower site and structure located at the Peak of Castle Rock Mountain, four (4) kilometers south southeast of Batesville, Albemarle County, Virginia (the "Castle Rock Site"). The geographical coordinates of the site are:

37° 57' 00" Latitude;

78° 43' 38" Longitude.

2. I have been in the electronic site leasing business for many years.

I have a great deal of experience dealing with broadcast clients. As a routine business practice, I maintain detailed records of the persons contacting me about use of all my broadcast transmitter sites and my assurances of site availability. These records are maintained in a locked file cabinet at my office. Only my secretary, Lucille Mawyer, and I have access to this cabinet. I also maintain some files at my home.

3. My business records reflect that James Madison University contacted me through its representative, Don Mussell, about use of the Castle Rock Site for its proposed facility. I also specifically recall speaking with WMRA's chief engineer at the time, Don Mussell, about use of the Castle Rock Site for a proposed noncommercial educational FM station. I remember Mr. Mussell's name and I recall that Mr. Mussell contacted me on behalf of Station WMRA and James Madison University.

4. Neither the business records in my office files nor the files I maintain at home reflect that any other entity has contacted me regarding use of the Castle Rock Site for a noncommercial educational FM station. In addition, I do not recall any other entity contacting me about use of the Castle Rock Site.

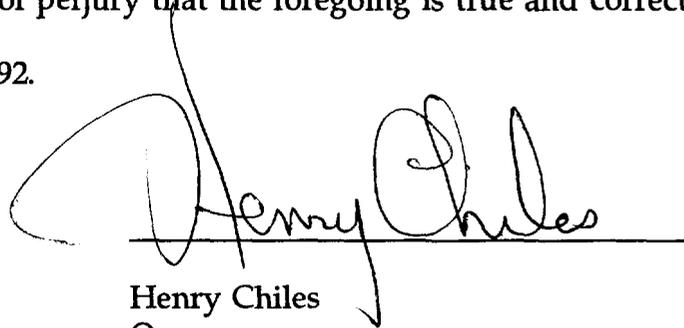
5. I have reviewed the attached copies of the Service Council, Inc. (CESCI) 1992 Board of Directors and 1992 Members and its Site Availability Certification. It is my understanding that these materials were taken from a Federal Communications Commission application filed by CESCI for a new noncommercial educational FM radio station to serve the Crozet, Virginia area. I do not recall CESCI, nor any of its governing board members, contacting me about use of the Castle Rock Site.

6. Based on my records and recollection, I have not given any written permission for CESCI to use the Castle Rock Site.

7. I am making this declaration at the request of Brenda Hankey, a representative of James Madison University. I understand that this declaration is being provided to the Federal Communications Commission in connection with its consideration of CESCI's application.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 19, 1992.

A handwritten signature in black ink, appearing to read "Henry Chiles", is written over a horizontal line. The signature is cursive and somewhat stylized.

Henry Chiles
Owner
Crown Orchard Company

CERTIFICATE OF SERVICE