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BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

| | | |
|--------------------------------------|---|------------------------|
| In re Applications of: |) | MM Docket No. 93-52 |
| |) | |
| BOARD OF VISITORS OF JAMES |) | File No. BPED-911101MA |
| MADISON UNIVERSITY |) | |
| |) | |
| and |) | |
| |) | |
| COMMUNITY EDUCATIONAL |) | File No. BPED-920511MB |
| SERVICE COUNCIL, INC. |) | |
| |) | |
| For a Construction Permit for a New |) | |
| FM Noncommercial Educational Station |) | |
| on Channel 278A in Crozet, Virginia |) | |

To: Administrative Law Judge Edward Luton

MOTION TO ENLARGE ISSUES

Richard D. Marks
Margaret L. Miller

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SUMMARY

The Board of Visitors of James Madison University moves to enlarge the issues specified against Community Educational Service Council, Inc. ("CESCI"). CESCI has no transmitter site. As JMU demonstrates, CESCI lacked reasonable assurance of site availability for the site specified in its application. Moreover, CESCI has not amended its original application to specify a new site, nor has CESCI notified the Commission pursuant to Section 1.65 that it has no site.

Exhibits 1 and 2 to the Motion are copies of Declarations from Henry Chiles, the transmitter site owner listed in the CESCI application.^{1/} Exhibit 1, a declaration dated October 19, 1992, demonstrates that Mr. Chiles's 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. Exhibit 2, a declaration dated December 18, 1992, reaffirms Mr. Chiles's earlier declaration and demonstrates that Mr. Chiles does not recall talking with CESCI's representative, Karl Johnson, who allegedly contacted Mr.

^{1/} The original Declarations of Henry Chiles are a matter of record with the Commission. The original Declarations were filed as Exhibits to a Petition to Deny filed by JMU against CESCI's application on October 21, 1992 and a Reply filed by JMU on December 22, 1992, respectively.

Chiles about the site's availability. Mr. Chiles's business records also reflect no contact with Karl Johnson or any other CESCO representative.

Without contacting the site owner, CESCO cannot have inquired of Mr. Chiles about the cost of leasing his site. Therefore, CESCO's financial certification in Section III of its application is suspect and a financial qualifications issue is warranted. Additionally, JMU requests specification of a financial qualifications issue against CESCO so that JMU may fully discover CESCO's documentation supporting the attestation of CESCO's financial qualifications.

Based on Mr. Chiles's declarations under penalty of perjury and the reasonable inferences from them, CESCO requests that the Presiding Officer enlarge the issues against CESCO in MM Docket No. 93-52 to include site

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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 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 the Castle Rock 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.

On this basis, and to avoid the delay and expense of an administrative hearing, JMU petitioned to deny the CESCO application and submitted a reply to a late-filed opposition by CESCO. The Commission designated JMU and CESCO's mutually exclusive applications for hearing without considering the matters raised in JMU's petition to deny the CESCO application.^{2/}

existing broadcast tower four (4) kilometers south southeast of Batesville.

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.

After JMU petitioned to deny the CESCO application on October 19, 1992, Mr. Chiles received several telephone calls from an individual who identified himself as Karl Johnson, a representative of CESCO. Mr. Johnson repeatedly asked Henry Chiles to recall a conversation that supposedly took place between Karl Johnson and Mr. Chiles on May 6, 1992, regarding use of the Castle Rock Site for a proposed FM radio station to be operated by CESCO. Mr. Chiles does not recall ever speaking with Karl Johnson before late October 1992 and Mr. Chiles's business records do not reflect that Mr. Chiles gave Karl Johnson assurance that the Castle Rock Site would be available to him or CESCO. In fact, Mr. Chiles's declaration in Exhibit 2 shows that, in Mr. Chiles's mind, CESCO does not have reasonable assurance that the Castle Rock Site will be available to it.

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 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 appears to have simply plagiarized the site availability exhibit in JMU's application. 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 CESCI 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."). Furthermore as discussed below, 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, a site availability issue should be specified against CESCI.

C. CESCI Cannot Amend Its Site.

Commission precedent and policy prohibit an applicant from amending its application to specify an alternative transmitter site if it did not have reasonable assurance for the site specified in its original application.^{5/} Accordingly, CESCI's failure to obtain reasonable assurance of the availability of its originally proposed site foreclose its ability now to locate a site which is available. In other words, CESCI's site defect is irremediable.

2. CESCI Has Failed to Report Its Lack of a Transmitter Site

Section 1.65 of the Commission's Rules requires applicants to ensure "the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application." 47 C.F.R. §1.65 (1992). Applicants are to report substantial changes in significant information as promptly as possible and, in any event, within thirty (30) days. *Id.* If the change is to a matter which may be of decisional significance in a

^{5/} Progressive Communications, Inc., *supra*, 3 FCC Rcd at 5758-60 (rejecting site amendment); South Florida Broadcasting, *supra*, 99 FCC2d at 845 n.12 ("an applicant will not be permitted to amend where it did not have the requisite 'reasonable assurance' to being with"); Adlai E. Stevenson IV, 5 FCC Rcd 1588, 1589 (Rev. Bd. 1990) (amendment specifying a new transmitter site rejected where applicant lacked reasonable assurance when initial application was filed). The Presiding Officer may take official notice that CESCI has not yet amended its application to specify a new site.

Commission proceeding involving the pending application, the applicant is required to serve its statement on parties of record. Id.

Despite a diligent search of FCC files containing CESCO's application, JMU has been unable to locate any CESCO report to the FCC regarding its lack of a transmitter site. JMU has not been served with any CESCO statement about its missing transmitter site. Yet, a missing site is clearly a substantial change in significant information of decisional significance.^{6/} Moreover, because the Declarations in Exhibits 1 and 2 were served on CESCO, it knew it lacked a site. Therefore, a Section 1.65 issue should be specified against CESCO for failure to report its site deficiency. See, e.g. National Communications Industries, 6 F.C.C. Rcd 1978, 1979 (Rev. Bd. 1991) ("If the transmitter site becomes unavailable after an applicant certifies it has reasonable assurance, that significant change must be reported within thirty days, in accordance with 47 C.F.R. § 1.65."); Marlin Broadcasting of Central Florida, 5 F.C.C. Red 5751, 5753 n. 9 (1990); Bay Television, Inc., 45 F.C.C. 2d 181, 182 (Rev. Bd. 1983).

^{6/} J. Sherwood, Inc., 63 F.C.C. 2d 151, 157 (Rev. Bd. 1976); Midwest St. Louis, Inc., 61 F.C.C. 2d 203, 207 (Rev. Bd. 1976).

3. A Financial Qualifications Issue Against CESCO Is Warranted

FCC Form 340, Section III, Item 3, states:

The applicant certifies, except as noted above, that sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the station for three months without additional funds.

The Instructions to FCC Form 340, Section III - Financial Qualifications state:

Documentation supporting the attestation of financial qualifications need not be submitted with the application, but must be available to the Commission upon request.

In order to prove reasonable assurance of financial qualifications at the time of certification, CESCO must "adduce probative evidence that, prior to certification, it engaged in serious and reasonable efforts to ascertain predictable construction and operation costs." Northhampton Media Associates, 4 FCC Rcd 5517, 5519 (1989) (emphasis added).

Exhibits 1 and 2 confirm that CESCO did not contact Mr. Chiles about use of the Castle Rock Site prior to filing the CESCO application. Thus, CESCO could not have engaged in "serious and reasonable efforts to ascertain predictable construction and operation costs." Without inquiring of Mr. Chiles about the costs of leasing his site, CESCO could not reasonably certify that it had the funds to

construct and operate the new station for three months. A financial qualifications issue is warranted.

There is a second reason for adding this issue. Under the present financial certification mechanism, "a challenger will seldom have precise knowledge of what a competitor's financial plan is." Las Americas Communications, Inc., 60 R.R.2d 1366, 1369 (1985). Thus, the Review Board has stated that "it would be an abdication of our qualifications approval responsibility if we were to immunize virtually every certificated financial proposal from scrutiny merely because a challenger could not describe an unreported proposal in detail and point to its deficiencies." Id. at 1369. Henry Chiles's declarations in Exhibits 1 & 2 raise a substantial and material question as to whether CESCO properly certified its financial qualifications. Thus, in order for JMU to explore fully in discovery CESCO's documentation of its financial qualifications, JMU requests a financial qualifications issue against CESCO.

4. Conclusion

CESCI never had a site and has no site now. The proposed site owner does not acknowledge any pre-filing contact with CESCI, let alone CESCI's claim of reasonable assurance to use the Castle Rock Site. Without a site, CESCI's application is fatally defective. No amendment can cure CESCI's initial failure to obtain reasonable assurance for its proposed site. Moreover, CESCI has known for nearly six (6) months that it lacked a transmitter site, but never so informed the Commission, despite its obligation under Section 1.65.

Moreover, CESCI's failure timely to obtain reasonable assurance of a site raises a substantial and material issue regarding its financial qualifications. Not knowing the cost of any site it might seek, CESCI cannot properly certify its ability to operate its proposed facility.

For these reasons, JMU requests that appropriate site availability, Section 1.65 reporting and financial qualifications issues be specified against CESCL.

Respectfully submitted,

THE BOARD OF VISITORS OF JAMES
MADISON UNIVERSITY

By: 

Richard D. Marks
Margaret L. Miller

Its Attorneys

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April 14, 1993

Exhibit 1

(Declaration of Henry Chiles dated October 19, 1992)

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

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.

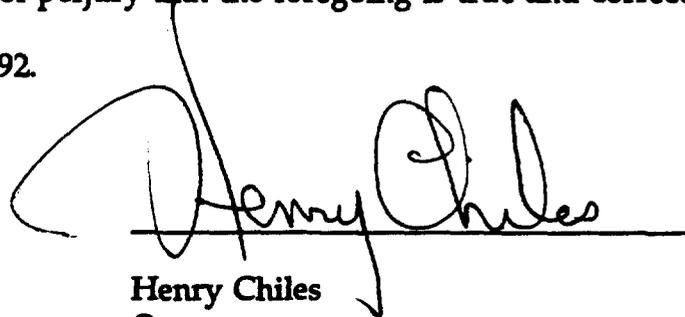
5. I have reviewed the attached copies of the Service Council, Inc. (CESCI) 1992 Board of Directors and 1992 Members and its Site Availability Certification. It is my understanding that these materials were taken from a Federal Communications Commission application filed by CESCI for a new noncommercial 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", written over a horizontal line. The signature is fluid and cursive.

Henry Chiles
Owner
Crown Orchard Company

Exhibit 2

(Declaration of Henry Chiles dated December 18, 1992)

DECLARATION OF HENRY CHILES

I, Henry Chiles declare as follows:

1. I reaffirm every statement in my Declaration, dated October 19, 1992 and incorporate it by reference into this Declaration,

2. Since late October 1992. I have received several telephone

CERTIFICATE OF SERVICE

I, JoEllen Walker, a secretary at Dow, Lohnes & Albertson, hereby certify that a copy of the foregoing "Motion To Enlarge Issues" was served this 14th day of April, 1993, by first class United States mail, postage prepaid, upon the following:

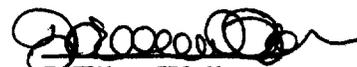
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