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Washington, D.C. 20554

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In Reply Refer to:
1800B3-WW/MW
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In re: Educational Media Foundation
FM Translator Station K224DK, Fontana, CA
Facility ID No.: 139831
File No. BNPFT-20030828ANS

Petition for Reconsideration

Dear Mr. Chautin:

The staff has under consideration: (1) the above-captioned application of Educational Media Foundation ("EMF") for a new FM translator station at Fontana, California, which was granted on March 7, 2005 (the "Application"); (2) the April 6, 2005, "Petition for Reconsideration and Request to Rescind Grant of FM Translator Permit" (the "Petition for Reconsideration") regarding the Application filed by Amataro Group of L.A., Ltd. ("Amataro"); and (3) related responsive pleadings.¹

Background. The Application was accepted for filing on March 11, 2004. Amataro timely filed a Petition to Deny the Application on March 31, 2004, arguing that the proposed translator would cause prohibited overlap to its co-channel Station KLIT(FM), Fountain Valley, California. In response, on April 29, 2004, EMF amended the Application to reduce the proposed effective radiated power to 0.01 kW, thereby eliminating the complained-of overlap. On March 7, 2005, the staff denied Amataro's Petition to Deny and granted the Application, finding that no actual interference was predicted to occur.² On April 6, 2005, Amataro timely filed its Petition for Reconsideration of that decision (the "Petition").³

¹ EMF filed an Opposition to the Petition for Reconsideration on May 4, 2005 (the "Opposition"), to which Amataro filed a Reply on May 13, 2005 (the "Reply"). Additionally, on August 26, 2005, Amataro filed a "Motion for Leave to File Supplement to Petition for Reconsideration and Request to Rescind Grant of FM Translator Permit" and the subject Supplement, noting that, subsequent to the filing of the Petition, EMF filed an application (File No. BMPFT-20050718ABY) to modify the Fontana permit, specifying a new transmitter site. This pleading is not authorized under the Commission's Rules, *see* 47 C.F.R. § 1.45, and EMF's modification application was dismissed on July 22, 2005. Accordingly Amataro's Motion will be denied.

² *Letter to Educational Media Foundation*, Reference 1800B3 (MB Mar. 7, 2005).

³ Additionally, on July 18, 2005, as observed at note 1, *supra*, EMF filed a minor modification application for Station K244DK, specifying a new transmitter site. The staff dismissed that application on July 22, 2005, due to impermissible overlap with co-channel Station KELT(FM), Riverside, California. *Letter to David Oxenford, Esq.* Reference 1800B3 (MB Jul. 22, 2005). The staff subsequently denied reconsideration of that action on April 28, 2006. *Letter to Educational Media Foundation*, Reference 1800B3 (Apr. 28, 2006).

In its Petition, Amaturio asserts that EMF's Application grant should be rescinded because: (1) the proposed translator station will cause interference to Amaturio's co-channel Station KLIT(FM); and (2) EMF lacked reasonable assurance of the availability to it of the antenna site specified in its Application. For the following reasons, we deny the Petition.

Discussion. Reconsideration is appropriate only when the petitioner either shows a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters.⁴ Amaturio has failed to make such a showing in this case.

Alleged Interference to Station KLIT(FM). As a component of the staff's routine pre-grant review of the Application, as amended, the staff concluded that there would be no predicted interference to Amaturio's co-channel Station KLIT(FM) caused by the proposed translator. In its Petition for Reconsideration, Amaturio seeks to demonstrate that interference will actually occur to Station KLIT(FM) using a supplemental engineering showing incorporating the Longley-Rice signal propagation methodology. However, supplemental showings have not been accepted, nor will they be, for the purpose of determining interference between FM broadcast stations.⁵ Accordingly, we will not accept Amaturio's supplemental showing to "extend" KLIT(FM)'s protected service contour in this case. For this reason, Amaturio has not established in its Petition for Reconsideration that the staff erred in processing or granting the Application.

In this regard, we note that, the Commission's rules regarding FM translator stations restrict such stations to operate strictly on a secondary basis and limit their permissible service. Section 74.1203(a)(3) states that an FM translator station will not be permitted to continue to operate if it causes any actual radio signal interference to the direct reception by the public of the off-the-air signals of any authorized broadcast station.⁶ Actual interference is based on listener complaints indicating that the signal that the complainant regularly receives is being impaired by the signal radiated by the FM translator station. Section 74.1203(b) states that, if the interference cannot be properly eliminated by the application of suitable techniques, the operation of the offending FM translator station shall be suspended and shall not be resumed until the interference has been eliminated. Accordingly, should EMF's Fontana translator station cause any actual interference to KLIT(FM) or any other authorized broadcast station, EMF will be required to take appropriate steps to resolve that interference or cease operation of the facility.⁷

⁴ See 47 C.F.R. § 1.106(c); *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom.*, *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966). See also *National Association of Broadcasters*, Memorandum Opinion and Order, 18 FCC Rcd 24414, 24415 (2003).

⁵ See, e.g., *Amendment of Parts 73 and 74 of the Commission's Rules to Permit Certain Minor Changes in Broadcast Facilities Without a Construction Permit*, Report and Order, 12 FCC Rcd 12371, 12402 ¶ 69 (1997) (supplemental contour-prediction methods, such as Longley-Rice, "have not been accepted, nor will be accepted, for the purpose of determining interference or prohibited overlap between FM broadcast stations").

⁶ An FM translator station creating actual radio signal interference to any authorized broadcast station is obligated to eliminate the interference, regardless of the location where the impaired signal reception occurs.

⁷ Again relying on its Longley-Rice study, Amaturio contends that the staff should not allow KILT(FM)'s coverage to be "usurped" by the EMF's Fontana translator, because the Application essentially proposes a "fill-in" translator facility for primary Station KLRD(FM), Yucaipa, California, in an area already adequately served by KLRD(FM)'s protected service contour. Petition for Reconsideration at 8. Because we reject Amaturio's use of supplemental

Reasonable Site Assurance. In its Petition, Amaturio also argues, for the first time on reconsideration, that grant of the Application should be reconsidered because EMF lacked reasonable assurance of the availability to it of the antenna site proposed in that Application. Amaturio states that EMF proposed to operate its station from the same tower and at the same location on the tower as that previously occupied by Amaturio's Station KELT(FM), Riverside, California. Amaturio maintains that, although it sold the tower in 1998, it retained recorded easement rights for KELT(FM)'s tower at the 70-foot level on the tower. Thus, states Amaturio, the location specified in the Application for EMF's antenna is within the tower space that Amaturio still controls, and EMF never contacted Amaturio about the use of this location on the tower. Amaturio maintains that, because it was the only entity from whom site assurance at the site and elevation specified could have been obtained, and no one connected with Amaturio provided such assurance, EMF did not comply with the Commission's site availability requirements.⁸

In its Opposition, EMF initially challenges the procedural propriety of Amaturio's raising the site availability argument for the first time in its Petition for Reconsideration.⁹ Additionally, EMF states that it did obtain reasonable assurance of its proposed site's availability from the owner of the tower, American Tower Corporation ("ATC"). In support of this latter contention, EMF submits a letter from Peter Starke, Vice President/General Manager of ATC's Broadcast Group, in which he states:

American Tower owns the tower and has land easement rights to access the site and operate the building. Although I do not know the exact date of your application to the FCC to utilize this site, I would like to confirm that EMF did in fact receive permission from American Tower to use this facility in its application to the FCC. At the time, reasonable assurances were given to EMF that ATC would enter into a tenant lease with EMF to operate its equipment from this site.¹⁰

In its Reply, Amaturio contends that EMF's site assurance documentation is inadequate because it is from a company that does not control the tower space in which EMF's translator is to be situated. It contends that reasonable assurance can only be obtained from the owner of the tower space at issue, and, since Amaturio, and not ATC, holds easement rights over the tower space specified by EMF, EMF never

engineering showings in this context, and because EMF is obligated to remedy any actual interference to KLIT(FM), this argument requires no further discussion.

⁸ Petition for Reconsideration at 6. Amaturio cites Paragraph L in the Instructions to FCC Form 349, "Application for Authority to Construct or Make changes in a FM Translator, or FM Booster Station," which contains the following admonition:

... All applicants for broadcast facilities must have a reasonable assurance that the site specified will be available when at the time they file FCC Form 349. *See William F. and Anne K. Wallace*, 49 F.C.C.2d 1424, 1427 (Rev. Bd. 1989); *Genesis Communications, Inc.*, 3 FCC Rcd 3595 (1988); *National Innovative Programming Network*, 2 FCC Rcd 5641 (1987).

⁹ EMF cites 47 C.F.R. § 1.106(c), which provides that a petition for reconsideration relying on facts not previously presented to the Commission may be granted only if there are new facts or changed circumstances previously unknown to the petitioner or where consideration is required in the public interest. Opposition at 3.

¹⁰ Opposition, Exhibit B, *Letter from Peter A. Starke to Mr. Jeff Wall* (May 3, 2005) (the "ATC Letter"). The ATC letter is not dated contemporaneously with the August 2003 filing of the Application.

received reasonable assurance, yet represented on four separate occasions that it had such rights.¹¹ Additionally, Amaturio observes that the “self-serving” ATC Letter was not prepared contemporaneously with the filing of EMF’s application, is based upon the recollection of an individual who did not provide the actual assurance, and does not establish the basis for his statements in the letter. For these reasons, Amaturio claims the ATC Letter should be rejected as hearsay.¹² Additionally, it indicates that any implication in the ATC Letter that Amaturio no longer has rights on the tower¹³ are untrue, and that it has advised ATC that grant of a lease to EMF that violates Amaturio’s legal rights “will most assuredly result in legal action.”¹⁴

We will dismiss that portion of Amaturio’s Petition that raises, for the first time, the site availability argument. As noted *supra*, the Commission’s rules are clear that a petition for reconsideration relying on facts not previously presented to the Commission may be entertained only if the facts raised are new or involve changed circumstances previously unknown to the petitioner (and which could not have been ascertained by the exercise of ordinary diligence) at the time that the petition was filed, or where consideration of the matter is required in the public interest.¹⁵ Amaturio does not demonstrate that it could not have timely discovered through the exercise of ordinary diligence that EMF proposed to locate its Fontana translator at a location on the ATC tower allegedly controlled by Amaturio, nor that our consideration of the facts upon which Amaturio relies “is required in the public interest,” as specified by Section 1.106(c)(2).¹⁶

In this regard, Amaturio claims that it “did not discover until later that EMF’s application specified the exact parameters of Amaturio’s previously licensed location for KELT(FM)” and that it “would not have had reason to anticipate” that the specified location would be the one for which it allegedly held easement rights;¹⁷ it thus states that it raised the argument only after confirming its easement rights. The arguments are unpersuasive. EMF’s Application was filed on August 28, 2003, and it was not granted until March 7, 2005, nearly 19 months later, during which time it was available for public inspection. Amaturio had ample time to study EMF’s specific technical proposal.¹⁸ We note that, on March 31, 2004, Amaturio timely filed its Petition to Deny the Application, arguing that the proposed translator would create impermissible overlap to Amaturio’s Station KLIT(FM), including in support an

¹¹ The four occasions are (1) when EMF filed its short-form application, (2) when it filed its Application, (3) when it amended the Application, and (4) when it responded to Amaturio’s Petition. Reply at 4.

¹² *Id.* at 5.

¹³ The ATC Letter does not mention Amaturio by name.

¹⁴ Reply at 5 and Exhibit A.

¹⁵ 47 C.F.R. §§ 1.106(b)(1), (c).

¹⁶ See, e.g., *Winstar Broadcasting Corp.*, Memorandum Opinion and Order, 20 FCC Rcd 2043 (2005); *Maine School Administrative District No. 49, Fairfield, Maine*, Order, 17 FCC Rcd 3550 (2002) (petitioner for reconsideration did not demonstrate new facts, changed circumstances, or unknown facts in compliance with 47 C.F.R. §§1.106(b)(1) and (c), and it failed to demonstrate that consideration of the material was required in the public interest).

¹⁷ Reply at 6, note 10.

¹⁸ Amaturio even admits that “ample time” passed between the filing of the application and the Bureau’s acceptance of the application for the Bureau to study the application for technical flaws. Reply at 2-3.

engineering showing study based on EMF's technical proposal contained in the Application. That Amaturio did not realize that EMF had specified the site that Amaturio allegedly controlled is, at best, due to a lack of "ordinary diligence" on its part.

Moreover, even were we to consider the merits of Amaturio's site availability argument, we would deny reconsideration on those grounds. An allegation that an applicant has falsely certified availability of a transmitter site raises two interrelated issues: (1) whether the applicant had reasonable assurance of the availability to it of the site at the time that the applicant so certified (*i.e.*, whether there was a meeting of the minds sufficient to establish reasonable assurance of a transmitter site's availability for its intended use); and (2) whether the certification was deliberately false, or whether the applicant believed, even if such belief was incorrect, that the site owner had made a commitment to make the transmitter site available to the applicant (*i.e.*, whether the applicant intended to deceive the Commission, as established by substantial evidence).¹⁹

With respect to the first issue, to demonstrate that it has obtained reasonable assurance that its proposed site is available, an applicant must provide proof of the property owner's favorable disposition toward making an arrangement with the applicant, beyond simply a mere possibility. This reasonable assurance may be acquired by informal telephone contacts with a representative of the property owner or prospective landlord, and rent and other details may be negotiated at a future date.²⁰ The unqualified statements in the May 3, 2005, ATC letter that "EMF did in fact receive permission from American Tower to use this facility in its application to the FCC" and "[a]t the time, reasonable assurances were given to EMF that ATC would enter into a tenant lease with EMF to operate its equipment from this site" are sufficient to meet this standard. Contrary to Amaturio's claims, the ATC letter is not "self-serving," as ATC is not even a participant in this proceeding.²¹ With respect to the second issue of possible misrepresentation by EMF, both ATC and EMF believe that ATC did provide reasonable assurance to EMF. Under these circumstances, there is no evidence of any false certification or untrue statements to the Commission by EMF regarding the specified site.

¹⁹ *Liberty Productions, A Limited Partnership*, Memorandum Opinion and Order, 16 FCC Rcd 12061, 12084-85 (2001) (subsequent history omitted). See also *National Innovative Programming Network, Inc. of the East Coast*, Memorandum Opinion and Order, 2 FCC Rcd 5641, 5642 (1987) (the proper initial inquiry is whether, based on the information available to it, was it reasonable for the applicant to conclude that the site would be available) and *Rem Malloy Broadcasting*, Memorandum Opinion and Order, 6 FCC Rcd 5843, 5846 (Rev. Bd. 1991), citing *South Florida Broadcasting Co.*, Memorandum Opinion and Order, 99 FCC 2d 840, 845 note 12 (Rev. Bd. 1984).

²⁰ *National Innovative Programming Network, supra*, 2 FCC Rcd at 5642 (citations omitted).

²¹ We need not reach the issue of whether the ATC Letter constitutes hearsay. The Commission's general practice is to consider relevant and material hearsay, provided that the weight to be accorded hearsay depends on its reasonableness and credibility, *e.g.*, whether the declarant is a disinterested witness. See, *e.g.*, *Johnson v. United States*, 628 F.2d 187, 190-91 (D.C. Cir. 1980). We have no reason to disregard or discount the ATC Letter in the circumstances presented here. We also need not resolve Amaturio's contention that it owns the right to the 70-foot level on the ATC tower such that ATC could not grant permission to EMF to use that location. Whether or not Amaturio retained an easement right to the 70-foot level on the tower sold to ATC in 1998 is a matter purely sounding in contract. The Commission is not the proper forum for the resolution of private contractual matters. See, *e.g.*, *John F. Runner, Receiver*, Memorandum Opinion and Order, 36 RR 2d 773, 776 (1976); *Transcontinent Television Corp.*, Memorandum Opinion and Order, 21 RR 2d 945 (1961). The question for us here is whether ATC provided reasonable assurance to EMF. The documentation before us, including ATC's unequivocal letter, demonstrates that it did so.

Conclusion/Action. In light of the foregoing, IT IS ORDERED, that the August 26, 2005, Motion for Leave to File Supplement to Petition for Reconsideration and Request to Rescind Grant of FM Translator Permit filed by Amaturio Group of L.A., Ltd. IS DENIED.

IT IS FURTHER ORDERED, that the April 6, 2005, Petition for Reconsideration and Request to Rescind Grant of FM Translator Permit filed by Amaturio Group of L.A., Ltd. IS HEREBY DISMISSED IN PART AND DENIED IN ALL OTHER RESPECTS, as discussed above.

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau

cc: Educational Media Foundation
Veronica D. McLaughlin Tippet
Amaturio Group of L.A., Ltd.