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In reply refer to:
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In re: **Living Proof, Inc.**
Big Pine, California
Facility No. 173373
File No. BNPED-20071018AJI
Application for new NCE FM Station
Petitions to Deny
Joint Request for Approval of Settlement Agreement.

Dear Counsel and Mr. Kalish:

Before us are the captioned application (the "Application") of Living Proof, Inc. ("Living Proof") for a new NCE FM station at Big Pine, California, a Petition to Deny (the "Kalish Petition") filed by Stephen Kalish, a Petition to Deny filed by the University and Community College System of Nevada (the "University") and related pleadings.[1] For the reasons set forth

[1] Opposition to Petition to Deny (the "Opposition") filed by Living Proof; a Reply to Opposition to Petition to Deny (the "Reply") filed by Kalish; a Consolidated Motion for Extension of Time (the "First Extension Motion") filed by Living Proof; a Consolidated Motion for Further Extension of Time ("the Second Extension Motion") and a Consolidated Motion for One-Day Further Extension of Time (the "Third Extension Motion"), filed by Living Proof; an Opposition to Consolidated Motion for Further Extension of Time (the "Opposition to Extension") filed by Kalish; a Reply to Opposition to Consolidated Motion for

below, we deny the University Petition, deny the Kalish Petition, grant the First, Second and Third Extension Motions, grant the Joint Request, and grant the Application, as amended.

Background. The University alleges that Living Proof's proposed station would cause interference to its FM translator station, K215BQ, Bishop, California.[2] It also claims that Living Proof lacks reasonable assurance of site availability[3] and that there are defects in Living Proof's local newspaper public notice that the Application had been filed.[4]

Kalish alleges that Living Proof falsely certified that it would comply with the local public notice publication requirements of Section 73.3580 of the Commission's Rules (the "Rules")[5] and misrepresented that Kalish was engaged in settlement negotiations with Living Proof and the University.[6] These matters, in combination, Kalish claims, show that Living Proof lacks "forthrightness and candor"[7] and has made a "possible material misrepresentation."[8] Therefore, Kalish argues that the Application should be dismissed with prejudice.[9] Finally, in his Reply, Kalish alleges that Living Proof violated Section 73.3526(e)(2)[10] of the Rules by not placing, in the Living Proof local public inspection file, a statement that the University and Kalish had filed Petitions to Deny, and a list of the names and addresses of the Petitioners.[11]

Living Proof claims that its defective local public notice was attributable to a "scrivener's error"[12] and that it subsequently published a correct notice. It argues that the Commission does

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Further Extension of Time (the "Reply to Opposition to Extension Motion") filed by Living Proof; and a Joint Request for Approval of Settlement Agreement (the "Joint Request") filed by Living Proof and the University. The Commission does not routinely grant extensions of time in which to file pleadings. *See* 47 C.F.R. § 1.46(a). It has done so, however, when, as here, parties require additional time to conclude a settlement agreement. *See*, *e.g., Port Huron Family Radio, Inc.*, Memorandum Opinion and Order, 4 FCC Rcd 5617 (Rev. Bd. 1989). Accordingly, we grant the First, Second and Third Extension Motions. We dismiss Living Proof's Reply to Opposition to Extension Motion because § 1.45(d) of the Commission's Rules ("Rules") makes no provision for the submission of replies to oppositions to motions. *See* 47 C.F.R. § 1.45(d).

[2] *See* University Petition at 1.

[3] *Id.* at 1-2.

[4] *See id*. at 3.

[5] 47 C.F.R. § 73.3580. *See* Application, Section II, Item 12 ("Local Public Notice: The applicant certifies compliance with the public notice requirements of 47 C.F.R. § 73.3580."). Kalish asserts, and Living Proof does not dispute, that the initial local public notice of the filing of the Application was published five days after the thirty-day period specified in 47 C.F.R. § 73.3580(c) and did not contain information on the power and antenna height of the proposed station as required by 47 C.F.R. § 73.3580(f)(5).

[6] In the Second Extension Motion, Living Proof represented that "[t]he parties have been discussing a resolution of the matter." Second Extension Motion at 1. Kalish, however, asserts that he "has never heard from [Living Proof's] counsel of any settlement offer or engaged in any resolution discussions with applicant's counsel whatsoever." Opposition to Extension at 1.

[7] Reply at 4.

[8] *Id.* at 1.

[9] See *id*. at 8.

[10] 47 C.F.R. § 73.3526(e)(2).

[11] *See* Kalish Reply at 6 and Exhibit C.

[12] Opposition at 3. (Living Proof asserts that the error was made "by a paralegal employed by [Living Proof's] former counsel.")

not dismiss applications if local public notice is deficient; it only requires that the applicant publish a corrected notice and so advise the Commission.[13]

In their Joint Request, the University and Living Proof seek dismissal of the University Petition, approval of the Joint Request and grant of the Living Proof Application, as amended.[14] The amendment substitutes Channel 212 for the originally requested Channel 214 to avoid potential interference to the University's translator station.[15]

Discussion. We accept the Living Proof amendment to specify Channel 212 in lieu of Channel 214 and grant the Joint Request. The University and Living Proof have provided the requisite "no consideration," declarations[16] and assert that there are no longer any disputed matters that require resolution by the Commission.[17] Accordingly, as Living Proof and the University request, we are dismissing the University Petition. Nonetheless, we are obliged to consider the University Petition on its merits.[18]

SBA Network Services manages the transmitter site specified in the Living Proof application pursuant to a special use permit issued by the U. S. Forest Service (the "Forest Service"). The site is located on Mazourka Peak, a major electronics site, in the Inyo National Forest.[19] The University contends that Living Proof has not contacted the Forest Service, received "reasonable assurance" from the Forest Service that the proposed use of the site would be acceptable, or submitted the forms necessary to obtain permission to construct and operate a broadcast transmission system at the site.[20] In support of those allegations, the University provides a declaration from Michael Levine.[21]

Mr. Levine[22] recites that, at the request of Kalish, he contacted Forest Service Land Specialist, Frances Alvarado, who told Mr. Levine that "SBA was told that they had to submit a

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[13] *Id.* at 2 (citing *Helen Broadcasting Co. L.P.,* Memorandum Opinion and Order, 5 FCC Rcd 2829, 2830 (1990) ("Helen Broadcasting")).

[14] *See* Joint Request at 2 and Exhibit A.

[15] *See id.*

[16] The parties to the agreement have provided declarations under penalty of perjury that neither party has received compensation, in excess of their reasonable and prudent expenses, in exchange for entering into the Joint Request. *See id.* at 2, Declaration of Daniel McClenaghan and Declaration of Daniel J. Klaich. *See also* 47 C.F.R. § 73.3588.

[17] *See* Joint Request at 2.

[18] *See Booth American Co*., Memorandum Opinion and Order, 58 FCC 2d 553, 554 (1976).

[19] *See id.* at 2 and Attachment 2.

[20] *Id.* The Forest Service issues special use permits to "facility owners" at designated sub-sites. Facility owners, such as SBA, may lease tower space or land for a new tower to tenants. A prospective tenant may contact either the facility owner or the Forest Service (which then directs the prospective tenant to a facility owner). The facility owner is required to provide 30-day notice to other tenants at the site, and other facility owners, whenever it adds new frequencies at a site, either for itself or its tenants. *See id.*, Attachment 2, Ex. A (Mazourka Peak Communications Site Management Plan). The notification must be accompanied by Forest Service Form 2700-10. *Id.*

[21] *See* University Petition at 2. According to the University, Mr. Levine believes that "an application by Living Proof to use the site would be denied." We note, however, that Mr. Levine makes no such statement in his declaration. He only opines that Living Proof's FCC application should be denied. *See id.* at Attachment 2.

[22] Mr. Levine states that he retired in 2004 as the Inyo National Forest Radio System Manager. *See* University Petition, Attachment 2 at 1.

[Form] 2700-10 to the Forest Service."[23] Mr. Levine states that "Frances Alvarado has not received any further phone calls or documentation from them."

The Declaration also states that Mr. Levine spoke to "State of California radio tech Sam Blum" and asked Mr. Blum "if he [Mr. Blum] or any of the state agencies received a [Form] 2700-10 for a potential new user at Mazourka Peak."[24] Mr. Levine claims that "the agencies always forward this [the Form 2700-10] to their technicians."[25] Mr. Levine states that Mr. Blum told him that he [Mr. Blum] had not received the form and was unaware of "the potential new user."[26] Mr. Levine recites that he made the same inquiry of another technician who denied receiving "any information on a new user."[27] Finally, Mr. Levine claims that "the applicant and site manager by not following site management procedure, has [sic] not met the conditions of the Mazourka site plan and the application should be denied."[28]

Mr. Levine's declaration is primarily hearsay and cannot be credited for that reason.[29] Assuming, *arguendo*, however, that the information in the declaration is correct, the fact that SBA may not yet have notified other site tenants or submitted a completed Form 2700-10 to the Forest Service does not undercut Living Proof's reasonable assurances to its proposed site. The Commission generally assumes that applicants will be able to obtain local land use permits and has not typically required applicants to obtain, or apply for, advance approval from local land use authorities in order to certify, in their applications, that they have reasonable assurance of site availability.[30] Critically, the University has failed to show how SBA's alleged failure to initiate the process of notifying the Forest Service and site tenants of the Living Proof proposal puts in issue Living Proof's reasonable assurance of its proposed site. The Commission generally has designated site availability issues only where it has been shown that permits already had been, or likely would be, denied by local land use authorities.[31] The University has made no such

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[23] *Id.*

[24] *Id.* at 3.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] 47 U.S.C. § 309(d)(1). Section 309(d)(1) of the Communications Act of 1934, as amended (the "Act"), states, in pertinent part, that petitions to deny must be supported with an affidavit from a "person or persons with personal knowledge" of facts alleged in the petition. The University's declarant lacks personal knowledge of the status of Living Proof's proposed site. He relies, instead, on hearsay information he obtained in telephone conversations with others. Declarations that rely on hearsay are inadequate to support a petition to deny. *See, e.g.*, *Excellence in Education Network*, Memorandum Opinion and Order, 8 FCC Rcd 6269, 6272 n.9 (1993) ("an affidavit of a party attesting to another person's assertions . . . is hearsay and as such has no probative value under Section 309(d)").

[30] *See*, *e.g., Artichoke Broadcasting Corp.*, 10 FCC Rcd 12631, 12633 (1995) (rejecting "supposition or opinion" about whether zoning approval would be granted (citing *San Francisco Wireless Talking Machine Co., Inc*., 47 RR2d 889, 893-94 (1980) (site issue not added where applicant had not sought land use approval from various government agencies and may have difficulty in obtaining such approval); *W. Gordon Allen*, 13 RR 1120, 1122-23 (1956) (site issue not added where site was zoned residential and applicant had not sought variance); *Chronicle Publishing Co.*, 45 FCC 1545 1546 (Rev. Bd. 1964) (site issue not added where applicant had not applied for zoning change).

[31] *See Teton Broadcasting, L.P.*, Memorandum Opinion and Order, 1 FCC Rcd 518 (1986) (site issue added where petitioner showed that local zoning board had previously refused to approved the proposed site, that the board's composition had not changed, and that the board's chairman had provided an affidavit stating that the board would not reverse its decision); *El Camino Broadcasting Corp*., Memorandum Opinion and

showing. Thus, Mr. Levine's claim–that Living Proof and SBA have not followed "site management procedure"–is not sufficient to justify further inquiry into Living Proof's site assurances.[32] Accordingly, we find that the University has not established, *prima facie*, that Living Proof, at the time it filed its Application, did not have reasonable assurances of its site.

We also decline to consider Kalish's Reply to the extent that it also questions whether Living Proof has reasonable assurance of its proposed site.[33] Section 1.45(c) of the Rules[34] dictates that a "reply shall be limited to matters raised in the oppositions." Living Proof did not refer to site availability in its Opposition. Thus, Kalish is barred from raising that issue for the first time in his Reply.[35]

Both Kalish and the University challenged the sufficiency of Living Proof's local public notice.[36] However, we agree with Living Proof that the precedent established in *Helen Broadcasting* applies here. We are not persuaded by Kalish's attempt to distinguish that case on its facts. The holding in *Helen Broadcasting*–that inadvertently deficient local public notice may be remedied by publication of a correct notice–applies here notwithstanding the immaterial factual differences between the two cases.[37] As Living Proof did publish a corrected notice and has notified the Commission of its action, no Commission action is necessary.

With regard to Kalish's misrepresentation allegation, Living Proof's explanation of why its local public notice was deficient is plausible. Kalish has not shown, and we cannot perceive, any motive to misrepresent or intent to deceive[38] by Living Proof when it incorrectly certified, in its Application, that it had complied with the public notice requirements of Section 73.3580 of the Rules.[39] Moreover, we find that Living Proof's use of a tri-weekly, instead of daily, newspaper for publication of its local public notice substantially complied with Section 73.3580(c)(1)(iii) of the Rules.[40] Finally, even assuming, *arguendo*, that the Second Extension Motion incorrectly

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Order, 14 FCC 2d 361, 352-353 (1968) (site issue added where petitioner showed it had filed a similar permit request which had been denied by the local land use authority).

[32] *Cf. John Hutton Corp.*, Memorandum Opinion and Order, 27 FCC 2d 214, 215-216 (Rev. Bd. 1971) (site issue not added where petitioner offered affidavit of a local land use administrator, stating he was "pessimistic and discouraging" regarding ultimate zoning approval).

[33] *See* Reply at 9.

[34] 47 C.F.R. § 1.45(c).

[35] Kalish's argument, which is based on Living Proof's lack of an executed lease agreement, is without merit. As explained *supra*, Living Proof was not required to have executed such a site lease or even initiated the Forest Service application process with SBA at the time the Application was filed.

[36] *See* University Petition at 2-3.

[37] *Helen Broadcasting*, 5 FCC Rcd at 2830.

[38] *See Liberty Productions, L.P.,* Memorandum Opinion and Order, 16 FCC Rcd 12061, 12079-12080 (2001). ("To raise a substantial and material question of deceit, it is necessary to show that the statement was inaccurate or materially incomplete and that there was an intent to deceive."); *Fox River Broadcasting, Inc*., Order, 93 FCC 2d 127, 129 (1983) (same).

[39] Living Proof responded "yes" to FCC Form 340, Section I, line 12. ("Local Public Notice. Applicant certifies compliance with the public notice requirements of 47 C.F.R. Section 73.3580.")

[40] Section 73.3580(c)(1)(iii) of the Rules contemplates publication in either daily or weekly newspapers and thus makes no reference to the publication of notices in tri-weekly newspapers. The tri-weekly Inyo Register, which Living Proof used for its notice, is equivalent to a daily newspaper to the extent that it allows a notice to be published twice a week for two consecutive weeks within a three week period, as required by 47 C.F.R. § 73.3580(c)(1)(iii).

implied that Kalish was a party to settlement discussions, such an implication, absent evidence of deceptive intent, does not rise to the level of misrepresentation and thus lacks legal significance.[41]

Kalish claims that Living Proof's public inspection file did not contain a statement that the Petitions to Deny had been filed or a list of the names and addresses of the petitioners.[42] This claim could not have been raised at an earlier stage of this proceeding.[43] Commission staff therefore afforded Living Proof an opportunity to respond to the allegation which we are considering as an objection to the Application. On May 5, 2008, Living Proof filed a response in which it (a) admitted the violation, (b) attributed it to inadvertence on the part of a Living Proof employee, and (c) stated that it placed the requisite information in its local public inspection file as soon as it became aware of the violation.[44]

Section 73.3526 of the Rules[45] serves the important purpose of "facilitating citizen monitoring of a station's operations and public interest performance, and fostering community involvement with local stations, thus helping to ensure that stations are responsive to the needs and interests of their local communities. In this regard, where lapses occur in maintaining the public file, neither the negligent acts or omissions of station employees or agents, nor the subsequent remedial actions undertaken by the licensee, excuse or nullify a licensee's rule violation."[46]

Section 503(b) of the Communications Act of 1934, as amended (the "Act")[47] and Section 1.80(a) of the Rules[48] state that persons who willfully[49] or repeatedly[50] fail to comply with the provisions of the Act or the Rules are liable for forfeiture penalties. The Commission's Forfeiture Policy Statement[51] and Section 1.80 of the Rules set a base forfeiture amount of $10,000 for public file violations.[52] In determining the appropriate forfeiture amount, if any, in the instant

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[41] *See supra* n.38.

[42] *See* 47 C.F.R. § 73.3526(e) ("[i]f petitions to deny are filed against the application, a statement that such a petition has been filed shall be maintained in the file together with the name and address of the party filing the petition.")

[43] *See* 47 C.F.R. §§ 1.106(b)(2)(ii), 1.106(c)(1). (Petition for reconsideration acceptable when it "relies on facts unknown to the petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.")

[44] *See* Response to Informal Objection, May 5, 2008.

[45] 47 C.F.R. § 73.3526.

[46] *Citadel Broadcasting Co.*, Memorandum Opinion and Order and Notice of Apparent Liability, 22 FCC Rcd 7083, 7097 (2007).

[47] 47 U.S.C. § 305.

[48] 47 C.F.R. § 1.80(a).

[49] Section 312(f)(1) of the Act defines "willful" as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f)(1). The legislative history of Section 312(f)(1) of the Act clarifies that this definition of "willful" applies to Sections 312 and 503(b) of the Act, H.R. REP. No. 97-765, 51 (Conf. Rep.), and the Commission has so interpreted the terms in the Section 503(b) context. *See Southern California*, 6 FCC Rcd at 4387-88.

[50] Section 312(f)(1) of the Act defines "repeated" as "the commission or omission of [any] act more than once or, if such commission or omission is continuous, for more than one day." 47 U.S.C. § 312(f)(1). *See also Southern California*, 6 FCC Rcd at 4388 (applying this definition of "repeated" to Sections 312 and 503(b) of the Act).

[51] See Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997), recon. denied 15 FCC Rcd 303 (1999).

[52] *See* 47 C.F.R. § 1.08(b)(4) (Note to Paragraph (b)(4): Guidelines for Assessing Forfeitures).

case, we must consider the factors enumerated in Section 503(b)(2)(D) of the Act,[53] including "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." [54]

We conclude that Living Proof has willfully and repeatedly violated Section 74.3526(e)(2) of the Rules. Considering the record as a whole, including Living Proof's lack of a history of earlier violations and the nature and duration of the violation, we believe admonishment, rather than a monetary forfeiture, is sufficient.[55]

Decision/Action. Accordingly, IT IS ORDERED that the Petition to Deny filed by Steven Kalish IS DENIED.

IT IS FURTHER ORDERED that the Petition to Deny filed by the University and Community College System of Nevada IS DENIED.

IT IS FURTHER ORDERED that the Joint Request for Approval of Settlement Agreement, filed by Living Proof, Inc. and the University and Community College System of Nevada IS GRANTED.

IT IS FURTHER ORDERED that the Reply to Opposition to Consolidated Motion for Further Extension of Time filed by Living Proof, Inc. IS DISMISSED as an unauthorized pleading.

IT IS FURTHER ORDERED that Living Proof, Inc. IS ADMONISHED for willful violation of Section 73.3526(e)(2) of the Commission's Rules.

IT IS FURTHER ORDERED that Application, File No. BNPED-20071018AJI, as amended, IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

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[53] 47 U.S.C. § 503(b)(2)(D).

[54] *See Southern California Broadcasting Co*., Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) *recon. denied*, 7 FCC Rcd 3454 (1992).

[55] *See Tabback Broadcasting Co.,* Memorandum Opinion and Order, 15 FCC Rcd 11899, 11900 (2000) (citing *EZ New Orleans, Inc.* Memorandum Opinion and Order, 15 FCC Rcd 7164, 7165 (1999) (finding that the licensee's single violation of the local public inspection file rule warranted admonishment, but not denial of its renewal application).