

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
The Los Angeles Social Justice Radio Project)	File No. BNPL-20131114BHE
Application for a Permit to Construct a New Low)	Facility ID No. 196949
Power FM Station at Los Angeles, California)	

MEMORANDUM OPINION AND ORDER

Adopted: June 23, 2016

Released: June 23, 2016

By the Commission:

1. We have before us an Application for Review (AFR) filed by The Los Angeles Social Justice Radio Project (SJRP)¹ and responsive pleadings from Calvary Chapel of Costa Mesa, Inc. (Calvary) and KLVE-FM License Corp. (KLVE) and SJRP's reply thereto.² SJRP seeks review of a *Decision*³ in which the Media Bureau (Bureau) affirmed its *Initial Dismissal*⁴ of SJRP's above-captioned application to construct a new low power FM (LPFM) station at Los Angeles, California.⁵ For the reasons discussed below, we grant the AFR and reinstate and grant the Application.

2. *Background.* SJRP filed the Application during the 2013 LPFM filing window, specifying a transmitter site on the campus of Pierce College (College Site).⁶ The Application was mutually exclusive with six others and the seven applications were collectively designated as MX Group 40. SJRP, in response to a public notice inviting settlements and major change engineering amendments,⁷ amended the Application on October 8, 2014 (October Amendment) to resolve all technical conflicts to MX Group 40 by changing its proposed channel and transmitter site. The Bureau accepted the amended Application and invited petitions.⁸

¹ *SJRP Application for Review* (filed Mar. 26, 2015) (AFR).

² KLVE, licensee of KLVE-FM, Los Angeles, California (with regard to which SJRP requested a second-adjacent channel waiver) and Calvary, licensee of KWVE-FM, San Clemente, California (which maintains that the proposed operations would diminish its station's listenable signal) filed separate oppositions. *See Calvary Opposition to Application for Review* (filed Apr. 10, 2015) (*Calvary Opposition*); *KLVE Opposition to Application for Review* (filed Apr. 10, 2015) (*KLVE Opposition*). SJRP requested additional time to respond, followed by a consolidated reply. *See SJRP Consolidated Reply to Oppositions* (filed Apr. 23, 2015) (*SJRP Reply*). We grant SJRP's request for additional time, and consider the SJRP Reply as timely-filed. We will not, however, consider a supplement that SJRP submitted on April 30, 2015. That filing, which transmits a "Statement of Christian Clergy on the Actions of Calvary Chapel (KWVE)," is late-filed, for which SJRP failed to seek leave to so file, and concerns matters beyond the scope of this proceeding.

³ *See William Berle*, Letter Order (MB Feb. 19, 2015) (*Decision*).

⁴ *See William Berle*, Letter Order (MB Jan. 13, 2015) (*Initial Dismissal*).

⁵ *See* File No. BNPL-20131114BHE (filed Nov. 14, 2013) (Application).

⁶ Application, Attachment 11, LPFM Second Adjacent Channel Waiver Study.

⁷ *See Commission Identifies Tentative Selectees in 79 Groups*, Public Notice, 29 FCC Rcd 8665 (2014) (*Settlement Notice*).

⁸ *See Broadcast Applications*, Public Notice, Report No. 28345 (MB Oct. 15, 2014).

3. Calvary and KLVE challenged the Application, as amended, pointing out that the new site coordinates specified in the October Amendment corresponded to public land (Nature Site) within the Chatsworth Nature Preserve/Reservoir (Nature Preserve).⁹ They argued that SJRP lacked reasonable assurance of site availability¹⁰ for the Nature Site and incorrectly claimed an exemption from environmental processing for that site in the amendment.¹¹ SJRP responded by amending its site coordinates specified in the October Amendment on November 24, 2014 (November Amendment). In so amending, SJRP claimed to have accidentally provided inaccurate coordinates for its intended site in the October Amendment, and revised the coordinates to correspond to private land owned by Richard Hill (Hill Site), a location about 750 feet from the Nature Site coordinates specified in the October Amendment.¹² SJRP claimed that it had assurance for the Hill Site prior to the filing of the October Amendment.¹³

4. The Bureau determined that SJRP's claim was insufficient because an applicant must have reasonable assurance of the availability of its transmitter site at the time of application. The Bureau stated that, with respect to "the time SJRP filed the application," SJRP documented neither that the Hill Site was its intended site, nor that it had obtained reasonable assurance for the Hill Site.¹⁴ The Bureau did not specify a particular date associated with its reference to "the time SJRP filed the application."¹⁵ On reconsideration, SJRP (apparently assuming that the Bureau was concerned with its assurance for the Hill Site at the time of amendment in October 2014) produced a February 10, 2015 statement from the Hill Site's owner, clarifying that he had provided assurance to SJRP in September 2014, *i.e.*, prior to the October 8, 2014 amendment filing date.¹⁶ The Bureau denied reconsideration, stating that SJRP had not demonstrated assurance for the Hill Site or for the Nature Site as of November 2013, when SJRP filed the Application initially.¹⁷

⁹ The October Amendment site coordinates were: North Latitude, 34 Degrees, 14 Minutes, 09.7 Seconds; West Longitude, 118 Degrees, 36 Minutes, 39.1 Seconds. *See* October Amendment, Application, Section VI, Question 2.

¹⁰ *See Calvary Opposition at 7; KLVE Opposition at 3-5.* A broadcast applicant must, in good faith, have "reasonable assurance" of transmitter site availability at the time it files or amends its application. *See George Edward Gunter*, Memorandum Opinion and Order, 104 FCC 2d 1363, 1364, para. 4 (Rev. Bd. 1986). Specification of a transmitter site in an application is an implied representation that the applicant has obtained such assurance. *See William F. Wallace*, Memorandum Opinion and Order, 49 FCC 2d 1424, 1427, para. 7 (1974). There must, at a minimum, be a "meeting of the minds resulting in some firm understanding as to the site's availability." *Genesee Communications, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 3595, para. 4 (Rev. Bd. 1988).

¹¹ *See Calvary Opposition at 7-9.*

¹² In its November 24, 2014 "Consolidated Opposition to Petition(s) to Deny," SJRP explained that the error in the October Amendment was "made by the accidental supply of slightly inaccurate coordinates to our engineer..." At Exhibit 1 of its concurrently-filed November Amendment, SJRP stated that its reason for the filing was "to correct coordinates of proposed LPFM station." The November Amendment site coordinates were: North Latitude, 34 Degrees, 14 Minutes, 16 Seconds; West Longitude, 118 Degrees, 36 Minutes, 34.1 Seconds. *See* November Amendment, Application, Section VI, Question 2.

¹³ SJRP represented that it "had received assurances by the [Hill Site] owner that this parcel would be available for the applicant in the event of a grant of a construction permit and that this site assurance was received prior to the amendment filing on October 8, 2014." *See* November Amendment, Attachment 11.

¹⁴ *See Initial Dismissal at 3-4.*

¹⁵ *Id.* at 4.

¹⁶ SJRP Petition for Reconsideration, Exhibit B (filed Feb. 12, 2015).

¹⁷ *See Decision at 2* ("SJRP has not demonstrated that it had reasonable assurance of site availability *at the time it filed the Application*, which was November of 2013. SJRP has not demonstrated that it had reasonable assurance of site availability at that point in time at either the Chatsworth Nature Preserve, which it identified in the Application, or at the [Hill] Site") (emphasis in original, footnote omitted).

5. SJRP contends that Commission review is warranted due to the *Decision*'s: (1) erroneous finding as to a material question of fact; and (2) conflict with rules, cases, and policies.¹⁸ Specifically, SJRP argues that the *Decision* conflated the site originally proposed by SJRP in its 2013 Application (the College Site) with that to which it amended in 2014 (the Hill Site) and reached a result in conflict with corrective amendment policies and related cases. Calvary and KLVE respond that the Bureau properly dismissed the Application because SJRP's specification of the Nature Site, without reasonable assurance of that site's availability, was a fatal flaw, not curable by corrective amendment.¹⁹ SJRP responds that it has shown it had reasonable assurance for the College Site when it filed the Application, as well as for the Hill Site when it filed the October Amendment and the November Amendment, and the latter amendment cured the former amendment's error in coordinates.²⁰

6. *Discussion.* We agree with SJRP that the Bureau based its ruling on an incorrect material fact. The Bureau apparently believed that SJRP specified only two sites – the Nature Site (for which SJRP concedes that it never had assurance), and the Hill Site (for which SJRP claims to have obtained assurance in September 2014). The Bureau was, therefore, concerned about whether SJRP, at the time of filing of its original Application, either had assurance for the Nature Site or actually intended to use and had assurance for the Hill Site. The Bureau held that SJRP's lack of assurance for either the Nature Site or the Hill Site at the time of initial Application filing was a fatal defect in the original Application that could not be cured by its later obtaining assurance for the Hill Site.²¹ The Bureau's holding would have been correct in the two-site scenario the Bureau believed that it was addressing. The *Decision* overlooked, however, that SJRP had listed coordinates not for two sites, but for three.²² The original 2013 Application proposed the College Site, and there has never been any question about SJRP's specification of that site or its reasonable assurance therefor.²³ SJRP's error in specifying the coordinates for the

¹⁸ See 47 CFR § 1.115(a)(2) (standards for review).

¹⁹ KLVE also raises various procedural arguments, which we find without merit and unnecessary to discuss in detail. We reject its argument (*KLVE Opposition* at 1-2) that reconsideration is barred by 47 CFR § 1.106(b)(2); that provision applies only when the full Commission has denied an application for review, which it has not done here. We similarly reject KLVE's argument that SJRP now makes new site assurance arguments in its AFR regarding the Hill Site that it could have made earlier to the Bureau, contrary to 47 CFR § 1.115(c). See *KLVE Opposition* at 3-5. In point of fact, SJRP provided such information regarding the Hill Site, in its Petition for Reconsideration, information that the Bureau considered in its *Decision*, in which it denied the Petition based on the fact that SJRP had not received reasonable assurance from the Hill Site owner until September 2014, after it had filed its Application the preceding November. As SJRP observes, the timing of its site assurance for the Hill Site was not an issue prior to the Bureau's *Decision*. See AFR at 8, Reply at 4. We also reject KLVE's argument that SJRP cannot now rely on the Hill Site assurance statements within the Application, as amended, because SJRP did not explicitly refer to those statements in prior pleadings before the Bureau. See *KLVE Opposition* at 4-5. Again, it had no earlier reason to make such a showing, since there was no question raised of whether SJRP lacked reasonable assurance of the Hill Site until the *Decision* questioning that timing. At any rate, it is beyond dispute that the Bureau's previous action was the result of its mistaken impression that the original Application specified the Hill Site, and its focusing on the timing of SJRP's receipt of reasonable assurance to the date that the Application was filed erroneous. It is well settled that the Commission may correct a subsequently discovered staff error. See *International Broadcasting Network*, Memorandum Opinion and Order, 2 FCC Rcd 2544 (1987).

²⁰ *SJRP Reply* at 3-9.

²¹ See *Decision* at 2.

²² Specifically, SJRP listed coordinates for the College Site (in the original Application), Nature Site (October Amendment), and Hill Site (November Amendment). Although SJRP characterizes its filings as proposing only two sites (the College and Hill Sites) its exclusion of the third (Nature Site) is based on SJRP's position that it did not intend to propose the Nature Site but had merely misidentified the coordinates for the Hill Site in the October Amendment. See AFR at 6.

²³ The Bureau appears to have misunderstood Calvary's allegation that "SJRP did not have reasonable assurance of its tower site at the time it filed the above referenced application." See *Calvary Petition to Deny* at 1-2 (filed Nov. 11, 2014). Although such language might be read as pertaining to the Application as originally filed in 2013, it

(continued....)

Nature Site the following year in the October Amendment is, thus, of no consequence in determining whether it had obtained reasonable assurance for the College Site at the time it filed the original application.²⁴

7. We reject Calvary's claim that SJRP's November Amendment cannot be accepted due to the site coordinate error in the October Amendment.²⁵ The non-auctioned application processing policies that the parties debate herein pertain to coordinate errors and lack of assurance for originally-proposed sites.²⁶ In contrast, the error in the instant proceeding involves a new site proposed in a post-window amendment period. The policies applicable to the former are different from the latter.²⁷ The parties cite no published decision in which the Commission has dismissed an application notwithstanding a timely amendment correcting a site error made in a post-window site change amendment.²⁸ Accordingly, we

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has since become evident that Calvary was referring only to the Application as amended in October 2014 because Calvary never mentioned the originally-proposed College Site and referred solely to the Nature Site by name, coordinates, public notice, site manager, and preservation requirements. *Id.*, Exhibits B-D; *see also*, *KLVE Petition to Deny* at 2 (filed Nov. 14, 2014).

²⁴ Although Calvary now contends that SJRP "fails to provide any evidence that it had reasonable assurance of site availability for any of the three (3) different sites it had proposed" (*Calvary Opposition* at 3), this is a bare allegation lacking any substance. The record contains no showing that SJRP lacked reasonable assurance for the originally-proposed College Site. With respect to availability of the Hill Site, we reject Calvary's argument that the unsworn statement dated February 10, 2015 from Richard Hill provided by SJRP with its Petition for reconsideration is insufficient. Calvary did not make a *prima facie* showing (or any showing at all) that assurance for the Hill Site was lacking, so there was nothing for SJRP to rebut with evidence, sworn or otherwise.

²⁵ *See Calvary Opposition* at 3-7.

²⁶ *See* AFR at 8-9 (citing cases where corrections of site coordinates were allowed for typographical errors); *Calvary Opposition* at 5-6 (not allowing amendments to correct Tech Box errors and missing waiver request); *SJRP Reply* at 8.

²⁷ The Commission allows timely curative amendments except where such a cure is precluded by a specific rule or by clearly established policy. *See Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, Public Notice, 56 RR 2d 776 (1984) (*Nunc Pro Tunc Public Notice*); *see, e.g., Christian Charities Deliverance Church*, Memorandum Opinion and Order, 30 FCC Rcd 10548, 10550-51, para. 8 (2015) (although Section 73.870(c) prohibits curative amendments to LPFM applications lacking second-adjacent channel spacing waivers, the *Nunc Pro Tunc Public Notice* allows a curative amendment for an LPFM application filed with a deficient waiver request); *Big Wyoming Broad. Corp.*, Memorandum Opinion and Order, 2 FCC Rcd 3493, para. 6 (1987) (a violation of Section 73.3518 is a fatal defect that cannot be cured through an amendment); *US Pro Descubierta*, Memorandum Opinion and Order, FCC 16-52, para. 2 (rel. Apr. 27, 2016) (absent a waiver of 47 CFR § 73.871(c)(3), a major change in an LPFM applicant's board of directors is a fatal defect). There is a clearly-established policy precluding curative site amendments in non-auction cases where the applicant lacked reasonable assurance for its initial proposed transmitter site. *See Christopher Falletti*, Memorandum Opinion and Order, 30 FCC Rcd 827, 828-29, paras. 5-7 (2015) (explaining the Commission's historical fatal defect approach to site availability for an applicant's initial transmitter site). However, there is no such clearly-established policy with respect to site availability for an amended site. *See Able Radio Corp.*, Letter, 26 FCC Rcd 16161, 16163 (MB 2011) (subsequent history omitted). As a matter of due process, we cannot treat the erroneous site coordinates in SJRP's October Amendment as a fatal defect without having given applicants prior notice of such a policy. *See Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 632 (D.C., Cir. 2000).

²⁸ Calvary incorrectly suggests that language in a public notice, which announced procedures prior to opening of the 2013 LPFM window, would prevent SJRP's post-window curative amendment. *See Calvary Opposition* at 4, *citing Procedures for October 15 – October 29, 2013 Low Power FM Filing Window*, Public Notice, 28 FCC Rcd 8854 (MB 2013) ("No curative amendments for such applications and amendments will be accepted after the window"). The language at issue tracks language in 47 CFR § 73.870(c) concerning short-spaced proposals, and addresses original window-filed applications. The later *Settlement Notice*, pursuant to which SJRP filed its October Amendment, contained no such language. Instead the *Settlement Notice* cites 47 CFR § 73.871(c), which permits minor amendments to LPFM applications at any time. *Settlement Notice*, 29 FCC Rcd at 8671.

find that SJRP's specification in error of the Nature Site coordinates in its October Amendment is not a fatal application defect.²⁹

8. We also reject Calvary's attempt to transfer wholesale its environmental arguments from the Nature Site (October Amendment) to the Hill Site (November Amendment). The record is clear that SJRP did not intend to propose operation from the Nature Site, and therefore its certification (Application, Section VI, Question 10) that the Nature Site was excluded from environmental processing under Section 1.1306(b)(1) of the FCC's rules (the Rules)³⁰ was simply a mistake arising from the underlying error in specifying coordinates for the Nature Site instead of the Hill Site.

9. Substantively, Calvary has failed to make any showing that SJRP's current claimed categorical exclusion from environmental processing for the proposed 12-meter tower on private land at the Hill Site is erroneous.³¹ Its argument that SJRP could not have made an accurate certification without an Environmental Assessment (EA) and Section 106 review is based on general claims that: (1) the Hill Site lies just outside of the Nature Preserve; (2) the Nature Preserve contains a historic site and is home to a variety of animals (none of which are claimed to belong to an endangered species) and plants; and (3) the "historic and environmental features of the Nature Preserve don't simply stop at the property line."³² These broad arguments fail to identify any "trigger" under Section 1.1307 of the Rules³³ that would require SJRP to file an EA. For example, Calvary does not (and cannot) argue that the proposed site is "in an officially designated wildlife preserve,"³⁴ as the parties agree that it is not, and Calvary has cited no precedent indicating that locating a tower site adjacent to a such a wildlife preserve is enough to warrant the filing of an EA. With respect to the historic site located within the Nature Preserve, Calvary has failed to show how SJRP's proposed tower at the Hill Site "may affect" that historic site.³⁵ Similarly,

²⁹ We also reject Calvary's contention that a signature date defect in the November Amendment prevents acceptance of the Application, as amended. Calvary observes that the Application's engineering certification is dated November 22, 2014, but the applicant's general certification remains October 8, 2014, the date of the previous amendment. See *Calvary Opposition* at 4, n.8, citing *WMOZ, Inc.*, Decision, 36 FCC 201, 218, para. 35 (1964) ("no material [may] be added to an application once it has been signed by the licensee, unless such material has been shown to the licensees, and unless the application is thereafter redated, re-signed, and reverified"). SJRP's error is unlike that in *WMOZ, Inc.* (involving fraud and signing blank pages) and more like that in *New Bohemia Group, Inc.*, Letter, 24 FCC Rcd 1357 (MB 2009). As in *New Bohemia*, SJRP shows that its principal who certified the Application and both amendments reviewed and approved the entire Application submitted in the November Amendment but, through inadvertence, did not "re-date" the non-technical portion which he had prepared and dated earlier. See Declaration of Arash Farhoomand, Director of Operations and Management, SJRP (Apr. 23, 2015) (attached to *SJRP Reply*).

³⁰ See 47 CFR § 1.1306(b)(1); see also FCC Form 318, Worksheet 2.

³¹ See *Calvary Opposition* at 9.

³² *Id.*

³³ 47 CFR § 1.1307.

³⁴ See 47 CFR § 1.1307(a)(2).

³⁵ 47 CFR § 1.1307(a)(4)(i). We note that Calvary fails to allege that the historic kiln site within the Nature Preserve meets the specific standard set forth in that rule section (*i.e.*, "listed, or eligible for listing, in the National Register of Historic Places"). See *Calvary Opposition* at 9. In the absence of specific information from Calvary, we take administrative notice of local government data regarding the kiln site. See LA. Dept. of City Plan., Off. of Hist. Resources, Designated Historic Cultural Monuments, <http://preservation.lacity.org/commission/designated-historic-cultural-monuments> (last visited Apr. 25, 2016) (Los Angeles city database lists the kiln site as historical site #141, and the address is shown as the intersection of Valley Circle Boulevard and Woolsey Canyon Road, on the western end of the Nature Preserve). The Nature Preserve is approximately two miles across (east to west, roughly between Valley Circle Boulevard and Topanga Canyon Boulevard) and the Hill Site is near the opposite end of the Nature Preserve from the address listed for the kiln site in the Los Angeles database. See Application, Section VI and Attach. 11.

Calvary's quotes from a Wikipedia article claiming that "there are over 200 species of birds at the Nature Preserve, in addition to 'notable' amphibians and reptiles, large and small mammals, habitats including oak woodlands and savanna, riparian areas, chaparral, grassland"³⁶ are not in any way probative of whether the proposed tower "may affect (federally) listed threatened or endangered species or designated critical habitats" or is likely "to jeopardize the continued existence of any proposed endangered or threatened species or likely to result in the destruction or adverse modification of proposed critical habitats."³⁷ For these reasons, we reject Calvary's efforts to rely on an argument that has no relevance to the Hill Site proposed by SJRP in its Application, as appropriately amended.

10. ACCORDINGLY, IT IS ORDERED that the Application for Review filed by The Los Angeles Social Justice Radio Project, on March 26, 2015, IS GRANTED, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(g) of the Commission's Rules.³⁸

11. IT IS FURTHER ORDERED that SJRP's application to construct a new LPFM station at Los Angeles, California (File No. BNPL-20131114BHE) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁶ *Calvary Opposition* at 9. Calvary cited other websites for its quotes. However, one of the links provided by Calvary is not available, and the quotes that Calvary provides actually come from Wikipedia. See Chatsworth Nature Preserve, http://en.wikipedia.org/wiki/Chatsworth_Nature_Preserve (last visited Apr. 25, 2016). It is well settled that news reports, whether from newspapers or the Internet, and Wikipedia citations do not satisfy the requirement in Section 309(d) of the Act that a petitioner must support its allegations of fact, other than those of which official notice can be taken, with affidavits of persons with first-hand knowledge of those facts. See, e.g., *DFW Radio License, LLC*, Memorandum Opinion and Order, 29 FCC Rcd 804, 810, para. 16 (2014); *ACC Licensee, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 18535, 18538, para. 13 (MB 2007), citing *Univision Holdings, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 6672, 6673, para. 4 (1992).

³⁷ See 47 CFR § 1.1307(a)(3).

³⁸ 47 U.S.C. § 155(c)(5); 47 CFR §§ 1.115(g).