



Federal Communications Commission
Washington, D.C. 20554

July 15, 2015

In Reply Refer To:
1800B3-ATS

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Mr. Steve Bingenheimer
Fusion Faith Center
241 First Avenue West
Albany, OR 97321

In re: Fusion Faith Center
New LPFM, Albany, Oregon
Facility ID Number: 195777
File Number: BNPL-20131112AUC

Petition to Deny

Dear Counsel and Mr. Bingenheimer:

We have before us: 1) the application of Fusion Faith Center (“Fusion”) for a construction permit for a new LPFM station at Albany, Oregon (“Fusion Application”); and 2) the Petition to Deny (“Petition”) the Fusion Application filed by You Matter.¹ For the reasons set forth below, we grant the Petition and dismiss the Fusion Application.

Background. Fusion filed the Fusion Application during the October 2013 LPFM filing window. The Media Bureau (“Bureau”) determined that the Fusion Application and the application filed by You Matter for a new LPFM station at Albany, Oregon (“You Matter Application”), were mutually exclusive and identified them as LPFM MX Group 286.² On September 5, 2014, the Commission identified the Fusion Application as the tentative selectee of LPFM MX Group 286 and began a 30-day period for filing petitions to deny against the applications, and 90-day periods in which the applicants could file time-share agreements and major change amendments in order to resolve their mutual exclusivities.³

In the Petition, You Matter argues that the Fusion Application is defective because: 1) it does not list all of Fusion’s voting members; 2) Fusion lacked reasonable assurance of site availability at the transmitter site identified in the Fusion Application; and 3) it was not properly signed by an officer of Fusion. You Matter states that although the Fusion Application lists five principals of the organization, the records of the Oregon Secretary of State indicate that Fusion has twenty-six members entitled to vote;

¹ The Petition was filed on August 8, 2014. Fusion filed an Opposition on August 27, 2014. You Matter filed a request for an extension of time in which to file a reply on September 8, 2014, to which Fusion filed an opposition on September 15, 2014. You Matter filed a Reply on September 18, 2014.

² *Media Bureau Identifies Mutually Exclusive Applications Filed in the LPFM Window and Announces 60-Day Settlement Period; CDBS Is Now Accepting Form 318 Amendments*, Public Notice, 28 FCC Rcd 16713 (MB 2013).

³ *Commission Identifies Tentative Selectees in 79 Groups of Mutually Exclusive Applications filed in the LPFM Window; Announces a 30-Day Petition to Deny Period and a 90-Day Period to File Voluntary Time-Share Proposals and Major Change Amendments* Public Notice, 29 FCC Rcd 8665 (2014) (“July Public Notice”).

thus, You Matter argues that Fusion has not disclosed all the parties to the application.⁴ Next, You Matter states that it has obtained a declaration from Rod Gardner, the manager of All Secure Mini Storage, which is the transmitter site identified by Fusion, who states that, to the best of his knowledge, no party had inquired about constructing a tower at the site and that Fusion was never given any assurance that it could do so.⁵ Finally, You Matter argues that the Fusion Application – signed by Ron Erickson, who is Fusion’s “Consulting Engineer” – was not signed by an officer of the corporation as required by Section 73.3513 of the Commission’s Rules (“Rules”).⁶

In the Opposition, Fusion argues that it properly identified the five principals on the board of directors who “are directed to conduct the business decisions of the Church.”⁷ Fusion explains that because “the only business that requires more than five board members is in the case of [Fusion] buying or selling real property,” it was only required to list the members identified in the Fusion Application.⁸ Fusion further states that its board president, Steve Bingenheimer, authorized Erickson to sign the Fusion Application.⁹ Finally, Fusion states that Erickson spoke with Gardner about using a unit that Erickson rents at All Secure Storage, and that “Erickson assumed Reasonable Assurance had been conveyed for him to donate tower space to Fusion.” Fusion also states that it has a secondary location for its transmitter at its church and “[n]ot only did we have reasonable assurance, we had a back-up approved location.”¹⁰

In the Reply, You Matter reiterates that the Fusion Application was not signed in accordance with Section 73.3513, and notes that the Bureau has previously dismissed an application signed by Erickson instead of an officer of the corporation.¹¹ You Matter also reiterates that Fusion has failed to identify all the parties to the application because “from all indication Fusion does indeed have additional members, who are indeed officers, who have the power to vote. When or if the power is exercised is irrelevant.”¹² You Matter also argues that Gardner’s statement fails to confirm that Fusion had reasonable assurance of site availability because it does not indicate that Gardner was willing to let Fusion use the site for its proposed tower.¹³

⁴ Petition at 2-3.

⁵ *Id.* at 4-5. The Petition includes a declaration signed by Gardner. *See id.* at Exhibit 3 (“First Gardner Declaration”).

⁶ *Id.* at 3-4, *citing* 47 C.F.R. § 73.3513.

⁷ Opposition at 2.

⁸ *Id.*

⁹ *Id.* Fusion includes a declaration signed by Bingenheimer stating that he authorized Erickson to sign the Fusion Application. *Id.* at Exhibit 2.

¹⁰ Opposition at 2. The Opposition includes another declaration signed by Gardner, which states: “I had forgotten about a conversation regarding the potential placement of a radio tower. This conversation was back in 2013 with Ron Erickson. Any final decision would need to come from the property owner but I can see now why Ron Erickson thought there would be reasonable assurance that such a request could be granted. There I retract an earlier statement made to the contrary.” *Id.* at Exhibit 3 (“Second Gardner Declaration”). Fusion also raises several arguments against the You Matter Application. Those arguments should have been raised in an Informal Objection or Petition to Deny that application. Moreover, they are moot because the You Matter Application has been dismissed, and that action is now final.

¹¹ Reply at 1-5, *citing* *Baton Rouge Progressive Network*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 905 (MB 2010) (“*Baton Rouge Progressive Network*”).

¹² Reply at 6 (emphasis in original).

¹³ *Id.* at 6-7.

Discussion. Pursuant to Section 309(d) of the Communications Act of 1934, as amended, petitions to deny must provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with the public interest.¹⁴ You Matter has met this burden, and we will grant the Petition and dismiss the Fusion Application.

Site Availability. It is well established that the specification of a transmitter site in an application is an implied representation that the applicant has obtained reasonable assurance that the site will be available.¹⁵ While some latitude is afforded such “reasonable assurance,” there must be, at a minimum, a “meeting of the minds resulting in some firm understanding as to the site’s availability.”¹⁶ There is no evidence in the record that Gardner had the authority to grant Fusion use of the proposed transmitter site. Gardner is not the owner of the site and – by his own admission – was not able to make a final decision regarding the use of the site.¹⁷ Moreover, even if Gardner did have such authority, there is no evidence that there was a “meeting of the minds”; Gardner merely states that he “can now see why Ron Erickson thought there would be reasonable assurance.”¹⁸ We also reject Fusion’s suggestion that it had a “back-up” location. An applicant will only be permitted to identify a new site location if it had reasonable assurance of site availability at the *original* site identified in its application.¹⁹ Accordingly, we will dismiss the Fusion Application on this basis.

Officer Signature. Section 73.3513(a)(3) states that an application filed by a corporation, such as Fusion, must be signed by an officer of the corporation.²⁰ The Fusion Application was signed by Ron Erickson, who is not an officer of Fusion. We reject Fusion’s argument that Erickson was authorized to sign the Fusion Application. Although we have held that the board of directors may authorize a director of the corporation to sign an application,²¹ we have never held that a “representative” may sign an application, and have specifically held that an engineer – namely, Ron Erickson – may *not* sign an

¹⁴ 47 U.S.C. § 309(d).

¹⁵ See, e.g., *William F. Wallace and Anne K. Wallace*, Memorandum Opinion and Order, 49 FCC 2d 1424, 1427 (1974) (“Some indication by the property owner that he is favorably disposed toward making an arrangement is necessary.”).

¹⁶ *Genesee Communications, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 3595 (1988). The applicant need not own the proposed site and may even work out the final details for a lease sometime in the future. The “reasonable assurance” standard is satisfied by “[s]ome clear indication from the landowner that he is amenable to entering into a future arrangement with the applicant for use of the property as its transmitter site, on terms to be negotiated . . .” *Elijah Broadcasting Corp.*, Memorandum Opinion and Order, 5 FCC Rcd 5350, 5351 (1990).

¹⁷ See First Gardner Declaration and Second Gardner Declaration.

¹⁸ See Second Gardner Declaration.

¹⁹ *Lake City Lighthouse, Inc.*, Letter, 28 FCC Rcd 411, 413 (MB 2013); *South Florida Broadcasting Co.*, Memorandum Opinion and Order, 99 FCC 2d 840, 845 (Rev. Bd. 1984) (“[A]n applicant will not be permitted to amend where it did not have the requisite “reasonable assurance” to begin with.”).

²⁰ See 47 C.F.R. §§ 73.801, 73.3513(a)(3); see also *Mary Ann Salvatoriello*, Memorandum Opinion and Order, 6 FCC Rcd 4705 (1991) (dismissing application that did not comply with signature requirement of Section 73.3513); *Central Florida Communications Group, Inc., et al.*, Hearing Designation Order, 6 FCC Rcd 522, 523 (1991) (same). See also Instruction for FCC Form 318, General Instructions, Certifications (“the application should be signed as follows: if a corporation, by an officer”).

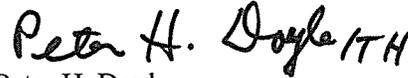
²¹ *New Bohemia Group, Inc.*, Letter, 24 FCC Rcd 1357, 1358-59 (MB 2009).

application.²² Therefore the Fusion Application was not properly signed by an officer of Fusion and would be dismissed on this basis as well as for lacking reasonable assurance of site availability.²³

Conclusion. Accordingly, IT IS ORDERED the Petition to Deny filed on August 8, 2014, by You Matter IS GRANTED.

IT IS FURTHER ORDERED that the application of Fusion Faith Center (BNPL-20131112ACU) for a new LPFM station at Albany, Oregon IS DISMISSED.

Sincerely,



Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Ron Erickson
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²² *Baton Rouge Progressive Network*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 25 FCC Rcd at 909 (MB 2010) (“The fraud component of this case is exacerbated by several ministerial errors by the Commission staff, *i.e.*, the inadvertent processing of applications signed only by an engineering consultant [Ron Erickson] rather than a principal of the “applicant,” as required by Section 73.3513 of the Rules.”).

²³ *See Blue Lake Academy, Inc.*, Letter, 20 FCC Rcd 12066, 12069 (MB 2005) (dismissing new LPFM application where it was not signed by officer of applicant corporation). We reject You Matter’s remaining argument. FCC Form 318 provides that for non-stock corporations such as Fusion, “[t]he applicant, the parent and subsidiary entities of the applicant, and the officers, directors, and governing board members of the applicant and its parent and subsidiary entities are considered to be parties to the application.” *See* Instruction to FCC Form 318 at 4, Section II Question 3. You Matter has not shown that the 26 unidentified parties are officers, directors, or board members. To the contrary, the Articles of Amendment distinguished between the 26 voting members and the board of directors. *See* Articles of Amendment at 1. (“Membership approval was not required. The amendment(s) was approved by a sufficient vote of the board of directors or incorporators.”).