



Federal Communications Commission
Washington, D.C. 20554

May 12, 2016

In Reply Refer To:
1800B3-ALV

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 for Reconsideration

Dear Mr. Bingenheimer:

We have before us a Petition for Reconsideration (Petition), filed by Fusion Faith Center (Fusion), seeking reconsideration of a July 15, 2015, Audio Division, Media Bureau (Bureau) letter,¹ which dismissed the above-referenced application of Fusion for a construction permit for a new low power FM (LPFM) station at Albany, Oregon (the Application).² For the reasons set forth below, we grant the Petition, reinstate the Application, *nunc pro tunc*, and grant the Application.

Background. Fusion filed the Application during the October-November 2013, LPFM filing window. The Bureau determined that the Fusion Application and the application filed by You Matter for a new LPFM station at Albany, Oregon, were mutually exclusive.³ Accordingly, the Commission compared the applications pursuant to the LPFM point system,⁴ identified the Fusion Application as the tentative selectee, and initiated a 30-day period for filing petitions to deny the Application.⁵

You Matter filed a Petition to Deny the Fusion Application, arguing, *inter alia*, that the Application is defective because (1) Fusion lacked reasonable assurance of the availability of its proposed tower site, and (2) the Application was not properly signed by an officer of Fusion. In support of its Petition to Deny, You Matter submitted a declaration from Rod Gardner, the manager of All Secure Mini Storage (All Secure), which is the transmitter site Fusion specified in its original Application. Mr. Gardner declared that, to the best of his knowledge, no party had inquired or been given any assurance about constructing a tower at the site. In the *Staff Decision*, the Bureau concluded that, based on the

¹ See *Fusion Faith Center*, Letter, Ref No. 1800B3-ATS (MB July 15, 2015) (*Staff Decision*).

² Fusion timely filed its Petition within thirty days from the July 20, 2015, public notice of the dismissal of its Application. See 47 U.S.C. § 405(a); 47 CFR § 1.106(f).

³ *Media Bureau Identifies Mutually Exclusive Applications Filed in the LPFM Window and Announces 60-Day Settlement Period*, Public Notice, 28 FCC Rcd 16713 (MB 2013).

⁴ See 47 CFR § 73.872.

⁵ *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).

record, Fusion failed to establish that it had reasonable assurance of site availability. Further, the Bureau found that the Application, which was signed by Fusion's consulting engineer, was not signed in accordance with Section 73.3513 of the Commission's Rules (Rules).⁶ Accordingly, the Bureau granted You Matter's Petition to Deny and dismissed Fusion's Application.

On August 17, 2015, Fusion timely filed the Petition, arguing that the dismissal of its Application was based upon "incorrect information and arguments" from You Matter.⁷ Fusion argues that, contrary to You Matter's claim, it had reasonable assurance of the availability of its original antenna site. Further, while Fusion concedes that its initial Application was not properly signed, it argues that there is Commission precedent to accept its April 26, 2015, amendment, which corrected the signature deficiency. Based on the foregoing, Fusion requests that its Application be reinstated and granted.

Discussion. The Commission will consider a Petition for Reconsideration only when the petitioner shows either a material error in the Commission's original order or raises changed circumstances or unknown additional facts not known or existing at the time of petitioner's last opportunity to present such matters.⁸ For the reasons set forth below, we find that Fusion has demonstrated that reconsideration is warranted.

Site Availability. The Commission does not require a noncommercial educational broadcast applicant to certify the availability of the transmitter site in its application.⁹ Nonetheless, when an LPFM applicant proposes a site, it must do so with reasonable assurance that the site will be available.¹⁰ While some latitude is afforded regarding 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."¹¹

We believe that, based on the muddled information then before it, the Bureau did not err in concluding that Fusion lacked reasonable assurance of site availability when it filed the Application. Mr. Gardner, the manager of All Secure, initially declared that no assurances or agreements had been given to Fusion.¹² Fusion subsequently (1) explained that Ron Erickson, its engineer, rented space at All Secure and spoke to Mr. Gardner regarding Fusion's proposed tower at his site; and (2) provided a statement from Mr. Gardner, retracting his earlier statement and stating that he "can see now why Ron Erickson thought there would be reasonable assurance."¹³ Based on this record, the Bureau found no evidence that that there was a "meeting of the minds" as to the site's availability.¹⁴

⁶ *Staff Decision* at 3-4, citing 47 CFR § 73.3513 (requiring that an officer of a corporate applicant sign an application).

⁷ Fusion Petition at 1.

⁸ See 47 CFR § 1.106; see also *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686, para. 2 (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); *Nat'l Ass'n of Broadcasters*, Memorandum Opinion and Order, 18 FCC Rcd 24414, 24415, para. 4 (2003).

⁹ See, e.g., *Carnegie-Mellon Student Gov't Corp.*, Hearing Designation Order, 7 FCC Rcd 3914 (MB 1992).

¹⁰ See, e.g., *Rock n' Roll Pres. Soc'y*, Letter, 23 FCC Rcd 16630, 16633 (MB 2008) (LPFM applicants must have reasonable assurance of site availability).

¹¹ *Genesee Communications, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 3595 (1988).

¹² See You Matter Petition to Deny at Exhibit 3, Rod Gardner Declaration.

¹³ See Fusion Opposition to Petition to Deny at Exhibit 3, Ron Erickson Declaration, and Exhibit 4, Rod Gardner Declaration.

¹⁴ *Staff Decision* at 3.

In the instant Petition, however, Fusion presents new facts in an attempt to demonstrate that it had reasonable assurance of site availability. Specifically, Fusion explains that it initially proposed to locate its tower on an All Secure space, which was rented by Ron Erickson. Mr. Erickson's lease included "permission to remodel, including installing a short tower behind the suite."¹⁵ Accordingly, Mr. Erickson explained that "my desire to donate space to Fusion, and the proposed use, fell inside my long term warehouse use agreement."¹⁶ Further, Rod Gardner, the All Secure Manager, clarified that "Erickson's company had been leasing a large commercial site and this type of location was his to remodel as needed."¹⁷ Gardner explained that his initial confusion and statements were "based upon catching me off guard and at a very busy time" and unequivocally stated that Erickson "had not only spoken with us about a short tower behind his unit, he had actually received more than a reasonable assurance from this company that a short tower would be permitted."¹⁸ We find that it is in the public interest to consider these new facts,¹⁹ and in light of this clarifying information, we find that Fusion had reasonable assurance of site availability at the time it filed the initial Application.²⁰

Officer Signature. Section 73.3513(a)(3) of the Rules requires that an application filed by a corporation, such as Fusion, must be signed by an officer of the corporation.²¹ It is undisputed that the initial Application was signed by Consulting Engineer Ron Erickson, who is not an officer of Fusion. On April 26, 2015, however, Fusion amended its Application to, *inter alia*, substitute Steve Bingenheimer, the President of Fusion, as the certifying party. The amended Application complies with Section 73.3513 of the Rules. The Commission has held that, as long as an application is "substantially complete," it will accept curative amendments to correct signature deficiencies.²² Accordingly, because the Fusion Application was substantially complete when originally filed, we will accept Fusion's curative amendment and reinstate the Application.²³

¹⁵ Fusion Petition at Exhibit 1, Statement from Ron Erickson.

¹⁶ *Id.*

¹⁷ Fusion Petition at Exhibit 1, Letter from Rod Gardner.

¹⁸ *Id.* (emphasis in original).

¹⁹ See 47 CFR § 1.106(c)(2) (providing that a petition for reconsideration which relies on facts not previously presented may be granted if the Commission or designated authority determines that "consideration of the facts relied on is required in the public interest"); see also *Mark Van Bergh*, Letter, 26 FCC Rcd 15135, 15137 (MB 2011) (considering additional information regarding site availability as in the public interest); *Colorado Materials Holding Corp.*, Order on Reconsideration, 22 FCC Rcd 13997, 13998, para. 4 (WTB 2007) (affirming denial of earlier petition for reconsideration based on information before Bureau at that time but granting petition for further reconsideration based on new information submitted by petitioner).

²⁰ On April 26, 2015, Fusion amended its Application to specify a new tower site. Because we find that Fusion had reasonable assurance of site availability at the original site, Fusion may amend to specify a new site. See, e.g., *Lake City Lighthouse, Inc.*, Letter, 28 FCC Rcd 411, 413 (MB 2013) (applicant with reasonable assurance of original site permitted to amend to specify a new site).

²¹ See 47 CFR § 73.3513(a)(3).

²² See, e.g., *Santa Monica Community College Dist.*, Hearing Designation Order, 9 FCC Rcd 3134, para. 2 (1994) (allowing applicant to amend an NCE FM application to include signature that complies with Section 73.3513 of the Rules); *Communication Gaithersburg, Inc.*, Memorandum Opinion and Order, 60 FCC 2d 537, 541, paras. 14-15 (1976) (permitting applicant to amend an AM application signed by person not qualified to sign under the Rules and submit a correct signature); *Jane A. Roberts*, Decision, 29 FCC 141, 149-150, paras. 18-25 (1960) (allowing *nunc pro tunc* amendment of signature).

²³ You Matter's mutually exclusive application for a new LPFM station at Albany, Oregon, was dismissed on February 25, 2015. The dismissal is final. See FCC File No. BNPL-20131112CGW.

Conclusion. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed on August 17, 2015, by Fusion Faith Center IS GRANTED. IT IS FURTHER ORDERED that the application of Fusion Faith Center (File No. BNPL-20131112AUC) for a construction permit for a new LPFM station at Albany, Oregon IS HEREBY REINSTATED, *nunc pro tunc*, and GRANTED.

Sincerely,



Peter H. Doyle *for*
Chief, Audio Division
Media Bureau

cc: Ron Erickson
P.O. Box 2575
Albany, OR 97321