

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

In re Application of	)	
	)	
NORTH AMERICAN	)	File No. BPH-960111MX
BROADCASTING COMPANY	)	
	)	
	)	
For Construction Permit for Channel 276C2,	)	
Karnes City, Texas	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 20, 2003**

**Released: April 3, 2003**

By the Commission:

1. The Commission has before it an Application for Review filed by Karnes Broadcasting, Inc. (“Karnes Broadcasting”) on June 29, 2000, and related responsive pleadings regarding the captioned application (the “Application”) of North American Broadcasting Company (“North American”)<sup>1</sup> for a construction permit for a new FM station on Channel 276C2, Karnes City, Texas.<sup>2</sup> Karnes Broadcasting seeks review of a May 31, 2000, staff decision that denied Karnes Broadcasting’s Petition to Deny.<sup>3</sup> We find no error in the *Staff Decision* and, therefore, deny the Application for Review.

**I. Background**

2. North American and Karnes Broadcasting were the only two participants in Closed Broadcast Auction No. 25, MX Group FM 117, for a construction permit for a new FM broadcast station at Karnes City, Texas. North American was the winning bidder. Karnes Broadcasting alleges that North American falsely certified that it had reasonable assurance of site availability, misrepresented facts when it identified the site owner’s representative,<sup>4</sup> and misrepresented facts in its Opposition to the Petition to Deny and attached declarations. Accordingly, Karnes Broadcasting requests that the Commission dismiss or designate for hearing the Application to determine whether North American and its principals possess the qualifications required to be a Commission licensee. The *Staff Decision* determined that there was no substantial and material question of fact regarding whether North American falsely certified that it had

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<sup>1</sup> The applicant was originally identified as John C. Carsey (“Carsey”) doing business as Karnes City Airwave Company. In a July 1997 amendment to the Application, the applicant was changed to North American with Carsey as president, secretary, director, and majority voting shareholder. In this decision, we will refer to the applicant as “North American.”

<sup>2</sup> On July 14, 2000, North American Broadcasting Company filed an Opposition to Application for Review. Karnes Broadcasting submitted a Reply to Opposition to Application for Review on July 26, 2000.

<sup>3</sup> See *Letter to Lawrence Bernstein, Esq., et. al*, Ref. No. 1800B3-JAM (Chief, Aud. Serv. Div., May 31, 2000) (“*Staff Decision*”).

<sup>4</sup> Karnes Broadcasting asserts that July 1, 1997, and November 12, 1999, amendments to the Application included further misrepresentations because they effectively reaffirmed the disputed certification of site availability.

obtained reasonable assurance of the availability of its proposed site or otherwise misrepresented material facts, denied Karnes Broadcasting's Petition to Deny, and found North American qualified to be a Commission licensee. The staff also determined that North American had submitted a good cause showing for acceptance of its February 4, 2000, amendment to the Application which specified a new transmitter site. Karnes Broadcasting filed a timely Application for Review of the *Staff Decision*.

## II. Discussion

3. *Site Certification.* In implementing the broadcast competitive bidding procedures, the Commission stated that, with respect to frozen non-hearing cases such as this one,<sup>5</sup> site assurance issues would be considered only to the extent they involve allegations of false certification.<sup>6</sup> The Commission reasoned that adjudicating issues relating to whether the winning bidder had reasonable assurance of site availability "would waste the resources of the Commission and of the parties and would serve only to delay service to the public" and, therefore, would disserve the public interest.<sup>7</sup>

4. On review, Karnes Broadcasting renews its contention that North American falsely certified that it had reasonable assurance of site availability. In support, Karnes Broadcasting submitted declarations from Margaret Holland Riley ("Riley"), the owner of the land that North American specified as its antenna site in the Application (the "Riley Site"); Nelda Jauer ("Jauer"), Riley's daughter-in-law; and Jauer's husband. Riley asserted that neither she nor anyone acting on her behalf gave assurance to any person that her land could be used to build a radio tower. Riley reported that someone telephoned her "some years ago" and asked if she would consider leasing her land for a radio tower, that she does not remember the name of the caller or the date of the call, and that she informed the caller that she would be willing to discuss the matter further after talking to her daughter-in-law. Riley also declared that she received a December 1995 letter from a North American representative expressing an interest in a lease. Riley stated that she did not reply to that letter and that she had no contact with North American after the

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<sup>5</sup> This class of applications consists of full-service commercial broadcast applications that were filed before July 1, 1997, were not designated for comparative hearing, and did not settle under the special provisions of 47 U.S.C. § 309(l)(3). See *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, Reexamination of the Policy Statement on Comparative Broadcast Hearings, Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, First Report and Order*, 13 FCC Rcd 15920, 15950, ¶80 (1998) ("*Broadcast First Report and Order*").

<sup>6</sup> *Broadcast First Report and Order*, 13 FCC Rcd at 15952, ¶85. To the extent that Karnes Broadcasting disagrees with the Commission's determination in this regard, the Application for Review constitutes an untimely petition for reconsideration of the *Broadcast First Report and Order*. See *Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038, 1040 (1997); see also *Applications for A and B Block Broadband PCS Licenses*, 11 FCC Rcd 17062, 17066-67 (1996).

<sup>7</sup> *Broadcast First Report and Order*, 13 FCC Rcd at 15952, 15956 (¶¶85, 99). The Commission noted that the site certification requirement, which was designed to deter the filing of frivolous and speculative applications that frustrated the Commission's processing goals, was no longer vital to the Commission's goal of expediting the initiation of new service to the public. See *Broadcast First Report and Order*, 13 FCC Rcd at 15987-89; see also *Liberty Productions, A Limited Partnership, et. al.*, 16 FCC Rcd 12061, 12071-72 n.31 (2001), *appeal pending sub nom.*, *Orion Communications Limited, et. al. v. FCC*, No. 01-1279 (D.C. Cir., filed June 21, 2001) ("*Liberty Productions*").

December 1995 letter.<sup>8</sup> Riley is now deceased. Jauer asserts that she handled all of Riley's business affairs during the period in question, that Riley had never agreed to any business matter without first discussing the matter with Jauer, and that Riley had never suggested that the Riley Site might be available for lease.

5. North American provided declarations from Kent Myatt ("Myatt"), a licensed Texas real estate agent; Robert Walker ("Walker"), a consultant for North American; and Carsey, the president and a director of North American. According to the Myatt declaration, Walker requested that Myatt locate a suitable tower site and obtain assurance of availability of the tower site. Myatt asserted that he contacted Riley by telephone in December 1995 and that they discussed the prospect of leasing the Riley Site, her retention of grazing rights, and a lease payment of \$1,000 per year. Myatt reported that Riley stated that the property was available, that she was interested in leasing the property as proposed, and that her son or grandson would need to review any formal proposal. Myatt stated that he then informed Walker that Riley had provided assurance that the property would be available for lease and that she was generally agreeable to the terms discussed. Walker declared that Myatt informed him that he had spoken to the land owner and that she assured him that she was willing to lease the Riley Site to North American, and that they had tentatively discussed lease terms. Walker also stated that he then wrote a formal introductory letter to "the Rileys" on December 21, 1995, and followed up with a phone call shortly thereafter during which Riley confirmed her interest in leasing the Riley Site to North American. Finally, Walker asserted that they discussed the terms of a proposed lease in this conversation and that he then reported all of this information to Carsey "to be incorporated into" the Application. Carsey stated that Walker informed him that Myatt had contacted members of the Riley family and that they had agreed that the Riley Site would be available to North American for lease. He noted that terms were discussed, but that the parties did not reach a formal agreement at that time. Finally, Carsey claimed that the information provided by Walker "allowed me to certify the application, which I did."

6. We find that the staff correctly concluded that there is no substantial and material question of fact regarding whether North American intentionally provided a false site certification in the Application or any amendment thereto. Although Karnes City and North American offer conflicting views about the Riley Site negotiations, the record in this case establishes that Carsey reasonably relied on the information provided by Walker.<sup>9</sup> On this basis, we conclude that Carsey made the site certification in good faith, even though his belief as to the Riley Site's availability may have been incorrect.<sup>10</sup>

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<sup>8</sup> A copy of the December 1995 letter and the envelope in which this letter was mailed are attached to Riley's declaration, indicating that the letter was addressed to Riley and Jauer, dated December 21, 1995, and postmarked December 29, 1995.

<sup>9</sup> See *High Country Communications*, 4 FCC Rcd 6237, 6238 (1989) ("*High Country*") ("the 'bare existence of a mistake' in an application, 'without any indication that the licensee meant to deceive the Commission, does not elevate such a mistake to the level of an intentional misrepresentation or raise a substantial and material question of fact,'" quoting *Kaye-Smith Enterprises*, 71 FCC 2d 1402, 1415 (1979)); see also *Garrett, Andrews, & Letizia, Inc.*, 86 FCC 2d 1172, 1180 (Rev. Bd. 1981), *mod. on other grounds*, 88 FCC 2d 620 (1981) (burden on petitioner to demonstrate motive to deceive or conceal because Commission will not infer improper motive from application errors, inconsistencies or omissions accompanied by speculation that lacks factual support).

<sup>10</sup> See *Liberty Productions*, 16 FCC Rcd at 12085 (as a matter of law, a determination that there was not a meeting of the minds between the applicant and the site owner sufficient to establish reasonable assurance of the original site does not foreclose a determination that the applicant mistakenly believed that the landowner had agreed to lease the property and thus made the certification in good faith); see also *Harrison County Broadcasting Co.*, 6 FCC Rcd at (continued....)

7. *Site Owner's Representative.* We also find that the staff properly concluded that there is no substantial and material question of fact regarding whether North American misrepresented facts in the Application when it reported that Myatt was the site owner's agent and the source of its reasonable assurance of site availability.<sup>11</sup> The critical issue concerns Carsey's understanding at the time of this certification. Carsey reported that, under Texas law, all real estate brokers involved in a real estate transaction are deemed to represent the seller or owner and are considered the owner's agent, unless there is a written buyer's representation agreement signed by a buyer and a real estate broker. Carsey stated that North American had not entered into a buyer's agent agreement with Myatt and, therefore, that he believed he properly checked the box indicating that Myatt was the owner's agent. There is no evidence that Carsey deliberately misrepresented facts, recklessly disregarded the truth, or otherwise intended to deceive the Commission when he reported that Myatt was the site owner's agent. Even if Carsey mistakenly interpreted the meaning of "Owner's Agent" in the application, the Commission has generally not found misrepresentations, absent evidence of intent to deceive, where misstatements result from a mistaken interpretation of the law.<sup>12</sup>

8. *Procedural Matters.* Finally, Karnes Broadcasting contends that the staff failed to undertake the requisite *Astroline* analysis with regard to the allegations set forth in its pleadings.<sup>13</sup> We disagree. When addressing petitions to deny, the Commission must first determine whether the petitioner has made specific allegations of fact which, *if true*, would demonstrate that grant of the application would be *prima facie* inconsistent with the public interest.<sup>14</sup> If so, we must then examine the evidence presented to determine whether the petitioner has raised a substantial and material question of fact.<sup>15</sup> If no material question is raised, the petition is denied and the application is granted if it otherwise serves the public interest. The *Staff Decision* determined that there was no substantial and material question of fact which required a hearing; therefore, the second *Astroline* criterion had not been met and the staff was not required to address the first *Astroline* step.<sup>16</sup> Additionally, contrary to Karnes Broadcasting's assertions, the staff applied the proper evidentiary standard when it concluded that there was no substantial and

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5824 (even when an applicant is grossly mistaken as to whether it had a solid site arrangement with a landowner, the Commission does not necessarily infer untruthfulness in the initial certification).

<sup>11</sup> If reasonable assurance of site availability is not based on the applicant's ownership of the proposed site, the applicant certifies that it has obtained reasonable assurance of site availability "by contacting the owner of [sic] person possessing control of the site or structure." See FCC Form 301, Application for a Construction Permit for Commercial Broadcast Station, Section VIII, question 3, page 26 (August 1992). The applicant must provide the name of the person contacted and specify whether that person is the owner, owner's agent, or other. *Id.* North American identified Myatt as the person contacted for this purpose and as the owner's agent.

<sup>12</sup> See *Liberty Productions*, 16 FCC Rcd at 12080; see also *High Country*, 4 FCC Rcd at 6238.

<sup>13</sup> See *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988) ("*Astroline*").

<sup>14</sup> 47 U.S.C. § 309(d)(1); *Astroline*, 857 F.2d at 1561.

<sup>15</sup> *Id.*

<sup>16</sup> See *Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399, 1410 (D.C. Cir. 1996) (the Commission need not plod through these two steps on pain of being reversed; the *Astroline* determinations are typically made concurrently and negative resolution of the second determination makes the first moot, citing *Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392 (D.C. Cir. 1985)).

material question of fact that North American deliberately provided false site certification or otherwise misrepresented facts to the Commission. Although a petitioner need not prove that its contentions are true, the petitioner bears the burden of demonstrating the existence of a substantial and material question of fact.<sup>17</sup> For the reasons set forth above, the staff correctly determined that Karnes Broadcasting has not met this burden.

9. *Conclusion.* Accordingly, IT IS ORDERED that the Application for Review filed June 29, 2000, by Karnes Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>17</sup> See 47 U.S.C. § 309(d)(2); *Choctaw Broadcasting Corporation, et. al.*, 12 FCC Rcd 8534, 8538 (1997).