



Federal Communications Commission
Washington, D.C. 20554

June 27, 2005

DA 05-1775
In Reply Refer to:
1800B3-CNZ

Patrick J. Vaughn, Esq.
American Family Association, Inc.
P.O. Drawer 2440
Tupelo, MS 38803

Mary V. Harris Foundation
c/o Donald E. Martin, Esq.
Donald E. Martin, PC
PO Box 8433
Falls Church, VA 22041

Eagle's Nest Fellowship Church
c/o A. Wray Fitch III, Esq.
Gammon & Grange, PC
8280 Greensboro Drive
7th Floor
McLean, VA 22102

Positive Alternative Radio, Inc.
c/o Cary S. Tepper, Esq.
Booth Freret Imlay & Tepper, PC
7900 Wisconsin Avenue
Suite 304
Bethesda, MD 20814

In Re: NEW (NCE FM), Denton, MD
Facility ID No. 90286
BPED-19980320MP

NEW (NCE FM), Harrington, DE
Facility ID No. 88282
BPED-19970915MB

NEW (NCE FM), Harrington, DE
Facility ID No. 90281
BPED-19980320MM

NEW (NCE FM), Harrington, DE
Facility ID No. 90270
BPED-19980320MD

Applications for Construction Permits

Group No. 970929

Dear Counsel:

We have before us Group 970929 – four mutually exclusive applications for permits to construct new noncommercial educational (“NCE”) FM stations serving different communities. In such situations, the rules require the Commission to make a threshold determination of whether grant of any of the applications would further the goals enunciated in Section 307(b) of the Communications Act of 1934, as

amended, for fair, efficient, and equitable distribution of radio service among communities.¹ For the reasons below, we determine that Eagle's Nest Fellowship Church ("ENFC") is entitled to a decisive Section 307(b) preference.

An NCE FM applicant is eligible to receive a Section 307(b) preference if it would provide a first or second reserved channel NCE aural service (in the aggregate) to at least 10 percent of the population, provided that this constitutes at least 2,000 people, within the proposed station's 60 dBu contour.² If more than one applicant in a mutually exclusive group qualifies for a preference, we compare first service population coverage totals.³ An applicant will receive a dispositive fair distribution preference by proposing to serve at least 5,000 more potential listeners than the next highest applicant's first service total.⁴ If no applicant is entitled to a first service preference, we will consider combined first and second service population totals and apply the same 5,000 listener threshold.

In the present group, ENFC would serve Harrington, Delaware, Mary V. Harris Foundation (the "Foundation") would serve Harrington, Delaware, Positive Alternative Radio, Inc. ("PARI") would serve Denton, Maryland, and American Family Association, Inc. ("AFA") would serve Harrington, Delaware. Each applicant claims that it would provide a new first or second service to 10 percent of the population, and to at least 2,000 people, within its respective service area, and therefore, that it is eligible for a fair distribution preference.⁵ We note, however, that AFA did not provide with its Section 307(b) showing and exhibit indicating the number of people it proposes to serve with new first and second service. Thus, we will not include AFA in our fair distribution analysis. We will also not include the Foundation in our analysis because it did not timely submit its 307(b) showing.⁶

ENFC asserts that it is entitled to a first service preference.⁷ Based on ENFC's submissions and calculations, however, it does not appear to qualify for a first service comparative preference because it does not provide new first service to 10 percent of the population within its proposed 60 dBu contour.

¹ See 47 U.S.C. § 307(b); 47 C.F.R. § 73.7002(a).

² See 47 C.F.R. § 73.7002(b). With respect to population information, applicants were to use the 2000 Census data, if available by June 4, 2001. See "Supplements and Settlements to Pending Closed Groups of Noncommercial Educational Broadcast Applications Due by June 4, 2001," *Public Notice*, 16 FCC Rcd 6893 (MB Mar. 22, 2001). Applicants were also to base their "fair distribution" analysis on the "snap shot" date of June 4, 2001, which is applicable unless the applicant subsequently makes engineering changes that would diminish its comparative position. *Id.* In this case, none of the applicants has made such engineering changes. As discussed *infra*, three of the applicants timely supplemented their applications with a Section 307(b) showing; all purport to be based on 2000 Census data and a "snap shot" date of June 4, 2001.

³ See 47 C.F.R. § 73.7002(b). See also "Deadline for NCE Settlements and Supplements Extended to July 19, 2001; Date for Calculating Comparative Qualifications Remains June 4, 2001," *Public Notice*, 16 FCC Rcd 10892, 10893 (MB May 24, 2001) ("*May 24 Public Notice*").

⁴ *Id.*

⁵ ENFC's 60 dBu contour encompasses 205,440 people. ENFC's claimed aggregated first and second service is 184,859 people. The Foundation's 60 dBu contour encompasses 158,728 people. The Foundation's claimed aggregated first and second service is 130,753 people. PARI's 60 dBu contour encompasses 188,623 people. PARI's claimed aggregated first and second service is 161,070 people. AFA's 60 dBu contour encompasses 195,227 people. AFA did not provide its claimed aggregated first and second service totals.

⁶ The deadline for filing Section 307(b) showings was July 19, 2001. See *May 24 Public Notice*, 16 FCC Rcd at 10892. The Foundation's showing was not received by the Commission until July 26, 2001. Thus, it was untimely filed. The Foundation seeks waiver, however, of the filing deadline. We decline to grant the waiver request.

⁷ ENFC claims to provide 2,037 people with new first service.

Next, we consider whether ENFC or PARI would provide combined first and second service to 5,000 more persons than the other applicant. Based on the applicants' submissions and calculations, ENFC would provide a first or second service to 184,859 people (2,037 first service plus 182,822 second service). PARI would provide a first or second service to 161,070 people (2,390 first service plus 158,680 second service). Accordingly, pursuant to Section 73.7004 of the Commission's rules, we identify ENFC as the tentative selectee. Group 970929 thus will not proceed to a point hearing.⁸

Accordingly, it is ordered that Eagle's Nest Fellowship Church is TENTATIVELY SELECTED to be awarded a construction permit (File No. BPED-19980320MD) for a new NCE FM station in Harrington, Delaware. Petitions to deny the tentative selectee are due within thirty (30) days following the issuance of a subsequently issued public notice announcing the tentative selection of this application.⁹

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

⁸ See 47 C.F.R. § 73.7002(b). The Media Bureau has delegated authority to make 307(b) determinations in NCE cases. See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 15 FCC Rcd 7386 (2000), *partially reversed on other grounds*, *NPR v. FCC*, 254 F.3d 226 (DC Cir. 2001) ("NCE Order"). See also 47 C.F.R. § 0.283. In the *NCE Order*, the Commission concluded that "[i]n examining the fair distribution issues, we will use the general process set forth in the Section of our Competitive Bidding proceeding that addressed Section 307(b) considerations for AM stations." See *NCE Order*, 15 FCC Rcd at 7397 (citing *Comparative Bidding for Commercial Broadcasting and Instructional Television Fixed Services*, 13 FCC Rcd 15920 (1998) (delegating authority to the staff to conduct Section 307(b) analyses with respect to AM applications prior to conducting auctions of competing applications)). In contrast, the *NCE Order* noted that the point system analysis conducted when Section 307(b) is not determinative is considered a simplified "hearing" for purposes of 47 U.S.C. § 155(c)(1). See *NCE Order*, 15 FCC Rcd at 7420.

⁹ See 47 C.F.R. § 73.7004. If any applicant previously raised issues against the tentative selectee, it must refile its objections within this thirty (30) day period.