



Federal Communications Commission
Washington, D.C. 20554

October 3, 2007

DA 07-4139

In Reply Refer To:

1800B3-IB

Released: October 3, 2007

State of Oregon Acting by and through
the State Board of Higher Education for
the Benefit of Southern Oregon University
c/o The Sanchez Law Firm
2300 M Street, N.W., Suite 800
Washington, D.C. 20037

Re: NEW(FM), Redding, CA
Facility ID No. 10905
BPED-19950327MA
MX Group No. 95031E
Petition to Deny
Petition for Reconsideration

Dear Counsel:

We have before us a Petition to Deny (“Petition”)¹ filed by State of Oregon Acting by and through the State Board of Higher Education for the Benefit of Southern Oregon University (“Oregon”) and related pleadings. Oregon contests the Commission’s tentative decision to issue a permit to construct a new noncommercial educational (“NCE”) FM station to Christian Arts and Education, Inc. (“CAE”), as proposed in the Commission’s *Omnibus Order*.² For the reasons set forth below, we deny the Petition and grant CAE’s application.³

Background. The *Omnibus Order* applied the Commission’s NCE comparative selection criteria⁴ to seventy-six groups of mutually exclusive NCE FM applications. Group 95031E consisted of

¹ Petition to Deny (May 2, 2007).

² See *Comparative Consideration of 76 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 22 FCC Rcd 6101 (2007) (“*Omnibus Order*”).

³ Oregon also sought reconsideration of the *Omnibus Order*. See Petition for Reconsideration (Apr. 26, 2007) (“*April Submission*”). However, Section 1.106(a)(1) of the Commission’s Rules (the “Rules”) specifically prohibits petitions for reconsideration of interlocutory actions. See 47 C.F.R. § 1.106(a)(1). Confirming the interlocutory nature of the *Omnibus Order*, the Commission emphasized that its selections were ‘tentative’ and took no final action with regard to any of the tentatively selected applications. See *Omnibus Order*, 22 FCC Rcd at 6102; See also *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The *April Submission* is therefore dismissed. Moreover, as discussed *infra* n.8, the arguments therein would not have changed the outcome of this proceeding.

⁴ See 47 C.F.R. §§ 73.7000 – 05. See also *Reexamination of Comparative Standards for Noncommercial Educational Applications*, Report and Order, 15 FCC Rcd 7386 (2000) (“*NCE R&O*”), *affirmed and clarified*, Memorandum Opinion and Order, 16 FCC Rcd 5074, 5106 (2001) (“*NCE MO&O*”), *Erratum*, 16 FCC Rcd 10549, (footnote continued...)

Oregon's and CEA's conflicting applications for new NCE FM stations at Redding, California. Because Oregon and CEA proposed to serve the same community, the Commission did not perform a fair distribution analysis.⁵ The Commission proceeded directly to a point system analysis using information that Oregon and CEA had provided in 2001. The Commission awarded two points to CAE for diversity of ownership based on CAE's certification that it had no attributable interest in any radio station serving the same area and that its governing documents required that such diversity of ownership be maintained.⁶ Oregon also received a total of two points. The Commission, therefore, applied a tie-breaker, and tentatively selected CAE's application for grant because CAE had fewer authorizations than Oregon.⁷

Discussion. Oregon raises two main issues: (1) whether a company that employs one of CAE's directors is an undisclosed real party in interest to CAE's application; and (2) whether CAE's failure to disclose changes in its attributable interests and corporate status affects CAE's point tally or character qualifications.⁸

Real Party in Interest. It is undisputed that one of CAE's four directors, Matt Tuter ("Tuter") works for a subsidiary of Family Stations, Inc. ("FSI") as station manager of Class A television station KFTL-CA, San Francisco, California.⁹ Oregon argues that FSI's broadcast interests should be attributed to CAE, which Oregon contends is acting as a surrogate so that FSI can benefit from preferences for which it could not otherwise qualify.¹⁰ Specifically, Oregon alleges that FSI, as the licensee of an FM translator station licensed to Redding, would not have received points for diversity of ownership had it applied in its own name for a second Redding station.¹¹ Oregon similarly contends that FSI's interests in over 100 radio stations would have prevented FSI from prevailing in a tie-breaker with Oregon, which had reported 42 attributable radio station authorizations.¹² In contrast, CAE became the tentative selectee in this group because it claimed to have no attributable radio station authorizations.

recon. denied, Memorandum Opinion and Second Order on Reconsideration, 17 FCC Rcd 13132 (2002) (subsequent history omitted).

⁵ See 47 C.F.R. § 73.7002.

⁶ See *Omnibus Order*, 22 FCC Rcd at 6131.

⁷ *Id.* at 6131, 6164; 47 C.F.R. § 73.7003(c)(1).

⁸ Oregon, in a footnote, also briefly cross-references arguments from the dismissed *April Submission*. See Petition at 3, n.11. Those arguments do not make a *prima facie* case that the tentative selection of CAE was erroneous. First, Oregon claimed that it should have received a fair distribution preference. The Commission's rules, however, are clear that a fair distribution analysis for NCE applications is appropriate only when applicants will serve different communities; both applicants in this proceeding would serve Redding. See 47 C.F.R. § 73.7002(a); see also 47 U.S.C. § 307(b) ("[T]he Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.") (emphasis added). Second, Oregon argued that it should have received points as an established local applicant based on a local headquarters. The Commission explained in the *Omnibus Order* that Oregon could not claim a local headquarters based on the Redding, California offices of Jefferson Public Radio. See *Omnibus Order*, 22 FCC Rcd at 6116-17.

⁹ See Petition, Ex. 4; Opposition at 2.

¹⁰ See Petition at 12, 16.

¹¹ *Id.*

¹² *Id.* at 12-14, Ex. 2.

Oregon asserts that CAE will assign the station's license to FSI at a future date. In support of this theory, Oregon states that a corporation in which Tuter held a fifty percent interest recently assigned the license of Class A television station, KKPM-CA, Chico, California, to FSI.¹³ Oregon also argues that Tuter and FSI have more than an ordinary employment relationship because Tuter is allegedly "a key employee."¹⁴ Tuter, in an unsworn Opposition, maintains that CAE has no connection to FSI, and denies Oregon's allegations as speculative and unsubstantiated.¹⁵

For purposes of the NCE point system, an "attributable interest" is defined as "an interest of an applicant, its parent, subsidiaries, their officers, and members of their governing boards that would be cognizable under the standards in the notes to Section 73.3555."¹⁶ The rule also identifies as attributable "an interest of an entity providing more than 33 percent of an applicant's equity and/or debt that also either (1) supplies more than 15% of the station's weekly programming, or (2) has an attributable interest pursuant to § 73.3555 in media in the same market."¹⁷ As Oregon recognizes, an employment relationship is not cognizable under the NCE attribution standards.¹⁸ The Tuter/FSI employment relationship and the qualifications of FSI would be immaterial in the current proceeding unless FSI is, as alleged, an undisclosed real party in interest to the CAE application.

A real party in interest is a third party that "has an ownership interest or is or will be in a position to actually or potentially control the operation of the station."¹⁹ It is an abuse of process to file an application in the name of a surrogate and thereby deny the Commission and the public the opportunity to review the qualifications of the real party.²⁰ Classic examples of disqualified surrogate applicants include sisters who served as fronts for their brother to claim a preference once available to female-owned businesses,²¹ and deceased relatives whose names were used by licensees that had reached a limit on the number of wireless authorizations that could be issued in their own names.²²

¹³ *Id.* at 9; File No. BALTTA-20061130ALD (granted Jan. 17, 2007).

¹⁴ *See* Petition at 8-9.

¹⁵ *See* Opposition at 1 (May 14, 2007). *See also* 47 C.F.R. § 73.7004(c) (denials must be supported by affidavit).

¹⁶ *See* 47 C.F.R. § 73.7000. Note 1 to Section 73.3555 reflects that interests can be direct or indirect. *See* 47 C.F.R. § 73.3555, n.1. Note 2 sets forth various cognizable interests including those of certain owners, partners, stockholders, officers, directors, and time brokers. *Id.* at n.2. When the instant application was filed in 1995, there were no attribution standards for NCE applicants, but such standards were adopted in 2000 along with the point system. *See NCE R&O*, 15 FCC Rcd at 7418-20.

¹⁷ *See* 47 C.F.R. § 73.7000.

¹⁸ *See* Petition at 11. Oregon alleges that CEA may air FSI programming, but provides no support for this contention. *Id.* at 10. It does not allege that FSI has provided any of CEA's equity or debt.

¹⁹ *See Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1564 (D.C. Cir. 1988) (quoting *KOWL, Inc.*, Memorandum Opinion and Order, 49 FCC2d 962, 964 (Rev. Bd. 1974)).

²⁰ *See Ronald Brasher*, Decision, 19 FCC Rcd 18462, 18477 (2004) (quoting *Arnold L. Chase*, Decision, 5 FCC Rcd 1642, 1643, n.7 (1990)); *See also Evansville Skywave, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 1699, 1702 n.7 (1992).

²¹ *See S.L. Communications, Inc. v. FCC*, 168 F.3d 1354, 1355-56 (D.C. Cir. 1999).

²² *See Ronald Brasher*, 19 FCC Rcd at 18477-80.

Oregon has not presented *prima facie* evidence that FSI has an undisclosed ownership interest in CAE, that FSI controls CAE through Tuter, or that CAE is otherwise acting as a surrogate for FSI.²³ Tuter's recent assignment of a single television station license to FSI is insufficient evidence of a surrogate relationship; Oregon has not shown that the transaction was other than arms-length. Oregon also attempts to establish that Tuter's position with FSI is akin to that of an officer or director because: (1) the FSI web page places a photograph of Tuter near one of FSI's President, and lists Tuter's name above that of an FSI board member; (2) a group of pastors objecting to an FSI policy copied Tuter on their letter of complaint; and (3) Tuter is among FSI's top five paid employees other than its officers or directors.²⁴ These matters, when taken together and in context, demonstrate only that FSI employs Tuter in a managerial capacity.²⁵

Moreover, there are several inherent flaws in Oregon's argument that FSI had motive to use CAE as a surrogate in order to hide FSI's interest in an FM translator serving Redding and thereby to qualify for more points than Oregon. First, CAE filed its application in 1995, well before the point system was established. Second, Oregon filed its application in response to CAE's application, not *vice versa*. Third, FSI did not yet hold an authorization for an FM translator in Redding at the time of CAE's application.²⁶ Thus, when CAE filed its application, no party could have been motivated by a desire to receive more points than Oregon or to exclude a translator not yet authorized. Fourth, FSI obtained a permit to construct an NCE station at Redding through an assignment of license in the late 1980's, but did not build before permit expiration or re-apply for those facilities after the authorization expired.²⁷ If FSI had renewed interest in applying for a full service Redding station five years later, at a time when the Commission's comparative procedures had not yet changed, there is no reason to believe that FSI would have resorted to illegitimate use of a surrogate instead of following lawful procedures as it had in the past. Finally, even under the point system, a translator licensee need not resort to deception to exclude the translator from its local diversity analysis. An applicant for a full service NCE station that would replace

²³ Assuming *arguendo* that Tuter could be influenced by FSI, Tuter's 25 percent interest in CAE is far short of that needed for control.

²⁴ See Petition at 8-9, Exs. 5-6.

²⁵ The "top pay" allegation is based on Tuter's appearance as fifth on a 2004 list of "Five Highest Paid Employees Other Than Officer, Directors, and Trustees," all earning less than \$60,000 at that time. See 2004 Return of Organization Exempt from Income Tax (Petition, Ex. 7). The document shows that Tuter's pay and benefits are comparable to those of employees with similar job titles. The web page photographs are in no discernible order, contain no job titles, and depict "Voices on the Air" *i.e.*, hosts of individual FSI programs. With respect to the alleged juxtaposition of the names of Tuter and a governing board member, Tuter is listed as contact representative for international inquiries about the availability of FSI's programming in foreign languages. The FSI board member is listed as responsible for the programming itself. See Petition, Ex. 5. We reject Oregon's argument that these facts represent "a good deal of smoke" requiring the Commission to investigate a possible "fire." See Petition at 7. The facts, if true, are insufficient to support Oregon's real party in interest allegations. See generally *Astroline Communications Co.*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

²⁶ CAE and Oregon filed their mutually exclusive NCE applications in March and July 1995, respectively. FSI applied for a permit to construct a translator station in November 1996. The Commission issued FSI's translator permit and license in March and December 1997, respectively. See File Nos. BPFT-19960910TK and BLFT-19970925TH. The record does not establish a beginning date of Tuter's employment with FSI. Oregon alleges only that Tuter has been an FSI employee "since at least 2002, if not before." Petition at 9.

²⁷ See DKXFR(FM), File Nos. BPED-19831229AE (expiring Dec. 30, 1987) and BAPED-19860922GQ (granted Nov. 24, 1987). See also Opposition at 2.

an FM translator serving the same area can claim diversity points if it pledges to cancel the translator authorization upon the new station's commencement of operations.²⁸

Failure to Update Application. All Commission applicants are responsible for the continuing accuracy of their applications and, therefore, must amend pending applications whenever the information furnished is no longer substantially accurate and complete.²⁹ Pursuant to this requirement, NCE applications must report changes that would have a potential negative impact on their comparative positions under the point system.³⁰ Information generally must be reported within 30 days of the change.³¹ However, because action on NCE applications was delayed for a considerable period due to litigation, and the applications had been submitted prior to the adoption of electronic filing requirements, the Bureau anticipated by late 2004 that many NCE applications were no longer up-to-date. The Bureau reminded NCE applicants of their Section 1.65 obligations, and set a deadline of January 21, 2005, for NCE applicants to update their applications electronically.³² CAE did not file such an amendment.

Oregon alleges that CAE should have amended its application to report that CAE's corporate status was suspended by the California Secretary of State ("State") and was not reinstated until April 2007, about a week after release of the *Omnibus Order*.³³ Oregon maintains that this matter is material because there is a possibility that CAE "operated *ultra vires* in California in violation of state corporation law."³⁴ Oregon also alleges that this matter shows CAE's lack of candor through its failure to disclose a negative occurrence. CAE, in an unsworn statement, argues that the suspension resulted from an easily resolved "clerical error regarding a twenty dollar fee" and that CAE never ceased to function.³⁵

Oregon's argument that CAE failed to report a negative occurrence reflects a fundamental misunderstanding of the duty of NCE applicants to maintain the accuracy of their applications. Applicants must report "substantial and significant" changes to their application submissions, including changes with the potential to reduce their comparative point totals and tie-breaker positions.³⁶ Oregon argues that CAE's suspended status was negative, but not that it would have altered CAE's answer to any question on the application. For example, Oregon has not shown that the suspension resulted from adjudicated wrongdoing reportable as an adverse action under the Commission's character policy.³⁷ The Commission is not the proper forum for adjudicating matters of state corporate law, and a claim of an

²⁸ See *NCE MO&O*, 16 FCC Rcd at 1502-03; FCC Form 340, Question IV(2)(b).

²⁹ See 47 C.F.R. § 1.65.

³⁰ See *Section 1.65 Amendment Deadline Established for Noncommercial Educational FM and FM Translator Station Applicants*, Public Notice, 19 FCC Rcd 24740 (2004) ("*Section 1.65 Notice*").

³¹ See 47 C.F.R. § 1.65.

³² See *Section 1.65 Notice*, 19 FCC Rcd at 24740.

³³ Petition at 13, Ex. 9.

³⁴ See Reply at 4. Oregon does not allege that CAE ceased to exist or failed to prosecute the application. Compare, *Omnibus Order*, 22 FCC Rcd at 6128 (disqualification of defunct corporation that failed to prosecute its application following dissolution).

³⁵ See Opposition at 1.

³⁶ See 47 C.F.R. § 1.65; *Section 1.65 Notice*, 19 FCC Rcd at 24740.

³⁷ See FCC Form 340, Questions II(8), (9). Nor has it shown that CAE is no longer an eligible nonprofit educational organization. *Id.* at Question II(2).

ultra vires action will not ordinarily prevent the Commission from reaching a license decision.³⁸ Nor has Oregon shown that the suspension potentially affected CAE's point tally. A temporary suspension of CAE's corporate status would not have negated CAE's claim of two points for local diversity of ownership. Moreover, it is apparent from the State's prompt reactivation of CAE's status, without additional proceedings or alteration of CAE's corporate identification number, that the State did not view CAE's "suspended" status as a highly significant or insurmountable problem.³⁹ The record corroborates CAE's unsworn statement that the suspension was readily correctable. The State reactivated CAE's status upon CAE's April 3, 2007, submission of a one-page State form containing ownership and service of process information.⁴⁰ The fee for filing the form was twenty dollars.⁴¹ The information that CAE provided in 2007 was practically identical to that it had submitted to the State in 1998.⁴²

Oregon also alleges that CAE did not properly update its application to report changes in information concerning tie-breakers. For purposes of the first tie-breaker, NCE FM applicants must report attributable authorizations for commercial and NCE AM, FM, and non-fill-in FM translator stations.⁴³ For purposes of the second tie-breaker, applicants must also report the number of pending new and major change applications for such stations.⁴⁴ At issue is Tuter's expression of interest in constructing five commercial AM stations during the AM Auction No. 84 filing window. CAE acknowledges that it did not amend its application in 2004 to report those matters, but contends that events occurring after the NCE "snapshot" date of June 4, 2001, need not be reported.⁴⁵

Applications for construction of radio stations, reportable for NCE tie-breaker purposes, are generally filed on Form 301, 340, or 345. In accordance with Auction 84 procedures, Tuter submitted a single FCC Form 175 ("Application to Participate in FCC Auction") along with five "tech box" portions from FCC Form 301. The Bureau associated a separate file number with each "tech box" submission, and examined each one to determine whether it was mutually exclusive with any other Auction No. 84 proposal. Tuter's proposal for 1450 kHz at Lovelock, Nevada was the only one deemed to be a "singleton."⁴⁶ With respect to that proposal, the Bureau invited Tuter to file a complete application for a construction permit on FCC Form 301 along with the appropriate filing fee, which Tuter did in October 2004.⁴⁷ The Bureau granted the Lovelock Application on February 2, 2007. The submission of Form 175, Application to Participate in an FCC Auction, is only a preliminary step in the application process. Accordingly, Form a 175 submission is not a cognizable new or major change application for NCE tie-

³⁸ See *Algreg Cellular Engineering*, Decision, 9 FCC Rcd 5098, 5129-30 (Rev. Bd. 1994).

³⁹ See Petition, Ex. 9 (reflecting the State's consistent use of number C1933648 to identify CAE from 1995 through present).

⁴⁰ See Statement of Information (Domestic Nonprofit Corporation) (Apr. 3, 2007) and related documents (Petition, Ex. 9).

⁴¹ *Id.*

⁴² *Id.*

⁴³ See 47 C.F.R. § 73.7003(c)(1).

⁴⁴ *Id.* at § 73.7003(c)(2).

⁴⁵ See Opposition at 1.

⁴⁶ See File No. BNP-20040128AQG; *AM Auction 84 Singleton Applications*, Public Notice, 19 FCC Rcd 16655 (Aug. 26, 2004).

⁴⁷ See File No. BNP-20041025ABA (granted Feb. 2, 2007) ("Lovelock Application").

breaker purposes because it represents only the potential to file a complete application at some time in the future.⁴⁸

Accordingly, we reject Oregon's argument that CAE was required to report five new AM applications in 2004. Nevertheless, we also reject CAE's assertion that it had no obligation to update its NCE application after 2001. As the Commission reminded applicants in December 2004, each applicant must report all information that can potentially decrease its comparative position.⁴⁹ CAE should have reported Tuter's October 2004 long-form submission as a pending application. CAE also should have filed an amendment in 2007 to report the grant of that application, *i.e.* the issuance of an attributable authorization. Thus, we find that CAE violated Section 1.65 of the Rules, but to a lesser extent than alleged.

A Section 1.65 violation is disqualifying only if the applicant intended to conceal information from the Commission, or if the reporting violations are so numerous and serious as to undermine the applicant's responsibility to be a licensee.⁵⁰ Intentional deceit reflects upon an applicant's basic qualifications, and "the fact of concealment may be more significant than the facts concealed."⁵¹ Intention can be inferred from motive.⁵² Oregon argues that CAE's failure to update the application amounts to lack of candor, *i.e.*, a concealment, evasion, or other failure to be fully informative accompanied by an intent to deceive.⁵³ Oregon alleges that CAE withheld information about Tuter's Auction No. 84 submissions because CAE wanted to obtain favorable action on its own NCE FM application and to conceal violations of Section 1.65.⁵⁴

CAE's failure to report the submission and grant of a single application, while erroneous, is not so serious as to be disqualifying. There is no support for Oregon's allegation that CAE intentionally concealed this information or had any motive to do so. The alleged intent to conceal is at odds with Tuter's disclosure of his AM proposals in a television application filed in 2006.⁵⁵ Moreover, reporting the AM proposals could not have changed the outcome of this proceeding. At the time that CAE should have updated its NCE application, Oregon's maximum tie-breaker position would have been well known to CAE. Even with an attributable interest in one station, CAE would have had a significant tie-breaker cushion over Oregon, which had 42 attributable authorizations. There was no need to conduct a secondary tie-breaker to consider how many other applications each party had filed. Had a secondary tie-breaker been necessary, however, CAE's attributable interest in a single additional application (for a total of two applications including the Redding application) would not have altered the outcome of this proceeding when compared to Oregon reported interests in eight applications. Oregon has not raised any

⁴⁸ *E.g.*, *Media Bureau Announces NCE FM New Station and Major Change Filing Procedures*, Public Notice, at 3 (MB Aug. 9, 2007).

⁴⁹ *See Section 1.65 Notice*, 19 FCC Rcd at 24740.

⁵⁰ *See David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253 (D.C. Cir. 1991) (citing *Valley Broadcasting Co.*, Decision, 4 FCC Rcd. 2611, 2618 (Rev. Bd. 1989).

⁵¹ *See Character Qualifications*, Report, Order, and Policy Statement, 102 FCC2d 1179, 1210, n.77 (1986) (quoting *FCC v. WOKO, Inc.* 329 U.S. 223, 227 (1946)).

⁵² *See, e.g., RKO General, Inc.*, Decision, 4 FCC Rcd 4679, 4684 (Rev. Bd. 1989).

⁵³ *See San Francisco Unified School District*, Hearing Designation Order and Notice of Apparent Liability, 19 FCC Rcd 13326, 13334 (2004).

⁵⁴ *See* Petition at 15.

⁵⁵ *See* Petition, Ex.1

substantial and material question concerning the Commission's tentative selection of CAE or CAE's basic qualifications. We do, however, caution CAE to be more careful in its future compliance with Commission reporting requirements.

Ordering Clauses. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed on April 26, 2007, by State of Oregon Acting by and through the State Board of Higher Education for the Benefit of Southern Oregon University IS DISMISSED.

IT IS FURTHER ORDERED, That the Petition to Deny filed on May 2, 2007, by State of Oregon Acting by and through the State Board of Higher Education for the Benefit of Southern Oregon University IS DENIED.

IT IS FURTHER ORDERED, That the application of Christian Arts and Education, Inc. to construct a new NCE station at Redding, California (File No. BPED-19950327MA) IS GRANTED CONDITIONED UPON its compliance with Section 73.7005 of the Commission's Rules, 47 C.F.R. § 73.7005, which sets forth a four-year holding period for applicants that are awarded permits by use of a point system.

IT IS FURTHER ORDERED, That the mutually exclusive application of State of Oregon Acting by and through the State Board of Higher Education for the Benefit of Southern Oregon University (File No. BPED-19950713MB) IS DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Christian Arts and Education, Inc.