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In re: Chesapeake Catholic Radio
New NCE (FM), Chincoteague, Virginia
Facility ID No. 175705
File No. BNPED-20071022BDH

NCE Group 439

Dear Counsel:

We have before us a Petition for Reconsideration or, in the alternative, Petition to Deny ("Petition")[1] filed on April 30, 2009, by Chesapeake Catholic Radio ("CCR"), seeking reconsideration of the staff's decision regarding its captioned application ("Application") for a new noncommercial educational ("NCE") FM facility in Chincoteague, Virginia.[2] For the reasons set forth below, we deny the Petition.

Background. CCR was among thirteen mutually exclusive applicants for a noncommercial educational FM station construction permit.[3] These applications, which propose to serve eight different communities in Maryland and Virginia, were designated NCE MX Group 439. Pursuant to established

[1] We find that a Petition for Reconsideration is improper at this juncture. *See State of Oregon*, Letter, 23 FCC Rcd 11576 (MB 2008) (finding that a Petition for Reconsideration of a tentative 307(b) decision is an untimely interlocutory appeal). However, a Petition to Deny is proper. *See Threshold Fair Distribution Analysis of 21 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations in October 2007 Window*, Memorandum Opinion & Order, 24 FCC Rcd 3873 (MB 2009) (providing for a 30-day petition to deny period) ("*2009 Fair Distribution MO&O*"). We therefore will treat the Petition as a Petition to Deny.

[2] We also have before us responsive pleadings filed after the Petition. On May 5, 2009, Hampton Roads Educational Telecommunications Association ("Hampton") filed an Opposition to Petition for Reconsideration or, in the alternative, Petition to Deny ("Opposition"). On May 18, 2009, CCR filed a Reply.

[3] *See 2009 Fair Distribution MO&O*, 24 FCC Rcd at 3885 (MB 2009).

procedures,[4] on March 31, 2009, the Media Bureau ("Bureau") determined that the Hampton application for a new NCE FM station in Gloucester Point, Virginia, was entitled to a decisive preference under Section 307(b) of the Communications Act of 1934, as amended ("Act"),[5] and identified Hampton as the tentative selectee in NCE MX Group 439.[6]

In the Petition, CCR does not dispute the staff's determination to grant Hampton's application. Instead, it argues that the Commission should grant both Hampton's application and the Application. It acknowledges that this request violates the policy established by the Commission in 2001 in the *NCE MO&O,* but avers that the Commission's "fair distribution" policy is arbitrary, capricious, and contrary to law in violation of the Administrative Procedure Act ("APA"). Specifically, it takes issue with the policy determination to dismiss all non-winning applicants in a group, even if such an applicant is not mutually exclusive with the winner of the group. Accordingly, CCR asks the Bureau to accept its application for filing because its proposal is not mutually exclusive with Hampton's proposal.[7] Alternatively, CCR asks for the Commission to withhold the grant of the Hampton application until it has reevaluated the fair distribution analysis policy.

Discussion. CCR's Challenge to Fair Distribution Ruling. Section 309(d)(1) of the Act[8] provides that any party in interest may file a petition to deny an application. In order to assess the merits of a petition to deny, a two-step analysis is required.[9] First, the petition must make specific allegations of fact sufficient to demonstrate that the petitioner is a party in interest and that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity.[10] This threshold determination is made by evaluating the petition and the supporting affidavits. If the petition meets this threshold requirement, the Commission must then examine all of the material before it to determine whether there is a substantial and material question of fact calling for further inquiry and requiring resolution in a hearing.[11] If no such question is raised, the Commission will deny the petition and grant

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[4] *See* 47 C.F.R. § 73.7002 (procedures for selecting among mutually exclusive applicants for stations proposing to serve different communities); *see also Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000) ("*NCE Comparative Order*"); Memorandum Opinion and Order, 16 FCC Rcd 5074, 5105 (2001) ("*NCE MO&O*"), *partially reversed on other grounds, NPR v. FCC*, 254 F.3d 226 (D.C. Cir. 2001).

[5] 47 U.S.C. § 307(b). A Section 307(b) analysis is ordinarily conducted at the staff level because the Bureau has delegated authority to make Section 307(b) determinations in NCE cases. *See NCE Comparative Order*, 15 FCC Rcd at 7397.

[6] *See 2009 Fair Distribution MO&O,* 24 FCC Rcd at 3886.

[7] Petition at 5. (". . . CCR's application on Channel 205, 88.9 MHz, is not mutually exclusive with the [Hampton] application on second-adjacent Channel 203, 88.5 MHz. CCR's only 'sin' is that it is mutually-exclusive with the application of Silver Fish Broadcasting, Inc. . . . on first-adjacent Channel 204, 88.7 MHZ, which is turn mutually-exclusive with the [Hampton] application on 88.5 MHZ.").

[8] 47 U.S.C. § 310(d).

[9] *See e.g. Artistic Media Partners, Inc.,* Letter, 22 FCC Rcd 18676, 18677 (MB 2007).

[10] *See id.*; *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

[11] 47 U.S.C. § 309(d)(2).

the application if it concludes that such grant otherwise serves the public interest, convenience, and necessity.

CCR's Petition contains no allegations of fact that granting Hampton's application would be contrary to the public interest, convenience or necessity. Because the Petition fails to meet this threshold requirement under Section 309(d)(1) of the Act, it will thus be dismissed for being insufficient as a matter of law. Nonetheless, we will briefly address its primary argument below.

In its Petition, CCR challenges the validity of the Commission's NCE fair distribution policy, established in the *NCE MO&O*. There, the Commission stated:

> . . . after the best qualified applicant is selected, it is possible that remaining applicants that are not mutually exclusive with this primary selectee and thus potentially secondary selectees, may also be significantly inferior to other applicants that are eliminated because they are mutually exclusive with the primary selectee. Rather than issue authorizations to applicants whose potential for selection stems primarily from their position in the mutually exclusive chain, *we believe it is appropriate to dismiss all of the remaining applicants and permit them to file again in the next filing window* (emphasis added).[12]

CCR argues that this policy "is arbitrary, capricious, and contrary to law, particularly 47 U.S.C. § 307(b), and constitutes reversible error when this case reaches the appellate court."[13] CCR further notes that "[w]hen a Commission comparative methodology for selecting winners and losers among broadcast applicants turns out to be arbitrary, capricious and contrary to law, the appellate court will not hesitate to invalidate the criteria and remand the case to the Commission for the formulation of new criteria."[14] In response, Hampton argues that the time to challenge the policy "expired long ago when the Commission adopted the policy."[15]

As noted by Hampton, the opportunity to challenge the 307(b) procedures set forth in the *NCE MO&O* has long since passed.[16] Indeed, it has already been challenged for violations of both the United States Constitution and the APA.[17] In *American Family Association*, the court rejected both constitutional

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[12] *Id* at 5105.

[13] Petition at 6.

[14] *Id.* (internal cites omitted).

[15] Opposition at 3. In its Reply, CCR claims that the Commission's policies and procedures are "always subject to challenge pursuant to the [APA] when their application would constitute agency action which is arbitrary, capricious or contrary to statute." Reply at 3 (*citing Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993) ("*Bechtel*"). We do not believe that *Bechtel* is applicable to the present case. The integration policy at issue in *Bechtel* was set forth in a policy statement, which, because it was adopted without notice and comment procedures, was "subject to complete attack" before being applied in a particular case. *Bechtel*, 10 F.3d at 878. In contrast, the Commission adopted the 307(b) policy at issue in the instant case following a full notice and comment rulemaking.

[16] 47 U.S.C. § 402(b).

[17] *American Family Association, Inc. v. FCC*, 365 F.3d 1156 (D.C. Cir. 2004).

and administrative challenges to the *NCE MO&O*. We therefore find that the Bureau staff acted properly in following the well-settled policy set forth by the Commission in the *NCE MO&O* to MX Group 439 and decline to consider CCR's argument that the same policy is arbitrary and capricious.

Certification to the Commission *en banc*. CCR further requests that we certify the matter to the Commission *en banc* pursuant to Section 0.283(c) of the Rules.[18] CCR argues that *en banc* review is warranted since the Commission's policy to dismiss non-winner applications that are not mutually exclusive with the winning application is arbitrary and capricious.

Section 0.283 of the Rules provides that "matters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines" shall be referred to the Commission for en banc disposition."[19] CCR's request does not fall under any of those four categories.[20] As discussed above, the Commission has previously addressed the "fair distribution" policy in the *NCE MO&O* and concluded that all non-winning applications in an MX group should be dismissed. This policy was appropriately applied to MX Group 439. Thus, the matter before us was easily and appropriately resolved by applying existing Commission rules and policies. There is no need to refer the matter to the Commission for *en banc* consideration.

Conclusion/Actions. Accordingly, IT IS ORDERED, that the April 30, 2009, Petition to Deny of Chesapeake Catholic Radio, Inc. IS HEREBY DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Hampton Roads Educational Telecommunications Association

[18] Petition at 9. *See also* 47 C.F.R. § 0.283(c).

[19] 47 C.F.R. § 0.283.

[20] *See, e.g., Dan Albert, Esq.*, Letter, 24 FCC Rcd 2209 (MB 2009) (declining to submit a matter to the full Commission where existing rules and precedent were sufficient for the Bureau to make a decision).