



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

September 10, 2010

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In Reply Refer to:

1800B3-ALV

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Hammock Environmental and Educational
Community Services
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In Re: Hammock Environmental and Educational
Community Services
NEW NCE FM, Palm Coast, FL
Facility ID No. 175730
BNPED-20071018ASP

Application for NCE FM Construction Permit

Dear Applicant:

We have before us the application of Hammock Environmental and Educational Community Services ("Hammock") for a new noncommercial educational ("NCE") FM station to serve Palm Coast, Florida (the "Application"). We also have before us a February 13, 2008, "Petition to Deny Application and Set Aside Approval of Settlement Agreements" (the "Petition") filed by Cornerstone Broadcasting Corporation ("Cornerstone") and related pleadings.¹ For the reasons set forth below, we grant the Petition to the limited extent indicated, deny the Petition in all other respects, and defer action on the Application pending receipt of the information requested below.

Background. On October 18, 2007, Hammock filed an application seeking authority to construct and operate a new NCE FM station in Palm Coast, Florida. The application was among ten

¹ We also have before us the following: (1) Hammock's February 26, 2008, Opposition to Petition to Deny Application; (2) Cornerstone's March 6, 2008, Reply to Opposition; (3) Hammock's December 4, 2008, Response to the FCC Letter of Inquiry; (4) Cornerstone's February 5, 2009, Letter to the FCC; and (5) Hammock's February 10, 2009, Letter to the FCC.

mutually exclusive applications filed during the October 2007, NCE FM filing window.² On January 4, 2008, Hammock and four other mutually exclusive applicants filed “Joint Requests for Approval of Settlement Agreements” (the “Settlements”) seeking dismissal of the applications of Reach Communications, Inc. (“Reach”), Community Public Radio, Inc. (“Community”), JKJ Educational Foundation (“JKJ”), and Family Worship Center Church (“Family”), in return for consideration from Hammock, and acceptance of the Hammock Application.³ On January 9, 2008, the Media Bureau (“Bureau”) staff approved the Settlements, and it subsequently placed the Hammock Application on Public Notice, announcing its acceptance for filing, and simultaneously dismissed the other mutually exclusive applications.⁴

In its Petition, Cornerstone objects to the grant of the Application,⁵ averring that: (1) Hammock is a “sham applicant” and therefore not qualified to hold an NCE license; (2) Hammock has misrepresented material facts in its Application, including its status as a Section 501(c)(3) organization⁶ and certification that it qualifies as an “established local applicant”; and (3) the Settlements fail to comply with Section 73.3525 of the Commission’s Rules (the “Rules”).⁷ In its Opposition, Hammock asserts that the Cornerstone Petition is meritless, was filed solely for the destructive purpose of stopping a competitor, and thus constitutes a “strike petition.”

Discussion. In assessing the merits of a petition to deny under Section 309(d) of the Communications Act of 1934, as amended, we first determine whether the petitioner makes specific allegations of fact that, if true, would demonstrate that grant of the application would be *prima facie* inconsistent with the public interest.⁸ If the Commission determines that the petitioner has satisfied the threshold determination, it proceeds to determine whether, on the basis of the application, the pleadings filed, or other matters which [the Commission] may officially notice, the petitioner has presented a

² See *Media Bureau Announces NCE FM New Station and Major Modification Application Filing Window for New and Certain Pending Proposals; Window to Open on October 12, 2007*, Public Notice, 22 FCC Rcd 2726 (2007).

³ See FCC File Nos. BNPED-20071022AJZ, 20071015ABK, 20071022AHN, and 20071019ANV, respectively. The Settlements were filed in response to the Media Bureau’s Public Notice encouraging applicants to settle among themselves. See *Window Opened to Expedite Grant of New NCE Station Construction Permits*, Public Notice, 22 FCC Rcd 19438 (2007) (“*NCE Settlement PN*”). The five other mutually exclusive applicants voluntarily dismissed their respective applications without consideration.

⁴ See *Broadcast Actions and Broadcast Applications*, Public Notice, Report Nos. 46651 and 26651 (January 14, 2008).

⁵ Cornerstone, the licensee of, *inter alia*, WJLU(FM), New Smyrna Beach, Florida, has standing to file the Petition by virtue of its status as a potential competitor. See *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940).

⁶ 26 U.S.C. § 501(c)(3).

⁷ 47 C.F.R. § 73.3525.

⁸ See *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). The Commission determines whether a petitioner has met this threshold inquiry in a manner similar to a trial judge's consideration of a motion for directed verdict: "if all the supporting facts alleged in the affidavits were true, could a reasonable fact finder conclude that the ultimate fact in dispute had been established." *Gencom Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987) (“*Gencom*”), cited in *Edwin L. Edwards*, Memorandum Opinion and Order and Notice of Apparent Liability, 16 FCC Rcd 22236, 22248 (2001).

"substantial and material question of fact" to warrant further inquiry.⁹ Using this standard, we consider Cornerstone's allegations.

Eligibility. Pursuant to Section 73.503(a) of the Rules "a noncommercial educational FM broadcast station will be licensed only to a *nonprofit educational organization* upon showing that the station will be used for the advancement of an educational program."¹⁰ In its Application, Hammock states that it is an unincorporated association formed in the State of Florida. Cornerstone asserts that Hammock is not legally qualified to hold an NCE license because Florida law does not recognize associations.¹¹ Cornerstone reasons that because individuals cannot hold NCE licenses, and "unincorporated associations have no status under Florida law," Hammock must be a "sham applicant."¹² In its Opposition, Hammock does not address the merits of Cornerstone's allegation but merely submits a copy of an unsigned letter to the Florida Secretary of State's office requesting that the association be registered with the state.

The Bureau staff believed a more detailed response from Hammock was necessary to evaluate Cornerstone's allegation. Accordingly, it directed Hammock to fully explain the steps it took to receive recognition from the State of Florida and the date on which the association was recognized by the state.¹³ Hammock submitted the requested information, but complained that the Bureau is "on shaky ground embarking on an interpretation of the laws of the State of Florida" and should "keep to its federal regulatory mission of ascertaining whether [Hammock] is an educational organization that is eligible to hold a NCE license."¹⁴

We generally decline to consider issues of a licensee's compliance with the requirements of state corporate law where no challenge has been made in state court and the determination is one that is more appropriately a matter of state resolution.¹⁵ An organization's existence, however, can be a relevant Commission inquiry,¹⁶ and we find that it is a germane inquiry in the current NCE FM context.

⁹ *Gencom*, 832 F.2d at 181; *see also* 47 U.S.C. §309(d)(2).

¹⁰ 47 C.F.R. § 73.503(a) (emphasis added).

¹¹ In support of its allegation, Cornerstone provides an opinion letter from a Florida attorney stating that "unincorporated associations are not a legal form of business recognized by Florida statute." *See* Cornerstone Petition at Exhibit A.

¹² *Id.* at 2-4.

¹³ *See* Letter from Peter H. Doyle, Chief, Audio Division, to Hammock (November 19, 2008). Hammock was directed to submit: (1) date-stamped copies of any documentation and/or letters submitted to the Florida Secretary of State; (2) certified copies of any documentation from the Florida Secretary of State indicating that Hammock was in fact incorporated, registered, enrolled, or a similar recognition, and the date on which such action occurred; and (3) Hammock's current articles of association and by-laws. *See* Hammock Letter of Inquiry, dated November 19, 2008.

¹⁴ *See* Letter from Hammock to Peter H. Doyle (December 4, 2008) ("Hammock Letter") at 1 and 9.

¹⁵ *See, e.g., Fatima Response, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 18543 (1999); *Aspen FM, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 17,852 (1997); *North American Broadcasting Co., Inc.*, Memorandum Opinion and Order, 15 FCC 2d 979 (1969). We are aware of no court challenge in the instant case.

¹⁶ *See, e.g., Cosmopolitan Enterprises*, Memorandum Opinion and Order, 47 FCC 2d 325 (1974).

An applicant for an NCE FM station must certify its eligibility to own and operate such station at the time it files its application.¹⁷ An applicant must be a non-profit organization with an educational purpose.¹⁸ Confirming Hammock's eligibility does not, contrary to Hammock's protests, require us to interpret Florida law. Rather, the purpose of our inquiry was to determine whether Hammock took the requisite steps to receive recognition from the State of Florida prior to filing its Application. We find that Hammock has sufficiently demonstrated its existence as a separate legal entity as of October 18, 2007, the date it filed its Application. Specifically, in response to the Bureau's request, Hammock submitted copies of its Articles of Association & Bylaws, effectuated January 2004, evidencing its educational purpose, and a July 26, 2007, date-stamped copy of a letter to the Florida Secretary of State's Office requesting that the association be registered with the state.¹⁹ Accordingly, we find that Hammock is eligible to hold an NCE FM license.

Misrepresentation. Cornerstone asserts that Hammock made material misrepresentations in its Application, including its status as a Section 501(c)(3) organization and its claim to be an "established local applicant," and the Application should therefore be designated for hearing. Cornerstone bases its allegation on its inability, despite its "extensive search," to locate: (1) any record that Hammock has been granted tax-exempt status, and (2) any activity in the past two years with which Hammock has had a local public connection.

Misrepresentation is a false statement of material fact made with an intent to deceive the Commission.²⁰ Thus, intent to deceive is a "necessary and essential element" of misrepresentation.²¹ We find no evidence that Hammock was deceptive in its Application and no concrete reason to question the veracity of the Application. Specifically, Hammock did not, as Cornerstone alleges, falsely claim that it had previously obtained Section 501(c)(3) tax-exempt status. Rather, Hammock openly specified in its Articles of Organization that it intended to file the necessary paperwork to qualify for Section 501(c)(3) status "[i]n the event it is granted a permit for a noncommercial FM station."²² Further, in light of the

¹⁷ See FCC Form 340, Section II, Question 2, and corresponding instructions. See also 47 U.S.C. §397(6)(A) (defining a "noncommercial educational broadcast station" as a station which is "owned and operated by a public agency or nonprofit private foundation, corporation, or association.").

¹⁸ 47 C.F.R. § 73.503(a). In contrast, the commercial broadcast service contains no such stipulation, and businesses in any form (*i.e.*, corporation, sole proprietorship, or individual) may use commercial broadcast channels.

¹⁹ Hammock further provides citations and text to Florida state statutes establishing that unincorporated associations are recognized and permitted under Florida law. See Hammock Letter at 4-7. Hammock also explains that under Florida law, Florida non-profit unincorporated associations are not required to file formal registration statements with the Secretary of State. *Id.* at 5 (citing Chapter 622 of the Florida statutes).

²⁰ See *Fox River Broadcasting, Inc.*, Order, 93 FCC 2d 127, 129 (1983).

²¹ See *Swan Creek Communications, Inc. v. FCC*, 39 F.3d 1217 (D.C. Cir. 1994). Intent to deceive may be found from the false statement of fact coupled with proof that the party making it had knowledge of its falsity. See *David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253, 1260 (D.C. Cir. 1991). Intent may also be inferred from motive. See *Joseph Barr*, Memorandum Opinion and Order, 10 FCC Rcd 32, 33 (Rev. Bd. 1994).

²² See Hammock Articles of Organization at Section 2.01. Under Section 73.503 of the Rules, each NCE FM applicant must demonstrate that it is a "nonprofit educational organization" that will use the proposed station "for the advancement of an educational program." This determination does not hinge on whether or not the applicant has received tax-exempt status from the I.R.S. See, *e.g.*, *Fatima Response*, Memorandum Opinion and Order, 14 FCC Rcd 18543 (1999).

Settlements, the Application will not proceed to a point hearing, and the issue of whether Hammock qualifies for points as an established local applicant is irrelevant.²³ We also note, however, that Hammock submitted documentation to support its localism claim, as required by the Commission.²⁴ For these reasons, we find no evidence of misrepresentation and therefore no basis to designate the Application for hearing.

Settlement Agreements. Applicants entering into agreements to procure the removal of a conflict between applications by amendment or dismissal of an application must ensure that their settlement agreements comply with the pertinent requirements of Section 73.3525 of the Rules, including the reimbursement restrictions.²⁵ Cornerstone contends that the Hammock Settlements failed to adhere to the Rules. Specifically, Cornerstone asserts that the Commission should have denied: (1) the Hammock-Community Settlement because it failed to include an itemized accounting of Community's expenses; and (2) the Hammock-Reach Settlement because both applicants are "unduly enriched" by the proposed option agreement.²⁶

The Hammock-Community Settlement provides for the payment of \$3,000 to Community in return for the dismissal of its application. In accordance with Section 73.3525 of the Rules, the parties furnished copies of their settlement agreement together with the appropriate declarations under penalty of perjury certifying that their applications were not filed for the improper purpose of reaching settlement, that the consideration is limited to the legitimate and prudent expenses of the dismissing applicant, and that the agreement is in the public interest. The parties, however, neglected to submit an itemized accounting of Community's expenses, as required by Section 73.3525(a)(5) of the Rules.²⁷ For this reason, Cornerstone urges the Commission to revoke its approval of the agreement and dismiss the Application.

We acknowledge that the Bureau staff should have requested that the parties submit documentation to support the claimed expenses and withheld its approval of the settlement until it received and reviewed the information. In the absence of actual documentation, there is no basis to

²³ Application conflicts which are not resolved through settlement or pursuant to a decisive Section 307(b) analysis are compared under an NCE point system, which is a simplified "paper hearing" process. See 47 U.S.C. § 307(b); 47 C.F.R. §§ 73.7002-73.7003. During the point system selection process the Commission staff reviews an applicant's point certifications and determines whether it qualifies for points as, *inter alia*, an established local applicant.

²⁴ See Hammock Articles of Organization at Section 2.01 (mandating that Hammock "shall be perpetually located in Palm Coast to assure it is a locally responsive organization"). If the Application were to be compared with other mutually exclusive applications under the point system, the staff would carefully review the Application to ensure Hammock supplied the requisite documentation to support its localism claim and would only award points if Hammock fully supported its claim. See 47 C.F.R. § 73.7003(b). The Commission rejects claims where an applicant certifies that it qualifies for points but fails to supply the requisite supporting information.

²⁵ 47 C.F.R. § 73.3525, which implements 47 U.S.C. § 311(c); see also *NCE Settlement PN*.

²⁶ Cornerstone further states that the Commission should also "possibly" reject the Hammock-JKJ and Hammock-Family settlement agreements. Cornerstone explains that it was unable to locate and review these settlements and therefore requests that the Commission set aside its approval of the settlements until copies have been made publicly available for inspection. The Bureau staff has confirmed that the Settlements are available for public viewing in the FCC reference room. Moreover, the staff previously reviewed the Settlements to ensure each complied with Section 73.3525 of the Rules. Accordingly, we deny this request.

²⁷ 47 C.F.R. § 73.3525(a)(5).

ascertain, pursuant to Section 73.3525(a) of the Rules, whether the claimed reimbursement exceeds Community's legitimate and prudent expenses. Although we find that this omission does not warrant the denial of the agreements and Application,²⁸ we find it necessary to defer action on the Application pending the submission and review of the requisite documentation, as discussed below. Moreover, we caution the parties to be diligent in ensuring any future settlements fully adhere to each pertinent requirement of the Rules.

Finally, the Hammock-Reach Settlement does not provide for the payment of monetary consideration to Reach. Rather, in consideration for the dismissal of its application, Reach has been granted an option to purchase the Hammock construction permit for fair market value. The option is exercisable by Reach beginning on the second anniversary of the grant of the permit, or upon the third anniversary if Hammock constructs and files a license application. Cornerstone surmises that Reach and Hammock will each be unduly enriched by the option agreement and therefore urges the Bureau to revoke its approval of the Settlement Agreement. Cornerstone does not clearly articulate the basis of its "undue enrichment" assertion. Rather, it hypothesizes, without support, that because there is no requirement that Hammock construct the station before selling, Hammock will receive consideration that "likely exceeds, by a substantial margin, the sum it could recover" and Reach will "clearly receive valuable consideration as it is unlikely Reach would prevail."²⁹

We disagree and find that the option agreement comports with the Commission's requirements. The option provides that the station will be purchased for "fair market value," a reasonable consideration.³⁰ The agreement does not contravene the Commission's prohibition against "white-knight" settlements.³¹ Moreover, if and when Reach elects to exercise the option, the parties must obtain Commission consent, and at that time, the Commission will review the qualifications of the parties and make a public interest finding before the proposed assignment can be consummated.

Strike Petition. Finally, we reject Hammock's contention that Cornerstone filed its Petition solely to stop or delay competition with its own stations, and the Petition therefore constitutes a "strike petition." In evaluating such allegations, we consider whether the petition was filed for the primary and substantial purpose of delay.³² The evidentiary standard is high and the charging party must make a strong showing of an improper purpose.³³ Hammock bases its allegation on: (1) its belief that the Cornerstone Petition is

²⁸ Except for the failure to document the expenses, the agreement complied with Section 73.3525 of the Rules.

²⁹ Cornerstone Petition at 9.

³⁰ According to the agreement, the fair market value of the station will be determined by averaging two appraisals made by two nationally recognized media brokers selected by Reach and Hammock.

³¹ In a prohibited "white-knight" settlement, a third party "steps into the shoes" of the surviving applicant and, upon grant of the construction permit, is immediately the permittee of the new station. *See Rebecca Radio of Marco*, Memorandum Opinion and Order, 5 FCC Rcd 937 (1990). This is not the case here. The Hammock-Reach option agreement provides that Reach, an applicant in this proceeding, must wait two to three years before exercising the option. *Compare George Borsari*, Letter, 22 FCC Rcd 13249 (2007) (finding that option in which a party must only await the grant of the permit before exercising the option violates Commission policy).

³² *See Radio Carrollton*, Memorandum Opinion and Order, 69 FCC 2d 1139 (1978), *recon. denied*, 72 FCC 2d 264 (1979).

³³ *Id.* at 1151-1152. In determining the primary purpose behind such a pleading, the Commission considers several factors: (1) statements by the petitioner's principals or officers admitting the obstructive purpose; (2) the withholding of information relevant to disposition of the requested issues; (3) the absence of any reasonable basis for the adverse

merely an “amalgamation of factual trivia, speculation, and disingenuous claptrap,”³⁴ and (2) a hearsay account of a conversation with the President of Cornerstone in which he allegedly admitted that the Petition was filed because they “don’t want another Christian broadcast station in this area.”³⁵

For the reasons set out above, we find that Hammock has failed to establish that Cornerstone's Petition is “disingenuous claptrap,” lacking any reasonable basis. Further, Hammock’s hearsay account³⁶ of Cornerstone’s alleged economic motivation for filing the Petition does not establish a *prima facie* case that Cornerstone filed the Petition for the sole purpose of delay.³⁷ Although we conclude that Cornerstone has failed to raise a substantial and material question of fact why the Application should not be granted, we find that its Petition is not so frivolous as to constitute a “strike” pleading.³⁸

Conclusion. Based on the evidence presented in the record, we find that Hammock is qualified to hold an NCE FM license and that grant of the Application is consistent with the public interest, convenience, and necessity. Nevertheless, we cannot, at this time, grant the subject Application. As explained above, in the Hammock-Community Settlement, the parties failed to submit an itemized accounting of Community’s expenses, as required by Section 73.3525(a)(5) of the Rules. Staff review of such information is necessary to ensure compliance with the Commission’s reimbursement restrictions. Accordingly, we direct Hammock to submit an itemization of Community’s expenses within 30 days of the date of this letter. Failure to respond within this time period may result in dismissal of the application for failure to prosecute pursuant to Section 73.3568 of the Commission’s Rules.³⁹ We will defer final processing of the Application pending receipt and review of this information.

Accordingly, IT IS ORDERED, That the Petition to Deny and Set Aside Approval of Settlement Agreements, filed by Cornerstone Broadcasting Corporation, IS GRANTED to the limited extent indicated, and IS DENIED in all other respects. IT IS FURTHER ORDERED, That Hammock shall, within 30 days of the date of this letter, file the requested information, and action on the Application of

allegations in the petition; (4) economic motivation indicating a delaying purpose; and (5) other conduct by the petitioner.

³⁴ Hammock Opposition at 3.

³⁵ *Id.* at 6.

³⁶ *See, e.g., Excellence in Education Network*, Memorandum Opinion and Order, 8 FCC Rcd 6269, 6272 n.9 (1993) (“an affidavit of a party attesting to another person's assertions ... is hearsay and as such has no probative value under Section 309(d) [of the Communications Act]”).

³⁷ *See, e.g., Utica Telephone Co.*, Memorandum Opinion and Order, 5 FCC Rcd 2791 (1990).

³⁸ *See, e.g., Hispanic Information and Telecommunications Network, Inc.*, Order on Reconsideration, 19 FCC Rcd 2829 (2004); *American Mobilphone, Inc.*, Order, 10 FCC Rcd 12,297 (1995).

³⁹ 47 C.F.R. § 73.3568.

Hammock Environmental and Educational Community Services, File No. BNPED-20071018ASP, for a new noncommercial educational FM station, IS DEFERRED pending receipt and review of this information.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau