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**In re: NCE October 2007 Window
MX Group Number 306**

New NCE(FM), Livingston, Alabama
Facility ID No. 172733
Greene/Sumter Enterprise Community
File No. BNPED-20071017AFJ

New NCE(FM), Livingston, Alabama
Facility ID No. 173317
The Board of Trustees of the University of Alabama
File No. BNPED-20071018AQC

**Petitions for Reconsideration
Request for Waiver**

Gentlemen:

We have before us a Petition for Reconsideration (“2010 G/S Petition”) filed by Greene/Sumter Enterprise Community (“G/S”) on May 13, 2010, directed against the staff’s dismissal of its application (the “G/S Application”) for a new noncommercial educational (“NCE”) FM station in Livingston, Alabama.¹ We also have before us a Request for Waiver (“G/S Waiver Request”) filed by G/S on May 13, 2010, which seeks waiver of the policy barring the grant of more than one application in an NCE MX Group that resulted in the dismissal of the G/S Application. Finally, we also have before us a Contingent Petition for Reconsideration and Reinstatement *Nunc Pro Tunc* (“University Petition”) filed by The Board of Trustees of the University of Alabama (“University”) on May 26, 2010, which requests that if the Commission reinstates the G/S Application, it also reinstate its application (the “University Application”).² For the reasons set forth below, we: (1) deny the 2010 G/S Petition; (2) deny the G/S Waiver Request; and (3) dismiss the University Petition as moot.

Background. G/S and University submitted their applications during a filing window for NCE FM applications in October 2007. The G/S and University Applications, along with two other applications filed

¹ *Catholic Radio Network, Inc.*, Letter, 25 FCC Rcd 4439 (MB 2010) (“*Staff Decision*”).

² On June 8, 2010, G/S filed a “Comment” on the University Petition, to which University filed a “Response” on June 22, 2010.

by Catholic Radio Network, Inc. (“CRN”) and International Religious and Cultural Exchange, were found to be mutually exclusive (“MX”) with each other and grouped into NCE MX Group 306.³ Pursuant to established procedures,⁴ the Bureau determined that the CRN Application was entitled to a dispositive preference under Section 307(b) of the Communications Act of 1934, as amended,⁵ and identified CRN as the tentative selectee in NCE MX Group 306.⁶ The tentative selection triggered a 30-day period for filing petitions to deny.

Although no party filed a petition to deny the CRN Application, G/S filed a Petition for Reconsideration (“2009 G/S Petition”) of the *2008 Fair Distribution Order*.⁷ G/S argued that its Application did not conflict with the CRN Application, and therefore its Application should be granted as well.⁸ In the G/S Reply, G/S conceded that the 2009 G/S Petition was premature and procedurally defective,⁹ but urged grant of either its application or the University Application in addition to the CRN Application.¹⁰ After the filing of the 2009 G/S Petition but prior to the submission of any pleadings in response to that Petition, the Bureau dismissed the University Application.¹¹ University filed a Petition for Reconsideration of this action, seeking reinstatement of its Application *nunc pro tunc* (“2009 University Petition”).¹² University also urged the Commission to grant its or the G/S Application in addition to the CRN Application.¹³

The *Staff Decision* dismissed the 2009 G/S Petition as premature, denied the 2009 University Petition, dismissed the G/S Application, and granted the CRN Application.¹⁴ The *Staff Decision* stated:

³ See *Media Bureau Identifies Groups of Mutually Exclusive Applications*, Public Notice, 23 FCC Rcd 9508 (MB 2008).

⁴ See 47 C.F.R. § 73.7002. See also *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Notice of Proposed Rule Making, 10 FCC Rcd 2877 (1995), *further rules proposed*, Further Notice of Proposed Rule Making, 13 FCC Rcd 21167 (1998), *rules adopted*, Report and Order, 15 FCC Rcd 7386 (2000) (“*NCE Comparative Order*”), *vacated in part on other grounds sub nom. National Public Radio v. FCC*, 254 F.3d 226 (D.C. Cir. 2001), *clarified*, Memorandum Opinion and Order, 16 FCC Rcd 5074 (“*NCE Comparative MO&O*”), *Erratum*, 16 FCC Rcd 10549, *recon. denied*, Memorandum Opinion and Second Order on Reconsideration, 17 FCC Rcd 13132 (2002), *aff’d sub nom. American Family Ass’n v. FCC*, 365 F.3d 1156 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 10004 (2004) (history pertaining only to non-reserved band FM channels omitted).

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 *Threshold Fair Distribution Analysis of 26 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in October 2007 Window*, Memorandum Opinion and Order, 23 FCC Rcd 17983, 17985, 17998 (MB 2008).

⁷ See 2009 G/S Petition, January 21, 2009.

⁸ See *generally id.* University filed an opposition to the 2009 G/S Petition on January 29, 2009, and CRN filed Comments on Petition for Reconsideration on February 9, 2009. G/S filed a reply to University’s opposition on February 9, 2009 (“G/S Reply”).

⁹ G/S Reply at 3.

¹⁰ *Id.* at 2, 5.

¹¹ *Broadcast Actions*, Public Notice, Report No. 46909 (Jan. 27, 2009) at 6, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-288090A1.pdf.

¹² University Petition for Reconsideration and Reinstatement *Nunc Pro Tunc* at 1, 5 (Feb. 26, 2009).

¹³ *Id.* at 4.

¹⁴ *Staff Decision*, 25 FCC Rcd at 4440.

In the *NCE Comparative MO&O*, the Commission considered a geographic-based processing proposal that would have sanctioned the tentative selection of more than one applicant in a mutually exclusive application group. The Commission rejected this proposal, noting that although it might be beneficial to select more than one applicant, doing so could potentially result in the selection of an inferior applicant as a secondary selectee. Instead, the Commission determined that the better approach would be to dismiss all non-selected applicants in a group, even if a particular application is not mutually exclusive with the primary selectee of the group.¹⁵

The *Staff Decision* also noted that, earlier this year, the Commission reiterated that only one application from each NCE MX Group would be granted and that the remaining applications, even if not mutually exclusive with the tentative selectee, should be dismissed (the “one grant per NCE MX Group policy”).¹⁶ The *Staff Decision* quoted the Commission, which directed the staff “to deny petitions for reconsideration based on the theory that the dismissed application is not mutually exclusive with the granted application.”¹⁷ For these reasons, the *Staff Decision* rejected the argument that either the University or the G/S Application should be granted based on its position in the mutual exclusive chain and the absence of any direct conflict with the tentative selectee.

G/S seeks reconsideration of the *Staff Decision* and dismissal of its Application. G/S argues that the current “one grant per NCE MX group policy” is unlawful and urges the Commission to revise its policy to permit additional grants.¹⁸ In its Waiver Request, G/S alternatively seeks waiver of this policy. G/S asserts that the concerns underlying this policy do not apply here because any additional grant would be to the next most superior applicant.¹⁹ In addition, G/S claims that it is “preferable to authorize more services, rather than fewer” and again attacks the Commission’s decision to adopt the “one grant per NCE MX group policy.”²⁰

In its Contingent Petition for Reconsideration and Reinstatement *Nunc Pro Tunc*, University supports G/S’s contention that additional grants “would better serve the public interest by allowing for a greater institution of NCE service.”²¹ However, University recognizes that “the Commission has previously considered these arguments and reached a different conclusion.”²² Should the Commission decide to

¹⁵ *Id.* at 4441–42 (MB 2010) (internal citations omitted).

¹⁶ *Staff Decision*, 25 FCC Rcd at 4442.

¹⁷ *Id.* (citing *Comparative Consideration of 59 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in the October 2007 Filing Window*, Memorandum Opinion and Order, 25 FCC Rcd 1681, 1716 (2010)).

¹⁸ 2010 G/S Petition at 5–9. G/S specifically proposes that the Commission (1) identify a single, overall best tentative selectee; (2) upon that selection becoming final, dismiss all applications directly in conflict with the selectee; (3) review the remaining applications to determine whether any additional tentative selectees are possible and, if so, select them; and (4) repeat this process as many times as necessary until the pool of eligible selectees is exhausted (“G/S Proposal”). *Id.* at 4–5.

¹⁹ G/S Waiver Request at 4.

²⁰ *See generally* G/S Waiver Request. G/S maintains that the “one grant per NCE MX group policy” undermines the public interest because it authorizes too few services, delays the institution of additional new service, and is too expensive for applicants.

²¹ University Petition at 2.

²² *Id.*

“reverse course,” University asks that, as a matter of fundamental fairness, we reinstate its application as well.²³

Discussion. 2010 G/S Petition. G/S argues that the Commission must revise its policy barring the grant of more than one application in a mutually exclusive group.²⁴ The G/S Proposal suggests a method for granting additional applications in a mutually exclusive group.²⁵ G/S’ criticisms of the current policy and its suggested revisions to that policy should be raised in a petition for rulemaking with the Commission, pursuant to Section 1.401 of the Rules.²⁶ The institution of a notice-and-comment rulemaking under the Administrative Procedure Act,²⁷ if warranted, would allow the Commission to develop a complete record from which it could make an informed determination regarding G/S’ proposals. Moreover, we note that the Commission determined, through notice-and-comment rulemaking procedures, that MX NCE applications “will be processed and assessed points to determine the tentative selectee for the particular channels,” and that all non-tentative selectee applications are to be dismissed and given the opportunity to be resubmitted during the next NCE filing window.²⁸ The Bureau is “bound by the decisions and guidelines set forth by the Commission”²⁹ and “has no authority to alter or depart from Commission precedent.”³⁰

G/S also argues that the “one grant per NCE MX group policy” is based on “weak authority” because “it did not evolve on a public record through A.P.A. notice-and-comment rule making”³¹ However, “it is well settled that an agency need not initiate a new notice-and-comment period as long as the rule it ultimately adopts is a ‘logical outgrowth’ of the initial notice.”³² The “one grant per NCE MX group policy” is unquestionably the “logical outgrowth” of the *NCE Comparative Proceeding*.³³ Moreover, we note that

²³ *Id.* at 3.

²⁴ 2010 G/S Petition at 10. G/S argues that the current method of “selection of a starting point to analyze a longitudinal daisy chain is “arbitrary” and results in “disparate treatment of applicants.” *Id.* at 3. Additionally, G/S argues that the staff’s “refusal to analyze MX groups for secondary grantees” is unlawful, citing *Ashbacker v. FCC*, 326 U.S. 327 (1945). 2010 G/S Petition at 5. G/S also states that the “danger of an inferior application being granted is illusory.” *Id.* at 7. G/S also maintains that “the cited factor [for determining tentative selectees] does not distinguish the situation from many others in the processing line” because there is “no rational basis to distinguish multiple grants created via settlement.” *Id.* at 8. Finally, G/S argues that the current analysis “accord[s] no weight to the Commission’s core mission to foster the larger and more effective use of radio.” *Id.* at 9.

²⁵ *See supra* n.18.

²⁶ 47 C.F.R. § 1.401. *See also Community Television of Southern California v. Gottfried*, 459 U.S. 498, 511 (1984) (citation omitted) (“rulemaking is generally a ‘better, fairer and more effective’ method of implementing a new industry-wide policy than is the uneven application of conditions in isolated proceedings”).

²⁷ 5 U.S.C. § 553.

²⁸ *Comparative MO&O* at 5104–05. *See also NCE Comparative Order* at 7386–88 (discussing the point system selection process).

²⁹ *RB Schools*, Letter, 21 FCC Rcd 6945, 6946 (MB 2006) (citing *WLDI, Inc.*, Order, 17 FCC Rcd 14750, 14752 (EB 2002)).

³⁰ *John F. Garziglia, Esq. and Arnold E. Martin, Esq.*, Letter, 22 FCC Rcd 8409, 8410 n.10 (MB 2007). G/S recognizes it has the opportunity to file for review with the full Commission,³⁰ but instead presents its case to the Bureau again “to make sure that staff has its chance to ponder [this case] in its entirety” 2010 G/S Petition at 2.

³¹ 2010 G/S Petition at 6.

³² *Crawford v. FCC*, 417 F.3d 1289, 1295 (D.C. Cir. 2005). Whether the “logical outgrowth” test is satisfied depends, in turn, on whether the affected party should have anticipated the agency’s final course in light of the initial notice. *Id.*

³³ *See, e.g., Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Further Notice of

G/S's proposed remedy – modifying procedures adopted through notice and comment by adjudicatory decision-making – would suffer from the same procedural defect about which it complains.

G/S Waiver Request. The Commission may grant a waiver for good cause shown.³⁴ A waiver is appropriate if (1) special circumstances warrant a deviation from the general rule, and (2) such deviation would better serve the public interest than would strict adherence to the rule.³⁵ Generally, the Commission may grant a waiver of its rules in a particular case only if the relief requested would not undermine the policy objective of the rule in question, and would otherwise serve the public interest.³⁶

G/S argues that grant of its Waiver Request would not result in the grant of an inferior application. G/S implies that, if its application is the next best application in NCE MX Group 306, grant of its Application will not undermine the policy objective of the rule. G/S ignores the fact that, in adopting the policy, the Commission cited not just concerns about granting an inferior application but also concerns about administrative efficiency. Specifically, the Commission stated: “We will process applications in a manner that will be most administratively efficient and that will be most likely to result in selection of the best qualified applicants as judged by the point system adopted in this proceeding.”³⁷ Implementation of G/S' proposal would vastly expand staff burdens by requiring multiple iterative comparative analyses of virtually all NCE MX groups. We conclude that the G/S Proposal, which would constitute a major change in the way NCE FM new station applications are processed, would be best considered under notice and comment procedures.

G/S contends that denial of the Waiver Request would “tend to thwart the growth of public broadcasting” could be made by many other applicants in other NCE MX Groups. G/S does not cite circumstances unique to its situation, instead citing the fact that it is a “local community service organization” and the fact that it would not be “faster” or “less expensive” for it to “purchase engineering again, to reapply, to analyze competitors, to attempt to negotiate settlements and to await the next point system decision.”³⁸ The previous selection method, however, involved lengthy, time-consuming, and expensive evidentiary hearings that were ultimately deemed “meaningless,” and used selection criteria considered arbitrary and capricious.³⁹ While G/S argues that as many applications as possible should be granted, the Commission has determined that awarding licenses in light of the quality, not the number, of eligible applicants best serves the public interest.⁴⁰ Additionally, G/S argues that “there is no language in [Section 73.7002] limiting [the selection process] to only one round of analysis.”⁴¹ However, Section

Proposed Rule Making, 13 FCC Rcd 21167, 21177 (1998) (“unlike lotteries, a point system would be designed to select the best qualified applicant, rather than leaving that selection to chance.”) By “teeing up” consideration of a system that would select the “best qualified applicant,” the Commission clearly announced that it was considering a licensing regime under which it would “dismiss all of the remaining applicants [in the group] and permit them to file again in the next filing window.” *Comparative MO&O*, 16 FCC Rcd at 5104.

³⁴ 47 C.F.R. § 1.3. See also *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1166 (D.C. Cir. 1990).

³⁵ *Id.* at 1166.

³⁶ *WAIT Radio*, 418 F.2d at 1157.

³⁷ *Comparative MO&O*, 16 FCC Rcd at 5104–05.

³⁸ Waiver Request at 5.

³⁹ *Comparative MO&O* at 5075.

⁴⁰ See 74 C.F.R. § 73.7003(a), (c); *NCE Comparative Order* at 7386; *Comparative MO&O* at 5105.

⁴¹ *Id.* at 5076.

73.7003 clearly lays out point system selection procedures that instruct the Commission to perform only one round of analysis.⁴²

In sum, NCE MX Group 306 underwent the same examination to determine a tentative selectee as its fellow groups.⁴³ The composition of NCE MX Group 306 does not differ in any unique way from other NCE MX groups. G/S presents no special circumstances that warrant a waiver, and fails to show that deviation from the “one grant per NCE MX Group” policy would better serve the public interest than strict adherence to the Commission’s rules and policies.

University Petition. University requested that, if we granted the 2010 G/S Petition and reinstated the G/S Application, we reinstate its Application “as a matter of fundamental fairness.” Because we deny the G/S Petition, we will dismiss the University Petition as moot.⁴⁴

Conclusion/Action. Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed by on May 13, 2010 by Greene/Sumter Enterprise Community IS DENIED.

IT IS FURTHER ORDERED that the Request for Waiver filed May 13, 2010, by Greene/Sumter Enterprise Community IS DENIED.

IT IS FURTHER ORDERED that the Contingent Petition for Reconsideration *Nunc Pro Tunc* filed May 26, 2010, by the Board of Trustees of the University of Alabama IS DISMISSED as moot.

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau

cc: Greene/Sumter Enterprise Community
The Board of Trustees of the University of Alabama

⁴² 47 C.F.R. § 73.7003 (“If timely filed applications for reserved FM channels . . . are determined to be mutually exclusive, *applications will be processed and assessed points to determine the tentative selectee for the particular channels . . .*” (emphasis supplied)).

⁴³ 47 C.F.R. § 73.7002.

⁴⁴ Additionally, G/S presented an addendum to the University Petition. However, since we are dismissing the University Petition as moot, we need not address the contents of the Comment.