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RE: New Noncommercial Educational FM
Ranchos de Taos, New Mexico
File No. BNPED-20071016AJM
Facility ID 173334
NCE Group 388
Petition to Deny

Dear Counsel:

We have before us a Petition to Deny (“Petition”) by the Board of Regents of New Mexico Highlands University (“Regents”) which contests the Media Bureau’s (“Bureau”) tentative selection of Cultural Energy (“CE”) to receive a construction permit for a new noncommercial education (“NCE”) FM station at Ranchos de Taos, New Mexico. Regents argues: (1) that the Bureau’s dismissal of Regents’ mutually exclusive application was prejudiced by an allegedly abusive filing by CE; and (2) that under a Longley-Rice analysis, CE would not qualify for the preference which led to CE’s selection. For the reasons set forth below, we affirm our selection of CE and grant the application.

Background. CE’s proposal to construct a new station at Ranchos de Taos, New Mexico was mutually exclusive with Regents’ application to construct a new station at Espanola, New Mexico. Their applications, along with several others, were designated as NCE Group 388, and analyzed in a December 15, 2009, Bureau Order.¹ The Bureau tentatively selected CE on the principle of “fair distribution of service.”² An NCE FM applicant is eligible to receive a fair

¹ *Threshold Fair Distribution Analysis of 22 Groups*, Memorandum Opinion and Order, 24 FCC Rcd 14531 (MB 2009) (“Order”).

² Specifically, when conflicting applications propose service to different communities, the Bureau undertakes a threshold analysis pursuant to Section 307(b) of the Communications Act of 1934 as amended *See* 47 U.S.C. § 307(b). If more than one applicant is eligible for a preference, the Bureau considers whether any would provide a first NCE aural service to at least 5,000 more potential listeners than the next best proposal for a different community. 47 C.F.R. § 73.7002(b). If that first step is not decisive, the Bureau considers aggregated first and second service and applies the same 5,000-person differential. *Id.*

distribution preference if it would provide, within the proposed station's 60 dBu contour, a first or second reserved band channel NCE aural service to at least ten percent of the population (in the aggregate), provided that the population served is at least 2,000 people.³

Several applicants in Group 388, including CE and Regents, claimed fair distribution preferences. Regents' first service claim was the largest, but the Bureau found the claim defective because Regents had failed to consider outstanding authorizations for other NCE stations.⁴ Regents' proposal, in fact, would have provided no first service at all and it was therefore eliminated. CE had raised identical concerns about Regents' proposal in a July 23, 2008, document styled as an informal objection ("Objection"), but the Order made no mention of that filing. CE was chosen as tentative selectee, and Regents filed its timely Petition.

Discussion. To assess the merits of a petition to deny, a two-step analysis is required.⁵ First, the petition must make specific allegations of fact sufficient to demonstrate that the petitioner is a party in interest and that grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity.⁶ If the petition meets this threshold requirement, the Bureau examines 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.⁷ If no such question is raised, the Bureau will deny the petition and grant the application if it concludes that such grant otherwise serves the public interest, convenience, and necessity.

CE's Alleged Role in the Bureau's Rejection of Regents' Fair Distribution Claim. Regents believes that it would have been named tentative selectee if not for CE's Objection, which Regents considers an abusive and disqualifying filing. Regents' argument turns on whether CE "misrepresented" its filing as an objection when, in Regents' view, the filing was a "disguised" petition to deny.⁸ Regents contends that CE impermissibly filed the Objection at a time when such a filing might prejudice the Bureau's comparative analysis, in conflict with Section 73.7004(a) of the Rules which specifies that NCE petitions to deny are to be filed following public notice of a tentative selection.⁹

We find that Regents fails to make a *prima facie* case that abuse by CE or prejudice by the Bureau led to dismissal of Regents' application.¹⁰ Our Rules explicitly permit the filing of

³ See 47 C.F.R. § 73.7002(b).

⁴ *Id.* at 14538.

⁵ See *Astroline Communications Co. v. FCC*, 857 F. 2d 1556, 1561 (D.C. Cir. 1988).

⁶ *Id.*

⁷ 47 U.S.C. § 309(d)(2).

⁸ Petition at i and 5.

⁹ 47 C.F.R. § 73.7004(a). See also 47 C.F.R. § 73.3584(a).

¹⁰ Its arguments rest entirely on negative inferences drawn from the timing and title of a CE filing and from the Bureau's silence as to that pleading's existence. Although Regents cites many cases which set forth Commission standards for misrepresentation and lack of candor, Regents has not shown any such misconduct by CE. See, e.g. *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946); *Contemporary Media v. FCC*, 214

informal objections at any time prior to application grant and, thus, the mere timing of an objection does not indicate any abuse on the part of the objector.¹¹ Nor can the Bureau be considered prejudiced by receipt of a permissible filing. Although it is true that the Bureau generally does not begin to review oppositional pleadings in NCE comparative proceedings until a tentative selectee is announced, the reason for that practice is unrelated to potential prejudice. Rather, as Regents acknowledges, it would simply be wasteful and inefficient to consider arguments against non-prevailing applicants.¹²

Moreover, CE's Objection played no role in the Bureau's decision. Regents was eliminated pursuant to procedures that the Bureau routinely follows in NCE cases that are potentially resolved on fair distribution principles. Specifically, the Bureau independently verifies that potentially decisive fair distribution claims are reasonable by ruling out any large or obvious applicant errors.¹³ In this case, Regents' claim was based on a large, readily apparent applicant error. Thus, it is not surprising that the Bureau, without considering or mentioning CE's Objection, discovered the same error as CE. Regents makes no argument that its original claim was accurate and contests only the manner in which it believes the Bureau learned of the flaw. Accordingly, we reject Regents' arguments that CE lacked candor and that Regents was prejudiced by the timing of the filing of the CE Objection.

CE's Fair Distribution Claim. All applicants in Group 388 correctly relied on the standard signal coverage methodology as set forth in Section 73.313 of our Rules,¹⁴ to compute their fair distribution claims. This methodology requires applicants to use a field strength chart based on average terrain.¹⁵ Although this method does not replicate coverage exactly,¹⁶ it provides a uniform method of calculation that is sufficiently accurate for most licensing purposes.

F.3d 187 (D.C. Cir. 2000); *San Francisco Unified School District*, 19 FCC Rcd 13326 (2004); *Fox Television Stations, Inc.*, 10 FCC Rcd 8452 (1995); *Fox River Broadcasting, Inc.*, 93 FCC 2d 127 (1983).

¹¹ See 47 C.F.R. § 73.3587. See, e.g., *Order*, 24 FCC Rcd at 14537 (prematurely-filed "Petition to Dismiss" in another group not considered but would be held in abeyance for later consideration as an informal objection in the event that the filing party did not submit a petition to deny).

¹² Petition at 4.

¹³ In this manner, the Bureau maintains the efficiency as well as integrity of the process by accepting most certifications at face value, while giving no credence to patent errors by potential selectees. Finer flaws or other problems with a tentative selectee's Section 307(b) claim can be brought to our attention in the petition to deny process. Regents' position that the Bureau should have named Regents tentative selectee based on its overstated and flawed fair distribution claim is contrary to the Commission's non-reliance upon overstated NCE fair distribution claims in comparative analyses. E.g., *Comparative Consideration of 32 Groups*, Memorandum Opinion and Order, 25 FCC Rcd 5013, 5010, 5022, 5034 (2010).

¹⁴ See 47 C.F.R. § 73.313. See also FCC Form 340, Instructions, Section III, Questions 1 and 2. NCE applicants also use the standard procedures to predict whether a proposed station's contours would overlap the contours of co-owned stations for purposes of claiming NCE points for local diversity of ownership.

¹⁵ See 47 C.F.R. § 73.333, Figure 1.

¹⁶ Because of the limited length (3 to 16 kilometers) of the radials used to determine antenna height above average terrain, the Commission's standard propagation methodology does not accurately account for all terrain effects. See *1998 Biennial Regulatory Review, Streamlining of Radio Technical Rules*, Notice of Proposed Rulemaking, 13 FCC Rcd 14849, 14863 (1998), subsequent history omitted.

Pursuant to this standard method, CE claimed that it would provide a first NCE aural service to 10,287 people, which is 11.4 percent of the overall 90,523 people it proposed to serve. CE's claim, therefore, satisfied a 10 percent/2,000 person threshold required for receipt of the fair distribution preference based on first NCE service.¹⁷

In contrast, Regents urges the Commission to recalculate CE's proposed coverage using a non-standard propagation model known as Longley-Rice, which is designed to account for irregular terrain.¹⁸ Regents argues that there is "extreme terrain" within CE's proposed service area and submits a supporting 8-page engineering study. Under the Regents Longley-Rice analysis, CE would provide a first service to only 5,685 people, which is substantially less than 10 percent of 122,688 people in the revised service area put forth by Regents, and therefore below the threshold needed to qualify for a fair distribution preference based on first NCE service.¹⁹

We find that it would be inappropriate to permit objectors to use alternate propagation models to negate a comparative fair distribution preference for which an NCE applicant would otherwise qualify and therefore reject Regents' attempt to do so here. In reaching this conclusion, we are guided by the Commission's decision to bar the use of alternate showings in circumstances when an applicant relies on the standard prediction methodology to demonstrate compliance with service coverage rules.²⁰ Moreover, we note that the Commission has never countenanced the use of alternate propagation models to resolve comparative claims of mutually exclusive NCE applicants.

¹⁷ See 47 C.F.R. § 73.7002(b).

¹⁸ The Longley-Rice method is an irregular terrain model named for Anita Longley & Phil Rice, who devised the model in 1968. See Longley, A.G. and Rice, P.L., *Prediction of Tropospheric Radio Transmission Loss Over Irregular Terrain, A Computer Method—1968*, ESSA Technical Report ERL 79–ITS 67, Institute for Telecommunications Sciences (1968). It predicts radio field strength based on the elevation of terrain between the transmitter and specific reception points. Its algorithm and source code are maintained by the Institute for Telecommunications Sciences, National Telecommunications Information Administration of the U.S Department of Commerce at <http://flattop.its.bldrdoc.gov/itm.html>. See also OET Bulletin No. 69, *Longley-Rice Methodology for Evaluating TV Coverage and Interference* (2004) available at <http://www.fcc.gov/oet/info/documents/bulletins/#69>.

¹⁹ We note that first service was only partially decisive. The group was resolved on the applicants' aggregated first and second service claims. CE claimed that it would provide aggregated first and second NCE service to a population of 47,006, which is 52 percent of the 60 dBu service contour population. Although Regents' Longley-Rice computations acknowledge that CE would provide cognizable first and second NCE service in the aggregate, the smaller first service claim would arguably eliminate CE before that stage of analysis.

²⁰ See, *Shaw Communications, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 5852, 5853 (2009) (not considering a Longley-Rice study in a petition to deny that sought to question the coverage of an FM station). See also *Lee G. Petro Esq.*, Letter, 25 FCC Rcd. 4486 (MB 2010) (rejecting petitioner's non-*prima facie* case for use of Longley-Rice method); *Lee Shubert, Esq.*, Letter, 10 FCC Rcd 3159, 3160 (MMB 1995) (rejecting attempt to use Longley-Rice calculations to disqualify an applicant that had demonstrated compliance with the multiple ownership rules using the Commission's standard calculation methods).

Permitting the use of Longley-Rice studies in an NCE comparative context would be especially inappropriate. The Commission has crafted a streamlined and simplified NCE comparative process because NCE entities can least afford complex undertakings.²¹ Supplemental analyses such as Longley-Rice, however, are “inherently more complex than the standard contour prediction method and the underlying assumptions are often open to varying interpretations.”²² Relying on Longley-Rice showings for some, but not all applicants, would also be inconsistent with the Commission’s desire for uniform standards of NCE comparison.²³ In establishing fair distribution standards, the Commission stated “of overall concern to us in this area is that we are comparing applications that use the same data.”²⁴ Thus, the population component of NCE fair distribution analyses is calculated as it existed on the snap-shot date of application, although it might be more accurate to require updates in response to new census data and population shifts. Similarly, although consideration of actual terrain can be more accurate than standard assumptions, any perceived benefit would be outweighed by the resulting comparison of “apples to oranges” among applications using different methods. For example, the analysis put forth by Regents applies a Longley-Rice analysis only to CE’s application and asks us to compare that data to standard computations for Regents and other applicants.²⁵ Accordingly, we conclude that Regents’ Petition provides no basis for reconsidering our selection of CE on fair distribution principles.

Ordering Clause. Accordingly, the Petition to Deny by the Board of Regents of New Mexico Highlands University IS DENIED and its application for a new station at Espanola, New Mexico (File No. BNPED-20071019AFT) IS DISMISSED. The application of Cultural

²¹ See *Reexamination of Comparative Standards*, Report and Order, 15 FCC Rcd 7386, 7389, 7423 (2000) (subsequent history omitted).

²² See *Amendment of Parts 73 and 74 of the Commission’s Rules to Permit Certain Minor Changes in Broadcast Facilities Without a Construction Permit*, Report and Order, 12 FCC Rcd 12371, 12403 (1997) (applicants are “not required to provide a supplemental analysis if the contour as predicted by the standard contour prediction method covers the community of license. . . .”).

²³ We note that the Media Bureau has allowed applicants to reserve certain non-reserved-band channels for NCE purposes by using alternative propagation methods in Section 307(b) showings, but only after providing an opportunity for notice and comment, and developing a process to ensure that any applicant seeking to use the channel at issue would be subject to the same standards. See *Amendment of Section 73.202(B), Table of Allotments, FM Broadcast Stations (Hemet, California)*, Notice of Proposed Rulemaking, 22 FCC Rcd 10311 (MB 2007); Report and Order, 22 FCC Rcd 19296 (2007).

²⁴ See *Reexamination of Comparative Standards*, Report and Order, Memorandum Opinion and Order, 16 FCC Rcd 5074, 5083 (2001) (subsequent history omitted).

²⁵ See *Lee G. Petro, Esq.*, Letter, 25 FCC Rcd 14362 (MB 2010) (Media Bureau makes independent evaluation of fair distribution claims to ensure valid “apples-to-apples” comparison between competing applicants).

Energy for a new station at Ranchos de Taos, New Mexico (File No. BNPED-20071016AJM) IS GRANTED conditioned upon compliance with Section 73.7002(c), which sets forth a period of four years of on-air operations substantially as proposed.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau