



**Federal Communications Commission
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In Reply Refer To:
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In re: New NCE(FM), Chehalis, Washington
Facility ID No. 173822
The KBOO Foundation
File No. BNPED-20071019ARU

Petition to Deny

Counsel:

We have before us the referenced application filed by The KBOO Foundation ("KBOO") for a new, noncommercial educational ("NCE") FM station at Chehalis, Washington. We also have before us: (1) a Petition to Deny the KBOO application ("Petition"), filed by Chehalis Valley Educational Foundation ("CVEF") on January 7, 2011; (2) an Opposition to Petition to Deny filed by KBOO on January 19, 2011; and (3) a Reply to Opposition to Petition to Deny filed by CVEF on February 2, 2011. For the reasons set forth below, we deny the Petition and grant KBOO's application.

Background. Both KBOO and CVEF filed applications in the October 2007 NCE FM filing window.¹ Their applications were mutually exclusive ("MX") with 15 others and were designated NCE MX Group 543.² On November 24, 2008, KBOO amended its application ("November 2008

¹ *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 6726 (MB 2007).

² *See Comparative Consideration of 24 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 25 FCC Rcd 12887 (2010) ("Comparative Consideration Order").

Amendment”) to reflect a greater than 50 percent change in its governing board (“Board”), which is generally considered a “major change” prohibited by Section 73.3573 of the Commission’s Rules (“Rules”).³ The November 2008 Amendment asked the Commission to waive the Rule in this case as it did in the 2007 *Omnibus Order*.⁴ Specifically, that Order waived the major change rule for “similarly situated” applications that had experienced “routine and inevitable changes in their boards” over a very long period during which they were pending due to judicial challenges to the new NCE comparative procedures.⁵

On September 2, 2010, the *Comparative Consideration Order* dismissed both referenced applications.⁶ A November 2, 2010, Public Notice published KBOO’s application’s dismissal.⁷ On December 2, 2010, KBOO filed a petition for reconsideration of the dismissal, and amended its application pursuant to a settlement agreement that would allow its application to be grantable as a singleton (“December 2010 Amendment”). The Commission granted the petition and reinstated KBOO’s application by Public Notice on December 8, 2010, pending a 30-day petition to deny period.⁸ CVEF timely filed its Petition on January 7, 2011.

The Petition alleges that a Section 73.3573 waiver is not warranted because KBOO’s application is not “similarly situated” to those addressed in the *Omnibus Order*.⁹ CVEF argues that entities eligible for waiver pursuant to the *Omnibus Order* must have experienced Board turnover gradually during a lengthy period of time and that the application must be “several years old.”¹⁰ Here, CVEF avers that KBOO’s first turnover occurred relatively suddenly, about a year after the application was filed, and KBOO’s application is not nearly as old as the applications at issue in the *Omnibus Order*.¹¹

³ 47 C.F.R. § 73.3573(a)(1), stating, “A major change in ownership is any change where the original party or parties to the application do not retain more than 50 percent ownership interest in the application as originally filed.” Major changes are not acceptable outside the filing window. See 47 C.F.R. § 73.3573(b)(3).

⁴ *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, 6125 (2007) rescinded, in part, by *Indiana Community Radio Corp.*, Memorandum Opinion and Order, 23 FCC Rcd 10963 (MB 2008) (“*Omnibus Order*”).

⁵ *Id.* at 6125. See also Opposition at 2 and at Attachment 1.

⁶ *Comparative Consideration Order*, 25 FCC Rcd at 12909-10.

⁷ *Broadcast Actions*, Public Notice, Report No. 47354 (MB 2010).

⁸ *Broadcast Applications*, Public Notice, Report No. 27378 (MB 2010).

⁹ Petition at 2-4.

¹⁰ *Id.*

¹¹ *Id.*

In opposition, KBOO states that the Board turnover was gradual because it did not occur at one single time.¹² Moreover, it claims that the changes were: (1) routine, as all the Board additions were in accordance with the bylaws;¹³ and (2) did not alter the nature of the organization or break continuity of control.¹⁴

CVEF also alleges that the December 2010 Amendment suffers from a fatal certification defect¹⁵ because it was not signed by an officer of the corporation.¹⁶ In response, KBOO avers that the signatory was an officer at the time, and it submitted a corrective amendment on January 19, 2011, with the list of current Board members (“January 2011 Amendment”).¹⁷ The January 2011 Amendment also reflects another major change and includes a similar request for waiver of Section 73.3573 of the Rules.¹⁸

Discussion. Pursuant to Section 309(d) of the Communications Act of 1934, as amended (“Act”), a petition to deny must provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with Section 309(a) of the Act.¹⁹ We find that the Petition fails to present specific factual allegations sufficient to meet this standard.

Waiver Requests. Pursuant to Section 73.3573 of the Rules, a 50 percent change in the governing board of an NCE applicant is generally considered a “major change” not permissible outside a filing window.²⁰ The *Omnibus Order* waived this Rule for a specific class of applications based on special circumstances applicable to that class. The class consisted of those applications pending for a substantial period while parties litigated the merits of the new NCE-FM points hearing system.²¹ Although KBOO’s application is not part of this class, KBOO argues that the same special circumstances are present here, including major Board changes that were “gradual,” “routine” and “inevitable” during a lengthy period.²²

¹² Opposition at 3.

¹³ Reply at 4.

¹⁴ *Id.*

¹⁵ Petition at 6. It also alleges that the November 2008 Amendment is defective because it was signed and certified more than two years prior to the submission date. Petition at 5. In response, KBOO claims that the outdated certification claim is a nonissue because CVEF misread the submission date of the November 2008 Application. Opposition at 6, n.24. It is clear that CVEF’s allegation was erroneous, as the November 2008 Amendment was submitted, signed, and certified in 2008. The signature could not have been two years old. We thus reject this argument.

¹⁶ Petition at 5-6.

¹⁷ Opposition at 5-6.

¹⁸ The January 2011 Amendment shows that the KBOO Board lost eight members and gained seven, a 70 percent change during about a year’s time.

¹⁹ See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff’d sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *rehearing denied* (Sept. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (petitions to deny must contain adequate and specific factual allegations sufficient to warrant the relief requested).

²⁰ See 47 C.F.R. § 73.3573.

²¹ See *Omnibus Order*, 22 FCC Rcd at 6125.

²² *Id.*

We disagree. First, KBOO's application has been pending for about four years, a considerably shorter period of time than the ten years during which many of the applications in the *Omnibus Order* were pending.²³ In addition, we disagree with KBOO's assertion that their Board changes were gradual in the sense contemplated by the *Omnibus Order*. In the *Omnibus Order*, the term gradual was augmented by the phrase "over long periods."²⁴ While gradual change can arguably occur over one year, the changes at issue here did not occur over a long period. The November 2008 Amendment revealed that, over the course of the year after KBOO filed its original application, its 12-member board had acquired six new board members and lost seven, a 55 percent change. Likewise, KBOO's January 2011 Amendment shows that KBOO lost eight members and gained seven, a 70 percent change during about a year's time. Thus, we do not find here the same special circumstances as in the *Omnibus Order*.

However, the Commission may grant a waiver for good cause shown.²⁵ 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.²⁶ 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.²⁷ We find that special circumstances and good cause merit a waiver in this case.

The purpose of Section 73.3573(a)(1) of the Rules is to ensure that, upon close of the filing window, the applicant maintains its organizational characteristics while the staff evaluates the application's merits. We find that KBOO has proven that at no one time since the application's filing have Board changes disrupted continuity of organizational operations because they occurred incrementally over time and in accordance with its bylaws.²⁸ We agree that these types of changes do not alter the nature of the organization or break continuity of control. In the licensee context, we have acknowledged such changes to be gradual as long as they do not occur at once or as a result of a dramatic

²³ The cases KBOO cites in support are inapposite, as each involves applications pending for at least nine years. See *State of Oregon Acting by and Through the State Board of Higher Education for the Benefit of Southern Oregon University*, Letter, 22 FCC Rcd 17643 (MB 2007) (application pending nine years); *Thomas Aquinas School*, Letter, 22 FCC Rcd 15651 (MB 2007) (application pending for 12 years). See also *Eagle's Nest Fellowship Church*, Letter, 23 FCC Rcd 862 (MB 2008) (application pending ten years).

²⁴ *Omnibus Order*, 22 FCC Rcd at 6125.

²⁵ See 47 C.F.R. § 1.3. See also *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) ("*WAIT Radio*"); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1166 (D.C. Cir. 1990).

²⁶ *WAIT Radio* 418 F.2d at 1166.

²⁷ *Id.* at 1157.

²⁸ KBOO submitted with its Opposition a copy of its bylaws and a detailed account of which Board members were elected, appointed, removed, quit, or were rendered ineligible and when those events occurred. The records corroborate KBOO's claims that 50 percent of the Board was not replaced at any one time. Opposition at Exhibit 1.

coup.²⁹ We also note the special circumstances of this case. By virtue of the settlement agreement, KBOO's application is, procedurally, uniquely positioned for a grant because as a singleton it would not preclude grant of another application in the MX Group.

Certification Defects. CVEF argues that the December 2010 Amendment suffers from certification defects, a violation of Section 73.3513 of the Rules, which requires corporations' applications to be signed by an officer.³⁰ Specifically, CVEF alleges that the December 2010 Amendment was signed by Kurt Lauer, who does not appear in either the November or December Amendment as an officer of the corporation. KBOO avers that it did not violate Section 73.3513 because Mr. Lauer was an officer at the time of the December 2010 Amendment. KBOO had failed to update the December 2010 Amendment's list of Board members. It filed the January 2011 Amendment to correct this oversight. Accordingly, we find no certification defect.

Section 1.65 Violation. CVEF alleges that KBOO's failure to update its application to reflect the January 2011 Amendment Board changes is a violation of Section 1.65 of the Rules, which requires applicants to submit an amendment within 30 days of when the information in the pending application is no longer substantially accurate and complete in all significant respects.³¹ Only deliberate misrepresentations are disqualifying.³² While KBOO concedes that it inadvertently neglected to amend its application to report its latest ownership change, we find that this omission is not disqualifying. Section 1.65 violations are potentially disqualifying only if an applicant intends to conceal information or if omissions of reportable information are so numerous and serious as to undermine the applicant's basic qualifications.³³ CVEF has submitted no evidence that KBOO intentionally concealed its ownership change or had any motive to do so. Further, we note that the January 2011 Amendment updated KBOO's ownership information and thus, remedied any deficiencies.

Conclusion. Accordingly, IT IS ORDERED, that the January 7, 2011, Petition to Deny filed by Chehalis Valley Educational Foundation, IS DENIED.

²⁹ Compare *Ocean Pines LPB Broadcast Corp.*, Initial Decision, 4 FCC Rcd 7767 (ALJ 1989) (finding nonprofit applicant had violated Section 73.3573 of the Rules with an abrupt major board change), and *Fatima Response, Inc.*, Letter, 21 FCC Rcd 11711 (MB 2006) (finding nonprofit applicant had violated Section 73.3573 of the Rules when 100 percent of board members changed), with *Center for Study of Black Economic Development*, Initial Decision, 8 FCC Rcd 2116 (ALJ 1993) (finding majority board turnover to be "evolutionary"), citing *Storer Communications, Inc. v. FCC*, 763 F.2d 436, 442 (D.C. Cir. 1985) and *Transfer Of Control Of Certain Licensed Non-Stock Entities*, 4 FCC Rcd 3403, 3405 (1989). See also *Texas Educational Broadcasting Co-operative*, Memorandum Opinion and Order and Notice of Apparent Liability, 22 FCC Rcd 13038 (MB 2007) (discounting alleged violation of Section 73.3527 of the Rules on the basis that incremental transfers of control will not necessarily change the nature of the organization or break continuity of control).

³⁰ 47 C.F.R. § 73.3513.

³¹ 47 C.F.R. § 1.65.

³² *Contemporary Media, Inc., v. FCC*, 214 F.3d 187, 196 (D.C. Cir. 2000).

³³ 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). Intentional deceit reflects upon an applicant's basic qualifications, and "the fact of concealment may be more significant than the facts concealed." See *Character Qualifications*, Report, Order and Policy Statement, 102 FCC 2d 1179, 1210, n.77 (1986) (quoting *FCC v. WOKO, Inc.*, 329 U.S. 223, 227 (1946)). Intention can be inferred from motive. See, e.g., *RKO General, Inc.*, Decision, 4 FCC Rcd 4679, 4684 (Rev. Bd. 1989).

IT IS FURTHER ORDERED, that the waiver requests of The KBOO Foundation ARE GRANTED, and the application for a new noncommercial educational FM station at Chehalis, Washington (File No. BNPED-20071019ARU) filed by The KBOO Foundation, IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Mr. Kurt Lauer, The KBOO Foundation
Mr. Cameron Beierle, Chehalis Valley Educational Foundation