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In re: **NCE MX Group 542**

New NCE(FM), Middlebury, Vermont
Vermont Public Radio
Facility ID No. 174747
File No. BNPED-20071018BDU

Petition to Deny

New NCE(FM), Rome, New York
Family Rosary Radio
Facility ID No. 171733
File No. BNPED-20071022AVJ

New NCE(FM), Boonville, New York

Mars Hill Broadcasting Co., Inc.

Facility ID No. 174416

File No. BNPED-20071022AKS

New NCE(FM), Old Forge, New York

Northeast Gospel Broadcasting, Inc.

Facility ID No. 172537

File No. BNPED-20071012ABI

New NCE(FM), Prospect, New York

State University of New York

Facility ID No. 175803

File No. BNPED-20071018AES

Joint Petition for Reconsideration

Dear Applicants:

We have before us: (1) the referenced application of Vermont Public Radio (“VPR”) for a new noncommercial educational (“NCE”) FM station to operate on Channel 206 at Middlebury, Vermont (the “VPR Middlebury Application”);¹ (2) the referenced application of Family Rosary Radio (“Family”) for a new NCE FM station also to operate on Channel 206 at Rome, New York (the “Family Application”); (3) a Petition to Deny (the “Petition”) the VPR Middlebury Application filed on November 29, 2010, by Family;² and (4) a Joint Petition for Reconsideration (the “Joint Petition”) filed on January 10, 2011, by Family, Mars Hill Broadcasting Co., Inc. (“Mars”) and Northeast Gospel Broadcasting, Inc. (“NGB”) directed against the Media Bureau’s (the “Bureau”) dismissal of the referenced applications of Mars, NGB, and State University of New York (“SUNY”).³ For the reasons set forth below, we deny the Petition; grant the Joint Petition to the extent indicated and dismiss it in all other respects; grant the VPR Middlebury Application; and dismiss the Family Application.

Background. VPR and Family submitted their applications during the October 2007 NCE filing window. On October 9, 2008, the Bureau issued a Public Notice that grouped these and 22 other applications⁴ into NCE MX Group 542.⁵ Pursuant to established procedures,⁶ on October 28, 2010, the

¹ We note that VPR also filed applications during the 2007 filing window for new NCE stations to operate on Channels 202, 205, 207, 211, 213, 215, and 216 in Vermont.

² VPR filed an Opposition on December 13, 2010.

³ Although the Joint Petition references in its caption the SUNY application, SUNY does not appear to be a signatory to the pleading.

⁴ VPR (File Nos. BNPED-20071018BBU, 20071018BCA, 20071018BCH, and 20071018BDR), NGB (File No. BNPED-20071012ABI), SUNY (File No. BNPED-20071018AES), Mars (File No. BNPED-20071022AKS), Foothills Public Radio, Inc. (File No. BNPED-20071022BVI), Ho.ly, Inc. (File Nos. BNPED-20071022ANW and 20071022ANY), Bangor Baptist Church (File No. BNPED-20071012AKC), Christian Ministries, Inc. (File Nos. BNPED-20071012ASX and 20071012ASZ), Wilbur Gospel Communications and Foundation (File No. BNPED-20071015AEZ), Onion River Community Access Media, Inc. (File No. BNPED-20071017AJV), Radio America Media, Corp. (File No. BNPED-20071018AJQ), David Coddette, Board of Trustees, Vermont State College (File No. BMJPED-20071019ACQ), Bridgebuilders International Leadership Network (File No. BNPED-20071019ANA), WAMC (File No. BNPED-20071019ATB), Champlain Music Appreciation Study, Inc. (File No. BNPED-20071022ANH), Bristol Radio, Inc. (File No. BNPED-20071022BAU), and NC Friends Broadcasting, Inc. (File No. BNPED-20071022BOL). Each of these applications was dismissed by the staff on December 6, 2010. *See Broadcast Actions*, Public Notice, Report No. 47379 (rel. Dec. 9, 2010).

Bureau identified VPR as the tentative selectee in NCE MX Group 542, accepted the VPR Middlebury Application for filing, and set a 30-day period for filing petitions to deny.⁷ Family timely filed its Petition on November 29, 2010.

The VPR Middlebury Application was tentatively selected because it would provide a combined first and second NCE service to 46,746 people.⁸ The VPR Middlebury Application would provide new NCE service to at least 5,000 more people than each of the proposals in NCE MX Group 542 to serve other communities, thus giving VPR a dispositive fair distribution preference under Section 307(b) of the Communications Act of 1934, as amended (the “Act”).⁹ Subsequent to the filing of the VPR Middlebury Application, VPR received a construction permit from the 2007 filing window for a new NCE station to serve Middlebury, Vermont, on Channel 211. This station is now operating as WOXM(FM).¹⁰

In its Petition,¹¹ Family argues that because WOXM(FM) provides new NCE service to the same community of license proposed to be served by the VPR Middlebury Application, that application is not eligible for a fair distribution preference and should be evaluated under a point system analysis.¹² Supported by a sworn declaration made by Family’s technical consultant,¹³ Family contends that VPR has claimed eligibility for a fair distribution preference based on service to areas which subsequently began to receive service from VPR’s WOXM(FM). Family argues that VPR’s failure to amend its fair distribution claims to report the grant of a permit for Channel 211 “has occasioned an erroneous result in the FCC Analysis.”¹⁴ It maintains that because the adjusted fair distribution claims in the VPR Middlebury Application now brings the total combined first and second NCE service to within 5,000 persons from the number proposed in the competing application of VPR for a facility on Channel 202,¹⁵ this matter must be

⁵ See *Media Bureau Identifies Groups of Mutually Exclusive Applications*, Public Notice, 23 FCC Rcd 9508 (MB 2008).

⁶ See 47 C.F.R. § 73.7003 (point system selection procedures); 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 Comparative MO&O*”), *rev’d in part on other grounds*, *NPR v. FCC*, 254 F.3d 226 (D.C. Cir. 2001).

⁷ See *Comparative Consideration of 9 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, 25 FCC Rcd 15134 (MB rel. Oct. 28, 2010) (“*Tentative Selectee Order*”).

⁸ Specifically, the VPR Middlebury application proposed 9,336 first service; 37,410 second service.

⁹ 47 U.S.C. § 307(b); see also 47 C.F.R. § 73.7002.

¹⁰ See File No. BNPED-20071018BDO. The staff granted VPR a permit to construct this station on August 7, 2008. See *Broadcast Actions*, Public Notice, Report No. 46798 (rel. Aug. 12, 2008).

¹¹ Family has standing as a competing applicant in this mutually-exclusive NCE group. See *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940).

¹² Petition at 4.

¹³ See Declaration of Stephen Gajdosik, Petition at Exhibit A.

¹⁴ Petition at 4.

¹⁵ See File No. BNPED 2007-1018BDR. The staff dismissed this application on December 6, 2010. See also n.3, *supra*.

referred to the Commission for a comparative analysis of the point claims of the applicants.¹⁶ Accordingly, Family argues, the VPR Middlebury Application should not be granted based on a Section 307(b) superiority that does not exist.¹⁷

In its Opposition, VPR argues that Family's argument is meritless. VPR contends that when the Commission adopted the comparative standards for NCE applicants, the Commission anticipated that new service grants might be made after the filing window and provided that the Section 307(b) analysis should be made based on data current as of the close of the filing window.¹⁸ VPR argues that it is thus entitled to the dispositive Section 307(b) credit that it received and that it was not required to amend the VPR Middlebury Application to reduce its proposed first and second NCE service claims.¹⁹ VPR argues that the Bureau's decision is correct.²⁰

In the Joint Petition, Mars, NGB, and Family (the "Petitioners"), argue that the applications of Mars, NGB and SUNY ("Competing Applications") should be reinstated "unless and until a [construction] permit is in fact awarded to . . . [VPR]."²¹ Further, Petitioners contend that the dismissals are premature in that they preclude "the possibility of a settlement agreement"²² among the Petitioners and SUNY in the event that the Petition's challenge to VPR's tentative selectee status prevails.²³

Discussion. *The Petition.* Section 309(d)(1) of the Act²⁴ 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.²⁵ 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.²⁶ 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.²⁷ If no such question is raised, the Commission will deny the petition and grant the application if it concludes that such grant otherwise serves the public interest, convenience, and necessity. Using this standard, we consider Family's allegations in the Petition.

¹⁶ Petition 5.

¹⁷ *Id.* at 3.

¹⁸ Opposition at 2.

¹⁹ *Id.* at 3.

²⁰ *Id.*

²¹ Joint Petition at 1.

²² We note that Commission records indicate that no settlement agreement has been filed in NCE MX Group 542.

²³ *Id.* at 2.

²⁴ 47 U.S.C. § 309(d)(1).

²⁵ See, e.g., *Artistic Media Partners, Inc.*, Letter, 22 FCC Red 18676, 18676 (MB 2007).

²⁶ See *id.*; *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

²⁷ 47 U.S.C. § 309(d)(2).

The Commission has determined that when applicants report population and other stations serving an area, as they do for fair distribution purposes under Section 307(b), they should use the data that is the most current at the close of any filing window.²⁸ It found that it is inevitable that there will be shifts in population and in number of services authorized in a region between close of a window and the time the staff acts on an application.²⁹ However, the Commission decided that such inevitable changes will not reduce an applicant's standing, and thus, the Commission will not require such applicants to notify it if these expected changes occur after the close of the window.³⁰ Subsequent shifts in population or number of services, therefore, do not adversely impact the fair distribution comparison.³¹ Of overall concern in this area is for the staff to compare applications that use the same data.³² Reliance on information as of the close of the window ensures that applicants have essentially a common reference date.³³ Thus, we will not consider the effect of the WOXM(FM) grant on VPR's comparative position *vis-à-vis* the Commission's fair distribution criteria.³⁴ Finally, because the Commission has decided not to consider post-filing window changes in population and service in its fair distribution analyses, VPR was not required to amend the VPR Middlebury Application to reflect the grant of the WOXM(FM) application or assess its effect on VPR's eligibility for a fair distribution.

The Joint Petition. With respect to the Joint Petition, reconsideration is appropriate only where the petitioner either demonstrates a material error or omission in the underlying order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters.³⁵ A petition for reconsideration that reiterates arguments that were previously considered and rejected will be denied.³⁶

In this case, we had not ruled on the Petition and therefore had not made a finding that there was "no substantial and material question concerning the grantability of the tentative selectee's application"

²⁸ See *NCE Comparative MO&O*, 16 FCC Rcd at 5083.

²⁹ *Id.*

³⁰ *Id.*

³¹ See *NCE Comparative MO&O*, 16 FCC Rcd at 5082-83 (Commission generally uses applicant's characteristics at the time of filing, establishing a "snap shot").

³² *Id.*

³³ *Id.*

³⁴ We note that an attachment to a 2004 Bureau *Public Notice* appears to require that an applicant amend its application to report a "less favorable position" with respect to population coverage and fair distribution analysis when it both amends its technical proposal *and* is the licensee of a new NCE station in the area. See *Section 1.65 Amendment Deadline Established for Noncommercial Educational FM and FM Translator Station Applicants*, Public Notice, 19 FCC Rcd 24740, 24743 (MB 2004), Attachment 1, Example 4. To the extent that this *Public Notice* can be read to imply that an applicant will need to amend to report a less favorable comparative position solely on the basis of the subsequent grant of one of the applicant's other applications serving the same area as the pending application, such a reading is inconsistent with the explicit Commission pronouncement that changes in population and the number of available services subsequent to the close of the filing window are not to be considered in fair distribution analysis.

³⁵ See 47 C.F.R. § 1.106(c), (d); see also *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964) ("*WWIZ*"), *aff'd sub. nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

³⁶ See *WWIZ*, 37 FCC at 686.

prior to dismissal of the Competing Applications. Accordingly, we find that dismissal of the Competing Applications was premature.³⁷ Accordingly, we will grant the Joint Petition for the purpose of acknowledging that the dismissal of the Competing Applications was premature, and will otherwise dismiss it as moot based on the grant of VPR's Application herein.³⁸

Conclusion/Actions. We have evaluated the VPR Middlebury Application and find that it complies with all pertinent statutory and regulatory requirements and that its grant will further the public interest, convenience, and necessity.

Accordingly, IT IS ORDERED, that the Petition to Deny filed by Family Rosary Radio, IS DENIED.

IT IS FURTHER ORDERED, that the January 10, 2011, Joint Petition for Reconsideration filed by Family Rosary Radio, Mars Hill Broadcasting Co., Inc., and Northeast Gospel Broadcasting, Inc., IS GRANTED to the extent indicated and IS DISMISSED in all other respects, as moot.

IT IS FURTHER ORDERED, that the application for a new noncommercial educational FM station at Rome, New York (File No. BNPED-20071022AVJ), filed by Family Rosary Radio, IS DISMISSED.

IT IS FURTHER ORDERED, that the application for a new noncommercial educational FM station at Middlebury, Vermont (File No. BNPED-20071018BDU), filed by Vermont Public Radio, IS GRANTED, conditioned upon Vermont Public Radio's compliance with Section 73.7005 of the Commission's Rules, 47 C.F.R. § 73.7005, which sets forth a four-year holding period for applicants that are awarded permits by use of a point system, and also provides that an applicant receiving a Section 307(b) preference that is decisive over another applicant must operate technical facilities substantially as proposed for a period of four years of on-air operations.³⁹

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

³⁷ See *Hawaii Public Radio, Inc.*, Letter, 25 FCC Rcd 3967 (MB 2010).

³⁸ See *Hampton Roads Educational Telecommunications Association, Inc.*, Letter, 25 FCC Rcd 7376, 7382 (MB 2010).

³⁹ See 47 C.F.R. § 73.7005.