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In re: **NCE MX Group 503**
New NCE (FM), Oaks, Oklahoma
Foundation for the Annunciation
Monastery of Clear Creek
Facility ID No. 176819
File No. BNPED-20071022BUI

**Petitions to Deny
Petition for Dismissal
Motion for Stay**

Dear Counsel:

This letter concerns the above-referenced application ("Application") of Foundation for the Annunciation Monastery of Clear Creek ("Foundation"), an Oklahoma non-profit corporation, for a new noncommercial educational ("NCE") FM station at Oaks, Oklahoma.¹ Foundation's Application was the tentative selectee in NCE Mutually Exclusive ("MX") Group 503.² The Cherokee Nation ("CN") filed a Petition to Deny the Application ("Petition") and a Motion for Stay on November 5, 2009, and John Brown University ("JBU") filed a June 27, 2008, Petition for Dismissal of the Application as well as a

¹ File No. BNPED-20071022BUI, filed October 22, 2007.

² *Threshold Fair Distribution Analysis of 28 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, 24 FCC Rcd 12390, 12398 (MB 2009) ("Tentative Selection Order").

November 5, 2009, Petition to Deny the Application. As discussed below, after careful review of the pleadings, documents produced by Foundation in response to a staff inquiry letter, and documents of which we take official notice, we dismiss the Application. We also accept for filing and tentatively select the application of CN for a new NCE FM station at Tahlequah, Oklahoma.

Background. Foundation, CN, and JBU filed applications in the October 2007 NCE filing window. Their applications, along with those of 14 other applicants, were assigned to NCE MX Group 503. Foundation became the tentative selectee, based on its proposal to provide first NCE service to 49,381 people, over 5,000 more than CN's next-highest proposal to provide first NCE service to a population of 43,346. Foundation's Application was thus accepted for filing on October 6, 2009.³

Discussion. *CN Petition.* On November 5, 2009, CN filed its Petition, alleging two separate grounds for dismissal of the Application or reversal of the tentative selection of Foundation.⁴ First, it alleges that the Commission improperly compared Foundation's population calculations to its own in finding a dispositive fair distribution preference for Foundation. Second, CN alleges that Foundation failed to disclose all of its directors in the Application, and moreover that two of Foundation's six directors as of the Application's filing date were not United States citizens. Accordingly, CN argues that the Application must be dismissed, either under Section 310(b)(3) of the Communications Act of 1934, as amended (the "Act"),⁵ which prohibits foreign control of more than one-fifth of a licensee corporation, or because Foundation's required amendment of the Application, to reflect accurately its control structure, would be a prohibited major amendment. We discuss each allegation in turn below.

Fair Distribution Preference. In the CN Petition, CN alleges that the population comparison between Foundation's proposal and its own is invalid, owing to the fact that Foundation's population figures were calculated using a 3-second terrain database, and CN's figures were calculated using a 30-second terrain database. CN demonstrates that, using 30-second terrain data, there is no dispositive difference between the populations receiving first and second NCE service under Foundation's proposal and CN's, and thus the group should proceed to a point system comparison.⁶ Foundation, in opposition, contends that, comparing both its and CN's proposals using population figures calculated using 3-second terrain data, its Application would still prevail, as the aggregated first plus second NCE service under its proposal is more than 5,000 persons greater than CN's proposed aggregated first plus second NCE service.⁷ In order to verify Foundation's claims, the staff sent a November 15, 2010, request for further information,⁸ requesting that Foundation provide the 3-second terrain data used by its engineer to arrive at the population figures for both proposals, as set forth in its Opposition to the CN Petition.

On December 27, 2010, Foundation provided some of the requested information in hard copy form, and simultaneously provided the complete 3-second data by way of electronic amendment to the

³ *Tentative Selection Order*, 24 FCC Rcd at 12413.

⁴ In its Petition, CN also argues that it should be the tentative selectee based on the then-proposed Tribal Priority. *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Notice of Proposed Rule Making, 24 FCC Rcd 5239, 5249-50 (2009) ("*Rural Radio NPRM*"). This argument is duplicative of that made in CN's simultaneously filed Motion for Stay. We address this argument below.

⁵ 47 U.S.C. § 310(b)(3) ("Section 310(b)(3)").

⁶ CN Petition at 2 and Exhibit A.

⁷ Opposition to Petition to Deny filed by Foundation December 1, 2009 ("Foundation Opposition") at 4 and Exhibit A.

⁸ *Stuart W. Nolan, Jr. Esq.*, Letter, Ref. No. 1800B3-TSN (MB Nov. 15, 2010) ("Inquiry Letter").

Application.⁹ Staff analysis of the underlying data confirms Foundation's claim, and CN has not provided any analysis of Foundation's data challenging that claim. We conclude that although there was no dispositive difference between the first NCE services proposed by Foundation and CN, as found in the *Tentative Selection Order*, Foundation nonetheless merited the fair distribution preference awarded to it based on the dispositive difference in proposed aggregated first plus second NCE service.¹⁰

Foundation's Corporate Governance / Major Change in Control / Foreign Control. CN also alleges in its Petition that Foundation's Application must be dismissed because, in the Application, Foundation did not fully disclose the members of its governing board.¹¹ CN attaches to its Petition copies of Foundation's most recent Restated Certificate of Incorporation ("Restated Certificate"), filed by Foundation with the Oklahoma Secretary of State on November 9, 2006. The Restated Certificate lists six members of Foundation's Board of Directors as of that date, two of whom CN claims are French citizens.¹² Additionally, the Restated Certificate provides that the "number and terms of office of the Directors of the Corporation shall be fixed and determined by the Bylaws of the Corporation, except that there shall not be fewer than three Directors and no more than 15 Directors."¹³ In its Application, however, Foundation listed only one "Director or Member of Governing Board" with 100 percent "voting stock," the Prior of the monastery, Rev. Philip Anderson.¹⁴

In the Inquiry Letter, we noted that applicant Foundation is a corporation formed and existing under the laws of the State of Oklahoma,¹⁵ and as such is governed by its Certificate of Incorporation and Bylaws. Accordingly, we requested copies of the Certificate of Incorporation, the Restated Certificate, and any amendments, restatements, or replacements thereto, and copies of the Foundation's Bylaws and any amendments, modifications, restatements, or replacements thereto. Additionally, we requested, for each officer, director, five percent or greater stockholder, non-insulated partner, member, and person and entity with attributable interests in the Foundation, at any time from October 21, 2007, through the date of response, the information requested in Section II, Question 6(a) to FCC Form 340 (Application for Construction Permit for Reserved Channel Noncommercial Educational Broadcast Station). We also requested the certification set forth in Section II, Question 6(b) to FCC Form 340. Foundation provided the requested information in its response to the Inquiry Letter.

⁹ *Letter to Marlene H. Dortch, Secretary, from Stuart W. Nolan, Jr., Esq.* (Dec. 27, 2010) ("Foundation Letter"). Because the technical data underlying Foundation's 3-second terrain base calculations were voluminous, only part of the data was provided under cover of the Foundation Letter. The data were provided in their entirety through an amendment to the Application.

¹⁰ Foundation shows that, using 3-second data, it would provide aggregated first and second NCE service to 86,206 persons, compared to a population of 80,647 that would receive aggregated first and second NCE service under CN's proposal.

¹¹ CN Petition at 2-5.

¹² Restated Certificate at 2-3; CN Petition at 5.

¹³ Restated Certificate at 2.

¹⁴ In the documents produced by Foundation, the Prior of the monastery is referred to as both Rev. Philip Anderson and Dom Philip Anderson. As the Prior signed and certified the Application as "Rev. Philip Anderson," we shall so refer to him here.

¹⁵ See Attachment 12 to Application, Governing Resolutions of the Foundation for the Annunciation Monastery of Clear Creek ("Governing Resolutions") ("WHEREAS, the Applicant is a nonprofit corporation seeking a federal permit . . . to construct a new noncommercial educational FM broadcast radio station . . . to provide Catholic radio programming in and around Tahlequah, Oklahoma . . .").

The instructions to the FCC Form 340 application state that Section II, Question 6(a) requires identification of the parties to the application. Specifically, with regard to non-stock corporations or other non-stock entities, the instructions to Form 340 state: “The applicant, the parent and subsidiary entities of the applicant, and the officers, directors, and governing board members of the applicant and its parent and subsidiary entities are considered to be parties to the application.” As noted above, the documents Foundation filed with the State of Oklahoma indicate that, as of the Application filing date, Foundation was to have no fewer than three members of its board of directors, and appeared to have six such members, two of whom were French citizens. In its responses to the Inquiry Letter, Foundation confirms that, in fact, six individuals were members of the Foundation’s board of directors as of October 22, 2007, and further that two of these were citizens of France.¹⁶

Foundation contends that, although its corporate documents might provide for a board of directors of a certain composition, nonetheless under ecclesiastic law all power over the Monastery, and hence the Foundation’s affairs, rests with the Prior of the Monastery, Rev. Philip Anderson. Moreover, because all members of the Foundation’s board of directors are and have been members of the Order of St. Benedict and members of the Monastery, who “pledge obedience” to their Prior, none are free to contradict the decisions of Rev. Anderson, who according to Foundation has sole control over the programming, personnel, and finance policies of the proposed radio station.¹⁷

Foundation’s argument that Rev. Anderson, rather than the board of directors, holds “*de facto* control” of the Foundation represents a somewhat novel application of the doctrine of *de facto* control. Ordinarily, *de facto* control of a licensee is alleged by a party seeking to show that there has been an unauthorized transfer of control of an authorization, *i.e.*, a petitioner may contend that the nominal licensee has ceded control to another person or entity that determines the policies regarding programming, personnel, and finances.¹⁸ Here, on the other hand, it is the applicant/tentative selectee itself arguing that its *de jure* corporate structure, as filed with the state of incorporation and as set forth in the applicant’s own Bylaws, does not accurately reflect *de facto* control of the corporation and any broadcast station that may ultimately be licensed to it. In other words, a doctrine that is typically used as a sword to pierce the veil of nominal control is in this case being used as a shield against an allegation that Foundation has violated the Commission’s Rules and/or the Act. While we know of no reason that the doctrine may not be used in this manner, we observe at the outset that there is an inherent contradiction in crediting the representations of an applicant that essentially asks us to ignore certain of its other representations, both those made in publicly filed documents and those made in the Bylaws that it adopted to govern itself.

¹⁶ In its response to the Inquiry Letter, Foundation disclosed that the following, all U.S. citizens, have been directors of the Foundation from September 18, 1999, to the present: Rev. Philip Anderson, O.S.B.; Dom Francis Bethel, O.S.B.; Dom Matthew Shapiro, O.S.B.; and Dom Francis-Xavier Brown, O.S.B. Additionally, Dom Antoine Forgeot, O.S.B., a citizen and resident of France, served as a director and chairman of the board of directors from September 18, 1999, until the Annunciation Monastery of Clear Creek (the “Monastery”) became ecclesiastically independent of the Our Lady of Fontgombault Abbey, of which Dom Forgeot was Abbot, on February 11, 2010. At that time Rev. Anderson, who had been Prior of the Monastery since September 18, 1999, became Abbot of the newly independent Monastery. Dom Francois de Feydeau, O.S.B., a French citizen and U.S. resident, was a member of the Foundation’s board of directors from September 18, 1999, until his death on November 15, 2009. Foundation also purported to file an amendment to the Application (Foundation Letter, Exhibit D1) listing the board of directors as of the response date, consisting of Rev. Anderson and Doms Bethel, Shapiro, and Brown, as well as Dom Rick Bales, O.S.B., a U.S. citizen, who also serves as Secretary.

¹⁷ Foundation Opposition at 8-9; Foundation Letter at 3.

¹⁸ See, e.g., *Roy M. Speer (Transferor) and Silver Management Company (Transferee)*, Memorandum Opinion and Order and Notice of Apparent Liability, 11 FCC Rcd 18393, 18415 (1996).

We begin, as we stated in the Inquiry Letter, by rejecting Foundation's contention that its corporate governance is a matter of ecclesiastic law. It may be the case, albeit irrelevant to our review, that ecclesiastic law governs the affairs of the Monastery as a religious entity. However, the applicant is not the Monastery as a religious entity, but rather the Foundation, a corporation organized under Oklahoma law, registered with the Secretary of State of Oklahoma, and governed by a set of articles and Bylaws established by the Foundation itself. Those articles, as restated in 2006, listed six directors, two of them citizens of France. They also provided that there were to be no fewer than three directors of the Foundation. The Foundation's responses to the Inquiry Letter show that there were no changes in the number of directors between the date of the Restated Articles and the date the Application was filed, nor that either of the two non-U.S. citizen board members had left the board as of the Application filing date. Thus, these six members were parties to the application; therefore, Foundation was required to list each of these parties in Section II, Question 6(a) of Form 340. However, in the Application the Foundation did not list the "officers, directors, and governing board members" of this non-stock corporation, but rather listed Rev. Philip Anderson, the Prior of the Monastery, as the sole party.

In its response to the Inquiry Letter, Foundation reiterates that only Rev. Anderson had control over the application, adding that for it to have listed any other parties in Form 340 "would have misrepresented control of the Station from the beginning."¹⁹ Foundation's claim that control of the corporation and the proposed radio station rests solely with Rev. Anderson, however, does not square with the Foundation's Bylaws, which were also produced in response to the Inquiry Letter. According to the Bylaws,²⁰ the Foundation is to have eight directors (Article 3, Section 1) who are to hold regular monthly meetings (Article 3, Section 8) at which a minimum of four directors are required to be present to constitute a quorum (Article 3, Section 11). Among the duties of the board of directors is to appoint, remove, employ, discharge, and supervise all officers, agents, and employees of the Foundation (Article 3, Section 4). Most significantly, Article 3, Section 12 provides as follows:

Every act or decision done or made by a majority of the directors present at a meeting duly held at which a quorum is present is the act of the Board of Directors, unless the Articles of Incorporation, these Bylaws, or provisions of law require a greater percentage or different voting rules for approval of a matter by the board.

Although the Bylaws were restated on October 19, 2006, this restatement merely changed the Foundation's address and changed the number of directors from eight to a minimum of three and a maximum of 15, noting that "the number of directors shall be set from time to time by resolution of the directors."²¹ The rest of the Bylaws were not changed.²²

¹⁹ *Id.* at 4.

²⁰ *Id.*, Exhibit C1.

²¹ *Id.*, Exhibit C2.

²² Foundation also produced the Governing Resolutions as Exhibit C3 to the Foundation Letter. This document includes a statement that Foundation "has heretofore had no governing documents *per se*, but rather has been governed pursuant to the authority of its Father Prior, recognized in Canon Law, who presides over the Applicant in all respects." The Governing Resolutions primarily make certain factual commitments relating to a point system determination under 47 C.F.R. § 73.7003. Significantly, the Governing Resolutions do not amend or rescind – or, indeed, even appear to recognize the existence of – Foundation's Articles of Incorporation or Bylaws. That the Governing Resolutions did not change Foundation's board structure is evident from the fact that Foundation acknowledges, in its response to the Inquiry Letter, that the six individuals listed in note 16, *supra*, continued to serve as directors (and, in some cases, officers) of Foundation well after the date of the Governing Resolutions. *Id.*, Exhibit D2.

Based, then, upon the documents produced by Foundation and those of which we have taken official notice, we find as follows:

1. The Application was filed on October 22, 2007.
2. Foundation, as a non-stock corporation, was required in the Application to disclose all members of its board of directors in response to Form 340, Section II, Question 6(a).
3. As originally filed, the sole party listed in the Application was Rev. Philip Anderson, O.S.B.
4. As of October 22, 2007, Foundation had six directors, two of whom were citizens of France.
5. Each of the six directors held one vote, with a majority of the directors' votes required to constitute Board action, and a quorum of four directors needed to hold a meeting, thus each director as of the Application filing date held 16.67 percent of the Foundation's voting control.
6. The Foundation's Board was charged with, among other things, conducting the activities and affairs of the Foundation, and/or supervising the Foundation's officers, who in turn conducted the Foundation's business.²³

Thus, we conclude that the Application did not adequately disclose the parties to the Application, and that to do so would require a major amendment, insofar as such an amendment would reduce the voting percentage of the original and only party to the Application, Rev. Anderson, from 100 percent to below 50 percent.²⁴ We further conclude that because 33.3 percent of the actual voting control of Foundation's board of directors at the time of application was held by citizens of France, the Application, if accurately filed, would violate Section 310(b)(3) of the Act.²⁵

Our conclusion is bolstered by the fact that, as CN points out, Oklahoma corporate law allows a corporation to have only one director; thus, there was no legal impediment to Foundation's structuring its corporate governance to conform to what it claims to be its *de facto* organizational structure.²⁶ As it did

²³ See *id.*, Exhibit C1, Article 4, regarding the duties of the Foundation's officers. See also *id.*, Exhibit C1, Article 3, Section 3 ("Subject to the provisions of the laws of this state and any limitations in the Articles of Incorporation and these Bylaws relating to action required or permitted to be taken or approved by the members, if any, of this corporation, the activities and affairs of this corporation shall be conducted and all corporate powers shall be exercised by or under the direction of the Board of Directors."). We note that, although in the Inquiry Letter we requested information regarding "each officer, director, five percent or greater stockholder, non-insulated partner, member, and person and entity with attributable interests in" the Foundation, no "members" were identified; the only parties identified were the individuals listed in note 16, *supra*. Under the Bylaws, then, only the board of directors had authority to oversee the business of the Foundation.

²⁴ See 47 C.F.R. §§ 73.3573(a)(1), (b)(3).

²⁵ 47 U.S.C. § 310(b)(3). We find the case of *Noe v. F.C.C.*, 260 F.2d 739 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 924 (1959), cited by Foundation, to be inapposite. In that case, a competing applicant argued that Loyola University of New Orleans ("Loyola"), which was operated by priests of the Society of Jesus ("Jesuits"), was a representative of an alien by virtue of the fact that the Superior General of the Jesuits was a Belgian citizen residing in Rome. The court rejected this argument, noting that Loyola was a corporation, legally and financially autonomous of the Jesuit order, and organized under the laws of the State of Louisiana. The court further found that all of Loyola's directors, while Jesuit priests, were also U.S. citizens, and that the officials of the Jesuit order who appointed Loyola's board members were themselves U.S. citizens. Any foreign "control" of Loyola by virtue of the hierarchical structure of the Jesuit order, then, was highly attenuated, and the court found that the chain of authority had never been used to impinge upon the university's or its radio station's independence. 260 F.2d at 740-42. Here, on the other hand, two of Foundation's six board members were French citizens who, as discussed above, held one-third of the board votes. This constitutes direct control of Foundation's affairs, rather than hierarchical control several levels removed from the business of the Foundation, as was the case in *Noe*.

²⁶ Reply to Opposition to Petition to Deny at 3, citing Okla. Stat. tit. 18 § 1027(B) (2010). Moreover, Oklahoma law provides a means by which a church or religious society that does not desire to become incorporated may organize and enjoy some of the benefits of incorporation, without formally incorporating. Okla. Stat. tit. 18 § 562 (2010).

not do so, we must take official notice of Foundation's *de jure* corporate structure as of the date of the Application, finding that the information provided in the Application did not accurately reflect that structure, and that to correct the Application would both constitute a prohibited major amendment and would reveal a violation of the Act. Finally, we observe that for us to accept Foundation's argument – that an applicant may simply disavow its duly adopted corporate articles and Bylaws, claiming extra-legal considerations, in order to avoid adverse legal consequences – would be to establish a dangerous precedent. Accordingly, the Application must be dismissed.²⁷

JBU Petitions to Dismiss/Deny. JBU filed a Petition for Dismissal of the Application on June 27, 2008, alleging that the Application failed to protect television station KOTV(TV), Tulsa, Oklahoma, which was then broadcasting on analog TV channel 6. Thus, JBU argued that the Application should be dismissed as violating Section 73.525 of the Rules. Foundation countered that it had sought waiver of Section 73.525, that the Commission could grant the Application contingent on KOTV(TV)'s move from analog channel 6 after the digital television transition, and that in any event it filed a July 11, 2008, amendment protecting KOTV(TV). JBU incorporated the allegations of its Petition for Dismissal in its November 5, 2009, Petition to Deny.

Because we dismiss the Application on other grounds, we need not reach the allegations of JBU's Petition for Dismissal or Petition to Deny. Were we to do so, however, we would acknowledge that Foundation's Application was defective at the time of filing because it failed to comply with the Channel 6 protection requirements of Section 73.525, although the Application was accompanied by a request for waiver.²⁸ Prior to the selection of Foundation as tentative selectee on October 6, 2009, and the issuance of the *Channel 6 Public Notice*, the staff dismissed numerous NCE applicants which had, like Foundation, not complied with the requirements of Section 73.525. However, had the staff dismissed the Application prior to its selection as tentative selectee, as requested by JBU, Foundation would have been permitted to file a curative amendment and seek reinstatement of its Application *nunc pro tunc* within 30 days of its dismissal.²⁹ Additionally, the *Tentative Selection Order* specifically affords tentative selectees

²⁷ Because the undisputed facts reveal that Foundation was unqualified to apply for a broadcast station license under 47 U.S.C. § 310(b)(3), its Application is subject to dismissal. To the extent it can be argued that the Application must be denied, and therefore set for hearing, because CN filed a Petition to Deny rather than to dismiss the Application, we find that a hearing is unnecessary because the relevant facts, which were produced and/or confirmed by Foundation, are not in dispute. Only where the public interest cannot be determined without a resolution of disputed facts has Congress dictated that the Commission must conduct a hearing under 47 U.S.C. § 309(e). *Marsh v. FCC*, 436 F.2d 132, 136 (D.C. Cir. 1970) (citing *Capitol Broadcasting Co. v. FCC*, 324 F.2d 402, 405 (D.C. Cir. 1963)).

²⁸ 47 C.F.R. § 73.3566(a) ("Applications which are determined to be patently not in accordance with the FCC rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective and will not be accepted for filing or if inadvertently accepted for filing will be dismissed. Requests for waiver shall show the nature of the waiver or exception desired and shall set forth the reasons in support thereof."). See also 47 C.F.R. § 73.525; *Media Bureau Provides Guidance to NCE FM Stations Regarding Television Channel 6 Protection Requirements*, Public Notice, 24 FCC Rcd 3916, 3916 and n.4 (MB 2009) ("*Channel 6 Public Notice*") ("The Bureau will dismiss any NCE FM station application that fails either to (1) satisfy Section 73.525 protection requirements, or (2) include an unconditional consent letter from the affected television Channel 6 station concurring with the proposed NCE FM facilities," defining "unconditional" to mean that the consent "cannot contain contingencies, conditions, qualifications, or restrictions.").

²⁹ Under Commission policy, NCE applicants are given one 30-day opportunity to correct all acceptability defects and to be reinstated *nunc pro tunc*. See *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, Public Notice, 56 RR 2d 776, 49 Fed. Reg. 47331 (Aug. 2, 1984). Cf. *Heartland Ministries, Inc.*, Letter, 25 FCC Rcd 3572 (MB 2010) (suggesting that applicant could have complied with Section 73.525 by timely filing a curative amendment to its defective application within 30 days of its dismissal, rather than waiting 18 months).

whose applications are not acceptable for filing the opportunity to cure any defects in their applications, provided that curative amendments are minor and do not alter the fair distribution preference.³⁰ Foundation's July 11, 2008, amendment appears to meet those criteria. However, as noted, we need not examine this issue further, as we dismiss the Application on other grounds. The JBU Petition for Dismissal and Petition to Deny are therefore dismissed as moot.

CN Motion for Stay. On November 5, 2009, CN filed a Motion for Stay, seeking to stay the grant of the tentative selectee of NCE MX Group 503 and dismissal of the other applicants, until Commission action on adoption of the Tribal Priority proposed in the Notice of Proposed Rule Making in *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*.³¹ CN believed that, if adopted, the Tribal Priority would give its application preference over the other applications in the MX group. However, while the Commission did adopt the Tribal Priority, it held that because a substantial majority of tentative selections had already been made for applications in the 2007 NCE window, it would not apply the Tribal Priority to applications filed in that window.³² CN did not seek reconsideration of the *Rural First R&O*. We therefore dismiss the Motion for Stay.

Disposition of NCE MX Group 503. With the dismissal of Foundation's Oaks, Oklahoma, Application, 16 applications remain mutually exclusive in MX Group 503.³³ As set forth in the *Tentative Selection Order*, two of the 16 applicants, JSCC and HFCN, concede they are not entitled to a fair distribution preference, and one, KMZD, claims the preference but provides no population figures supporting its claim. These three applications are thus eliminated. Of the remaining 13 applicants, four (Way-FM, Omni, CBMH, and CGP) do not claim entitlement to a first NCE service preference and are therefore eliminated. While CN proposes first NCE service to the highest population among the nine applicants remaining, its first NCE service claim is not dispositive as it is less than 5,000 greater than the next highest proposal, that of EMF.³⁴ Gentry, JBU, St. Bernard, RNE, Pearl, and Myaamia are eliminated

³⁰ *Tentative Selection Order*, 24 FCC Rcd at 12409 n.64 ("If a tentative selectee's application is found unacceptable for filing, it is dismissed. The applicant then has one opportunity to submit a curative amendment and a petition for reconsideration requesting reinstatement *nunc pro tunc* within 30 days. The amendment must be minor and may not alter the fair distribution preference. See 47 C.F.R. § 73.3522(b)(1). The staff will not reinstate the application of a tentative selectee that is unable to cure all defects.") 47 C.F.R. § 73.3573 describes major amendments and minor amendments to applications for construction permits for proposed NCE FM stations.

³¹ *Rural Radio NPRM*, 24 FCC Rcd at 5249-50.

³² *Rural Radio Service and to Streamline Allotment and Assignment Procedures*, First Report and Order and Further Notice of Proposed Rule Making, 25 FCC Rcd 1583, 1595 (2010) ("*Rural First R&O*").

³³ The group is now comprised of 16 applications proposing service to 13 different communities in Arkansas, Kansas, and Oklahoma. Two applicants, Bible Broadcasting Network, Inc. ("BBN") and Gentry Communications Network, Inc. ("Gentry"), propose to serve Gravette, Arkansas. Christian Broadcasting Group of Mountain Home ("CBMH") and KMZD Radio, Inc. ("KMZD") would each serve Harrison, Arkansas. Also proposing service at communities in Arkansas are JBU for Gentry, Way-FM Media Group, Inc. ("Way-FM") for Bentonville, and Omni Center for Peace, Justice, and Ecology ("Omni") for Cave Springs. Two applications in the group propose service at communities in Kansas: St. Bernard's Council No. 796, Knights of Columbus ("St. Bernard") for Fort Scott, and Joshua Springs Calvary Chapel ("JSCC") for Altoona. The remaining seven applicants propose service at communities in Oklahoma: CN and Church of God of Prophecy ("CGP") for Tahlequah; Radio Nine Eleven, Inc. ("RNE") for Welch; Myaamia Foundation ("Myaamia") for Miami; Hispanic Family Christian Network, Inc. ("HFCN") for Ballard; Pearl Communications Group ("Pearl") for Pawhuska; and Educational Media Foundation ("EMF") for a major modification to the construction permit for its NCE FM Station KMLT(FM), Jay, Oklahoma.

³⁴ The claims of first NCE service among these applicants are, in ascending order of population: Myaamia, 3,957 people; Pearl, 4,771 people; RNE, 5,920 people; St. Bernard, 13,588 people; JBU, 24,318 people; Gentry, 27,664 people; BBN, 34,892 people; EMF, 38,747 people within the area of newly added service; and CN, 43,346 people.

because the next best proposal, that of BBN, would serve at least 5,000 more people. The remaining three applications, those of BBN, EMF, and CN, are comparable with respect to first NCE service.

When no proposal prevails on first service, we consider combined first and second NCE service population totals among the remaining applications proposing comparable first NCE service. We find that CN merits a dispositive fair distribution preference based on its proposed aggregated first and second NCE service to a population of 83,793 (43,346 first service plus 40,447 second service), 13,863 persons more than BBN's next highest proposed aggregated service to a population of 69,930 (34,892 first service plus 35,038 second service), or EMF's proposed aggregated service to 56,570 (38,747 first service plus 17,823 second service).³⁵ Accordingly, CN is the new tentative selectee in NCE MX Group 503.

Conclusion. IT IS ORDERED that the CN Petition to Deny IS GRANTED IN PART. IT IS FURTHER ORDERED that the JBU Petition for Dismissal and Petition to Deny ARE DISMISSED AS MOOT. IT IS FURTHER ORDERED that the CN Motion for Stay IS DISMISSED. IT IS FURTHER ORDERED that the Application of Foundation for Annunciation Monastery of Clear Creek (File No. BNPED-20071022BUI) IS DISMISSED. IT IS FURTHER ORDERED that the application filed by Cherokee Nation (File No. BNPED-20071018ASS) is ACCEPTED FOR FILING and TENTATIVELY SELECTED to be awarded a construction permit for a new NCE FM station at Tahlequah, Oklahoma. If, after a 30-day petition to deny period has run, there is no substantial and material question concerning the grantability of the tentative selectee's application, we intend, by public notice, TO DISMISS the mutually exclusive applications of Way-FM Media Group, Inc. (File No. BNPED-20071015AHO), John Brown University (File No. BNPED-20071018AQV), Christian Broadcasting Group of Mountain Home (File No. BNPED-20071019AHJ), Omni Center for Peace, Justice, and Ecology (File No. BNPED-20071019AOH), Bible Broadcasting Network, Inc. (File No. BNPED-20071019APU), Gentry Communications Network, Inc. (File No. BNPED-20071022ASM), KMZD Radio, Inc. (File No. BNPED-20071022AUA), St. Bernard's Council No. 796, Knights of Columbus (File No. BNPED-20071022BBA), Joshua Springs Calvary Chapel (File No. BNPED-20071022BIY), Radio Nine Eleven, Inc. (File No. BNPED-20071015ACA), Myaamia Foundation (File No. BNPED-20071017AEQ), Educational Media Foundation (File No. BMAPED-20071019BDC), Hispanic Family Christian Network, Inc. (File No. BNPED-20071022ALU), Pearl Communications Group (File No. BNPED-20071022AXC), and Church of God of Prophecy (File No. BNPED-20071022BAF), and TO GRANT the application of Cherokee Nation (File No. BNPED-20071018ASS) CONDITIONED UPON that selectee's compliance with Section 73.7002(c) of the Commission's Rules, 47 C.F.R. § 73.7002(c), which sets forth a four-year period of on-air operations substantially as proposed.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

³⁵ EMF claims it would provide aggregated first and second NCE service to 56,570 of the 83,831 people within the newly added area within its 60 dBμ contour; BBN to 69,930 of the 218,426 people within its proposed 60 dBμ contour; and CN to 83,793 of the 177,225 people within its proposed 60 dBμ contour. Thus, each would provide combined first and second NCE service to at least ten percent of the population within its 60 dBμ contour and to more than 2,000 people.

cc: Way-FM Media Group, Inc.
Christian Broadcasting Group of Mountain Home
Omni Center for Peace, Justice, and Ecology
Bible Broadcasting Network, Inc.
Gentry Communications Network, Inc.
KMZD Radio, Inc.
St. Bernard's Council No. 796, Knights of Columbus
Joshua Springs Calvary Chapel
Radio Nine Eleven, Inc.
Myaamia Foundation
Educational Media Foundation
Hispanic Family Christian Network, Inc.
Pearl Communications Group
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