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In re: NCE MX Group 389

New NCE(FM), Milan, NM
Facility ID No. 177340
Board of Regents of New Mexico Highlands University
File No. BNPED-20071022BPX

**Request for Waiver
Petition to Deny**

New NCE(FM), Tohajiilee Indian Reservation, NM
Facility ID No. 172581
Available Media, Inc.
BNPED-20071018BAR

Petition for Reconsideration

Gentlemen:

We have before us the referenced application (“Milan Application”) filed by the Board of Regents of New Mexico Highlands University (“NMHU”) for a new, noncommercial educational (“NCE”) FM station (“Milan Station”) at Milan, New Mexico, and NMHU’s request for waiver of the main studio requirements set forth in Section 73.1125(a) of the Commission’s rules (“rules”). We also have before us a Petition to Deny the Milan Application (“Petition”), filed by Available Media, Inc. (“AMI”) on June 2, 2011. Finally, we have before us a Petition for Reconsideration filed by AMI on July 14, 2011, which argues the Commission prematurely dismissed its application for a new NCE FM station at Tohajiilee Indian Reservation, New Mexico (“Tohajiilee Application”). For the reasons set forth below, we deny the Petition, grant the Petition for Reconsideration in part and dismiss it as moot in all other respects, grant NMHU’s request for waiver, and grant the NMHU Application.

Background. NMHU and AMI are two of the applicants that filed a total of six mutually exclusive applications for new NCE FM station construction permits to serve five different communities

in New Mexico.¹ After conducting a fair distribution analysis and a point hearing,² the Commission tentatively selected the Tohajiilee Application for grant. Specifically, it found that AMI and NMHU were each entitled to five points under the point system, but that AMI prevailed under the first tie-breaker criterion.³ The Commission announced a 30-day period for filing petitions to deny that application.

NMHU timely filed a Petition to Deny the Tohajiilee Application on July 27, 2010. NMHU argued that the Commission should dismiss the Tohajiilee Application because AMI did not qualify for the diversity of ownership points awarded to it. The Commission ultimately agreed with NMHU, concluding AMI was not entitled to the two points awarded to it under the diversity of ownership criterion.⁴ This resulted in NMHU prevailing on points. Accordingly, the Commission tentatively selected the Milan Application and announced a 30-day period for filing petitions to deny that Application.⁵

AMI timely filed the Petition on June 2, 2011. AMI argues that NMHU failed to adequately document its claim for points under the diversity of ownership criterion.⁶ AMI also claims that NMHU never intended to maintain diversity of ownership and engaged in misrepresentation or lack of candor about this. NMHU did not oppose the Petition.

On June 7, 2011, staff dismissed the Tohajiilee Application. AMI timely sought reconsideration of this dismissal on July 11, 2011. AMI notes that it filed the Petition and argues that “[u]ntil the petition against NMHU is finally adjudicated, AMI retains all of its rights as a pending and comparative applicant and its application must not be dismissed.”⁷

Discussion. Milan Application. *AMI Petition to Deny.* Section 309(d)(1) of the Communications Act of 1934, as amended,⁸ 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.⁹ 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,

¹ These applications were designated NCE MX Group 389. See *Media Bureau Identifies Groups of Mutually Exclusive Applications*, Public Notice, 23 FCC Rcd 9508 (MB 2008).

² See 47 C.F.R. §§ 73.7002, 73.7003.

³ See *Comparative Consideration of 52 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 8793, 8830-31 ¶¶ 124-26 (2010). The Commission eliminated three of the applicants on fair distribution grounds. *Id.* at 8830-31 ¶ 124. The Commission then conducted a point hearing to determine which of the remaining three applicants – AMI, NMHU, and another applicant – should prevail. AMI and NMHU each received three points as “established local applicants” and two points for diversity of ownership, while the other applicant received two points for diversity of ownership. *Id.* at 8831 ¶ 125. Accordingly, AMI and NMHU proceeded to the tie-breaker – the number of radio station authorizations attributable to each applicant. AMI certified it had no attributable interests, and NMHU certified that it had one attributable interest in a radio authorization. Accordingly, as the applicant with the fewest authorizations, AMI prevailed. *Id.* at 8831 ¶ 126.

⁴ *Comparative Consideration of 37 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations filed in the February 2010 and October 2007 Filing Windows*, Memorandum Opinion and Order, 26 FCC Rcd 7008, 7040-43 ¶¶ 92-98 (2011).

⁵ *Id.* at 7043 ¶ 98, 7060 ¶ 152.

⁶ Petition at 1-4.

⁷ Petition for Reconsideration at 1.

⁸ 47 U.S.C. § 310(d).

⁹ See e.g. *Artistic Media Partners, Inc.*, Letter, 22 FCC Rcd 18676, 18677 (MB 2007).

convenience, and necessity.¹⁰ 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.¹¹ 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.

Under Section 73.7003(b)(2) of the rules, the Commission awards two points to an applicant if the principal community contours of the applicant's proposed station and any other station in which any party to the application holds an attributable interest do not overlap.¹² To be awarded these points, an applicant's governing documents must include a provision to maintain that diversity in the future.¹³ The Milan Application included an exhibit addressing NMHU's claim for diversity of ownership points. The exhibit stated that NMHU held the license for only one radio station, KEDP-FM, Las Vegas, New Mexico, and explained that there would be no overlap between the principal community contour of the proposed NCE FM station at Milan and the principal community contour of KEDP-FM. The Milan Application also included a copy of a resolution adopted by the Board of Regents. NMHU asserted that the resolution required diversity of ownership to be maintained.¹⁴ The resolution states:

RESOLVED THAT: Should New Mexico Highlands University be granted a new NCE FM radio station by the FCC, the Board of Regents commits itself to will [sic] maintain the circumstances which permitted NMHU, on its application form, to claim certain qualifications to be awarded certain points pursuant to the criteria established under the FCC's Point System for awarding NCE stations to applicants, specifically including such Point System criteria as the "fair distribution," "established local applicant," "diversity of ownership," and "technical parameters" criteria, as set forth in the FCC Rules.

AMI argues that the resolution is "too vague, inconsistent and amorphous to document a point system credit."¹⁵ We disagree. While the resolution is poorly worded and does mischaracterize certain aspects of the Commission's rules (*e.g.*, referring to a fair distribution preference as part of the point system), the commitment to maintain diversity of ownership is present.

AMI also alleges that NMHU never intended to maintain diversity of ownership and engaged in misrepresentation or lack of candor about its intentions. To support this claim, AMI has provided a copy of the meeting minutes for the Board of Regents. In these, the Board discusses the upcoming filing window for applications for new NCE FM radio stations. The minutes mention that New Mexico Highlands University Foundation ("NMHU Foundation") "is applying for the Las Vegas license because [NMHU] already owns a license in Las Vegas." According to the minutes, the President of the NMHU Foundation stated that, "if the NMHU Foundation is awarded the Las Vegas license [] they would transfer the license to NMHU." AMI further asserts that NMHU has not maintained diversity of ownership because, since NMHU filed the Milan Application, a member of the Foundation's board has become a member of the NMHU Board of Regents.

¹⁰ See *id.*; *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

¹¹ 47 U.S.C. § 309(d)(2).

¹² 47 C.F.R. § 73.7002(b)(2).

¹³ *Id.*

¹⁴ See File No. BNPED-20071022BPX, Exh. 12-3.

¹⁵ Petition at 3.

NMHU Foundation did apply for a construction permit for a new NCE FM station at Romeroville, New Mexico (“Romeroville Station”).¹⁶ While the principal community contours of this new NCE FM station and the NMHU station in Las Vegas¹⁷ overlap, the principal community contours of these stations do not overlap the principal community contour proposed in the Milan Application. We find any diversity of ownership issues related to the Romeroville Station and Station KEDP(FM) are irrelevant to whether NMHU was entitled to receive two points for diversity of ownership for the Milan Application. We note that the plain language of Section 73.7002(b)(2) – which focuses on overlaps between the principal community contour of the proposed station and those of any other attributable stations – supports our conclusion.¹⁸

Main Studio Waiver Request. Section 73.1125 (a) of the rules requires that each broadcast station operate a main studio within its community of license, the principal community contour of any AM, FM or TV station licensed to its community of license, or 25 miles of the reference coordinates of the center of its community of license.¹⁹ The Commission will waive these requirements where good cause exists to do so and where the proposed studio location “would be consistent with the operation of the station in the public interest.”²⁰ Traditionally, the Commission has recognized the benefits of centralized operation for noncommercial educational stations, due to their limited funding, and has granted waivers to state and regional public television and radio networks to operate stations that do not necessarily meet the requirements of a main studio.²¹

NMHU proposes to operate the Milan Station as a “satellite” of KEDP(FM).²² NMHU requests a waiver of the main studio requirements set forth in Section 73.1125(a) of the rules in order to locate the main studio of the Milan Station in Las Vegas, New Mexico, at the KEDP(FM) main studio.²³ NMHU

¹⁶ See File No. BNPED-20071019AAC.

¹⁷ KEDP(FM).

¹⁸ We also conclude that, while AMI has raised a substantial and material question as to whether NMHU Foundation maintained diversity of ownership with respect to the Romeroville Station, there is no need to investigate this issue further. In the point hearing in which it ultimately designated NMHU Foundation the tentative selectee for MX Group 176, the Commission awarded NMHU Foundation five points – three under the established local applicant criterion and two under the diversity of ownership criterion. See *Comparative Consideration of 32 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations filed in the October 2007 Filing Window*, 25 FCC Rcd 5013, 5023 ¶ 30 (2010). The Commission awarded no points to the other applicant, Abundant Life Broadcasting (“Abundant Life”) in MX Group 176. *Id.* Accordingly, even were the Commission to find NMHU Foundation was not entitled to the two points awarded it under the diversity of ownership criterion, it still would prevail over Abundant Life.

¹⁹ See 47 C.F.R. § 73.1125(a); *Review of the Commission's Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations*, Report and Order, 13 FCC Rcd 15691 (1998), recon. granted in part, 14 FCC Rcd 11113 (1999).

²⁰ 47 C.F.R. § 73.1125(b)(2).

²¹ See, e.g., *Amendment of Sections 73.1125 and 73.1330*, Memorandum Opinion and Order, 3 FCC Rcd 5024, 5026-7 (1988).

²² A “satellite” station meets all of the Commission's technical rules; however, it originates no programming and instead rebroadcasts the parent station's programming. See *Amendment of Multiple Ownership Rules*, Memorandum Opinion and Order, 3 R.R.2d 1554, 1562 (1964).

²³ See File No. BNPED-20071022BPX, Exh. 13. NMHU also requests a waiver of the Commission's Emergency Alert System (“EAS”) rules to the extent necessary for its operation of the Milan Station as a satellite of KEDP(FM). *Id.*, Exh. 13-1. However, Section 11.11(b) of the rules, 47 C.F.R. § 11.11(b), provides that satellite stations that rebroadcast 100 percent of the programming of their parent station's programming may satisfy the EAS requirements through the use of a single set of EAS equipment at the parent station which complies with the EAS rules. NMHU indicates it will operate the Milan Station as a satellite of KEDP(FM). It also represents that it is fully compliant with the Commission's EAS rules and conducts all required national and local monitoring from its

bases its request on the fact that the Milan Station will be part of a regional network intended to bring educational and instructional programs to small towns and rural outlying areas which would otherwise not have access to such programs and the fact that it would be financially infeasible to operate the Milan station on a noncommercial basis from its community of license.

We find that NMHU has justified its request to permit it to operate the Milan Station out of its main studio in Las Vegas, Nevada. We note that, where there is considerable distance between parent and satellite stations, licensees must take adequate measures to maintain awareness of the satellite station's community needs and interests. To that end, NMHU has pledged to (1) subscribe to the local newspaper for the Milan area; (2) have faculty and staff make periodic visits to Milan; (3) regularly consult with Milan community leaders to ascertain the needs and interests of Milan and take into account these needs and interests in developing its news and public affairs programs; (4) maintain a web page whereby Milan residents can provide feedback on the stations programming; and (5) maintain a toll-free telephone line between Milan and the Milan Station by which residents can contact station management. We note that NMHU proposes to maintain the Milan Station's public inspection file in Las Vegas, Nevada. We reject this proposal and require NMHU to maintain the Milan Station's public inspection file at a convenient location in Milan where its contents will be accessible during regular business hours. With the pledges noted above and this additional requirement, we are persuaded that NMHU will meet its local service obligations and thus, that grant of the requested waiver is consistent with the public interest.²⁴

We have examined the Milan Application and find that, excepting the main studio requirement which we waive herein, it complies with all pertinent statutory and regulatory requirements. We find that grant of the Milan Application will further the public interest, convenience, and necessity.

Tohajiilee Application. Section 1.106 of the Commission's rules²⁵ and established case law provide that "reconsideration is appropriate only when the petitioner either shows a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters."²⁶ We will grant the Petition for Reconsideration. 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" prior to dismissal of the AMI Application. Thus, our dismissal was premature.²⁷ Accordingly, we will grant the Petition for Reconsideration for the purpose of acknowledging that the dismissal of the AMI Application was premature. We otherwise dismiss the Petition for Reconsideration as moot based on our grant of the NMHU Application herein.²⁸

main studio facilities. Based on these representations, we find NMHU does not need a waiver of the EAS rules and dismiss as moot the NMHU waiver request.

²⁴ We remind NMHU of the requirement that it maintain a public file for the Milan Station at the main studio of parent station KEDP-FM. NMHU must also make reasonable accommodation for listeners wishing to examine the file's contents. *See Review of the Commission's Rules regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations*, Memorandum Opinion and Order, 14 FCC Rcd 11113, 11129 (1999). We further remind NMHU that, notwithstanding grant of the waiver requested here, the public file for the Milan Station must contain the quarterly issues and programs list required by Section 73.3527(e)(8) of the rules. 47 C.F.R. § 73.3527(e)(8).

²⁵ 47 C.F.R. § 1.106(c).

²⁶ *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC Rcd 685, 686 (1964); *see also National Association of Broadcasters*, Memorandum Opinion and Order, 18 FCC Rcd 24414, 24415 (2003).

²⁷ *See Hawaii Public Radio, Inc.*, Letter, 25 FCC Rcd 3967 (MB 2010).

²⁸ *See Hampton Roads Educational Telecommunications Association, Inc.*, Letter, 25 FCC Rcd 7376, 7382 (MB 2010).

Conclusion/Action. IT IS ORDERED that the Petition to Deny filed by Available Media, Inc. on June 2, 2011, IS DENIED.

IT IS FURTHER ORDERED, that the Petition for Reconsideration filed by Available Media, Inc. on July 14, 2011, IS GRANTED TO THE EXTENT INDICATED AND IS DISMISSED AS MOOT IN ALL OTHER RESPECTS.

IT IS FURTHER ORDERED that the request of the Board of Regents of New Mexico Highlands University for a waiver of the main studio requirement, 47 C.F.R. § 73.1125(a), for the proposed new NCE FM station at Milan, New Mexico, IS GRANTED.

IT IS FURTHER ORDERED that the application for a new noncommercial educational FM station at Milan, New Mexico (File No. BNPED-20071022BPX) filed by the Board of Regents of New Mexico Highlands University IS GRANTED, conditioned upon Board of Regents of New Mexico Highlands University'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.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Board of Regents of New Mexico Highlands University
Available Media, Inc.