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In re: **NCE Reserved Allotment Group No. 8**
New NCE-FM, Westley, California
Sacred Heart Roman Catholic Parish
Facility ID No. 184829
File No. BNPED-20100226AJO

New NCE-FM, Westley, California
Modesto Peace/Life Center
Facility ID No. 184977
File No BNPED-20100224ABX

New NCE-FM, Westley, California
Calvary Chapel of Turlock, Inc.
Facility ID No. 185121
File No BNPED-20100226AGO

Petitions to Deny

Dear Counsel:

We have before us: the referenced applications of Sacred Heart Roman Catholic Parish (“SHRCP”), Modesto Peace/Life Center (“MPLC”), and Calvary Chapel of Turlock, Inc. (“CCT”) for a new noncommercial educational (“NCE”) FM station on Channel 238A at Westley, California (the “SHRCP Application,” “MPLC Application” and “CCT Application,” respectively); a Petition to Deny the SHRCP Application, filed by MPLC on June 2, 2011 (“MPLC Petition”); and a Petition to Deny the SHRCP Application, filed by CCT on June 2, 2011 (“CCT Petition”).¹ For the reasons set forth below,

¹ SHRCP filed an Opposition to Petition to Deny (“Opposition”) on June 27, 2011. MPLC filed a Reply to Opposition to Petition to Deny (“Reply”) on July 8, 2011.

we grant the MPLC and CCT Petitions, rescind the prior tentative selection of the SHRCP Application, and dismiss the SHRCP Application. Further, we find the MPLC and CCT Applications defective and dismiss them as well.

Background. SHRCP, MPLC, CCT, and five other parties² filed mutually exclusive applications for a new NCE FM facility on Channel 238A at Westley, California, during the February 2010 NCE filing window. The Commission subsequently designated these applications as NCE Reserved Allotment Group No. 8.³ In the *Comparative Consideration Order*, the Commission concluded that each applicant would provide a first or second NCE service to at least ten percent of the population and to at least 2,000 people within their proposed service areas.⁴ Therefore, all applicants proceeded to an NCE point hearing. SHRCP received three points for being an established local applicant, two points for diversity of ownership, and two points for having the best technical proposal for a total of seven points. MPLC and CCT were credited with five points.⁵ Accordingly, the SHRCP Application was tentatively accepted for filing, triggering a 30-day period for parties to file petitions to deny against the tentative selectee.⁶

In its application, SHRCP asserted that the total population within its 60 dBμ contour is 587,663 people, and that a total of 154,981 people (approximately 26 percent of the total population) within its contour would receive either a first or second NCE service. Accordingly, SHRCP contended that it met the reservation standard.

Both the MPLC and CCT Petitions assert that the SHRCP Application failed to account for NCE FM station KUOP(FM), Stockton, California, in its NCE service calculations and that, when station KUOP(FM) is taken into account, SHRCP's aggregate first and second NCE service would serve only approximately five percent of the total population. MPLC and CCT request that the SHRCP Application be dismissed for failing to satisfy the third channel reservation standard's ten-percent service threshold.⁷

In its Opposition, SHRCP concedes that it overlooked KUOP(FM) and thus does not meet the reservation standard under its original application. However, SHRCP has submitted a curative amendment ("Amendment"), which accounts for the additional NCE station and adjusts its proposed

² The other five applicants were Radio Bilingue, Inc. (File No. BNPED-20100225ACV) ("RBI"), Ondas de Vida Network, Inc. (File No. BNPED-20100226AAE) ("OVN"), Crossroads Church, an Evangelical Free Church (File No. BNPED-20100226ACV) ("Crossroads"), Centro Cristiano Vida Abundante, Inc. (File No. BNPED-20100226ADX) ("CCVA"), and Hispanic Family Christian Network, Inc. (File No. BNPED-20100226AHR) ("HFCN"). These applications were dismissed by the staff on June 7, 2011, and those actions have become final. See *Broadcast Actions*, Public Notice, Report No. 47505 (Jun. 10, 2011).

³ See *Comparative Consideration of 37 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial FM Stations filed in the February 2010 and October 2007 Filing Windows*, Memorandum Opinion and Order, 26 FCC Rcd 7008, 7019-20 (MB 2011) ("*Comparative Consideration Order*"). The Westley, CA, Channel 238* allotment was reserved for NCE use in *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Westley, California)*, Report and Order, 19 FCC Rcd 13115 (MB 2004).

⁴ *Id.* at 7020. Channel 238A at Westley, California was reserved under the third channel reservation criterion. Accordingly, applicants for this frequency must demonstrate that they are technically precluded from using a reserved channel and that they will provide first or second NCE service to at least ten percent of its covered population, which must total at least 2,000 persons.

⁵ See *id.* Crossroads also was credited with five points. RBI, OVN, CCVA, and HFCN each received two points.

⁶ *Id.* at 7052.

⁷ *Id.* at 7010. The MPLC Petition also argues for dismissal on the grounds that SHRCP failed to obtain reasonable assurance of the construction site's availability, and the CCT Petition claims that the SHRCP's construction site is unsuitable and that SHRCP violated FAA notification requirements, 47 C.F.R. § 17.7(a). Because we dismiss the SHRCP Application on the fair distribution argument, we do not address the merits of these claims.

service population and area.⁸ After the Amendment, SHRCP claims its proposed site provides first or second service to 10.2 percent of its total service population. SHRCP claims because it satisfies the ten percent threshold, the SHRCP Application cannot be dismissed and should be re-evaluated alongside MPLC and CCT.

In its reply, MPLC contends that the Amendment was unauthorized, and, therefore, it cannot be considered.⁹ It states that satisfaction of the third channel reservation standard is a prerequisite to qualifying for the points analysis, and SHRCP cannot amend its Application because it impermissibly enhances its qualifications after the application window closed.

Discussion. *SHRCP Application.* Section 309(d)(1) of the Act¹⁰ 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.¹¹ 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.¹² 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.¹³ If no such question is raised and if the Commission concludes that such grant otherwise serves the public interest, convenience, and necessity, the Commission will deny the petition and grant the application.

In upholding the third channel reservation standard, the Commission specifically advised prospective NCE applicants that the first or second NCE service requirement does not end upon allotment but remains applicable at the application stage.¹⁴ An application implementing an allotment reserved under these procedures that fails to satisfy this requirement is eliminated and will not proceed to the point system analysis.¹⁵ Taking station KUOP(FM) coverage into account, we find that SHRCP's original technical proposal provides first and second NCE service to a combined population of 190 people, only 0.03 percent of the total service population of 693,714 people. It thus fails to satisfy the ten-percent threshold requirement of the third channel reservation standard.

⁸ The Amendment changes the antenna coordinates, height, and coverage pattern in order to reduce SHRCP's service population from 587,663 people to 285,962 people and its service area from 3,376 sq. km to 2,309 sq. km. In the Amendment, SHRCP claims to provide first NCE service to 25 people and second NCE service to 29,133 people for a combined 10.2% of the total service population.

⁹ The Reply also contends that the population calculations used in SHRCP's Amendment are flawed because they are based on NED 3-second terrain data instead of the standard 30-second NGDC data. Because we are not considering SHRCP's amendment, we need not address this argument.

¹⁰ 47 U.S.C. § 309(d)(1).

¹¹ See, e.g., *Artistic Media Partners, Inc.*, Letter, 22 FCC Rcd 18676, 18676 (MB 2007).

¹² See *id.*; *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

¹³ 47 U.S.C. § 309(d)(2).

¹⁴ See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Second Report and Order, 18 FCC Rcd 6691, 6705 (2003) ("*NCE Second Report and Order*") ("*Reserved allotments will be conditioned on the construction and licensing of an NCE station that provides the requisite level of first and second NCE service. In the event that all applications for a reserved band allotment fail to propose such service, the allotment will become unreserved by operation of law and subject to the Commission's competitive bidding licensing procedures*"). See also 47 C.F.R. § 73.202(a)(1)(ii).

¹⁵ *Comparative Consideration Order*, 26 FCC Rcd at 7009.

SHRCP argues in its Opposition that a tentative selectee is permitted to submit curative amendments if its application is found to be unacceptable;¹⁶ it argues that it is not improving its qualifications because it is reducing its originally proposed service area and population and claiming fewer points than originally awarded, in effect weakening its original comparative position.¹⁷ MPLC argues that the SHRCP Amendment cannot be considered, as the Amendment does have the effect of impermissibly enhancing SHRCP's qualifications after the application window closed because SHRCP should not have proceeded to the point hearing in the first place with its defective proposal.¹⁸

Section 73.7003(e) provides that an applicant's "maximum qualifications are established at the time of application."¹⁹ However, we need not decide whether the Amendment constitutes an untimely attempt to enhance SHRCP's comparative position, because the Amendment, even if acceptable, fails to cure the defect in the SHRCP Application. Contrary to SHRCP's submission, our studies indicate that SHRCP's amended proposal would provide first or second NCE service to 20,458 people, only 7.1 percent of the total service population of 289,179 people within the amended 60 dBμ contour.²⁰

Accordingly, we find that the SHCRP Application is defective because it fails to meet the third channel reservation standard and must be dismissed pursuant to Section 73.3566(a). We therefore will rescind our tentative selection of the SHRCP Application and dismiss the SHRCP Application as defective pursuant to Section 73.3566(a).

MPLC and CCT Applications. Because we are dismissing the tentatively selected SHRCP Application, we now turn to the MPLC and CCT Applications, tied with five points in the *Comparative Consideration Order*.²¹ Upon reviewing the technical proposals for the MPLC and CCT Applications, we find them similarly defective. CCT claims to provide aggregate first and second NCE service to 27,433 people, 10.2 percent of its total service population of 269,972 people.²² MPLC claims to provide aggregate first and second NCE service to 26,531 people, 10.5 percent of its total service population of 253,959 people.²³ However, we found that both applicants fail to attain the ten-percent threshold and, therefore, do not satisfy the requirements of the third channel reservation standard. Our studies show that CCT would provide first and second NCE service to 19,901 people, 7.0 percent of its total service population of 285,562 people; MPLC would provide first and second NCE service to 19,920 people, 7.6

¹⁶ See *Comparative Consideration of 33 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 26 FCC Rcd 9058, 9094 n. 157 (MB 2011).

¹⁷ Opposition at 3; 47 C.F.R. § 73.3522(b)(2).

¹⁸ Reply at 4.

¹⁹ 47 C.F.R. § 73.7003(e). See also *Fair Distribution Threshold Analysis of 28 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 24 FCC Rcd 12390, 12399 (MB 2009) (rejecting applicant's attempt to amend its application after the close of the filing window to claim a preference based solely on aggregated first and second NCE service).

²⁰ Our review revealed that the amended proposal failed to include an existing station whose contour overlaps with the proposed coverage area: KCSS(FM), Turlock, California (File No. BLED-19990316KB).

²¹ See 47 C.F.R. § 73.7004(d) ("If an applicant is found unqualified, the application shall be denied, and the applicant(s) with the next highest point tally named as the new tentative selectee"). Although Crossroads also received five points, it did not file a petition for reconsideration of the dismissal of its application, and that dismissal is now final. See *supra* n. 2.

²² CCT Application, Exhibit 13.

²³ MPLC Application, Exhibit 13.

percent of its total service population of 260,982 people.²⁴ Accordingly, none of the remaining applications in NCE Reserved Allotment Group No. 8 would provide the requisite level of first and second NCE service. Therefore, we also dismiss the MPLC and CCT Applications pursuant to Section 73.3566(a) and conclude that the Channel 238A Westley, CA, allotment is unreserved by operation of law. The Media Bureau will include this allotment in an upcoming auction.²⁵

Conclusions/Actions. Accordingly, IT IS ORDERED, that the Petition to Deny filed by Modesto Peace/Life Center on June 2, 2011 and the Petition to Deny filed by Calvary Church in Turlock, Inc. on June 2, 2011, ARE GRANTED to the extent indicated above.

IT IS FURTHER ORDERED, that the tentative selection of Sacred Heart Roman Catholic Parish's application (File No. BNPED-20100226AJ0) IS RESCINDED and its application IS DISMISSED.

IT IS FURTHER ORDERED, that the applications of Modesto Peace/Life Center and Calvary Chapel of Turlock, Inc. (File Nos. BNPED-20100224ABX and BNPED-20100226AGO, respectively) ARE DISMISSED.

IT IS FURTHER ORDERED, that, pursuant to Section 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, that effective July 27, 2012, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS MODIFIED BY OPERATION OF LAW with respect to the communities listed below, to read as follows:

<u>Community</u>	<u>Channel No.</u>
Westley, California	238A

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

²⁴ As did SHRCP, MPLC and CCT failed to include KCSS(FM) in their NCE coverage calculations. *See supra* n. 21.

²⁵ *See NCE Second Report and Order*, 18 FCC Rcd at 6705, *supra* n. 14.