



Federal Communications Commission  
Washington, D.C. 20554

August 10, 2012

**DA 12-1314**

*In Reply Refer to:*

1800B3-ERC/ATS

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In re: **NCE MX Group 95083E**

**New NCE-FM, Kaneohe, HI**

Maka'ainana Broadcasting Company, Ltd.

Facility ID No. 81548

File No. BNPED-19960418MB

**New NCE-FM, Honolulu, HI**

Calvary Chapel of Honolulu, Inc.

Facility ID No. 81538

File No. BNPED-19960416MA

**Petition for Reconsideration**

**Petition to Deny**

Dear Counsel:

We have before us the referenced application, filed by Maka'ainana Broadcasting Company, Ltd. ("MBC"), for a new, noncommercial educational ("NCE") FM station on at Kaneohe, Hawaii ("MBC Application") and the referenced application filed by Calvary Chapel of Honolulu, Inc. ("CCHI") for a new NCE FM station at Honolulu, Hawaii ("CCHI Application"). We also have a Petition for Reconsideration ("MBC Petition for Reconsideration")<sup>1</sup> of the Commission's decision to rescind the MBC Application's status as tentative selectee of NCE MX Group 95083E and identify the CCHI Application as the new tentative selectee of that group;<sup>2</sup> and a Petition to Deny ("MBC Petition to Deny") the CCHI Application<sup>3</sup> filed by MBC on July 21, 2011. For the reasons set forth below, we dismiss the MBC Petition for Reconsideration and deny the MBC Petition to Deny.

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<sup>1</sup> CCHI filed a Motion to Dismiss ("Motion") and a "Contingent Opposition to Petition for Reconsideration" ("CCHI Contingent Opposition") concurrently on August 3, 2011. MBC filed a Reply to "Contingent Opposition to Petition to Deny" ("Reply to Contingent Opposition") on August 15, 2011.

<sup>2</sup> *Comparative Consideration of 33 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial FM Stations*, Memorandum Opinion and Order, 26 FCC Rcd 9058, 9091 (MB 2011) ("*Comparative Consideration Order*").

<sup>3</sup> CCHI filed an Opposition to Petition to Deny ("CCHI Opposition") on August 3, 2011. MBC filed a Reply to Opposition to Petition to Deny ("Reply to Opposition") on August 15, 2011.

**Background.** MBC, CCHI, and a third applicant, Bible Broadcasting Network, Inc. (“BBN”), filed mutually exclusive applications for a new NCE FM station. MBC proposed service to Kaneohe, Hawaii, and the other applicants proposed service to Honolulu. The Commission subsequently designated these applications as Group 95083E.<sup>4</sup> In the *Omnibus Order*, the Commission named MBC the tentative selectee based on an award of five points for satisfying the “established local applicant” and “local diversity of ownership” criteria.<sup>5</sup> The Commission established a 30-day period in which to file petitions to deny.<sup>6</sup>

CCHI filed a petition to deny the MBC Application on May 2, 2007, challenging MBC’s qualifications as an established local applicant, claiming that MBC does not use its physical headquarters -- located at 875 Waimanu Street, in Honolulu (“Suite 110”) -- to conduct any activity in the community. Specifically, CCHI alleged “there is no hint of MBC’s presence at [Suite 110] or of any activity on the part of MBC other than prosecution of the application.”<sup>7</sup> In response, MBC acknowledged that it was formed primarily for the purpose of filing its Application and had no other current business activities, but argued that its physical presence within 25 miles of its community of license for more than two years was sufficient to receive points as an established local applicant.<sup>8</sup>

On October 3, 2007, the Media Bureau (“Bureau”) Staff issued a letter, finding that the mere local address of an applicant was not sufficient to entitle it to receive points as an established local applicant: “It has never been our intent to award the established local applicant credit to organizations engaged in virtually no activities in the community of interest . . . A shell organization’s mere paper existence for two years or more [does not satisfy the standard].”<sup>9</sup> Finding that CCHI had raised a *prima facie* case that MBC was an inchoate organization, the Bureau referred the case to the Commission for final disposition and offered MBC a 30-day period to produce additional factual documentation for the Commission’s consideration. MBC submitted the following, supported by a declaration of its President under penalty of perjury: (1) a photograph of a sign located at a rear outside entrance to Suite 110 listing MBC among seven businesses therein; (2) a description of a “somewhat unusual” building layout that might create difficulty seeing the MBC sign; (3) a statement that MBC’s principals have regularly conferred concerning programming plans; and (4) descriptions of active involvement of several MBC principals in local public affairs.<sup>10</sup>

In the *Comparative Consideration Order*,<sup>11</sup> the Commission found the record, as a whole, supported our preliminary finding that MBC is an inchoate organization: “It is clear from the record that MBC is not an actively operating organization and that its Suite 110 address functions, at most, like locations which the Commission has identified as insufficient to qualify for points.”<sup>12</sup> It concluded that

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<sup>4</sup> See *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, 6133 (2007) (“*Omnibus Order*”).

<sup>5</sup> *Id.* CCHI received three points, and BBN received zero points.

<sup>6</sup> *Id.* at 6165.

<sup>7</sup> CCHI, May 2, 2007, Petition to Deny at 6.

<sup>8</sup> MBC, May 16, 2007, Opposition to Petition to Deny at 5 n.3.

<sup>9</sup> *Calvary Chapel of Honolulu, Inc.*, Letter, 22 FCC Rcd 17654, 17660 (MB 2007) (“*Staff Decision*”) (citing *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Memorandum Opinion and Second Order on Reconsideration, 17 FCC Rcd 13132, 13137-38 (2002) (“*NCE Second Order*”).

<sup>10</sup> MBC asserted that its principals worked with local charities, volunteered at non-commercial television stations, and held positions of public office in the community.

<sup>11</sup> *Comparative Consideration Order*, 26 FCC Rcd at 9091.

<sup>12</sup> *Id.* at 9091.

MBC failed to show that any business or activities relating to MBC ever took place in Suite 110 and that the active community involvement of the MBC principals cannot be attributed to MBC as the applicant entity.<sup>13</sup> As a result, the Commission conducted a new comparative analysis, declined to credit MBC's claim for three points as an established local applicant, and named CCHI the new tentative selectee.<sup>14</sup> The Commission also established a new 30-day period in which to file petitions to deny the CCHI Application.<sup>15</sup>

In response to the *Comparative Consideration Order*, MBC filed the instant pleadings. In the MBC Petition for Reconsideration, MBC argues, as it did previously, that Section 73.7000 of the Commission's Rules (the "Rules")<sup>16</sup> only requires that an established local applicant be headquartered within 25 miles of the proposed community of license for a period of more than two years. MBC alleges that the Commission has improperly deviated from the codified standard by requiring some level of "specific activity by the applicant in its own name," and that such a requirement is unsupported by previous Commission pronouncements.<sup>17</sup> MBC claims this revision is an "arbitrary and capricious" application of Section 73.7000.<sup>18</sup> MBC argues in the alternative that if such activity is required, the local activities and engagements undertaken by MBC's principals should suffice to satisfy the requirement.<sup>19</sup>

In its Motion, CCHI claims that MBC's Petition for Reconsideration should be dismissed because it is procedurally improper and violates Section 1.106(a)(1).<sup>20</sup> Further, in the Contingent Opposition, CCHI argues that MBC fails to raise any new points not already considered by the Commission and fails to demonstrate any error in the Commission's *Comparative Consideration Order*.<sup>21</sup> In MBC's Reply to Contingent Opposition, MBC reiterates its argument that the Commission has deviated from the language of Section 73.7000 regarding the established local applicant criterion and states that a petition for reconsideration was the proper vehicle to raise its objections.<sup>22</sup>

In its Petition to Deny, MBC claims that CCHI changed more than 50 percent of its board of directors -- a "major change in ownership" -- which is generally impermissible after the close of the filing window under Section 73.3573.<sup>23</sup> MBC alleges that, since the initial application filing in 1996, three of CCHI's five board members have been replaced by new directors, and that the removal of the most recent member, Stephen Holck, cannot be considered the result of "gradual" or "inevitable" change for which a waiver may be granted.<sup>24</sup> MBC claims that CCHI fired Mr. Holck in November, 2006, although CCHI

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<sup>13</sup> *Id.* at 9091-92.

<sup>14</sup> *Id.* at 9092.

<sup>15</sup> *Id.* at 9105.

<sup>16</sup> 47 C.F.R. § 73.7000.

<sup>17</sup> MBC Petition for Reconsideration at 4-5.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 5-7 (stating repeatedly that an organization is "nothing more nor less than its principals").

<sup>20</sup> 47 C.F.R. § 1.106(a)(1). CCHI argues that Section 1.106(a)(1) prohibits petitions for reconsideration of interlocutory decisions, such as the *Comparative Consideration Order*. As such, CCHI states that the Bureau should dismiss the MBC Petition for Reconsideration without consideration.

<sup>21</sup> CCHI Contingent Opposition at 6-8. CCHI also argues that MBC's Application should be dismissed for lack of reasonable assurance of site availability. We do not reach the merits of this claim.

<sup>22</sup> Reply to Contingent Opposition at 1-2.

<sup>23</sup> MBC Petition to Deny at 2-4; *see* 47 C.F.R. § 73.3573.

<sup>24</sup> *Id.* at 4-6.

previously stated that Mr. Holck took a leave of absence following his wife's death.<sup>25</sup> MBC alleges that this discrepancy is evidence of CCHI's misrepresentation and lack of candor and should be separate grounds for dismissal of the CCHI Application and an investigation.<sup>26</sup>

In its Opposition, CCHI acknowledges that it has replaced three of its originally listed five directors but maintains that it is eligible for a waiver because of the extended period between application filing and action.<sup>27</sup> CCHI also argues that the *Staff Decision* previously addressed this issue and stated that a waiver would be appropriate.<sup>28</sup> CCHI denies MBC's allegations that it provided false information and maintains that Mr. Holck took a leave of absence in November, 2006, before leaving permanently.<sup>29</sup> In its Reply, MBC argues that waiver is inappropriate because CCHI's major change in ownership is distinguishable from those specified in the *Omnibus Order*.<sup>30</sup> MBC also avers that CCHI's refusal to respond to claims regarding the circumstances of Mr. Holck's departure from CCHI's board is evidence of a lack of candor and credibility.<sup>31</sup>

**Discussion. *Petition for Reconsideration.*** Section 1.106(a)(1) of the Rules specifically prohibits petitions for reconsideration of interlocutory orders.<sup>32</sup> The *Comparative Consideration Order* against which reconsideration is sought took no action with regard to any of the underlying applications in Group 95083E. Confirming the interlocutory nature of the *Comparative Consideration Order*, the Bureau repeatedly emphasized that the selections were "tentative" and took no final action on either the MBC or CCHI Applications.<sup>33</sup> The *Comparative Consideration Order* expressly states that "[a]ny argument that the tentatively selected application should not be granted should be raised in such a petition [to deny], even if the objection relates only indirectly to the tentative selectee's qualifications."<sup>34</sup> We therefore will dismiss the MBC Petition for Reconsideration as procedurally improper.

Moreover, even if we consider MBC's arguments, we find them unpersuasive. MBC argues that nothing more is needed to satisfy the established local applicant criterion if the applicant demonstrates that it is physically headquartered within 25 miles of its community of license and has been for more than two years.<sup>35</sup> It claims that the Commission has enforced the established local applicant criterion in an

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<sup>25</sup> *Id.* MBC provides a detailed account of its version of the circumstances surrounding Mr. Holck's departure and his relationship with CCHI. *Id.* at 3-4. As discussed below, we these details are irrelevant to our determination.

<sup>26</sup> *Id.* at 8-9.

<sup>27</sup> CCHI Opposition at 2.

<sup>28</sup> *Id.* at 5.

<sup>29</sup> *Id.* at n. 15.

<sup>30</sup> Reply to Opposition at 2-3. The *Omnibus Order* specified two cases in which waiver of the major change in ownership prohibition would be granted. *Omnibus Order*, 22 FCC Rcd at 6124. MBC argues that both cases are distinguishable because they involved an extended organization and an institutional system of checks and balances, requiring regular managerial turnover. MBC Petition to Deny at 2-3. MBC claims that CCHI lacks these essential features. *Id.*

<sup>31</sup> Reply to Opposition at 4.

<sup>32</sup> See 47 C.F.R. § 1.106(a)(1). See also *Comparative Consideration Order*, 26 FCC Rcd at 9094 ("Parties should not raise . . . [objections] as petitions for reconsideration of the instant Order because the point hearings herein take no final action on any application, and petitions for reconsideration do not lie against such interlocutory decisions"); *State of Oregon*, Letter, 23 FCC Rcd 11576 (MB 2008).

<sup>33</sup> See *Comparative Consideration Order*, 26 FCC Rcd at 9094.

<sup>34</sup> See *id.* (stating that "an applicant that concedes that the tentative selectee is qualified for the points received but believes its own proposal should have received a greater number of points than the tentative selectee's would make its argument in a petition to deny"). We find the example apt for this situation.

<sup>35</sup> MBC Petition for Reconsideration at 4-5.

arbitrary and capricious manner, “at odds with the Commission’s explicit goals.”<sup>36</sup> We disagree. The Commission explicitly anticipated that some applicants would exist solely on paper and emphasized that such applicants would not satisfy the established local applicant criterion.<sup>37</sup> The Commission also has explicitly rejected MBC’s argument that the activities of its principals in the community of license should be attributed to MBC for the purposes of establishing community involvement, although not undertaken as representatives of MBC.<sup>38</sup> It stated in the *Comparative Consideration Order* that “MBC cannot rely on activities of local director with other organizations to overcome its own lack of local activity.”<sup>39</sup> MBC has shown no error in these determinations.

*Petition to Deny.* Section 309(d)(1) of the Communications Act of 1934, as amended,<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup> 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.

Pursuant to Section 73.3573(a) of the Rules,<sup>44</sup> a fifty percent change in the governing board of an NCE applicant would generally be considered a major change and would not be permissible outside of a filing window.<sup>45</sup> In the *Omnibus Order*, however, the Commission delineated the circumstances under which waivers might be appropriate.<sup>46</sup> For instance, the Commission indicated that a waiver would be warranted when the change occurred gradually and pursuant to state law and not as an outgrowth of any party’s desire to gain control over an entity which has pending an NCE new station application.<sup>47</sup> The Commission also looks to whether the change occurred naturally as the organization evolved and grew.<sup>48</sup> Indeed, the Commission has recognized that gradual changes in the control of NCE governing boards may

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<sup>36</sup> *Id.* at 1.

<sup>37</sup> See *NCE Second Order*, 17 FCC Rcd at 17661 (“Paper existence serves neither to establish the applicant’s educational credentials in a particular locality nor to foster participation by truly local entities in noncommercial educational broadcasting”).

<sup>38</sup> MBC Petition for Reconsideration at 5-7.

<sup>39</sup> *Comparative Consideration Order*, 26 FCC Rcd at 9092.

<sup>40</sup> 47 U.S.C. § 309(d)(1).

<sup>41</sup> See, e.g., *Artistic Media Partners, Inc.*, Letter, 22 FCC Rcd 18676, 18676 (MB 2007).

<sup>42</sup> See *id.*; *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

<sup>43</sup> 47 U.S.C. § 309(d)(2).

<sup>44</sup> 47 C.F.R. §73.3573(a).

<sup>45</sup> See *Omnibus Order*, 22 FCC Rcd at 6123.

<sup>46</sup> *Id.* at 6124.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

occur over periods as brief as four years.<sup>49</sup> Nevertheless, it noted that waivers are not warranted in all circumstances.<sup>50</sup>

In the MBC Petition to Deny, MBC claims that CCHI's 60 percent change in its governing board should not be entitled to a waiver of the major change of ownership rule because it does not follow the cases specified in the *Omnibus Order*.<sup>51</sup> This argument is misguided. The *Staff Decision*, in *dicta*, merely stated that, "in view of the waivers that the Commission has granted to NCE applicants that underwent routine and inevitable ownership changes over a substantial period . . . it would be inconsistent to penalize NCE petitions that potentially are similarly-situated."<sup>52</sup>

We find a waiver of Section 73.3573(a) is justified in this case because CCHI's major change of ownership was occurred gradually and was not the outgrowth of any party's desire to gain control. CCHI submitted its Application in April, 1996. The first of its original directors left in 1998; the second in 1999; and the third, Mr. Holck, in November, 2006.<sup>53</sup> Such turnover, over more than ten years, falls within the range of what the Commission has deemed to be "gradual."<sup>54</sup> Moreover, MBC has not alleged that the change in ownership was an outgrowth of any party's desire to gain control, nor do the facts support this conclusion.<sup>55</sup> Instead, MBC focuses on the circumstances surrounding Mr. Holck's departure, claiming that his dismissal cannot be considered "routine" or "inevitable" because Mr. Holck was allegedly fired.<sup>56</sup> MBC contends that waiver is inappropriate because Mr. Holck's departure is distinguishable from the cases highlighted in the *Omnibus Order* where waiver was approved.<sup>57</sup> However, the Commission's discussion of major change of ownership issues in the *Omnibus Order* was not intended to be an exhaustive list of the circumstances in which waiver would be appropriate. Rather, the Commission recognized that it would be "unreasonable to penalize . . . similarly situated NCE applicants for routine and inevitable changes in their boards or other governing bodies, over the substantially [long] period that the Commission was unable to act on their applications due to pending NCE rulemaking and judicial proceedings."<sup>58</sup> Although MBC focuses on the specific falling out between CCHI and Mr. Holck, the Commission is only concerned with the overall pattern of change in ownership.<sup>59</sup> We find that CCHI's major change in ownership was gradual and routine, and not the outgrowth of any party's desire to gain control.

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<sup>49</sup> *Id.* at 6125.

<sup>50</sup> *Id.* at 6128 (declining to waive rule where changes were evidence of an attempt to gain control of the applicant entity and were not the gradual replacement of the applicant members over time).

<sup>51</sup> MBC Petition to Deny at 2-3; *see supra* n. 29.

<sup>52</sup> *Staff Decision*, 22 FCC Rcd at 17655. The *Staff Decision* briefly addressed the major change in ownership issue in considering whether CCHI had standing to file its May 2, 2007, Petition to Deny.

<sup>53</sup> *See* CCHI Opposition, Attachment A. Mr. Holck allegedly took a leave of absence starting in November, but, as he never returned, we will treat November, 2006, as his departure date.

<sup>54</sup> *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).

<sup>55</sup> William Stonebraker, CCHI's President, and Kevin O'Neill, CCHI's Vice-President, have remained on CCHI's board of directors since the original filing.

<sup>56</sup> MBC Petition to Deny at 4-6.

<sup>57</sup> *Id.* at 4-5, *citing Omnibus Order*, 22 FCC Rcd at 6124-25.

<sup>58</sup> *Omnibus Order* at 6125. The Commission anticipated that a large number of NCE applicants would be affected, stating, "We expect that many pending NCE applicants that have experienced 50 percent ownership changes will qualify for such waivers."

<sup>59</sup> MBC's argument also fails to address the fact that all three departed directors must be considered. MBC alleges that Mr. Holck's dismissal was not routine or inevitable but is silent on the remaining two.

The Commission may waive its policies or rules upon a showing of good cause.<sup>60</sup> An applicant seeking a waiver has the burden to plead with particularity the facts and circumstances that warrant such action.<sup>61</sup> The Commission must give waiver requests “a hard look,” but an applicant for waiver “faces a high hurdle even at the starting gate”<sup>62</sup> and must support its waiver request with a compelling showing.<sup>63</sup> The Commission may exercise its discretion to waive a policy or rule where the particular facts make strict compliance inconsistent with the public interest.<sup>64</sup> In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.<sup>65</sup> However, waiver of the Commission’s policies or rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.<sup>66</sup>

In this case, consistent with Commission pronouncements in the *Omnibus Order*, we find that strict compliance with Section 73.3573 would disserve the public interest and that “special circumstances” – the 16-year pendency of the CCHI Application – warrant a deviation from that general rule. Accordingly, we waive Section 73.3573 with respect to the change in CCHI’s governing board.

Finally, MBC alleges that CCHI has engaged in misrepresentation and lack of candor.<sup>67</sup> The trait of truthfulness is a key element of character qualifications necessary to operate a broadcast station in the public interest.<sup>68</sup> Misrepresentation and lack of candor raise immediate concerns as to whether a licensee will be truthful in future dealings with the Commission.<sup>69</sup> Misrepresentation is a false statement of fact made with intent to deceive.<sup>70</sup> Lack of candor is concealment, evasion, or other failure to be fully informative, accompanied by intent to deceive.<sup>71</sup> Intent can be shown in many ways. If a licensee knowingly makes a false statement, that is sufficient proof of intent to deceive.<sup>72</sup> Intent to deceive can also be inferred when one

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<sup>60</sup> 47 C.F.R. § 1.3.

<sup>61</sup> See *Columbia Communications Corp. v. FCC*, 832 F.2d 189, 192 (D.C. Cir. 1987).

<sup>62</sup> See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff’d*, 459 F.2d 1203 (1972), *cert. denied*, 93 S.Ct. 461 (1972) (“*WAIT Radio*”). See also *Thomas Radio v. FCC*, 716 F.2d 921, 924 (D.C. Cir. 1983).

<sup>63</sup> *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999) (citing *Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974)).

<sup>64</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“*Northeast Cellular*”).

<sup>65</sup> *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

<sup>66</sup> *Network IP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166.

<sup>67</sup> MBC Petition to Deny at 7-9.

<sup>68</sup> See *Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order and Policy Statement, 102 FCC 2d 1179, 1210-11 (1986), *recon. denied*, 1 FCC Rcd 421 (1986), *appeal dismissed sub nom. National Association for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. Jun. 11, 1987).

<sup>69</sup> *Id.*

<sup>70</sup> See *Fox River Broadcasting, Inc.*, Order, 93 FCC 2d 127, 129 (1983).

<sup>71</sup> *Id.*

<sup>72</sup> See *Leflore Broadcasting Co., Inc. v. FCC*, 636 F.2d 454, 462 (D.C. Cir. 1980) (“[T]he fact of misrepresentation coupled with proof that the party making it had knowledge of its falsity [is] enough to justify a conclusion that there was fraudulent intent”).

has a clear motive to deceive.<sup>73</sup> Moreover, intent can be found when the surrounding circumstances clearly show the existence of intent to deceive, even if there is no direct evidence of a motive.<sup>74</sup>

MBC presents the Declaration, under penalty of perjury, of Christopher Racine, a director of MBC, who states that Mr. Holck was fired in November, 2006,<sup>75</sup> contradicting prior statements by CCHI that Mr. Holck simply took a leave of absence in November, 2006, and was subsequently replaced in 2007.<sup>76</sup> We find that MBC has not proved the requisite intent necessary to establish misrepresentation and lack of candor. The party alleging misrepresentation and lack of candor has the burden of proof to make a *prima facie* showing of intent to deceive.<sup>77</sup> MBC has not made such a showing, instead choosing only to pose a series of rhetorical questions.<sup>78</sup> Additionally, we find no evident motive supporting an intent to deceive, because whether Mr. Holck was fired or placed on leave November of 2006 and ultimately replaced is irrelevant to the central issue of whether the change in CCHI's board occurred gradually.

**Conclusions/Actions.** In light of the procedural and substantive defects, we find that MBC's arguments do not warrant overturning its tentative dismissal. Further, MBC's arguments do not affect our determination that CCHI is entitled to a waiver of Section 73.3573 of the Rules, as the replacement of three of CCHI's five directors over a ten-year period constitutes a gradual change in ownership.

Accordingly, IT IS ORDERED that the Petition for Reconsideration, filed by Maka'ainana Broadcasting Company, Ltd. on July 21, 2011, IS DISMISSED.

IT IS FURTHER ORDERED that the Petition to Deny, filed by Maka'ainana Broadcasting Company, Ltd. on July 21, 2011, IS DENIED.

Sincerely,

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

cc: Maka'ainana Broadcasting Company, Ltd.  
Calvary Chapel of Honolulu, Inc.

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<sup>73</sup> See, e.g., *RKO General, Inc.*, Decision, 4 FCC Rcd 4679, 4684 (Rev. Bd. 1989).

<sup>74</sup> See *American International Development, Inc.*, Memorandum Opinion and Order, 86 FCC 2d 808, 816 n. 39 (1981), *aff'd sub nom. KXIV, Inc. v. FCC*, 704 F.2d 1294 (D.C. Cir. 1983) (stating that "the absence of direct evidence of motive is not significant where the record otherwise clearly establishes that deceptive conduct has occurred").

<sup>75</sup> MBC Petition to Deny, Attachment C, Declaration of Christopher Racine.

<sup>76</sup> See also CCHI Opposition at 3 n. 7.

<sup>77</sup> See, e.g., *Merrimack Valley Broadcasting, Inc.*, Memorandum Opinion and Order, 99 FCC 2d 680, n. 9 (1984).

<sup>78</sup> See Reply to Opposition to Deny at 4.