



**Federal Communications Commission
Washington, D.C. 20554**

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In Reply Refer to:
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In re: **NCE Reserved Allotment Group No. 1**
New NCE-FM, Anniston, Alabama
Anniston Seventh-Day Adventist Church
Facility ID No. 184996
File No. BNPED-20100226ABT

Petition to Deny

Petition for Reconsideration

New NCE-FM, Anniston Alabama
Board of Trustees of Jacksonville State
University
Facility ID No. 184855
File No BNPED-20100226AFB

Dear Counsel:

We have before us: (1) the referenced application, filed by Anniston Seventh-Day Adventist Church (“ASDA”), for a new noncommercial educational (“NCE”) FM station at Anniston, Alabama; (2) the referenced application, filed by the Board of Trustees of Jacksonville State University (“JSU”), for a new NCE FM station at Anniston, Alabama; (3) a Petition to Deny JSU’s application, filed by ASDA on June 22, 2012; and (4) a Petition for Reconsideration filed by ASDA on June 22, 2012.¹ For the reasons set forth below, we grant the Petitions, dismiss the JSU application, reinstate ASDA’s application, *nunc pro tunc*, and grant ASDA’s application.

¹ JSU filed an Opposition to Petition to Deny and an Opposition to Petition for Reconsideration on July 6, 2012 (“Opposition”). ASDA filed a Reply to Opposition to Petition for Reconsideration (“Reply”) on July 13, 2012.

Background. In the *Comparative Consideration Order*,² the Commission applied NCE comparative selection criteria³ to 37 groups of mutually exclusive NCE applications and tentatively selected one winner in each group. Thirty-four of the 37 groups involved applications for NCE allotments in the “non-reserved” portion of the FM band.⁴ In those 34 groups, each applicant was required to satisfy the “third channel reservation standard.”⁵ Under that standard, each applicant is required to show that its proposed station would provide a first or second NCE service to at least ten percent of the population within the proposed service area and that this includes at least 2,000 people. If more than one application within the mutually exclusive group meets this standard, each remaining application then proceeds to a comparative analysis pursuant to 73.7003 of the Rules.

NCE Reserved Allotment Group No. 1 consisted of eight applications to serve Anniston, Alabama, on Channel 261C3.⁶ The Commission concluded that each applicant met the reservation standard by providing a first or second NCE service to at least ten percent of the population and to at least 2,000 people within their respective proposed service areas.⁷ Therefore, all applicants proceeded to an NCE point hearing. ASDA had the highest point total of all the applicants with five points, while JSU was credited with three points.⁸ Accordingly, the ASDA application was tentatively selected and accepted for filing, which triggered a 30-day period for parties to file petitions to deny against the tentative selectee.⁹

On June 12, 2011, JSU filed a petition to deny, arguing that the ASDA application had not met the reservation standard and therefore should be dismissed. Commission staff reviewed ASDA’s application and confirmed that ASDA’s aggregate first and second NCE service would only serve 6.8 percent of the total population within the service area of its proposed station. In a letter released on May 23, 2012 (“Letter Decision”), the Bureau granted JSU’s petition to deny, rescinded ASDA’s tentative selection, dismissed its application and accepted JSU’s application for filing, triggering the 30-day period for parties to file petitions to deny.¹⁰

On June 22, 2012, ASDA timely filed the instant Petitions, arguing that the Commission should dismiss JSU’s application, accept its amended application (“Amendment”) which cures the deficiencies cited in the Letter Decision, and reinstate its application, *nunc pro tunc*. ASDA claims that Section 73.3522(b)(2) of the Commission’s Rules (“Rules”) allows tentative selectees one opportunity to submit a curative amendment, as long as it is minor.¹¹ JSU claims that this provision does not apply to ASDA because, by failing to meet the threshold NCE service requirements, it was never eligible to proceed to the

² 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, 7014 (MB 2011) (“*Comparative Consideration Order*”).

³ See 47 C.F.R. §§ 73.7000 – 05.

⁴ See *Comparative Consideration Order*, 26 FCC Rcd at 7009-10.

⁵ *Id.*

⁶ Because all applicants were required to apply for the same allotted community, fair distribution considerations were inapplicable. 47 C.F.R. § 73.7002(a).

⁷ *Id.* at 7014.

⁸ See *Comparative Consideration Order*, 26 FCC Rcd at 7015. Equality Broadcasting Network, Moody Bible Institute of Chicago, and Smile FM each received two points; and Covenant Communications, Serendipity Educational Broadcasting, and Old Time Gospel Ministries did not receive any points.

⁹ *Id.* at 7050.

¹⁰ See *NCE Reserved Allotment Group No. 1*, Letter, 27 FCC Rcd 5710 (MB 2012).

¹¹ Petition for Reconsideration at 2. See 47 C.F.R. § 73.3522(b)(2).

point system evaluation.¹² Moreover, JSU argues that Section 73.7003(e) of the Rules states that “an applicant’s maximum qualifications are established at the time of application and will be reduced for any post-application changes that negatively affect any evaluation criterion.”¹³ Because ASDA did not meet the minimum technical standards on the date it filed its original application, JSU claims that ASDA cannot now, “well after the fact,” correct “basic, qualifying defects.”¹⁴

Discussion. Section 309(d)(1) of the Act¹⁵ 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.¹⁶ 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.¹⁷ 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.¹⁸ 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.

The Commission will consider a Petition for Reconsideration only when the petitioner shows either a material error in the Commission’s original order or raises changed circumstances or unknown additional facts not known or existing at the time of petitioner’s last opportunity to present such matters.¹⁹ For the reasons set forth below, we find that ASDA has met this burden, and has it met the showing required to grant a petition to deny.

Under our NCE comparative selection rules, population counts are applied in three different ways for non-Tribal applicants such as ASDA. The first is the “third channel reservation standard” that was applied in the Letter Decision to dismiss the ASDA application. This is a basic qualifying test, not a comparative standard. All applicants proposing to operate on a vacant FM allotment in the non-reserved portion of the FM band that has been reserved for NCE use must make the required population showing.²⁰ Accordingly, Section 73.3522(b)(2) (providing one opportunity to cure defects in otherwise prevailing NCE applications) applies, and Section 73.7003(e) (specifying that an amendment cannot enhance an applicant’s comparative qualifications) is not implicated here. Section 73.3522(b)(2) of the Rules specifically affords tentative selectees whose applications are not acceptable for filing the opportunity to cure any defects in their applications, provided that the curative amendments are minor and do not increase the number of qualitative points as originally claimed.²¹ The Amendment meets these criteria.

¹² Opposition at 2.

¹³ 47 C.F.R. § 73.7003(e).

¹⁴ Opposition at 3.

¹⁵ 47 U.S.C. § 309(d)(1).

¹⁶ See, e.g., *Artistic Media Partners, Inc.*, Letter, 22 FCC Rcd 18676, 18676 (MB 2007).

¹⁷ See *id.*; *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

¹⁸ 47 U.S.C. § 309(d)(2).

¹⁹ See 47 C.F.R. § 1.106; *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff’d sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966), and *National Association of Broadcasters*, Memorandum Opinion and Order, 18 FCC Rcd 24414, 24415 (2003).

²⁰ *Comparative Consideration Order*, 26 FCC Rcd at 7009-10.

²¹ See 47 C.F.R. § 73.3522(b)(2).

The second and third types of population counts are comparative standards that are not at issue in this case. These are the fair distribution preference described in Section 73.7002(b) of the Rules and the technical parameters criterion described in Section 73.7003(b)(4) of the Rules. We have consistently rejected post-window amendments that alter service population totals in a manner that would enhance an applicant's comparative position.²² However, ASDA's Amendment remedied a basic qualifying defect, as permitted under Section 73.3522(b)(2), rather than enhancing ASDA's comparative status. Accordingly, we find that applicants may cure defective third channel reservation showings by filing an amendment that satisfies the criteria set forth in Section 73.3522(b)(2), as ASDA's Amendment did. JSU points to no Rule or Commission order supporting its position.²³

Commission staff has reviewed the Amendment and confirms that ASDA's proposal meets the reservation standard. Specifically, it satisfies the ten-percent threshold requirement of the third channel reservation standard by providing first and second NCE service to a combined population of 16,114 people, 10.7 percent of the total service population of 150,248 people. We thus grant ASDA's petition to deny and petition for reconsideration, dismiss JSU's application, accept the Amendment, reinstate ASDA's application, *nunc pro tunc*, and grant it.

Conclusions/Actions. Accordingly, IT IS ORDERED, that the Petition to Deny filed by the Anniston Seventh-Day Adventist Church on June 22, 2012, IS GRANTED, to the extent discussed herein.

IT IS FURTHER ORDERED, that the Petition for Reconsideration filed by the Anniston Seventh-Day Adventist Church on June 22, 2012, IS GRANTED, to the extent discussed herein.

IT IS FURTHER ORDERED, that the application of Board of Trustees of Jacksonville State University (File No. BNPED-20100226AFB) IS DISMISSED.

IT IS FURTHER ORDERED, that the application of the Anniston Seventh-Day Adventist Church (File No. BNPED-20100226ABT) IS REINSTATED, *nunc pro tunc*.

²² See, e.g., *Comparative Consideration of 24 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 12887, n. 37 (2010) (rejecting applicant's post-window amendment, where it claimed a first service preference for the first time); *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, 12394-12395 (MB 2009) (finding that an applicant's amendment was a prohibited attempt to enhance its comparative position when the initial application erroneously used population data from a different community than that which applicant proposed to serve). See also *Catholic Social Club of Putnam County Tennessee, Inc.*, Letter, 26 FCC Rcd 5057, n.9 (MB 2011) (noting that an applicant's amended application would provide a combined first or second NCE service to an additional 2,011 persons over its original proposal, accepting the amendment but declining to credit applicant with post-filing window improvement in its comparative position); *Network of Glory*, Letter, 25 FCC Rcd 7311 (MB 2007) (finding that applicant's amendment was a prohibited attempted to enhance its comparative position when the amendment attempted to correct allegedly erroneous population numbers).

²³ JSU's Opposition states that Section 73.3522(b)(2) of the Rules applies only to "A §73.7003 Tentative Selectee." JSU argues that this provision, which sets forth the point system analysis, does not apply to ASDA's application because it never met the threshold technical criteria. Opposition at 2. Our Rules specifically provide otherwise. Under Section 73.3564(a)(3), a patently defective application will be dismissed, but otherwise applications may be corrected pursuant to Section 73.3522 of the Rules. See 47 C.F.R. §§ 73.3564(a)(3), 73.3522. Section 73.3522(b)(2) was written to cover exactly the type of curative amendment that ASDA filed. This rule advances the long-standing Commission policy that perfecting amendments should be allowed "[s]o long as the defect can be removed without otherwise injuring any public or private interests." *James River Broadcasting v. FCC*, 399 F.2d 581, 585 (D.C. Cir. 1968).

IT IS FURTHER ORDERED, that the application of the Anniston Seventh-Day Adventist Church (File No. BNPED-20100226ABT) IS GRANTED, CONDITIONED UPON that selectee'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 Section 73.202(a)(1)(ii) of the Commission's Rules, 47 C.F.R. § 73.202(a)(1)(ii), which requires that the NCE station provide the requisite level of first and second NCE service.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Board of Trustees of Jacksonville State University
Anniston Seventh-Day Adventist Church