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Michael Couzens, Esq.
6536 Telegraph Avenue, Suite B201
Oakland, CA 94609

David. A. O'Connor, Esq.
Wilkinson Barker Knauer, LLP
2300 N Street, N.W., Suite 700
Washington, DC 20037

In re: **NCE Reserved Allotment Group No. 8**
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 for Reconsideration

Dear Counsel:

The Media Bureau ("Bureau") has before it: (1) the referenced application of Modesto Peace/Life Center ("MPLC Application") for a new noncommercial educational ("NCE") FM station at Westley, CA on Channel 238A ("Channel"); (2) the referenced application of Calvary Chapel of Turlock, Inc. ("CCT Application") for a new NCE FM station on the Channel at Westley, CA; (3) a Petition for Reconsideration filed by MPLC ("MPLC Petition"); and (4) a Petition for Reconsideration and Reinstatement Nunc Pro Tunc filed by CCT ("CCT Petition"). Both Petitions were filed on August 27, 2012, in response to a decision issued by the Bureau on July 27, 2012.¹ For the reasons set forth below, the Bureau grants the Petitions, reinstates the MPLC Application and CCT Application, *nunc pro tunc*, and re-reserves the Channel for NCE use.

¹ *Sacred Heart Roman Catholic Parish*, Letter, 27 FCC Rcd 8375 (MB 2012) ("*Staff Decision*"). In response to the Petitions, the parties subsequently filed response to each other: MPLC filed an Opposition to Petition for Reconsideration on September 10, 2012 ("MPLC Opposition"); CCT filed an Opposition to Petition for Reconsideration on September 11, 2012 ("CCT Opposition"); MPLC filed a Reply to Opposition Re: Petition for Reconsideration on September 20, 2012 ("MPLC Reply"); and CCT filed a Reply to Opposition to Petition for Reconsideration on September 21, 2012 ("CCT Reply").

Background. In the *Comparative Consideration Order*,² the Commission applied NCE comparative selection criteria³ to 37 groups of mutually exclusive NCE applications. Thirty-four of the 37 groups consisted of applications for allotments previously reserved for NCE use.⁴ The Commission requires applicants for these “reserved allotments” to specify technical facilities that satisfy the “third channel Reservation Standard” (“Reservation Standard”).⁵ Under the Reservation Standard, each applicant must show that its proposed station would provide an aggregate first or second NCE service to at least 10 percent of the population within the proposed service area and that this percentage would include at least 2,000 people. If more than one application in a group meets this standard, these applications proceed to a comparative analysis points hearing pursuant to Section 73.7003 of the Commission’s Rules (“Rules”).⁶

NCE Reserved Allotment Group No. 8 consisted of eight applications for the reserved Westley, CA, allotment. The Commission concluded that each applicant satisfied the Reservation Standard.⁷ The applicants then proceeded to the points hearing. MPLC and CCT were each credited with five points and Sacred Heart Roman Catholic Parish (“SHRCP”) was credited with seven points.⁸ SHRCP earned the most points and therefore was designated the tentative selectee.⁹

In response to the tentative selection of SHRCP, MPLC and CCT filed petitions to deny, each arguing that SHRCP’s application had not satisfied the Reservation Standard and therefore should be dismissed. Commission staff reviewed SHRCP’s application and confirmed that SHRCP had failed to take into account NCE station KUOP(FM), Stockton, CA, and that, when accounted for, SHRCP’s aggregate first and second NCE service would have provided first and second NCE service to only 190 people, or 0.03 percent of the total service population.¹⁰ Accordingly, the Bureau granted the MPLC and CCT petitions to deny, rescinded SHRCP’s tentative selection, and dismissed its application.¹¹

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 (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 47 C.F.R. § 73.7003.

⁷ See *Comparative Consideration Order*, 26 FCC Rcd at 7020.

⁸ *Id.*

⁹ *Id.* at 7052.

¹⁰ *Staff Decision*, 27 FCC Rcd at 8376. SHRCP’s amended application also failed the 10 percent service requirement because it only provided first or second NCE service to 7.1 percent of the total service population, within its amended 60 dBμ contour. *Id.* at 8378.

¹¹ *Id.* See 47 C.F.R. § 73.3566 (“Applications which are determined to be patently not in accordance with the FCC rules, regulations, or other requirements . . . will be considered defective and will not be accepted for filing or if inadvertently accepted for filing will be dismissed”). SHRCP’s dismissal is now final because it did not file a petition for reconsideration appealing the Bureau’s action. See 47 C.F.R. § 1.106(f) (“ . . . the petition for reconsideration and any supplemental thereto shall be filed within 30 days from the date of public notice of the final Commission action . . .”).

In light of SHRCP's dismissal, the Bureau next turned to the MPLC and CCT Applications, both tied with five points.¹² CCT claimed to provide aggregate first and second NCE service to 27,433 people, 10.2 percent of its total service population. MPLC claimed to provide aggregate first and second NCE service to 26,531 people, 10.5 percent of its total service population. Upon review, however, the Bureau determined that both Applications failed to include NCE station KCSS(FM), Turlock, CA, in their NCE coverage calculations, and that when accounted for, MPLC and CCT failed to attain the 10 percent service threshold and thus did not satisfy the Reservation Standard.¹³ The *Staff Decision* dismissed the MPLC and CCT Applications pursuant to Section 73.3566(a) of the Rules, and concluded that the Channel 238A allotment was unreserved by operation of law.¹⁴

MPLC and CCT timely filed their Petitions on August 27, 2012. MPLC argues that the *Staff Decision* is incorrect, and maintains that its application did, in fact, account for KCSS(FM) and that it continues to satisfy the Reservation Standard. CCT argues that the Commission should accept its amended application ("CCT Amendment"), which cures the deficiencies cited in the *Staff Decision*, and reinstate its application, *nunc pro tunc*. In its Opposition, MPLC argues that the Commission should reject the CCT Amendment because it attempts to cure a basic qualifying defect.¹⁵ In reply, CCT maintains that the Commission should accept its amendment because (1) there is precedent for allowing minor curative amendments that apply to basic qualifying defects¹⁶ and (2) it does not change CCT's comparative position.¹⁷

Discussion. 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 additional facts not known or existing at the time of petitioner's last opportunity to present such matters.¹⁸

MPLC Petition for Reconsideration. MPLC's Petition alleges that the Bureau made a material error in its calculation of MPLC's first and second NCE service coverage. We agree. We have revisited MPLC's engineering data and find that its Application satisfies the Reservation Standard.¹⁹ Thus, we grant reconsideration and reinstate MPLC's Application.

CCT Petition for Reconsideration. The NCE comparative selection rules apply population counts in three different ways for non-Tribal applicants such as MPLC and CCT. The Reservation Standard is one such way; the *Staff Decision* applied it to dismiss the SHRCP, MPLC, and CCT applications. The

¹² 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").

¹³ *Staff Decision*, 27 FCC Rcd at 8378-79, n.24.

¹⁴ *Id.* at 8379.

¹⁵ MPLC Opposition at 4-5.

¹⁶ CCT Reply at 2.

¹⁷ *Id.* at 3-4.

¹⁸ 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).

¹⁹ The error appears to be due to an isolated discrepancy in our databases.

Reservation Standard is a basic qualifying test, not a comparative standard.²⁰ 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 show that they satisfy the Reservation Standard by making the required population showing.²¹ 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 comparative points originally awarded.²² The CCT Amendment meets these criteria.

The CCT Amendment remedies a basic qualifying defect, as permitted under Section 73.3522(b)(2), and does not improve CCT's comparative status. Contrary to MPLC's assertion, the Bureau has previously held that applicants may cure qualifying defects, such as insufficient Reservation Standard showings, by filing an amendment that satisfies the criteria set forth in Section 73.3522(b)(2), as CCT has done here.²³ Section 73.7003(e) (specifying that an amendment cannot enhance an applicant's comparative qualifications) is not implicated here.²⁴

We have reviewed the CCT Amendment and confirm that it satisfies the Reservation Standard. Specifically, it exceeds the population thresholds by providing first and second NCE service to a combined population of 26,667 people, or 11.58 percent, of the total service population of 230,365 people. The Bureau thus grants the CCT Petition, accepts the Amendment, and reinstates the CCT Application, *nunc pro tunc*.

Tie-breaker mechanism. The Bureau now finds that the MPLC and CCT Applications both satisfy the Reservation Standard and that MPLC and CCT remain tied with five points each.²⁵ Accordingly, the Bureau refers the MPLC and CCT Applications to the Commission to administer the tie-breaker mechanisms and to determine the tentative selectee(s) for NCE Reserved Allotment Group No. 8.

Conclusions/Actions. Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed by Modesto Peace/Life Center on August 27, 2012, IS GRANTED, to the extent discussed herein.

IT IS FURTHER ORDERED, that the Petition for Reconsideration filed by Calvary Chapel of Turlock, Inc., on August 27, 2012, IS GRANTED, to the extent discussed herein.

IT IS FURTHER ORDERED, that the application of Modesto Peace/Life Center (File No. BNPED-20100224ABX) IS REINSTATED.

²⁰ The second and third types of population counts are comparative standards that are not at issue in this case. These are the fair distribution preferences described in 47 C.F.R. § 73.7002(b) and the technical parameters criteria described in 47 C.F.R. § 73.7003(b)(4).

²¹ *NCE Reserved Allotment Group 1*, Letter, DA-12-1588, at 3 (MB 2012) (“*Group 1 Letter*”).

²² See 47 C.F.R. § 73.3522(b)(2).

²³ *Group 1 Letter* at 3.

²⁴ See 47 C.F.R. § 73.7003(e). The Bureau finds that CCT, via its Amendment, remains eligible for the five points it claimed for being an established local applicant (three points) and for having diversity of ownership (two points).

²⁵ See 47 C.F.R. 73.7003(c). Tie-breakers must be conducted by the Commission because they are part of the comparative hearing process.

IT IS FURTHER ORDERED, that effective January 21, 2013, 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

IT IS FURTHER ORDERED, that the application of Calvary Chapel of Turlock, Inc. (File No. BNPED-20100226AGO) IS REINSTATED, *nunc pro tunc*.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau