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John C. Trent, Esq.
Putbrese Hunsaker & Trent, PC
200 South Church Street
Woodstock, VA 226644

Mark N. Lipp, Esq.
Wiley Rein, LLP
1776 K Street, N.W.
Washington DC 20006

Harry C. Martin, Esq.
Fletcher, Heald & Hildreth, PLC
1300 North 17th Street
11th Floor
Arlington, VA 22209

In re: **NCE MX Group 9901XP**

New NCE (FM), Cocoa Beach, Florida
Black Media Works, Inc.
Facility ID No. 93959
File No. BPED-19990730MA

New NCE (FM), Cocoa Beach, Florida
CSN International
Facility ID No. 92643
File No. BPED-19990121MA

New NCE (FM), Merritt Island, Florida
Central Florida Educational Foundation, Inc.
Facility ID No. 93960
File No. BPED-19990730MB

Petition to Deny
Petition for Reconsideration

Dear Counsel:

We have before us: (1) the referenced application of Black Media Works, Inc. ("BMW"), for a new noncommercial educational ("NCE") FM station in Cocoa Beach, Florida ("BMW Application"); (2) the referenced application of CSN International ("CSN") for a new NCE FM station in the same community; (3) the referenced application of Central Florida Educational Foundation, Inc., ("Central") for a new NCE FM station in Merritt Island, Florida; (4) a Petition to Deny ("CSN Petition") filed by CSN against the BMW Application;[1] and (5) a Petition for Reconsideration filed by Central ("Central

[1] CSN filed its petition on February 15, 2011. BMW filed an Opposition to Petition to Deny ("Opposition") on February 25, 2011. CSN filed a Reply to Opposition to Petition to Deny ("Reply") on March 7, 2011.

Petition").[2] For the reasons stated below, we deny the CSN Petition, dismiss the Central Petition, grant the BMW Application, and dismiss the CSN application.

Background. The mutually exclusive ("MX") applications of BMW, CSN, Central, and Merritt Island Public Radio, Inc. ("MIPR"), were among those applications designated NCE MX Group 9901XP. Pursuant to established procedures,[3] the Commission determined that no applicant in NCE MX 9901XP was entitled to a dispositive fair distribution preference under Section 73.7002 of the Commission's Rules ("Rules"),[4] and consequently applied the NCE point system criteria and identified MIPR as the tentative selectee.[5]

Central then filed a petition to deny MIPR's application on the ground that MIPR was not entitled to points under the local established applicant criterion. The Commission agreed..[6] In that *Tentative Selectee Order*, the Commission identified BMW as the new tentative selectee based on its status as the only remaining applicant claiming local established applicant points. The order accepted the BMW Application for filing, set a 30-day period for filing petitions to deny, and indicated that, if, after that 30-day petition period had run, there was no substantial and material question concerning the BMW Application, it would, by public notice, dismiss the competing applications and grant the BMW Application.[7] CSN filed its Petition on February 15, 2011, arguing that BMW was not entitled to points as an established local applicant.

Discussion. Section 309(d)(1) of the Act[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, 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 and

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[2] Central filed its petition on April 8, 2011, seeking reinstatement of its dismissed application pending the resolution of the CSN Petition. Because we are denying the CSN Petition and granting the BMW Application, we will dismiss the Central Petition as moot.

[3] *See* 47 C.F.R. § 73.7003 (point system selection procedures); *see also Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000) ("*NCE Comparative Standards Report and Order*"); Memorandum Opinion and Order, 16 FCC Rcd 5074, 5105 (2001), *reversed in part on other grounds, NPR v. FCC*, 254 F.3d 226 (D.C. Cir. 2001); Memorandum Opinion and Second Order on Reconsideration, 17 FCC Rcd 13132 (2002) ("*NCE Comparative Standards Second Order*").

[4] 47 C.F.R. § 73.7002.

[5] *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, 6155-6156 (2007). Although the applicants of NCE MX Group 9901XP filed their applications under former NCE comparative procedures, licensing decisions are based on the revised comparative standards. *Id*. at 6102.

[6] *See Comparative Consideration of 18 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 26 FCC Rcd 803, 825 (2011) ("*Tentative Selectee Order*").

[7] *Id.* at 832.

[8] 47 U.S.C. § 309(d)(1).

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

[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).

the Commission otherwise makes the required public interest determination, it will deny the petition and grant the application.

CSN argues that BMW should not have been awarded points under the established local applicant criterion because: 1) 75% of its board members do not reside within 25 miles of Cocoa Beach; and 2) BMW failed to amend its governing documents to require that its headquarters remain within 25 miles of Cocoa Beach to maintain localism.[12] In opposition, BMW does not dispute that fewer than 75% of its board members live within 25 miles of Cocoa Beach, but contends that it is nonetheless entitled to established local applicant points because its headquarters is within 25 miles of Cocoa Beach and has been since January of 1991. It further argues the Commission does not require an applicant to amend its governing documents when claiming points based on the location of the applicant's headquarters.[13] In reply, CSN argues that Section 73.7003 of the Rules makes no distinction between applicants that claim localism points based upon the residence of their directors and applicants that claim localism points based on the location of their headquarters, and requires *all* applicants claiming localism points to amend their governing documents to require that such localism be maintained.[14]

As an initial matter, we acknowledge that there is a discrepancy between the requirements for established local applicant points as outlined in Section 73.7000 of the Rules and as explained in the Instructions and worksheets to the Form 340. Section 73.7000 defines a local applicant as "an applicant physically headquartered, having a campus, or having 75% of board members residing within 25 miles of the reference coordinates for the community to be served, or a governmental entity within its area of jurisdiction."[15] Section 73.7003 of the Rules provides that NCE applicants in comparative selection hearings are entitled to three points if they demonstrate they are "[established] local applicants as defined in § 73.7000 who have been local for no fewer than two years (24 months) immediately prior to application, if the applicant's own governing documents (*e.g.*, by laws, constitution, or their equivalent) require that such localism be maintained."[16] Thus, under the Rules, an applicant relying on its headquarters location to claim these points must amend its governing documents to ensure that the applicant will maintain a "local" headquarters.

The Instructions to the FCC Form 340, however, do *not* appear to require applicants claiming local applicant points based on their headquarters location to amend their governing documents. The Instructions state that:

> An applicant claiming points as an established local applicant, must place supporting documentation in a local public inspection file and submit to the Commission copies of the documentation. Examples of acceptable documentation include corporate material from the secretary of state, lists of names, addresses, and length of residence of board members, *copies of governing documents requiring a 75% local governing board,* and course brochures indicating that classes have been offered at a local campus for the preceeding (sic) two years, etc.[17]

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[12] CSN Petition at 2-3.

[13] Opposition at 2-3.

[14] Reply at 1-2.

[15] 47 C.F.R. § 73.7000.

[16] 47 C.F.R. § 73.7003.

[17] Instruction to FCC Form 340 at 9 (emphasis added).

The worksheet to FCC Form 340 likewise distinguishes these two categories of local applicants, and, notably, only requires those relying on the location of their governing board to amend their governing documents:

> **(b) Local Headquarters.** Applicant has a local headquarters (primary place of business) within 25 miles of the reference coordinates* of the proposed community of license. NOTE: A local headquarters is the applicant's primary place of business and not, for example, a post office box or branch office.
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> **(c) Local Governing Board.** (1) At least 75% of the members of applicant's governing board have for the preceding two years maintained their primary residence within 25 miles of the reference coordinates* of the proposed community of license *AND (2) applicant's governing documents (e.g., by-laws) require that this 75% local characteristic of the governing board be maintained for future boards as well.* NOTE: A primary residence is a domicile, and not for example, a vacation home or a student's temporary school address. For example, an address may be a domicile if it is the address from which the board member is registered to vote, maintains his driver's license, and/or files his federal income taxes.[18]

The orders adopting the current NCE point system also make this distinction. The Commission was aware of the potential for manipulation of the selection process and constructed the system to prevent gamesmanship based on board members' primary residences.[19] In the *NCE Comparative Standards Report and Order*, the Commission stated:

> So that points awarded to an applicant based on the composition of its governing board will remain meaningful, despite anticipated board changes, we will award points only to organizations whose own documents, (e.g. by-laws, constitution, or their equivalent) establish requirements for maintaining the characteristics of the board for which it claims credit.[20]

Notably, the Commission did not specifically require applicants relying on their headquarters location to amend heir bylaws in a similar manner. The only reference to headquarters in the *NCE Comparative Standards Report and Order* was an explanation that "a local headquarters or residence must be a primary place of business or primary residence. . . ."[21]

Subsequently, in the *Second Order*, the Commission reiterated this distinction, stating:

> To be considered "local," an applicant must have a headquarters, campus, or 75 percent of its governing board residing within 25 miles of the proposed community of license. Distances are measured from the community's center coordinates. Only primary residences qualify. *An applicant relying on a local board residence to claim points as an established local applicant must demonstrate that its governing documents, i.e. by-laws, require that such localism be maintained for at least four years of station operations*.[22]

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[18] Instruction to FCC Form 340, Worksheet 4 (emphasis added).

[19] *NCE Comparative Standards Report and Order*, 15 FCC Rcd at 7394 ("Of course, we would be concerned if these characteristics were merely feigned, and thus will select factors that are not easily subject to gamesmanship").

[20] *NCE Comparative Standards Report and Order*, 15 FCC Rcd at 7419.

[21] *Id.* at 7410.

[22] *NCE Comparative Standards Second Order*, 17 FCC Rcd at 13134, n. 10 (internal citations omitted) (emphasis added). *See also Tentative Selectee Order*, 26 FCC Rcd at 805 ("To qualify for localism points based on board composition, the applicant also must certify that its governing documents require that such board composition be maintained").

Thus, the two NCE orders and the Instructions to the Form 314 provide that applicants relying on the location of their headquarters to claim established local applicant points may do so without amending their governing documents, while Section 73.7000 of the Rules suggests that such applicants must in fact amend their governing documents. Where there is ambiguity between the Rules and instructions to an FCC form, we will generally give deference to an applicant's reasonable interpretation of both.[23] We therefore agree with BMW's argument that it was only required to demonstrate that it had maintained a headquarters within 25 miles of Cocoa Beach. BMW's Articles of Incorporation, dated January 31, 1991, and filed with the State of Florida Department of State on February 14, 1991, state that BMW's headquarters is located on 1150 W. King Street, Cocoa, Florida.[24] This is well within 25 miles of Cocoa Beach, the community to be served. Accordingly, BMW was properly awarded points as an established local applicant.

After reviewing all of the arguments contained in the Petition, we find that CSN has not raised a substantial and material question of fact regarding the BMW Application sufficient to warrant its denial. Moreover, we have examined the BMW Application, and we find that it fully complies with all pertinent statutory and regulatory requirements and that grant of the application would further the public interest, convenience, and necessity.

Conclusion/Actions. Accordingly, IT IS ORDERED that the Petition to Deny filed on February 15, 2011, by CSN International IS DENIED.

IT IS FURTHER ORDERED that the Petition for Reconsideration filed on April 8, 2011, by Central Florida Educational Foundation, Inc., is DISMISSED AS MOOT.

IT IS FURTHER ORDERED that the application of CSN International (File No. BPED-19990121MA) for a construction permit for a new noncommercial educational FM station in Cocoa Beach, Florida, IS HEREBY DISMISSED.

IT IS FURTHER ORDERED that the application of Black Media Works (File No. BPED-19990730MA) for a construction permit for a new noncommercial educational FM station in Cocoa Beach, Florida, IS HEREBY GRANTED, conditioned upon Black Media Works' compliance with Section 73.7005 of the Commission's Rules.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

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[23] *See, e.g., Trinity International Foundation, Inc.*, Letter, 23 FCC Rcd 4000, 4004 (MB 2008) (finding that applicant's interpretation of Rules was reasonable where ambiguity existed between Rules and form instructions), *citing Trinity Broadcasting of Florida, Inc. v. FCC,* 211 F.3d 618, 632 (D.C. Cir. 2000) (finding that, where regulations are unclear and where the petitioner's interpretation is reasonable, a regulated party is not "on notice" of the agency's ultimate interpretation of the regulations, and may not be punished).

[24] Opposition at Exhibit 1.