

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

In the Matter of)	
)	
Holy Family Communications, Inc.)	File No. BPED-19960920MA
)	Facility ID No. 83428
For a New Noncommercial FM Station)	NCE MX Group 960908
at Lancaster, New York)	

ORDER ON RECONSIDERATION

Adopted: November 13, 2013

Released: November 13 , 2013

By the Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. We have before us a May 2, 2013, Petition for Reconsideration (“Petition”) filed on May 2, 2013, by the Mary V. Harris Foundation (“Harris”).¹ Harris seeks reconsideration of an April 2, 2013, Commission *Memorandum Opinion and Order*² which denied Harris’s Application for Review and upheld: (1) the Media Bureau’s (“Bureau”) Order denying reconsideration of the Bureau’s grant of Holy Family Communications, Inc.’s (“Holy Family”) application to construct a new noncommercial (“NCE”) FM station at Lancaster, New York (“Holy Family Application”);³ and (2) the Bureau’s dismissal of Harris’s mutually exclusive application to a construct a new NCE FM station at Williamsville, New York (“Harris Application”).⁴ For the reasons discussed below, we deny the Petition for Leave, dismiss the Supplement,⁵ and dismiss the Petition pursuant to Sections 1.106(b)(3) and 1.106(p) of the Commission’s rules (the “Rules”).⁶

¹ We also have before us related responsive pleadings. Holy Family filed an Opposition to the Petition on May 16, 2013, to which Harris filed a Reply on May 31, 2013. Harris also filed a Petition for Leave to File a Supplement (“Petition for Leave”) and a Supplement to the Petition on June 14, 2013 (“Supplement”). Holy Family filed an Opposition to the Petition for Leave on June 20, 2013.

² *Holy Family Communications, Inc.*, Memorandum Opinion and Order, 28 FCC Rcd 4854 (2013) (“*MO&O*”).

³ *Holy Family Communications, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 12791 (MB 2011) (“*Reconsideration Decision*”).

⁴ File No. BPED-19970516MA.

⁵ 47 C.F.R. § 1.106(f) provides that “the petition for reconsideration *and any supplement thereto* shall be filed within thirty days from the date of public notice of the final Commission action.” See 47 C.F.R. § 1.106(f) (emphasis added). Harris acknowledges the Supplement is late-filed, but argues it should be accepted because of the Media Bureau’s May 15, 2013, decision in *Anniston Seventh-Day Adventist Church*, Letter, 28 FCC Rcd 7094 (MB 2013) (“*Anniston*”), in which an applicant was permitted to correct an NCE reservation standard *acceptability* defect pursuant to 47 C.F.R. § 73.3522(b)(2). Harris argues that *Anniston* supports its position that the ten percent threshold required for a dispositive fair distribution preference is arbitrary and capricious, as both require that an applicant provide a first and/or second NCE service to ten percent of the population within the proposed protected service contour and the applicant in *Anniston* “succeeded in arbitrarily massaging its application in just the way that Harris predicted that applicants could and would do.” Petition for Leave at 4. However, *Anniston* is inapposite to the present case. Although both the NCE reservation and fair distribution standards incorporate a ten percent threshold factor, the reservation standard in *Anniston* is “a basic qualifying test, not a comparative standard” for all applicants proposing to reserve for NCE use a vacant FM allotment in the non-reserved portion of the FM band. (continued . . .)

II. BACKGROUND

2. The Petition constitutes Harris's fourth attempt to prevail with the same argument. By way of background, the Harris Application and the Holy Family Application were determined to be mutually exclusive and were designated NCE FM MX Group 960908.⁷ In 2007, finding that neither applicant merited a fair distribution preference under Section 307(b) of the Communications Act of 1934, as amended,⁸ the Commission tentatively selected the Holy Family Application for grant based on a comparative point system analysis of the two applications. It therefore accepted the Holy Family Application for filing,⁹ triggering a thirty-day period for parties to file petitions to deny, and indicated that if, after this period had run, there was no substantial and material question concerning the Holy Family Application, it would dismiss the Harris Application and grant the Holy Family Application.¹⁰

3. Harris filed a Petition to Deny, in which it claimed that it should prevail over Holy Family because: (1) Holy Family should be deemed unqualified because it was not incorporated at the time of application;¹¹ (2) the Commission should prefer Harris as a threshold matter because Harris's proposal to provide a first or second NCE service to 9.46 percent of the population within its proposed service area "came close" to the ten percent minimum required for a fair distribution preference, and that such a ten percent threshold is arbitrary;¹² and (3) Holy Family did not qualify for any of the points awarded and that Harris, thus, should prevail on points.¹³ In the *Letter Decision*, the Bureau found Harris's Petition to Deny was meritorious, in part, leading to the exclusion of the two points Holy Family had claimed for diversity of ownership.¹⁴ Nevertheless, the Bureau rejected Harris's other contentions

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Anniston Seventh-Day Adventist Church, Letter, 27 FCC Rcd 12149, 12151 (MB 2012). As correctly observed by the Bureau in *Anniston*, Section 73.3522(b)(2) of the Rules permits curative minor amendments by tentative selectees whose applications have been found unacceptable for filing. In contrast, the fair distribution preference is a *comparative* criterion that can be dispositive in contested licensing proceedings. Accordingly, the Commission as a matter of basic fairness strictly limits the award of any such preference to "service and population data *as of the close of the window*." Thus, NCE applicants may not improve their comparative positions by amendment after the window filing deadline. See *Media Bureau Announces NCE FM New Station and Major Change Filing Procedures for October 12 – October 19, 2007 Window; Limited Application Filing Freeze to Commence on September 8, 2007*, Public Notice, 22 FCC Rcd 15050, 15052 (MB 2007) (emphasis supplied). We therefore find that *Anniston* is inapposite and does not constitute "new facts." On this basis we will deny the Petition for Leave and dismiss the Supplement. See *Peninsula Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 3293, 3293 n.2 (2000) (Commission dismisses untimely supplement which cited a *Notice of Proposed Rule Making* unrelated to the issues in the case); *Sacramento RSA Limited Partnership*, 9 FCC Rcd 3182, 3185 n.22 (supplements rejected where they "failed to advance any arguments" not already considered and where the facts in the case cited in the supplement "were inapposite").

⁶ 47 C.F.R. §§ 1.106(b)(3) and 1.106(p). See, e.g., *Barry Wood, Esq.*, Letter, 24 FCC Rcd 13666 (MB 2009) (Bureau dismissed petition for reconsideration as repetitious under Section 1.106(b)(3)).

⁷ *Comparative Consideration of 76 Groups of Mutually Exclusive Applications to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 22 FCC Rcd 6101, 6135-36 (2007) ("2007 Omnibus Order").

⁸ 47 C.F.R. § 307(b).

⁹ 2007 Omnibus Order at 6136.

¹⁰ *Id.* at 6167.

¹¹ *Mary V. Harris Foundation*, Letter, 22 FCC Rcd 18931, 18932 (2007) ("*Letter Decision*").

¹² *Letter Decision*, 22 FCC Rcd at 18934.

¹³ *Id.* at 18937-38.

¹⁴ *Id.* at 18936.

and granted the Holy Family Application because Holy Family's revised total of three points still exceeded Harris's two-point total.¹⁵

4. Harris sought reconsideration of the *Letter Decision*, rearguing the points raised in its Petition to Deny. The Bureau rejected these contentions in its *Reconsideration Decision*.¹⁶ Harris then filed an Application for Review, relying again on arguments previously advanced and rejected by the Bureau in the *Reconsideration Decision*. In the *MO&O*, the Commission, *inter alia*, denied review and affirmed the Bureau's decision to grant the Holy Family and dismiss the Harris Application.¹⁷ Harris then timely filed the Petition.

5. In its Petition, Harris restates its argument that the Bureau erred in tentatively selecting the Holy Family Application in NCE MX Group 960908.¹⁸ It argues that the Harris Application should be awarded a dispositive fair distribution of service preference because it "came very close"¹⁹ to the ten percent minimum required by the Commission for such a preference.²⁰ Harris further reiterates its argument that the ten percent threshold specified in Section 73.7002 of the Rules "is clearly arbitrary and capricious."²¹ Harris states that it "observed and warned" the Commission that "reliance on the ten percent benchmark opens the [NCE] FM comparative selection process to manipulation and gamesmanship" and that "whatever modicum of public interest value" the ten percent benchmark may have is "flushed down the drain" when the applicant that wins this preference subsequently seeks to modify its facilities.²² Harris alleges that this very scenario arose in NCE Group 414,²³ in which Spirit Broadcasting Group, Inc. ("Spirit"), an applicant for a new NCE station at Branchville, South Carolina, claimed to be eligible for a fair distribution preference based on its proposed service to 10.5 percent of its total proposed service area population, but subsequently upgraded its construction permit on April 1, 2013, thereby decreasing service to the underserved population down to two percent.²⁴ Harris reiterates its preference for an alternative criterion.²⁵

III. DISCUSSION

6. Section 1.106(b)(3) and 1.106(p) of the Rules provide that the Bureau may dismiss a petition for reconsideration of a Commission decision affirming a prior Bureau decision in the case if the petition fails to rely on new facts or changed circumstances.²⁶ It is settled Commission policy that petitions for reconsideration are not to be used for the mere reargument of points previously advanced and

¹⁵ *Id.* at 18934-18938.

¹⁶ *Reconsideration Decision*, 26 FCC Rcd at 12794.

¹⁷ *MO&O* at 4855.

¹⁸ Petition at 2.

¹⁹ *Id.*

²⁰ See 47 U.S.C. § 307(b); 47 C.F.R. § 73.7002.

²¹ Petition at 7.

²² *Id.* at 3.

²³ See *Comparative Consideration of 26 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations filed in the October 2007 Filing Window*, 25 FCC Rcd 11108, 11120 (2010).

²⁴ Petition at 3-5.

²⁵ *Id.* at 6.

²⁶ See, e.g., *Royce International Broadcasting Co.*, Memorandum Opinion and Order, 26 FCC Rcd 9249 (MB 2011).

rejected,²⁷ and reconsideration will not be granted merely for the purpose of again debating matters on which the Commission has already deliberated and decided.²⁸

7. Harris devotes the majority of its Petition to supporting its prior argument that the ten percent threshold required by the Commission for a decisive fair distribution preference is arbitrary and capricious by describing in detail the post-selection actions of Spirit. Harris contends that these actions constitute “new facts” or events that occurred since its last opportunity to present them, and as such, reconsideration is warranted.²⁹ However, the grant of an application - filed in an unrelated proceeding - by public notice constitutes neither new facts nor changed circumstances warranting Commission review here. Most importantly, and as Harris concedes,³⁰ Spirit was not awarded a comparative fair distribution preference based on its provision of a first and/or second NCE service. Thus, unlike applicants who receive a dispositive fair distribution preference,³¹ there was no prohibition on Spirit modifying WKBR-FM’s facilities. Harris’s example fails in any way to show that the Commission’s NCE licensing process is subject to manipulation. We find that this licensing decision does not constitute “new facts.” Reconsideration for the purpose of debating matters on which both the Bureau and the Commission have already deliberated and decided is inappropriate.³² Accordingly, we will dismiss the Petition as repetitious.

IV. CONCLUSION/ACTIONS

8. Accordingly, IT IS ORDERED, in light of the above discussion, the June 14, 2013, Petition for Leave to File a Supplement IS DENIED, and the Supplement IS DISMISSED.

9. IT IS FURTHER ORDERED, pursuant to authority contained in 47 C.F.R. §§ 1.106(b)(3) and 1.106(p) of the Rules, that the Petition for Reconsideration filed by the Mary V. Harris Foundation on May 2, 2013, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau

²⁷ See *Regents of the University of California*, Order, 17 FCC Rcd 12891, 12892 (WTB 2002) (“*Regents*”) (citing *Mandeville Broadcasting Corp. and Infinity Broadcasting of Los Angeles*, Order, 3 FCC Rcd 1667 (1988)); and *M&M Communications, Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 5100 (1987).

²⁸ See *Regents*, 17 FCC Rcd at 12892. See also *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*, 383 U.S. 967 (1966) (Commission does not need to reexamine arguments that it has already considered and rejected).

²⁹ Petition at 3.

³⁰ *Id.* at 4. Harris acknowledges that Spirit ultimately was awarded the permit not on the basis of a fair distribution preference but because the initial tentative selectee voluntarily dismissed its application and Spirit, having the next highest point total, was designated the successor tentative selectee.

³¹ See 47 C.F.R. § 73.7005(b) (“an NCE applicant receiving a decisive preference for fair distribution of service is required to construct and operate technical facilities substantially as proposed, and cannot downgrade service to the area on which the preference is based for a period of four years of on-air operations”).

³² See *Regents*, 17 FCC Rcd at 12892; see also *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*, 383 U.S. 967 (1966) (Commission has no duty to debate for a second time matters on which it has already deliberated and spoken).