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Washington, D.C. 20554

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DA 14-13

In Reply Refer To:

1800B3-IB

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Jeffrey D. Southmayd, Esq.  
Southmayd & Miller  
4 Ocean Ridge Blvd. South  
Palm Coast, FL 32137

Michael Couzens, Esq.  
6536 Telegraph Avenue  
Suite B201  
Oakland, CA 95609

In Re: **Reserved Allotment Group 47**  
New NCE (FM), Wynnewood, Oklahoma  
Wynnewood Community Radio Association  
Facility ID No. 184597  
File No. BNPED-20100225ADV

New NCE(FM), Wynnewood, Oklahoma  
Norman Unitarian Universalist Fellowship  
Facility ID No. 185094  
File No. BNPED-20100226AJA

**Petition for Reconsideration**

Dear Counsel:

The sole issue in this case is whether we correctly determined that Wynnewood Community Radio Association ("WCRA"), an unincorporated applicant comprised of a single person, is ineligible to construct a new noncommercial educational ("NCE") FM station at Wynnewood, Oklahoma.<sup>1</sup> For the reasons discussed below, we uphold our dismissal of WCRA's application. We also grant a construction

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<sup>1</sup> The Commission directed the Media Bureau ("Bureau") to review WCRA's qualifications after tentatively selecting WCRA for grant in a point system analysis of six mutually exclusive applications. See *Comparative Consideration of 33 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 26 FCC Rcd 9058, 9074, 9099 (2011) ("*Comparative Order*"). Subsequent to the *Comparative Order*, a second tentative selectee that had been tied with WCRA withdrew and a non-selected applicant, Norman Unitarian Universalist Fellowship ("NUUF"), challenged WCRA's eligibility in a July 21, 2011 petition to deny. On September 21, 2012, the Bureau issued a Letter of Inquiry requiring WCRA to provide additional information about its NCE eligibility. *Jeffrey D. Southmayd, Esq.*, Letter, Ref. No. 1800B3-ATS (Sept. 21, 2012). WCRA responded on October 18, 2012. By letter of January 14, 2013, we dismissed WCRA's application. *Jeffrey D. Southmayd, Esq., et al.*, Letter, Ref. No. 1800B3-ATS (Jan. 14, 2013) ("*Dismissal Letter*"). WCRA filed a Petition for Reconsideration ("*Petition*") on February 15, 2013. Also before us are NUUF's Opposition of February 28, 2013, and WCRA's Reply of March 14, 2013.

permit to the group's sole remaining applicant, NUUF, which was tentatively selected for grant in the same document that dismissed WCRA's application.<sup>2</sup>

**Background.** Section 73.503(a) of the Commission's rules (the "Rules") provides that "a noncommercial educational FM broadcast station will be licensed only to a nonprofit educational organization and upon showing that the station will be used for the advancement of an educational program."<sup>3</sup> Individuals and sole proprietors are ineligible in the NCE service.<sup>4</sup> In evaluating the *bona fides* of an NCE applicant whose legal qualifications have been challenged, the Commission generally defers to the requirements of the state where the applicant was formed.<sup>5</sup> NUUF has argued that WCRA is not a legal entity recognized in the State of Oklahoma, but rather the alter ego of one individual, Tony Malaska ("Malaska"). WCRA, however, has maintained that it is an unincorporated association and that the Commission has licensed such entities previously. WCRA submitted a statement by Malaska that such forms of business are permitted under Oklahoma law but we did not credit Malaska's opinion in the *Dismissal Letter* because he had not established any qualifications on such matters.<sup>6</sup> Moreover, we observed that unincorporated associations generally consist of two or more people, whereas Malaska is the sole officer and director of WCRA.<sup>7</sup> We recognized that we have on occasion granted permits to unincorporated NCE applicants but stated that those applicants, unlike WCRA, had demonstrated state recognition of their organizational status either by registering with a Secretary of State's office or by submitting an opinion from a qualified attorney that the applicant is an unincorporated association under state law.<sup>8</sup>

**Discussion.** Reconsideration is appropriate if a petitioner demonstrates a material error or omission in the underlying order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters. Reconsideration is not granted to debate matters already decided.<sup>9</sup> WCRA seeks reconsideration based on arguments that our decision was unsupported by the record and misinterpreted Oklahoma law. In particular, WCRA contends that we erred by (1) examining WCRA's eligibility under Section 73.503(a) of the Rules instead of Section 397(6)(A) of the Communications Act of 1934, as amended (the "Act"), which explicitly mentions associations; (2) breaking with general Commission policy of leaving interpretation of state law to the states; (3) improperly faulting WCRA for not formally filing or registering with the State of Oklahoma when the

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<sup>2</sup> See *Dismissal Letter* at 5. We received no petition to deny the NUUF application.

<sup>3</sup> 47 C.F.R. § 73.503(a). An entity applying for a permit to construct a new NCE FM station must certify to its eligibility as part of its application. See FCC Form 340, Section II, Question 2, and corresponding instructions.

<sup>4</sup> 47 C.F.R. § 73.503(a). In contrast, the Rules that apply to commercial broadcast service contain no such requirement. The exclusion of individuals and sole proprietorships from NCE broadcasting, but not from commercial broadcasting, is directly tied to major differences between these two services and the need for an organizational structure that will support that distinction.

<sup>5</sup> E.g., 47 C.F.R. § 73.503(a)(1) and (2) (eligibility determinations shall consider any accreditation by State departments of education and regional accrediting authorities).

<sup>6</sup> *Dismissal Letter* at 4.

<sup>7</sup> *Id.* at 4, nn. 27 and 29. WCRA's governing documents further specify that WCRA shall have no members. See Articles of Association and Bylaws of WCRA, Article IV, Section 4.01.

<sup>8</sup> *Dismissal Letter* at 4, citing *Hammock Environmental and Educational Community Service*, Letter, 25 FCC Rcd 12804, 12807 (MB 2010) ("*Hammock Letter*") and *M&M Community Development, Inc.*, Letter, 21 FCC Rcd 7983, 7984 (MB 2006) ("*M&M Letter*").

<sup>9</sup> See *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub. nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965).

State has no such process or requirement; and (4) disregarding Malaska's statement that unincorporated associations are legitimate in Oklahoma. WCRA also submits new evidence, an opinion letter from an Oklahoma law firm, which concludes that Oklahoma law permits unincorporated associations and has no requirement that they register with the State.<sup>10</sup> In opposition, NUUF argues that neither the new evidence nor any Oklahoma case cited therein addresses the question of whether an entity like WCRA, comprised of one individual, can be recognized as an unincorporated association in Oklahoma.

As an initial matter, we confirm that the appropriate standard for considering eligibility for licensure as an NCE FM station is Section 73.503(a) of the Rules. That provision, entitled "Licensing requirements and service," is contained within the rule part governing NCE FM broadcast stations. The Commission has used that rule to determine NCE FM eligibility for almost 50 years. The alternative advanced by WCRA, Section 397(6)(A) of the Act is also a longstanding provision, albeit newer than Section 73.503(a). This provision is found within a portion of the Act named "Assistance for Telecommunications Facilities; Telecommunications Demonstrations; Corporation for Public Broadcasting," which primarily governs non-Commission entities that provide financial grants to NCE broadcasters.<sup>11</sup> Section 397(6)(A) defines the term "noncommercial educational broadcast station" as one which "under the rules and regulations of the Commission . . . is eligible to be licensed by the Commission as a noncommercial educational radio or television station and which is owned by a public agency or nonprofit private foundation, corporation, or *association*."<sup>12</sup> In other words, an association can potentially own an NCE station but only if it first meets Commission licensing requirements such as those in Section 73.503(a). The Dismissal Letter correctly framed the issue here as whether WCRA adequately supported its claim under Section 73.503(a) of the Rules that, as of the application filing date, it was an organization eligible to hold an NCE license.

WCRA's claim that we erred as to its ineligibility is based largely upon a new legal opinion, which allegedly confirms and bolsters information that we previously rejected from WCRA's principal about Oklahoma law. This new evidence is inadmissible under the Rules and thus forms no basis for reconsideration.<sup>13</sup> Specifically, WCRA does not show that it could not have submitted the legal opinion

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<sup>10</sup> See *Letter from Kent P. Sullivan, Esq., Leach and Sullivan to WCRA* (Feb. 14, 2013) (submitted as *Petition*, Exh. C). The letter provides citations to statutes and cases for the principles that unincorporated associations in Oklahoma have the capacity to sue and be sued, receive service of process, and hold title to real property. *E.g.*, OK ST T. 12 §§ 182, 2017 B, and 2023.2; *Oliver v. Farmers Insurance Group of Companies*, 941 P.2d 985 (1997); *Mozingo v. Oklahoma Secondary School Activities Ass'n*, 575 P.2d 1379 (1978).

<sup>11</sup> Because the Commission does not administer any grant programs and not all NCE broadcasters qualify for grants administered by others, Section 397(6)(A) has historically been of limited relevance to the Commission. Mainly, our reference to that provision began after Congress, in the late 1990s, amended the Act to exempt applicants from spectrum auctions when applying for stations that meet the Section 397(6)(A) definition. *See* Pub. L. No. 105-33, Title III, 111 Stat. 251 (1997); *See also* 47 U.S.C. § 309(j)(2)(C). While we have since, on occasion, cited Section 397(6)(A) in non-auction comparative cases, the outcome of such cases has been identical to the instant proceeding concerning ineligibility of unincorporated applicants that did not exist in a form recognized under state law when the application was filed. *See, e.g.*, *Six Applications for New Low Power FM Stations*, Memorandum Opinion and Order, 28 FCC Rcd 13390, 13393-94 (2013) ("*Six Applications*").

<sup>12</sup> 47 U.S.C. § 396(6)(A) (emphasis added).

<sup>13</sup> *See* 47 C.F.R. § 1.106(c).

previously.<sup>14</sup> Nor does WCRA show that consideration of the legal opinion at the present time is required in the public interest.<sup>15</sup> Accordingly, we shall dismiss the Petition as procedurally defective.

Moreover, even had the new evidence been properly before us, we would have found no error in our determination that WCRA is ineligible to hold an NCE license. When, as here, an NCE applicant's organizational status has been challenged before the Commission, and the applicant is not accredited by a state department of education or recognized by another accrediting authority, the entity's legal status under state law is germane.<sup>16</sup> The Commission has previously resolved some challenges in the favor of unincorporated associations, but only if the applicant demonstrated that it took steps to obtain state recognition<sup>17</sup> or furnished the opinion of a qualified attorney that laws of the relevant state already recognize the applicant's status as an unincorporated association.<sup>18</sup> Although this type of inquiry does not take place in the context of commercial broadcast applications, the *Dismissal Letter* correctly applied our Rules and precedent in the context of an NCE application.<sup>19</sup>

The legal opinion's general conclusion that Oklahoma recognizes unincorporated associations is silent on a specific issue central to this case -- whether Oklahoma recognizes entities like WCRA, comprised of a single person, as associations. Black's Law Dictionary defines "association" as "a *gathering of people* for a common purpose; an unincorporated organization that is not a legal entity separate from *the persons* who compose it."<sup>20</sup> Thus, the general legal understanding of an association is an entity comprised of more than one person.<sup>21</sup> WCRA has not shown that Oklahoma law accords a

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<sup>14</sup> WCRA merely claims that our Letter of Inquiry did not ask specifically for a lawyer's statement but rather for "a declaration by a person qualified to render an opinion on Oklahoma corporate law" and Malaska viewed himself as so qualified. Petition at 3, 7. Malaska continues to claim that he is "fully qualified to give an opinion on Oklahoma law" but again provides no information to support his bare assertion. *Id.* at 4.

<sup>15</sup> See 47 C.F.R. § 1.106(c)(2).

<sup>16</sup> See *Hammock Letter*, 25 FCC Rcd at 12807 (Commission inquiry about NCE applicant's existence under state law) citing *Cosmopolitan Enterprises*, Memorandum Opinion and Order, 47 FCC 2d 325, 326 (1974).

<sup>17</sup> *Hammock Letter*, 25 FCC Rcd at 12807 (NCE applicant showed steps taken to be recognized by Florida Secretary of State, including a stamped copy of its articles of incorporation and bylaws).

<sup>18</sup> See *M&M Letter*, 21 FCC Rcd at 7984 (Applicant for a Low Power FM station in Ohio demonstrated that it was a legally recognized unincorporated nonprofit association at the time of application by submitting a letter from an attorney licensed in Ohio stating that Ohio law authorizes unincorporated associations and that the applicant met the State's definition).

<sup>19</sup> See *supra* at n.4; see also *Six Applications*, 28 FCC Rcd at 13394 (non-compliance with state corporation law is generally not a basis for denial of a commercial broadcast application if the matter has not been contested in state court and the determination is more appropriately a matter for state resolution, but NCE applicants must demonstrate their legal existence as an organization under pertinent state law at the time their applications are filed). In the NCE context, operation of an unincorporated entity within an organizational format that is state-recognized provides a system of accountability outside of the Commission for meeting shared not-for-profit goals, generally expressed in publicly available documents or in association meetings, thereby preventing unilateral action for pecuniary gain.

<sup>20</sup> Black's Law Dictionary (9<sup>th</sup> ed. 2009) (emphasis added).

<sup>21</sup> The *Dismissal Letter* correctly rejected WCRA's reliance on the Revised Uniform Unincorporated Nonprofit Association Act ("RUUNAA"), a provision not adopted in Oklahoma, and showed that RUUNAA undercuts, rather than supports, WCRA's position because it specifies that an "unincorporated nonprofit association" consists of two or more members. See *Dismissal Letter* at 4, n.27, citing RUUNAA Section 2(8), available at [http://apps.americanbar.org/intlaw/leadership/policy/RUUNAA\\_Final\\_08.pdf](http://apps.americanbar.org/intlaw/leadership/policy/RUUNAA_Final_08.pdf). RUUNAA explains that while there are other business models that can be formed by a single individual, at least two persons are required for an association because that is the minimum necessary to have an agreement under general legal principles. RUUNAA Section 2(8).

different meaning to this term and none of the Oklahoma cases that WCRA cites concerning associations involved a single person.<sup>22</sup> Since Malaska would not be eligible in the NCE service as an individual, sole proprietorship, or similar form of business, it follows that Malaska, the individual, doing business as WCRA is also not eligible. An individual doing business under an assumed name cannot side-step Commission NCE eligibility requirements simply by choosing a name that contains the word “association” or “organization.” Such a name choice supplies none of the safeguards, checks, and balances provided by organizational structure and state law toward ensuring that non-profit entities adhere to the noncommercial educational principles essential for NCE broadcasting.

WCRA’s citation to a case in which we licensed an unincorporated nonprofit organization in Marlow, Oklahoma is misguided.<sup>23</sup> That applicant, unlike WCRA, was not comprised of a single person. Moreover, that organization’s eligibility to hold an NCE license had been resolved in another Commission proceeding, where the organization demonstrated steps it had taken to register with the State of Florida. As we observed in the *Dismissal Letter*, WCRA has not shown that it is recognized by *any* state.<sup>24</sup>

**Conclusion/Actions.** Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Wynnewood Community Radio Association on February 15, 2013, IS DISMISSED.

IT IS FURTHER ORDERED, that the application filed by Norman Unitarian Universalist Fellowship (File No. BNPED- 20100226AJA) is ACCEPTED FOR FILING for permit to construct a new NCE FM station at Wynnewood, Oklahoma IS GRANTED CONDITIONED UPON its compliance with Section 73.7002(c) of the Rules.<sup>25</sup>

Sincerely,

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

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<sup>22</sup> WCRA argues that although the relevant Oklahoma statute refers to “when two or more persons associate themselves” for business purposes as an unincorporated association, that law does not require associations to have at least two principals nor indicate that an unincorporated non-profit association cannot exist with a single principal. Reply at 3 citing 12 O.S. § 182. The legal opinion of WCRA’s Oklahoma attorney is silent on this matter.

<sup>23</sup> See *Hammock Letter*, 25 FCC Rcd at 12807.

<sup>24</sup> *Dismissal Letter* at 5.

<sup>25</sup> 47 C.F.R. § 73.7002(c).