

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

In the Matter of)	
)	
Christian Music Network)	NCE MX Group 363
)	
Application for a New NCE FM Station at Gloucester, Massachusetts)	File No. BNPED-20071012AEE Facility I.D. No. 165651

MEMORANDUM OPINION AND ORDER

Adopted: October 16, 2014

Released: October 17, 2014

By the Commission:

1. We have before us an Application for Review (“AFR”) filed by Christian Music Network, Inc. (“Christian Music”) on April 9, 2012. Christian Music challenges the dismissal of its application for a new noncommercial educational (“NCE”) FM station at Gloucester, Massachusetts (“Application”).

2. Christian Music is one of 13 applicants that filed competing applications to serve ten different communities in Massachusetts and New Hampshire during a filing window for NCE FM applications in October 2007. These applications were designated NCE MX Group 363 (“Group 363”).¹ Pursuant to established procedures,² the Bureau determined that an application (“UMass Application”) filed by the University of Massachusetts (“UMass”) was entitled to a dispositive fair distribution preference under Section 307(b) of the Communications Act of 1934, as amended.³ In an order released on March 31, 2009, the Bureau designated UMass the tentative selectee for Group 363.⁴ No party filed a petition to deny the UMass application.

3. On May 4, 2009, Wellspring House, Incorporated (“Wellspring”), another applicant in Group 363, voluntarily withdrew its application. In response to this withdrawal, on May 8, 2009, another applicant in Group 363 – Talking Information Center (“TIC”) – filed a Petition for Severance and Grant (“Severance Petition”). TIC argued that, as a result of the Wellspring withdrawal, its application for a new NCE FM station at Middleborough Center, Massachusetts (“TIC Application”) and an application filed by Home Improvement Ministries (“HIM”) for a new NCE FM station at Middleboro, Massachusetts (“HIM Application”) no longer conflicted with any other applications in Group 363. That

¹ See *Media Bureau Identifies Groups of Mutually Exclusive Applications*, Public Notice, 23 FCC Rcd 9508 (MB 2008).

² See 47 C.F.R. § 73.7002 (procedures for selecting among mutually exclusive applicants for stations proposing to serve different communities).

³ 47 U.S.C. § 307(b).

⁴ *Threshold Fair Distribution Analysis of 21 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 3873, 3879-80 ¶ 21-22 (MB 2009) (“*Tentative Selectee Order*”).

same day, the Bureau – unaware of the Severance Petition – dismissed all of the applications in Group 363 except for the UMass Application.⁵

4. TIC immediately challenged the dismissal of its application. It then proceeded to enter into a settlement agreement with HIM, which provided for grant of the TIC Application and dismissal of the HIM Application. TIC and HIM sought Commission approval of their settlement agreement.⁶

5. Subsequently, Christian Music filed a petition for reconsideration (“2009 Petition”) of the dismissal of the Application. It argued that the Bureau could and should grant its Application in addition to the UMass Application. Christian Music relied on the fact that, at the same time the Bureau dismissed the Application, it dismissed the only application from Group 363 that caused the Application to conflict with the UMass Application.

6. The Bureau denied the Christian Music petition, citing the Commission’s policy of granting one application per group of mutually exclusive applications resolved under the NCE comparative licensing procedures.⁷ In contrast, the Bureau granted the petitions filed by TIC and HIM and reinstated the TIC and HIM applications in order to consider their voluntary settlement agreement.⁸ The Bureau found that the voluntary withdrawal of the Wellspring application removed the TIC and HIM Applications from Group 363. It also found that TIC and HIM were eligible to settle, approved their settlement agreement and accepted the TIC Application for filing.⁹ In doing so, the Bureau explained that TIC was in “a significantly different procedural posture” than Christian Music.¹⁰ Specifically, any grant of the Christian Music Application “would have been premised on the dismissal as part of the comparative process of at least one other application that was mutually exclusive with the [Christian Music] Application.” Grant of the TIC Application was not premised on the dismissal of any applications as part of the comparative process. Instead, it was premised on Wellspring’s voluntary withdrawal of its application and the subsequent settlement agreement between TIC and HIM.

7. Christian Music filed a second petition for reconsideration (“2010 Petition”), which challenged the Bureau’s denial of the 2009 Petition. Among other things, Christian Music argued that it was arbitrary for the Bureau to rely on Wellspring’s voluntary withdrawal of its application as the sole factor distinguishing the TIC Application from the Application. Christian Music asserted that it was

⁵ *Broadcast Actions*, Public Notice, Report No. 46984 (MB May 13, 2009). It later granted the UMass Application. *Broadcast Actions*, Public Notice, Report No. 46999 (MB June 4, 2009).

⁶ HIM sought reconsideration of the dismissal of its application in order to effectuate the settlement agreement. HIM recognized that approval of the settlement agreement required its application to be pending before the Commission.

⁷ *MX Group Number 363*, Letter, 25 FCC Rcd 9060, 9062-63 (MB 2010) (“*2010 Staff Decision*”), citing *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Memorandum Opinion and Order, 16 FCC Rcd 5074, 5104-05 ¶ 90 (2001) (rejecting a proposal that would have sanctioned the tentative selection of more than one applicant in a mutually exclusive application group and explaining that “after the best qualified applicant is selected, it is possible that remaining applicants that are not mutually exclusive with this primary selectee and thus potentially secondary selectees, may also be significantly inferior to other applicants that are eliminated because they are mutually exclusive with the primary selectee. Rather than issue authorizations to applicants whose potential for selection stems primarily from their position in the mutually exclusive chain, we believe it is appropriate to dismiss all of the remaining applicants and permit them to file again in the next filing window”).

⁸ *Id.* at 9063.

⁹ *Id.* at 9063-64. The Bureau noted that it would grant the TIC application and dismiss the HIM application if, after the period for filing petitions to deny the TIC application had run, there was no substantial and material question concerning the grantability of the TIC application. *Id.* at 9064. The Bureau granted the TIC Application on September 7, 2010. *Broadcast Actions*, Public Notice, Report No. 47318 (MB Sept. 10, 2010).

¹⁰ *Id.* at 9063-64.

similarly situated to TIC and that the Bureau had failed to offer a reasonable explanation for its “disparate treatment” of the Application and the TIC Application.

8. The Bureau dismissed the 2010 Petition, finding it repetitious and thus procedurally defective.¹¹ It went on to state that, even if it were to consider Christian Music’s petition, it would have found “it is without merit.”¹² It then discussed and rejected Christian Music’s argument that it and TIC were similarly situated, explaining that Christian Music had sought to rely on the dismissal – as part of the comparative process – of an application that linked the Application with the UMass Application while TIC had relied on the voluntary withdrawal of an application linking the TIC Application with the UMass Application.¹³

9. Christian Music now seeks review of the *2012 Staff Decision*. It again argues that there is no factual basis for distinguishing its Application from that of TIC¹⁴ and thus that the Bureau’s disparate treatment of its and TIC’s applications violates the principle set forth in *Melody Music* that the Commission must treat similarly situated parties similarly.¹⁵ Upon review of the AFR and the entire record, we conclude that Christian Music has failed to demonstrate that the Bureau erred. We thus uphold the Bureau’s decision for the reasons stated in the *2012 Staff Decision*.

10. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended,¹⁶ and Section 1.115(g) of the Commission’s Rules,¹⁷ the Application for Review filed by Christian Music Network, Inc. on April 9, 2012, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹¹ *MX Group Number 363*, Letter (MB dated Mar. 9, 2012) (“*2012 Staff Decision*”), citing 47 C.F.R. § 1.103(b)(3). Section 1.103(b) of the Commission’s rules states that a “petition for reconsideration of an order which has been previously denied on reconsideration may be dismissed by the staff as repetitious.”

¹² *2012 Staff Decision* at 3.

¹³ *Id.* at 3. Christian Music states that the “Bureau’s reliance on this distinction required the disavowal of a published decision released just three months earlier, which rejected a settlement agreement which was analogous to the situation between [TIC and HIM].” See AFR at 5, citing *The Helpline*, 25 FCC Rcd 2597 (MB 2010). We find that the Bureau properly rejected Christian Music’s argument that it and TIC were similarly situated. Moreover, while Christian Music claims that the Bureau’s decision with respect to TIC was inconsistent with its action in *The Helpline*, staff-level decisions are not binding on the Commission. See *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008). In any event, as noted above, the Bureau disavowed *The Helpline* decision. See *2010 Staff Decision* at n. 15; see also *2012 Staff Decision* at 5.

¹⁴ AFR at 9-10.

¹⁵ AFR at 11-13, citing *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965). Christian Music also argues that the Bureau erred in finding its second petition for reconsideration procedurally defective. AFR at 7-9. Given that we have rejected Christian Music’s arguments on substantive grounds, we find its procedural argument to be moot.

¹⁶ 47 U.S.C. § 155(c)(5).

¹⁷ 47 C.F.R. § 1.115(g).