

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

In the Matter of
Hampton Roads Educational Telecommunications Association
Application for a New Noncommercial Educational FM Station at Gloucester Point, Virginia
File No. BNPED-20071022BGC
Facility ID No. 173962

MEMORANDUM OPINION AND ORDER

Adopted: December 16, 2015

Released: December 17, 2015

By the Commission:

1. We have before us a July 9, 2010, Joint Application for Review ("AFR"), a July 9, 2010, Joint Petition for Reconsideration ("Petition") and responsive filings to each. Those parties joining in the AFR and/or Petition (collectively, "Joint Filers") are former applicants in NCE MX Group 439 ("Group 439"). They contest the Media Bureau's ("Bureau") dismissal of their respective applications and the grant of the captioned application of Hampton Roads Educational Telecommunications Association ("Hampton Application" and "Hampton," respectively). Because the AFR and Petition raise similar issues, the Bureau has referred the Petition to the Commission for resolution in conjunction with the AFR. For the reasons set forth below, we dismiss the Petition and deny the AFR.

2. On review, Joint Filers assert that the Bureau erred in its Letter Decision and reiterate that: (1) it was error not to dismiss the Hampton Application as "defective as filed" and that it is "blatantly unfair" to allow Hampton to obtain a fair distribution advantage over others that observed the TV Channel 6 protection requirements; (2) Hampton's TV Channel 6 defect cannot be cured by acquiring concurrence from a licensee who was not licensee at the time of the filing window; (3) if,

1 The AFR was filed by Fountain of Mercy, Inc. ("Fountain"); Chesapeake Catholic Radio ("CCR"); Educational Media Corporation; Pensacola Christian College, Inc.; Delmarva Educational Association; Positive Alternative Radio, Inc.; and Silver Fish Broadcasting, Inc. (collectively, "Joint Filers").

2 The Petition was filed by Fountain and CCR (collectively, "Joint Petitioners").

3 Hampton filed an Opposition to AFR ("Opposition") on July 21, 2010, to which Joint Filers filed a Joint Reply on August 2, 2010. Hampton subsequently filed a "Motion for Leave to File Response" to the Joint Reply on August 9, 2010 ("Motion"). Consideration of the material contained therein is unnecessary in light of our disposition, see Paragraph 6, infra, and we will deny the Motion. Additionally, Hampton filed an Opposition to Petition for Reconsideration on July 21, 2010, to which Joint Petitioners filed a Joint Reply on August 2, 2010.

4 Letter to Lauren A. Colby, Esq., et al., 25 FCC Rcd 7376 (MB 2010) ("Letter Decision"). See also 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, 3885-86 (MB 2009) (identifying Hampton as the tentative selectee in NCE MX Group 439) ("2009 Fair Distribution Order").

5 47 C.F.R. §§ 1.104(b), 1.106(a)(1).

6 AFR at 6-9.

7 AFR at 7.

arguendo, the Hampton Application’s technical defect could be cured in such a fashion, the other applicants should have been allowed to amend their applications “to become more competitive now that concurrence from the new . . . [WTVR-TV] licensee is within the realm of availability”;⁸ (4) the Commission does not prohibit the Bureau from granting multiple permits within a mutually-exclusive group;⁹ and (5) the Commission is *required* to grant additional permits when the MX group includes applications not in conflict with any tentative selectee application.¹⁰ In its Opposition, Hampton states that the AFR should be dismissed because Joint Filers failed to “state the form of relief sought,” as required by Section 1.115(b)(4) of the Rules,¹¹ and it argues that it properly sought consent from the TV Channel 6 station licensee and that acceptance of its application did not in any way improve Hampton’s comparative position.¹² In the Petition for Reconsideration, Joint Petitioners contest the dismissal of one of the MX Group 439 applications and grant of the Hampton Application for reasons set forth in the AFR.

3. *Procedural Matters.* We find that the AFR is not procedurally defective because it states the relief which Joint Filers seek, *i.e.*, the reinstatement of the dismissed applications in Group 439, the rescission of the grant of Hampton’s Application and dismissal of that Application.¹³ Under these circumstances, we conclude that the AFR meets the standard set forth in the Rules.¹⁴

4. We also find, however, that the Petition is procedurally defective. Section 1.104(b) of the Rules authorizes persons “desiring Commission consideration of a final action taken pursuant to delegated authority to file either a petition for reconsideration or an application for review (but not both)” within 30 days of public notice of that action.¹⁵ Joint Petitioners have sought both reconsideration and review of the same actions. We therefore will dismiss the Petition.¹⁶

5. *Substantive Matters. TV Channel 6 Protection.* In 2009, the Bureau released two public notices regarding NCE FM licensing and the digital television transition. The first, released the day after the Bureau issued the *2009 Fair Distribution Order*, announced that it would continue to require that NCE applications comply with Section 73.525 with regard to all stations licensed to operate on TV Channel 6 as of September 7, 2008, and “clarifie[d] [its] processing policy” to state that an applicant’s request for waiver of the Rule based on the expectation that the affected station would vacate Channel 6 as part of the then-upcoming digital transition would not suffice, and that it would dismiss all applications that failed to provide an unconditional consent from the affected Channel 6 station.¹⁷ Further, it indicated that the Commission would establish in a subsequent public notice the date on which it would begin

⁸ AFR at 10.

⁹ AFR 10-12.

¹⁰ *Id.* at 11-13, 15-18, citing 47 U.S.C. § 307(b), *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, 24 FCC Rcd 5239 ¶ 15 (2009) and 5 U.S.C. § 706(2)(A).

¹¹ Opposition at 6-7, referencing 47 C.F.R. § 1.115(b)(4).

¹² *Id.* at 6, 8-9.

¹³ AFR at 19.

¹⁴ 47 C.F.R. § 1.115(b)(4). *See, e.g., Vodaphone Airtouch, PLC, and Bell Atlantic Corporation, et al.*, Memorandum Opinion and Order, 20 FCC Rcd 6439, 6446 (2005) (Application for Review filed pursuant to Section 1.115(b)(4) found procedurally acceptable).

¹⁵ 47 C.F.R. § 1.104(b).

¹⁶ *See, e.g., Beasley Broadcast Group*, Memorandum Opinion and Order, 23 FCC Rcd 15949 n.1 (2008) (petitioner is entitled to file petition for reconsideration or application for review of bureau decision, but not both); *Edward W. St. John*, Memorandum Opinion and Order, 5 FCC Rcd 1192 n.1 (1990) (Commission dismisses petition for reconsideration filed by same person who also filed application for review of the same staff action).

¹⁷ *See Media Bureau Provides Guidance to NCE FM Stations Regarding Television Channel 6 Protection Requirements*, Public Notice, 24 FCC Rcd 3916, 3916 (MB 2009) (“April Public Notice”).

accepting applications premised on the termination of analog TV Channel 6 transmissions.¹⁸ The second public notice announced that as of October 27, 2009, the Commission would no longer protect TV Channel 6 stations that had terminated analog operations.¹⁹ Nothing in these *Public Notices* limited or modified the rules under which affected applications would be processed.

6. We affirm the conclusion in the *Letter Decision* that it was harmless error not to dismiss the Hampton Application. Therein, the Bureau acknowledged that the Hampton Application was defective at the time of filing because it failed to comply with Section 73.525 of the Rules, having included a waiver request of Section 73.525 rather than a consent letter from the affected Channel 6 station's licensee.²⁰ However, the staff stated that, had it dismissed the Hampton Application for this technical acceptability defect prior to its selection as tentative selectee, Hampton would have been permitted under longstanding procedures to file a curative amendment and seek reinstatement of its application *nunc pro tunc* within 30 days of its dismissal.²¹ In fact, the *2009 Fair Distribution Order* identifying Hampton as the tentative selectee in NCE MX Group 439 specifically afforded tentative selectees the opportunity to file curative amendments, provided that they were minor and did not alter the fair distribution qualifications of the applicant.²² Despite Joint Filers' contrary protestations, Hampton's amendment filed on April 24, 2009, met these criteria; it was a minor amendment providing the consent of WTVR-TV's licensee, Community Television of Alabama License, LLC, filed within 30 days of the release date of the *2009 Fair Distribution Order*.²³ The AFR maintains that the Bureau decision "cannot be reconciled with the strict application of TV6 requirements that has led to numerous dismissed applications," but the applications in the cited cases all suffered from defects not present here.²⁴ The result here fully accords with the Commission's prior determination that the subsequent termination of TV6 analog transmissions (similar to Hampton's amendment filing here) cured a Section 73.525 defect and thus permitted grant of the application.²⁵

7. We also affirm the *Letter Decision* conclusion that the staff properly accepted a TV Channel 6 consent letter from the current licensee of WTVR-TV rather than the licensee as at the close of 2007 NCE Filing Window. Contrary to Joint Filers' claims,²⁶ acceptability issues, such as compliance

¹⁸ *Id.* at 3917.

¹⁹ *Media Bureau Establishes October 27, 2009, Initial Filing Date for Acceptance of Certain Noncommercial Educational FM Station Minor Change Applications*, Public Notice, 24 FCC Rcd 12598 (MB 2009).

²⁰ *Letter Decision*, 25 FCC Rcd at 7380.

²¹ *Id.* at 7381 n.34, citing *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, Public Notice, 56 RR 2d 776, 49 Fed. Reg. 47331 (Aug. 2, 1984), and *Heartland Ministries, Inc.*, Letter, 25 FCC Rcd 3572 (MB 2010) (suggesting that applicant could have complied with Section 73.525 by timely filing a curative amendment to its defective application within 30 days of its dismissal, rather than waiting 18 months).

²² *Letter Decision*, 25 FCC Rcd at 7381 n.35, citing *2009 Fair Distribution Order*, 24 FCC Rcd at 3887 n. 41.

²³ Hampton explains that, after the *April Public Notice* had clarified that it required a consent letter in lieu of its waiver request, it immediately commenced negotiations with WTVR-TV's licensee, negotiated and received the consent letter, and filed the amendment providing it. Opposition at 6.

²⁴ See AFR at 9. In *Heartland Ministries, Inc.*, the Bureau rejected the NCE FM applicant's amendment submitting the Channel 6 station's consent letter because it was filed beyond the 30 day reconsideration period. *Heartland Ministries, Inc.*, Letter, 25 FCC Rcd 3572, 3574 (MB 2010). In *Family Life Educational Foundation*, which predated the *April Public Notice*, the NCE FM applicant had failed to submit a consent letter from the Channel 6 licensee, relying only on the station's anticipated digital operation on a channel other than Channel 6. *Family Life Educational Foundation*, Letter, 23 FCC Rcd 4779 (MB 2008). Here, as noted by the Bureau, Hampton filed the WTVR-TV consent letter within the 30-day reconsideration period following the *2009 Fair Distribution Order*.

²⁵ See *BVM Helping Hands*, Memorandum Opinion and Order, 29 FCC Rcd 6464, 6465 (2015).

²⁶ AFR at 8.

with Section 73.525, have no relation to the “snapshot date” at which time maximum comparative qualifications are fixed. The *April Public Notice* did not require that unconditional consent letters be from the television licensee as of the snapshot date, but rather merely stated that such letters must be “from the affected television Channel 6 station”²⁷ Here, Hampton obtained the consent of the current WTVR-TV licensee with respect to the affected television Channel 6 station within 30 days of being identified as the tentative selectee in NCE MX Group 439. This was sufficient to permit the staff to process and grant the Hampton Application.

8. One Grant Policy. Finally, we find unpersuasive Joint Filers’ contention that the “one grant policy,” under which the Commission grants only one application on a comparative basis in each NCE MX group, is contrary to law.²⁸ As noted in the *Letter Decision*, the Commission has previously considered and rejected the tentative selection of more than one applicant in a mutually exclusive application group, in part because it could result in the selection of an inferior applicant as the secondary selectee.²⁹ We recently rejected a number of substantially similar challenges to this processing policy, which was adopted pursuant to notice and comment procedures. For the same reasons the Commission previously rejected those arguments, we are again rejecting them here.³⁰

9. Accordingly, for the reasons set forth above, IT IS ORDERED that the August 9, 2010, Motion for Leave to File Response filed by Hampton IS DENIED.

10. IT IS FURTHER ORDERED that, pursuant to Section 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 405(a), and Sections 1.104(b) and 1.106(a)(1) of the Commission’s rules, 47 C.F.R. §§ 1.104(b), 1.106(a)(1), the Petition for Reconsideration filed by the Joint Petitioners on July 9, 2010, IS DISMISSED.

11. IT IS FURTHER ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and Section 1.115(g) of the Commission’s rules, 47 C.F.R. § 1.115(g), the Joint Application for Review filed by the Joint Filers on July 9, 2010, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁷ *April Public Notice*, 24 FCC Rcd at 3916.

²⁸ AFR at 10-15 (arguing that failure to allow additional grants conflicts with the Commission’s mandate under Section 307(b) of the Act and is inconsistent with the Commission’s practice of allowing settlement agreements and technical amendments that can result in multiple grants).

²⁹ *Letter Decision*, 25 FCC Rcd at 7382.

³⁰ See, e.g., *Greene/Sumter Enterprise Community, etc.*, Memorandum Opinion and Order, 30 FCC Rcd 7694 (2015).