

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

In the Matter of)	
)	
Calvary Chapel of Honolulu, Inc.)	File No. BPED-19960416MA
)	Facility ID No. 81538 and
Application to Construct a New Noncommercial)	
Educational FM Station at Honolulu, Hawaii)	
)	
Maka'ainana Broadcasting Company, Ltd.)	File No. BPED-19960418MB
)	Facility ID No. 81548
Application to Construct a New Noncommercial)	
Educational FM Station at Kaneohe, Hawaii)	
)	
MX Group No. 95083E)	

MEMORANDUM OPINION AND ORDER

Adopted: December 16, 2015

Released: December 18, 2015

By the Commission:

I. BACKGROUND

1. The Commission has before it September 10, 2012 and July 17, 2013 Applications for Review filed by Maka'ainana Broadcasting Company, Ltd. ("MBC") and responsive pleadings concerning the comparative consideration of the captioned mutually exclusive applications of MBC and Calvary Chapel of Honolulu, Inc. ("CCHI") for new noncommercial education ("NCE") FM stations in Hawaii.¹ The Commission has considered these mutually exclusive applications twice previously.² MBC now challenges two related decisions by the Media Bureau ("Bureau"): (1) a 2012 Letter³ which dismissed MBC's petition for reconsideration of the Commission's tentative selection of CCHI and denied MBC's petition to deny CCHI's application; and (2) a 2013 action by public notice simultaneously granting CCHI's application and dismissing MBC's competing application.⁴

2. MBC's 2012 and 2013 Applications for Review make identical arguments that the Bureau: (1) exceeded statutory and delegated authority by acting on a point system-related reconsideration petition directed to the full Commission and thereby prevented the Commission from correcting an erroneous finding that MBC did not qualify for points as an established local applicant; and

¹ With respect to the 2012 Application for Review, CCHI filed an Opposition on September 25, 2012 and MBC filed a Reply on November 9, 2012. With respect to the 2013 Application for Review, CCHI filed an Opposition on July 31, 2013 and MBC filed a Reply on August 12, 2013.

² See *Comparative Consideration of 76 Groups of Mutually Exclusive Applications*, Memorandum Opinion and Order, 22 FCC Rcd 6101, 6133 (2007) ("*Omnibus Order*") (tentatively selecting MBC with the most points claimed); *on recon.*, *Comparative Consideration of 33 Groups of Mutually Exclusive Applications*, Memorandum Opinion and Order, 26 FCC Rcd 9058, 9091-92 (2011) ("*Comparative Order*") (rescinding tentative selection of MBC and tentatively selecting CCHI instead because MBC's original claim of three points as an established local applicant was based on an erroneous certification).

³ See *Harry F. Cole, Esq.*, Letter, 27 FCC Rcd 9295 (MB 2012) ("*2012 Letter*").

⁴ See *Broadcast Actions*, Public Notice, Rep. No. 48011 (Jun. 17, 2013).

(2) improperly permitted a major change in CCHI's ownership after CCHI allegedly made misrepresentations about that change.⁵ For the reasons herein we will deny both the 2012 Application for Review and the duplicative 2013 Application for Review.

II. DISCUSSION

3. Upon consideration of the entire record, we affirm the Bureau's actions for the reasons stated in the *2012 Letter*. The Rules authorize the Bureau to dismiss petitions for reconsideration directed to the full Commission "that plainly do not warrant consideration by the Commission," such as those that are procedurally defective.⁶ MBC's reconsideration petition was defective because it addressed an interlocutory matter, *i.e.*, the Commission's tentative NCE point determination which took no final action and which the Commission had expressly directed parties *not* to raise in petitions for reconsideration.⁷ The mere fact that MBC's petition concerned point system-related matters would not preclude Bureau action where the Bureau did not conduct a new hearing but, rather, engaged in routine post-hearing processing at the Commission's direction.⁸ To the extent that MBC argues that action on its petition by the Bureau rather than by the Commission prevented the agency from "correct[ing] the Commission's erroneous 2011 decision"⁹ with respect to MBC's claim for points as an established local applicant, we find no error for the reasons explained below.

4. As an initial matter, the Bureau is bound by our findings.¹⁰ The Bureau's role in the NCE comparative process is simply to facilitate routine post-hearing actions, including consideration of petitions to deny.¹¹ We require the Bureau to refer cases back to us in very limited circumstances, primarily if information in a petition is sufficient to raise a substantial and material question concerning the Commission's point-based tentative selection.¹² MBC's defective reconsideration petition, the substance of which it repeats on review, raised no such substantial and material question. For example, MBC repeats its contention that the Commission's failure to credit MBC with comparative points based on its board members' local activities conflicts with a statement by the U.S. Court of Appeals for the D.C. Circuit in *American Family* that the established local applicant criterion was "designed to 'reward[] applicants who are controlled by locals.'"¹³ At issue in *American Family* was whether an NCE

⁵ In the 2013 Application for Review, MBC resubmits previously-filed documents including the 2012 Application for Review "out of an abundance of caution in order to preserve its appellate rights." 2013 Application for Review at 2.

⁶ See 47 C.F.R. § 1.106(p). While MBC is correct that the Communications Act of 1934, as amended, reserves to the Commission authority over comparative hearings, the statute does not preclude delegation of non-hearing matters to the Bureau. See 47 U.S.C. § 155(c)(1).

⁷ See *Comparative Order*, 26 FCC Rcd at 9094. See also *2012 Letter* at n.32, citing 47 C.F.R. § 1.106(a)(1). The Commission previously advised MBC and other NCE applicants to raise any arguments concerning their own points within petitions to deny the tentative selectee. See *Comparative Order*, 26 FCC Rcd at 9094.

⁸ See *Comparative Order*, 26 FCC Rcd at 9095. See generally 47 C.F.R. §§ 0.61, 0.283.

⁹ 2012 Application for Review at 4.

¹⁰ See *Jelks v. FCC*, 146 F.3d 878, 881 (D.C. Cir. 1998) ("a subordinate body like the [Bureau's Video] Division cannot alter a policy set by the Commission itself"); *Michael Couzens, Esq.*, Letter, 25 FCC Rcd 13672, 13675 (MB 2010) (the Bureau is bound by the decisions and guidelines set forth by the Commission and has no authority to alter or depart from Commission precedent).

¹¹ See *Omnibus Order*, 22 FCC Rcd at 6162, n.230, citing 47 C.F.R. §§ 0.61(h), 0.283 (staff consideration of petitions to deny tentatively selected NCE applications is consistent with authority delegated to the Bureau).

¹² On that basis, the Bureau referred to the Commission CCHI's petition to deny MBC's application. See *Comparative Order*, 26 FCC Rcd at 9089.

¹³ See 2012 Application for Review at 5, citing *American Family Association v. FCC*, 365 F.3d 1156, 1164 (D.C. Cir. 2004) ("*American Family*").

comparative criterion which promoted local control of programming but did not require local origination of programming was arbitrary and capricious. Thus, *American Family* is inapposite and unrelated to our finding in this proceeding that an organization with a mere paper existence and no business activities of its own cannot claim to have a local “headquarters,” *i.e.*, a primary place of business, at an address that simply houses its FCC application and at which its principals conduct business for other organizations and thus cannot claim comparative points for being an established local applicant.¹⁴ Thus, it was appropriate for the Bureau to dismiss MBC’s petition for reconsideration. In any event, our affirmation of the Bureau decision herein moots the issue of the Bureau’s authority to issue the *2012 Letter*.

5. Finally, we disagree with MBC’s contention that the Bureau provided insufficient justification for permitting, by waiver, a major change in CCHI’s ownership.¹⁵ The Bureau properly found that the facts of the instant case involved special circumstances upon which the Commission had previously granted waivers and had directed the Bureau to do the same.¹⁶ MBC’s argument to the contrary focuses upon whether CCHI’s ownership change can be considered “gradual” or “routine” based on the circumstances under which one of CCHI’s directors left the organization.¹⁷ MBC further contends that the Bureau erred in rejecting its argument that CCHI misrepresented the manner in which the director departed.¹⁸ Here, the circumstances of the director’s departure were not shown to be an outgrowth of any party’s desire to gain control and, thus, are immaterial.¹⁹ As the Bureau aptly noted, the Commission is concerned with the overall pattern of ownership changes and MBC failed to demonstrate that CCHI had a motive to make misstatements or conceal facts about the departure of a single director.²⁰ The Bureau

¹⁴ See *Comparative Order*, 26 FCC Rcd at 9091-92; see also *Omnibus Order*, 22 FCC Rcd at n.89 (“the established local applicant requirements are phrased in terms of the basic characteristics of the applicant, not the relationships the applicant or its members may have with other organizations.”); *Reexamination of Comparative Standards for Noncommercial Educational Applicants*, Memorandum Opinion and Second Order on Reconsideration, 17 FCC Rcd 13132, 13137-38 (2002) (“*NCE Second Order*”) (rejecting argument that organizations are local only because people behind them are local).

¹⁵ Specifically, CCHI had a five-member governing board upon application in 1996 but replaced one director in 1998, another in 1999, and a third in 2006 or 2007. A major change occurred because the original parties to the application did not retain more than a 50 percent interest after departure of the third original director. The Bureau waived a Rule which ordinarily requires renumbering, and therefore dismissal, of applications that undergo major ownership changes outside of a filing window. See 47 C.F.R. § 73.3573(a). Rule waivers are appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence. See *Network IP, LLC v. FCC*, 348 F.3d 116, 127 (D.C. Cir. 2008).

¹⁶ See *Omnibus Order*, 22 FCC Rcd at 6124-25 (directing the Bureau to consider ownership waivers for certain NCE applications filed prior to 2000 that had been subject to a lengthy processing freeze after comparative procedures were called into question and subject to rulemaking and judicial proceedings).

¹⁷ See 2012 Application for Review at 7-8.

¹⁸ *Id.* at 9.

¹⁹ See *2012 Letter*, 27 FCC Rcd at 9300; see also *Omnibus Order*, 22 FCC Rcd at 6125-28 (waivers for pre-2000 NCE applicants experiencing major board changes appropriate if the changes were gradual, routine, and not the outgrowth of an attempt to gain control).

²⁰ See *2012 Letter*, 27 FCC Rcd at 9301-02, citing *Fox River Broadcasting, Inc.*, Order, 93 FCC 2d 127, 129 (1983) and *RKO General, Inc.*, Decision, 4 FCC Rcd 4679, 4684 (Rev. Bd. 1989) (intent to deceive can be inferred from motive). We dismiss MBC’s new argument that a CCHI motive to deceive can be derived from the possibility that CCHI’s application would have been dismissed as a result of the ownership change, and that CCHI’s resulting loss of status as a mutually exclusive applicant would have caused dismissal of CCHI’s Petition to Deny against MBC for lack of standing. See 2012 Application for Review at 10. See generally *Calvary Chapel of Honolulu, Inc.*, Letter, 22 FCC Rcd 17654, 17655 (MB 2007). The Bureau had no opportunity to consider this newly raised claim. Moreover, it is insufficient to establish any motive to misrepresent because (1) the Bureau’s longstanding practice is to consider Petitions to Deny as informal objections under 47 C.F.R. § 73.3587 if the filer lacks standing; (2) arguments for dismissal of CCHI’s application due to the ownership change would have been premature at that time

(continued....)

correctly identified the replacement of three out of five directors over ten years, in three separate stages, as a gradual change without any attempt to gain control.

III. ORDERING CLAUSE

6. Accordingly, IT IS 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(c) and (g) of the Commission's rules, 47 C.F.R. §§ 1.115(c), (g), the September 10, 2012, and July 17, 2013 Applications for Review of Maka'ainana Broadcasting Company, Ltd. ARE DISMISSED to the extent that they raise new arguments and DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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because CCHI was not then a tentative selectee; and (3) the Commission had directed the Bureau to consider waivers for pre-2000 NCE applicants that experienced changes. Furthermore, those waivers are based on the nature of the overall change in the composition of the board (*e.g.*, CCHI's "gradual" loss of three board members over ten years) and not on the final event within the chain of events (CCHI's allegedly "sudden" loss of a single board member). Thus, the disagreement between CCHI and MBC as to the circumstances surrounding the departure of one of CCHI's board members would have been immaterial to the granting of a waiver to CCHI.