

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

|   |   |                            |
|---|---|----------------------------|
| In the Matter of  | ) |                            |
|   | ) |                            |
| CALIFORNIA ASSOCIATION FOR RESEARCH AND EDUCATION, INC.                                   | ) | File No. BNPED-20071022BUZ |
|   | ) | Facility ID No. 176940     |
|   | ) |                            |
| Application for a New Noncommercial Educational FM Broadcast Station at Upton, Kentucky   | ) |                            |
|   | ) |                            |
| BETHEL FELLOWSHIP, INC.   | ) | File No. BNPED-20071018AUM |
|   | ) | Facility ID No. 175963     |
|   | ) |                            |
| Application for a New Noncommercial Educational FM Broadcast Station at Cecilia, Kentucky | ) | NCE MX Group 99            |
|   | ) |                            |

**ORDER ON RECONSIDERATION**

**Adopted: December 16, 2015**

**Released: December 17, 2015**

By the Commission:

**I. INTRODUCTION AND BACKGROUND**

1. Before us is Bethel Fellowship, Inc.’s (“Bethel”) September 3, 2014, Petition for Reconsideration (“Petition”). Bethel seeks reconsideration of the Commission’s August 4, 2014, Memorandum Opinion and Order,<sup>1</sup> in which we denied Bethel’s Application for Review (“AFR”), and affirmed two prior decisions by the Media Bureau (“Bureau”).<sup>2</sup> For the reasons discussed below, in this *Order on Reconsideration* we dismiss in part and otherwise deny the Petition pursuant to Sections 1.106(b)(2), (b)(3), and (j) of the Commission’s Rules (the “Rules”).<sup>3</sup>

2. The California Association for Research and Education Inc. (“CARE”), Bethel, and Bowling Green Community Broadcasting, Inc. (“BGCB”) filed applications in the October 2007 noncommercial educational (“NCE”) FM filing window.<sup>4</sup> The applications were found to be mutually exclusive (“MX”) and were designated NCE MX Group 99 (“Group 99”). Because none of the applicants qualified for a fair distribution preference,<sup>5</sup> the Commission determined the tentative selectee of Group 99

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<sup>1</sup> *California Association for Research and Education Inc. and Bethel Fellowship, Inc.*, Memorandum Opinion and Order, 29 FCC Rcd 9739 (2014) (“*MO&O*”).

<sup>2</sup> See *Daniel Steffy*, Letter, Ref. No. 1800B3-VMM (MB Oct. 27, 2011) (“*Reconsideration Decision*”); *Daniel Steffy*, Letter, Ref. No. 1800B3-JSP (MB Dec. 23, 2010) (“*Staff Decision*”).

<sup>3</sup> 47 C.F.R. §§ 1.106(b)(2), (b)(3), and (j).

<sup>4</sup> See *Media Bureau Identifies Groups of Mutually Exclusive Applications*, Public Notice, 23 FCC Rcd 3914 (MB 2008). See also File Nos. BNPED-20071022BUZ (CARE application or “Application”); BNPED-20071018AUM (Bethel application); BNPED-20071012AQB (BGCB application).

<sup>5</sup> See generally 47 C.F.R. § 73.7002. The threshold fair distribution analysis discharges the Commission’s obligation to distribute radio service fairly, efficiently, and equitably under 47 U.S.C. § 307(b).

pursuant to its point system procedures.<sup>6</sup> As CARE was awarded four points – two points for diversity of ownership and two for presenting the best technical proposal – and neither Bethel nor BGCB were awarded any points, CARE was designated the tentative selectee.<sup>7</sup> The staff subsequently denied Bethel’s petition to deny the CARE Application,<sup>8</sup> granted the CARE Application, and dismissed the Bethel Application.<sup>9</sup> The staff subsequently denied Bethel’s Petition for Reconsideration of those actions (“Reconsideration Petition”),<sup>10</sup> and Bethel filed the AFR on November 28, 2011, which we denied by the *MO&O*.

3. On November 7, 2013, CARE applied to modify its construction permit,<sup>11</sup> seeking to construct a non-directional antenna at a new site because it had lost its original site. Due to the short time remaining on its construction permit, CARE stated that it was not feasible to design and proof a directional antenna suitable to a new site, proposing instead a site from which it could operate a non-directional antenna. The Modification Application was granted December 2, 2013, without challenge from Bethel.<sup>12</sup> However, on December 23, 2013, CARE’s construction permit expired without CARE having constructed the proposed facilities or requested tolling. On August 4, 2014, we released the *MO&O*, concluding that Bethel had failed to demonstrate staff error in the *Reconsideration Decision*, and therefore denied the AFR.<sup>13</sup> Bethel timely filed the Petition on September 3, 2014.

## II. DISCUSSION

4. In the instant Petition, Bethel claims that the filing of the Modification Application and the expiration of CARE’s construction permit are “new facts” compelling reconsideration.<sup>14</sup> Bethel argues that in the Modification Application CARE “explicitly acknowledged that ‘building and proofing a directional antenna has become technically unfeasible,’” and further contends that CARE’s failure to construct is “the *ultimate* demonstration of failure to prosecute.”<sup>15</sup> Bethel also argues that, because the CARE permit expired before the *MO&O* was released, Bethel’s application was still pending due to its repeated appeals, thus requiring that we reverse our decision and reinstate and grant its application.<sup>16</sup> Bethel brings its Petition under Section 1.106(b)(2)(i) of our Rules, which provides that a petition for reconsideration will be entertained only if “[t]he petition relies on facts or arguments which relate to events which have occurred or circumstances which have changed since the last opportunity to present

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<sup>6</sup> 47 C.F.R. § 73.7003 (point system selection procedures). CARE was tentatively selected in *Comparative Consideration of 59 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in the October 2007 Filing Window*, Memorandum Opinion and Order, 25 FCC Rcd 1681, 1705 (2010) (“*Comparative Selection MO&O*”).

<sup>7</sup> *Comparative Selection MO&O*, 25 FCC Rcd at 1705, 1725.

<sup>8</sup> CARE did not oppose Bethel’s petition to deny, nor did it respond to a staff letter requesting response. See *Daniel Steffy*, Letter (MB Oct. 14, 2010) (“*Inquiry Letter*”). However, CARE did file an engineering amendment to its Application shortly after the *Inquiry Letter* was sent. *Broadcast Applications*, Public Notice, Report No. 27385 (MB Dec. 17, 2010).

<sup>9</sup> *Staff Decision* at 3; *Broadcast Actions*, Public Notice, Report No. 47392 (MB Dec. 29, 2010).

<sup>10</sup> *Reconsideration Decision* at 4. On reconsideration, Bethel added the new argument that, because CARE did not respond to the *Inquiry Letter*, its Application should be dismissed for failure to prosecute under 47 C.F.R. §§73.3566(b) and 73.3568(a)(1). The staff rejected this argument. *Reconsideration Decision* at 3.

<sup>11</sup> File No. BNPED-20131107AMT (“Modification Application”).

<sup>12</sup> See *Broadcast Actions*, Public Notice, Report No. 48130 (MB Dec. 6, 2013).

<sup>13</sup> *MO&O*, 29 FCC Rcd at 9740.

<sup>14</sup> Petition at 1, 4.

<sup>15</sup> *Id.* at 5 (emphasis in original).

<sup>16</sup> *Id.* at 1-2, 4-5.

such matters to the Commission.”<sup>17</sup> A petition that fails to introduce relevant new facts or changed circumstances may be dismissed as repetitious.<sup>18</sup> Moreover, it is settled Commission policy that a petition for reconsideration is not to be used to re-argue points already argued and rejected.<sup>19</sup>

5. Although Bethel raises questions regarding CARE’s Modification Application,<sup>20</sup> it does not show why these facts could not have been raised in either an objection to the Modification Application or in a prior pleading. In particular, we note that CARE filed its Modification Application and CARE’s construction permit expired more than seven months before the Commission ruled on Bethel’s AFR. We thus reject these arguments for reconsideration purposes.<sup>21</sup> As a separate and independent ground for rejecting Bethel’s Petition, we do not agree with Bethel’s claim that the “new fact” of the CARE permit expiration demonstrates error in either the Bureau’s or our review of its arguments.<sup>22</sup> Because CARE modified its permit to specify a new site and a non-directional antenna – with no challenge from Bethel – the permit that expired is not the one to which Bethel objected in its petition to deny or other pleadings. Thus the fact of the expiration does not undermine the basis for denying Bethel’s petition to deny. Likewise, we find no merit in Bethel’s failure to prosecute claim. Failure to construct is not failure to prosecute, and although CARE did not respond to the staff’s *Inquiry Letter*, it did take steps toward construction,<sup>23</sup> even though they were ultimately unsuccessful. Moreover, notwithstanding CARE’s failure to have responded to the Bethel petition to deny, the Bureau’s own analysis of Bethel’s allegations led it to conclude that they were without basis.<sup>24</sup> Bethel has thus failed to demonstrate the circumstances necessary to find failure to prosecute.<sup>25</sup>

6. Finally, we reject Bethel’s attempt to revive its own Group 99 application based on its “last applicant standing” argument, through which it contends that forestalling the finality of the dismissal of its own application, by filing the various pleadings and appeals noted herein – each rejected by the Bureau – now entitles it to replace CARE as the tentative selectee.<sup>26</sup> Bethel essentially argues that it need not prevail on the merits, it need only outlast its competitor. We disagree. Bethel relies on Section 73.7004(d) of the Rules, which provides, at the petition to deny stage, “If an applicant is found unqualified, the application shall be denied, and the applicant(s) with the next highest point tally named as the tentative selectee.”<sup>27</sup> But in light of the fact that the Bureau properly denied Bethel’s petition to deny and, in granting the CARE Application, found CARE to be qualified, this provision is inapplicable here.<sup>28</sup> By contrast, had Bethel successfully shown an error of fact or law that voided the original selection of

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<sup>17</sup> 47 C.F.R. § 1.106(b)(2)(1).

<sup>18</sup> *See Notices of Apparent Liability for Forfeitures of Emery Telephone*, Memorandum Opinion and Order, 15 FCC Rcd 7181, 7184 ¶ 5 (1999) (citing 47 C.F.R. § 1.106(b)(3)); *see also, e.g., Sagir, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 15967, 15974 ¶ 16 (2003).

<sup>19</sup> *S&L Teen Hospital Shuttle*, Order on Reconsideration, 17 FCC Rcd 7899, 7900 (2002).

<sup>20</sup> Petition at 6 and n.2.

<sup>21</sup> 47 C.F.R. § 1.106(b)(2).

<sup>22</sup> Petition at 5.

<sup>23</sup> *See supra* notes 8, 11.

<sup>24</sup> *Staff Decision* at 3; *Reconsideration Decision* at 3.

<sup>25</sup> *Innovative Women’s Media Ass’n v. F.C.C.*, 16 F.3d 1287, 1289 (D.C. Cir. 1994) (quoting *The Dunlin Group*, Memorandum Opinion and Order, 6 FCC Rcd 4642, 4644 (Rev. Bd. 1991)) (dismissing an application for failure to prosecute requires a finding that the applicant, with contempt or inexcusable sloth, has defied a Commission order).

<sup>26</sup> Petition at 4-5.

<sup>27</sup> 47 C.F.R. § 73.7004(d). Petition at 4-5.

<sup>28</sup> *See Staff Decision* at 3.

CARE or grant of its Application, it might have at least a colorable claim as the Group 99 tentative selectee.<sup>29</sup> As discussed above, however, we find no such error.

7. The petition and review process allows interested parties to raise legitimate issues regarding our processing of broadcast applications, and to redress genuine errors of fact, law, or procedure.<sup>30</sup> The process is not, however, designed to afford a disappointed applicant a means to keep the proceeding open through the filing of meritless and repetitive pleadings in the hope that the tentative selectee will fail to build, allowing the petitioner to replace the original tentative selectee. This constitutes misuse of the Commission's processes that wastes limited staff resources. To hold otherwise would be to encourage *all* unsuccessful applicants to file petitions to deny or informal objections against their successful competitors – not to raise genuine issues, but merely as placeholders in the event that the prevailing applicants should ultimately fail to construct.

### III. ORDERING CLAUSE

8. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 405 of the Communications Act of 1934, as amended,<sup>31</sup> and Sections 1.106(b)(2), (b)(3), and (j) of the Commission's Rules,<sup>32</sup> the Petition for Reconsideration filed by Bethel Fellowship, Inc. on September 3, 2014, IS DISMISSED to the extent that it raises new arguments or fails to cite any relevant new facts, and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>29</sup> Such a claim would not be assured, however. Bethel's attack on CARE's technical facilities, if successful, would only have negated the two points CARE received for superior technical facilities. CARE would still have retained its two diversity of ownership points, whereas Bethel could have earned, at most, two points, resulting at best in a tie, to be resolved under the tie-breaker rules. See 47 C.F.R. § 73.7003(c); *Comparative Selection MO&O*, 25 FCC Rcd at 1725.

<sup>30</sup> See, e.g., *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process*, Second Further Notice of Inquiry and Notice of Proposed Rule Making, 3 FCC Rcd 5179, 5183-84 (1988) (stating that among the procedures for the public to participate in the broadcast application process is "the statutory right under [47 U.S.C. § 309] to file a petition to deny in broadcast application proceedings, the purpose of which is to enable interested parties to provide factual information as to whether grant of an application would be in the public interest.").

<sup>31</sup> 47 U.S.C. § 405.

<sup>32</sup> 47 C.F.R. §§ 1.106(b)(2), (b)(3), and (j).