

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

In the Matter of)
)
Comparative Consideration of Seven Groups of) NCE MX Group Numbers 377, 381, 430,
Mutually Exclusive Applications for Permits to) 508, 538, 971114, and 990512
Construct New Noncommercial Educational FM)
Stations)

MEMORANDUM OPINION AND ORDER

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By the Commission:

TABLE OF CONTENTS

Heading	Paragraph #
I. INTRODUCTION.....	1
II. BACKGROUND.....	2
III. NCE COMPARATIVE PROCESS.....	5
A. Section 307(b) --Threshold Fair Distribution Study.....	6
B. Point System Selection Process.....	8
IV. SECTION 307(B) CHALLENGES.....	15
A. NCE MX Groups 377 and 508.....	16
B. NCE MX Group 538.....	28
C. NCE MX Group 971114.....	31
V. ESTABLISHED LOCAL APPLICANT CHALLENGE.....	36
A. NCE MX Group 430.....	37
VI. DIVERSITY – CONTINGENT DIVESTITURE COMMITMENTS.....	45
A. NCE MX Group 990512.....	46
VII. ESTABLISHED LOCAL APPLICANT DOCUMENTATION CHALLENGE.....	54
A. NCE MX Group 381.....	55
VIII. NEXT STEPS.....	63
IX. ORDERING CLAUSES.....	68

I. INTRODUCTION

1. By this Memorandum Opinion and Order (“Order”), the Commission considers three Petitions to Deny, two Petitions for Reconsideration, and four Applications for Review that challenge actions taken by the Media Bureau (“Bureau”) and Commission regarding seven groups of mutually exclusive applications for new noncommercial educational (“NCE”)¹ FM station construction permits. In each of these groups, the Bureau or Commission previously resolved the conflicting NCE proposals by applying comparative procedures codified in Part 73, Subpart K, of the Commission’s Rules (the “Rules”)² and tentatively selected applications for grant. These actions now require additional analysis as

¹ Channels 201-220 are reserved for noncommercial educational FM broadcasting. See 47 C.F.R. § 73.501.

² 47 C.F.R. §§ 73.7000 – 73.7005.

a result of subsequent filings or events. In some instances this analysis requires the selection of a new tentative selectee. We tentatively conclude that the grant of these applications would serve the public interest, convenience and necessity, but note that these selections can be challenged with a petition to deny.³

II. BACKGROUND

2. The majority of the applications addressed in this Order were filed or amended in October 2007, during the first filing window for NCE FM reserved band applications.⁴ Each application addressed herein was mutually exclusive (“MX”) with at least one other application, and the applicants were given the option of filing settlements or technical amendments to resolve the mutual exclusivities.⁵ The Bureau and the Commission subsequently resolved the seven MX groups herein, along with over 500 other MX groups, comprising thousands of NCE FM applications,⁶ by applying the NCE comparative procedures, which include (1) threshold fair distribution criteria for applications proposing to serve different communities,⁷ and (2) an NCE point system,⁸ which is a simplified, “paper hearing” process for selecting among mutually exclusive NCE applications.⁹ The Commission’s comparative review of MX

³ As discussed in Section VIII *infra*, challenges to new tentative selectees are not properly raised as petitions for reconsideration of this Order, as the point hearings take no final action on the application, and petitions for reconsideration do not lie against such interlocutory decisions.

⁴ The applications addressed in Groups 377 to 538 were filed during a filing window that was open from October 12, 2007, through October 22, 2007, for FM reserved band (Channels 201-220) proposals. *See Media Bureau Announces NCE FM New Station and Major Change Filing Procedures for October 12-October 19, 2007 Window*, Public Notice, 22 FCC Rcd 15050 (MB 2007) (“*Procedures Notice*”); *Media Bureau to Extend Window for NCE FM New Station and Major Change Applications; Window Will Close on October 22, 2007*, Public Notice, 22 FCC Rcd 18680 (MB 2007). The applications in Groups 971114 and 990512 were cut off from competing applications prior to the October 2007 window. Pre-window procedures applicable specifically to these groups, which were filed under former NCE comparative procedures, are described further in *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Memorandum Opinion and Order, 16 FCC Rcd 5074, 5103-04 (2002).

⁵ *See Deadline for NCE Settlements and Supplements Extended to July 19, 2001*, Public Notice, 16 FCC Rcd 10892 (MB 2001); *Window Opened to Expedite Grant of New NCE Station Construction Permits*, 22 FCC Rcd 19438 (MB 2007); 47 C.F.R. § 73.7003(d).

⁶ *See, e.g., Comparative Consideration of 76 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 22 FCC Rcd 6101 (2007) (“*NCE Omnibus Order*”); *Threshold Fair Distribution Analysis of 32 Groups of Mutually Exclusive Applications for Permits to Construct New Or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 23 FCC Rcd 10213 (2008); *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 (2010) (“*59 Group Comparative Order*”).

⁷ *See* 47 U.S.C. § 307(b); 47 C.F.R. § 73.7002(a). During the first step of this process, the Bureau, acting pursuant to delegated authority, uses service area population data and certifications provided by the applicants to conduct a threshold fair distribution analysis.

⁸ *See* 47 C.F.R. § 73.7003 (point system selection procedures). The NCE point system awards a maximum of seven merit points, based on four distinct criteria: (1) established local applicant; (2) diversity of ownership; (3) state-wide networks; and (4) technical parameters. *See* ¶¶ 8-13, *infra*.

⁹ *See Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Notice of Proposed Rulemaking, 10 FCC Rcd 2877 (1995), *further rules proposed*, Further Notice of Proposed Rulemaking, 13 FCC Rcd 21167 (1998), *rules adopted*, Report and Order, 15 FCC Rcd 7386 (2000) (“*NCE Order*”), *vacated in part on other grounds sub nom., National Public Radio v. FCC*, 254 F.3d 226 (D.C. Cir. 2001), *clarified*, Memorandum Opinion and Order, 16 FCC Rcd 5074 (“*NCE MO&O*”), *Erratum*, 16 FCC Rcd 10549, *recon. denied*, Memorandum Opinion and Second Order on Reconsideration, 17 FCC Rcd 13132 (2002) (“*NCE Reconsideration Order*”), *aff’d sub nom. American Family Ass’n v. FCC*, 365 F.3d 1156 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 1000 (2004).

applications is based on applicant-provided information.¹⁰ To expedite the licensing of new NCE FM stations, the Bureau and the Commission rely on applicant certifications and documentation and do not independently confirm their accuracy during the review process. Rather, the Bureau and the Commission rely on the petition to deny process and random audits to verify the accuracy of the points claimed and certifications.¹¹

3. After applying these procedures, the Bureau or Commission tentatively selected applications for grant from each MX group and initiated a 30-day period for filing petitions to deny against the applicants tentatively selected.¹² In this Order, we address the majority of the outstanding, unresolved challenges from the October 2007 NCE FM window. The pleadings addressed herein include multiple petitions to deny¹³ the tentative selectee applications as well as applications for review¹⁴ of prior Bureau decisions regarding the subject MX groups. In many of the petitions to deny, a petitioner has challenged the exclusion or inclusion of challenged or claimed points, thus potentially altering the outcome of the particular NCE MX group. Accordingly, the Bureau has referred these groups to the Commission.¹⁵ Although the groups we resolve in this Order involve a broad range of fact patterns, they also involve many common issues arising from our NCE comparative process. We therefore believe that organizing this Order primarily by topic and consolidating these decisions as a single order will provide guidance on the application of many of the NCE comparative criteria.

4. Section III of this Order provides an introductory overview of each NCE comparative criterion. In Section IV we address three challenges to our threshold Section 307(b) fair distribution analyses. Section V is devoted to a challenge to our prior award of established local applicant points. In Section VI we address the question of whether an NCE applicant may rely on a contingent divestiture commitment to qualify for a diversity of ownership credit. Finally, Section VII addresses whether the documentation submitted by the tentative selectee from one MX group was sufficient to receive established local applicant points.

III. NCE COMPARATIVE PROCESS

5. The Commission's analysis of mutually exclusive groups of NCE applications generally consists of three main components. First, for non-allotment groups (in which applicants can propose

¹⁰ See Section IV of FCC Form 340 "Application for Construction Permit for Reserved Channel Noncommercial Educational Broadcast Station."

¹¹ See *NCE MO&O*, 16 FCC Rcd at 5104.

¹² See 47 C.F.R. § 73.7004(b)

¹³ In cases involving a petition to deny, the Commission applies a two-step analysis under the public interest standard. The Commission must first determine whether the petition contains specific allegations of fact sufficient to show that granting the application would be *prima facie* inconsistent with the public interest. 47 U.S.C. § 309(d)(1); *Astroline Communications Co., Ltd. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) ("*Astroline*"). If the petition meets this first step, the Commission must determine whether "on the basis of the application, the pleadings filed, or other matters which [the Commission] may officially notice," the petitioner has raised a substantial and material question of fact as to whether the application would serve the public interest. *Astroline*, 857 F.2d at 1561; 47 U.S.C. § 309(e).

¹⁴ Under Section 1.115(b)(2) of the Commission's Rules, a party filing an Application for Review must demonstrate one of the following: (1) that the action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy; (2) that the action involves a question of law or policy which has not previously been resolved by the Commission; (3) that the action involves application of a precedent or policy which should be overturned or revised; (4) an erroneous finding as to an important or material question of fact; or (5) a prejudicial procedural error. 47 C.F.R. § 1.115(b)(2).

¹⁵ The Commission directed the Bureau to refer only those issues where the exclusion or inclusion of challenged or claimed points could alter the outcome of a particular NCE group, or where a new or novel question exists. See *NCE Omnibus Order*, 22 FCC Rcd at 6162 n.230 (standards for staff evaluation of petitions).

service to different communities) the Bureau performs a threshold fair distribution study pursuant to Section 307(b) of the Communications Act of 1934, as amended (the “Act”).¹⁶ The Bureau generally has used the population data and applicant certifications submitted in conjunction with Section 307(b) claims to make these comparative determinations. Second, application conflicts not resolved under this “fair distribution” analysis¹⁷ are compared under an NCE point system.¹⁸ The Commission generally has awarded the number of points claimed by each applicant in Section IV of its FCC Form 340 application. Third, if necessary, the Commission makes a tie-breaker determination, based on applicant-provided data and certifications contained in Section V of each application. These steps are described in greater detail below.

A. Section 307(b) --Threshold Fair Distribution Study

6. When mutually exclusive applications for permits to construct NCE FM stations propose to serve different communities, the Bureau determines whether grant of any of the applications would best further the fair, efficient, and equitable distribution of radio service among communities.¹⁹ An NCE FM applicant is eligible to receive a Section 307(b) preference if it would provide, within the proposed station’s 60 dBu contour, a first or second reserved band channel NCE aural service to at least ten percent of the population (in the aggregate), provided that such service is to at least 2,000 people.²⁰

7. If more than one applicant in a mutually exclusive group qualifies for a Section 307(b) preference, the Bureau compares each applicant’s first service population coverage totals.²¹ An applicant proposing a first NCE aural service to ten percent of the population and at least 2,000 people will receive a dispositive fair distribution preference over applicants for different communities that would not provide such first service. Such an application also would receive a dispositive fair distribution preference over applicants for different communities that would provide a first NCE aural service to at least 5,000 fewer potential listeners than the next highest applicant’s first service total.²² If no applicant is entitled to a first service preference, we consider combined first and second NCE aural service population totals and apply the same 5,000-listener threshold. At each stage of the Section 307(b) analysis between applicants for different communities, any applicant that is comparatively disfavored in terms of eligibility or service totals is eliminated. Comparable applicants proceed to the next level of analysis, provided that different communities are still represented in the remaining pool of applicants. The process ends when the Commission determines that none of the remaining applicants can be selected or eliminated based on a

¹⁶ See 47 U.S.C. § 307(b).

¹⁷ See 47 C.F.R. § 73.7002 (procedures for selecting among mutually exclusive applicants for stations proposing to serve different communities).

¹⁸ See 47 C.F.R. § 73.7003 (point system selection procedures).

¹⁹ See 47 U.S.C. § 307(b) (“In considering applications for licenses ... when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.”); 47 C.F.R. § 73.7002(a). A Section 307(b) analysis is ordinarily conducted at the staff level because the Bureau has delegated authority to make Section 307(b) determinations in NCE cases. See *NCE Order*, 15 FCC Rcd at 7397. See also 47 C.F.R. §§ 0.61 and 0.283. In contrast, the point system analysis, which is conducted when Section 307(b) is not determinative, must be conducted by the Commission as this analysis is considered a simplified “hearing” for purposes of 47 U.S.C. § 155(c)(1). *NCE Order*, 15 FCC Rcd at 7420.

²⁰ See 47 C.F.R. § 73.7002(b). Applicants were required to count all reserved band aural authorizations, including stations for which a construction permit, but not a license, has been issued. See, e.g., *Procedures Notice*, 22 FCC Rcd at 15052.

²¹ See 47 C.F.R. § 73.7002(b).

²² *Id.*

Section 307(b) preference, or that each remaining applicant proposes to serve the same community. At that stage, the remaining applicants proceed to a point system analysis.

B. Point System Selection Process

8. **Four Distinct Criteria.** The Commission compares mutually exclusive groups of NCE FM applications under the point system set forth in Section 73.7003 of the Rules.²³ The NCE point system awards a maximum of seven merit points, based on four distinct criteria.²⁴

9. **Established Local Applicant.** First, three points are awarded to applicants that certify that they have been local and established for at least two years immediately prior to the filing of their application. Applicants with a headquarters, campus, or 75 percent of their board members residing within 25 miles of the reference coordinates of the community of license are considered local. A governmental unit is considered local within its area of jurisdiction. To qualify for such points based on board composition, the applicant must certify that its governing documents require that such local board composition be maintained. The applicant also must certify that it has placed documentation supporting its certification in a local public inspection file, and that it has submitted that documentation to the Commission.²⁵

10. **Diversity of Ownership.** Second, two points are awarded for local diversity of ownership if the principal community contours of the applicant's proposed station do not overlap with those of any other station in which any party to the application holds an attributable interest.²⁶ To be awarded such points, an applicant's governing documents must include a provision requiring that such diversity of ownership be maintained in the future. Applicants that are organized pursuant to state charters that cannot be amended without legislative action are permitted to base the governing document component of their local diversity certifications on other safeguards that reasonably assure that board characteristics supporting any points claimed by the applicant will be maintained.²⁷ An applicant awarded diversity of ownership points must submit and place in its public file copies of pertinent governing documents to support its certification or, for applicants such as state universities that are governed by laws which cannot be amended without legislative action, an appropriate alternative showing. An applicant that proposes a full service NCE station that would replace an attributable FM translator may exclude the translator for calculating ownership diversity points if it has pledged to request cancellation of the translator authorization upon the new station's commencement of operations.²⁸ The Commission has stated that it will, on a waiver basis, similarly allow applicants to exclude Class D (10 watt) FM stations that will be replaced by the proposed full service NCE station.²⁹ The Bureau has also extended this waiver treatment to low power FM ("LPFM") stations.³⁰

²³ See 47 C.F.R. § 73.7003.

²⁴ See 47 C.F.R. § 73.7003(b).

²⁵ See FCC Form 340 at 9 (requiring governing documents to ensure that applicant maintain "local" characteristics of governing board); FCC Form 340, Worksheet 4 (same); *NCE Order*, 15 FCC Rcd at 7419.

²⁶ See 47 C.F.R. § 73.7003(b)(2). Parties with attributable interests are defined as the applicant, its parent, subsidiaries, their officers, and members of their governing boards. See 47 C.F.R. § 73.7000. Interests of certain entities providing more than 33 percent of the applicant's equity and/or debt are also attributable. *Id.*

²⁷ See *NCE MO&O*, 16 FCC Rcd at 5095.

²⁸ *Id.* at 5102-03.

²⁹ See *NCE Omnibus Order*, 22 FCC Rcd at 6120.

³⁰ See, e.g., *59 Group Comparative Order*, 25 FCC Rcd at 1686). See also *Procedures Notice*, 22 FCC Rcd at 15052-53. An applicant seeking to avoid attribution of an LPFM interest must, as part of its window-filed application, submit a request for waiver of the Rule that would otherwise result in the attribution of the LPFM interest in the applicant's point system determination and propose to surrender the LPFM interest. The Commission

(continued...)

11. State-wide Network. Third, two points are awarded for certain state-wide networks providing programming to accredited schools. These points are available only to applicants that cannot claim a credit for local diversity of ownership.³¹

12. Technical Parameters. Fourth, an applicant that proposes the best technical proposal in the group (i.e., proposes service to the largest population and area, excluding substantial areas of water) may receive up to two points. The applicant receives one point if its proposed service area and population are ten percent greater than those of the next best area and population proposals, or two points if both are 25 percent greater than those of the next best area and population proposals as measured by each proposed station's predicted 60 dBu signal strength contour.³² If the best technical proposal does not meet the 10 percent threshold, no applicant is awarded points under this criterion. In considering this criterion, we generally accept applicants' coverage and population claims.

13. Finally, the Commission tallies the total number of points awarded to each applicant. Each of the applicants with the highest score in a group is designated a "tentative selectee." All other applicants are eliminated.

14. **Timely Documentation of Comparative Qualifications.** The NCE new station application, FCC Form 340, is certification-based, but requires applicants to document certain of their claims by submitting supporting information both to the Commission and to a local public file.³³ Applicant point claims must be readily ascertainable from timely-filed application exhibits.³⁴ Certifications which require the applicant to submit documentation, but which are not supported with any such timely submitted documentation, are not credited. For example, the Commission rejects claims where the applicant certifies that it qualifies for points for diversity of ownership or as an established local applicant but fails to supply supporting information referred to in the certification. As noted above, every applicant claiming points for diversity of ownership must certify that the proposed station's service area would not overlap that of an attributable existing station, that its governing documents require that such diversity be maintained, and "that it has placed documentation of its diversity qualifications in a local public file and has submitted to the Commission copies of that documentation."³⁵ Similar

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will waive the LPFM cross-ownership rule so that an NCE FM construction permit may issue to an LPFM licensee, provided that the LPFM licensee divests its interest in the LPFM station prior to commencement of program tests by the new NCE FM station. See 47 C.F.R. § 73.860(a).

³¹ See 47 C.F.R. § 73.7003(b)(3). The statewide network credit is an alternative for applicants that use multiple stations to serve large numbers of schools and, therefore, do not qualify for the local diversity of ownership credit.

³² *Id.* § 73.7003(b)(4). See *NCE Omnibus Order*, 22 FCC Rcd at 6121-22 (If there is one top applicant in terms of area and population, but no single next best applicant for both factors, the Commission will compare the top applicant's proposed area to the next best area of one applicant and the top applicant's population to the next best population of another applicant. Point(s) are awarded only if the top applicant prevails against the next best area and population proposals.).

³³ See *NCE Order*, 15 FCC Rcd at 7423.

³⁴ To be considered timely-filed, such exhibits must be filed by the close of the filing window. See, e.g., *Comparative Consideration of 33 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Education FM Stations*, Memorandum Opinion and Order, 26 FCC Rcd 9058, 9063 (2011) ("33 Group Comparative Order") (comparative qualification claims not supported with documentation on file by close of window cannot be credited); *59 Group Comparative Order*, 25 FCC Rcd at 1694 (rejecting documentation filed after close of window as prohibited attempt to enhance comparative qualifications).

³⁵ See *FCC Form 340*, Instructions, Question IV(2). With respect to documenting current diversity, the preferred information is a map showing no overlap or a statement that none of the parties to the application holds an attributable interest in any other station. To document future diversity, the applicant would generally submit a copy of the governing documents referenced in the certification.

certifications and documents are required of applicants claiming points as established local applicants.³⁶ While there is some flexibility in the type of documentation an applicant may provide, an applicant submitting no timely documentation at all cannot be found to have made a valid certification.

IV. SECTION 307(B) CHALLENGES

15. As noted previously, the initial step in the NCE FM comparative process is a threshold Section 307(b) analysis, which is performed only if mutually exclusive NCE FM applicants propose to serve different communities and will provide a new first and/or second NCE aural service to a substantial population.³⁷ In the following four NCE MX groups, we address challenges to our previous Section 307(b) analyses. Specifically, we address whether to allow NCE applicants to enhance fair distribution claims after the close of a filing window and whether pending applications and outstanding modified construction permits must be considered in fair distribution claims.

A. NCE MX Groups 377 and 508

16. The Helpline (“Helpline”) seeks review of two Bureau decisions in which the staff declined to consider post-window amendments³⁸ which Helpline filed in an attempt to enhance its fair distribution claims.³⁹

17. **Background.** The Bureau released a Public Notice on August 9, 2007, establishing the procedures for the October 2007 NCE window.⁴⁰ The *Procedures Notice* explicitly stated that fair distribution analyses “will be based on service and population data as of the close of the window.”⁴¹ The subject NCE window opened on Friday, October 12, 2007, and closed on Friday, October 19, 2007.⁴² Helpline filed both the Harrisonville and Fort Morgan Applications during the window. Helpline certified that the Harrisonville Application was entitled to a fair distribution preference and that its proposal would provide first NCE service to 8,946 people, but would provide no second NCE service.⁴³ Helpline certified in the Fort Morgan Application that its proposal did not provide either first or second NCE service and thus was not entitled to a fair distribution preference.⁴⁴

18. Three months later, on January 7, 2008, Helpline amended the Harrisonville Application to claim a first NCE service to 37,309 people and a second NCE service to 7,286 people. Helpline also amended the Fort Morgan Application to claim, for the first time, that it was entitled to a fair distribution

³⁶ See *FCC Form 340*, Instructions, Question IV(1). Examples of acceptable documentation include corporate materials from the secretary of state, lists of names, addresses, and length of residence of board members, copies of governing documents requiring a 75 percent local governing board, and course brochures indicating that classes have been offered at a local campus for the preceding two years.

³⁷ See *supra* ¶¶ 6-7

³⁸ File No. BNPED-20071019BCP (“Harrisonville Application”) and File No. BNPED-20071019BCM (“Fort Morgan Application”).

³⁹ *NCE MX Group 377*, Letter, 25 FCC Red 7311 (MB 2010) (“*NCE MX Group 377 Decision*”) and *NCE MX Group 508*, Letter, Ref 1800B3-VMM (MB Dec. 9, 2010) (“*NCE MX Group 508 Decision*”). Helpline filed an Application for Review of the *NCE MX Group 377 Decision* on August 18, 2010 (“Harrisonville Application for Review”) and an Application for Review of the *NCE MX Group 508 Decision* on January 10, 2011 (“Fort Morgan Application for Review”). Make a Difference Foundation, Inc. filed an Opposition to the Fort Morgan Application for Review on January 25, 2011.

⁴⁰ *Procedures Notice*, 22 FCC Red at 15052.

⁴¹ *Id.* at 15052.

⁴² *Id.* at 15050.

⁴³ Harrisonville Application at Section III, Questions 3 and 4, and Exhibit 12.

⁴⁴ Fort Morgan Application at Section III, Questions 3 and 4.

preference because the proposed facilities would provide a first NCE service to 5,330 persons, and a second NCE service to 18,542 persons.

19. **NCE MX Group 377 – Harrisonville Application.** The Harrisonville Application was among six mutually exclusive applications for an NCE FM station construction permit to serve six different communities in Missouri and Kansas.⁴⁵ In performing a fair distribution analysis, the Bureau refused to consider the new population figures set forth in the amendment to the Harrisonville Application, relying instead on the lower numbers Helpline provided in the original Harrisonville Application.⁴⁶ Comparing these population totals to those provided by other applicants in the group, the Bureau determined that the application filed by another applicant – Network of Glory, LLC (“Glory”) – was entitled to a decisive preference under Section 307(b) and identified Glory as the tentative selectee in NCE MX Group 377.⁴⁷

20. Helpline filed a Petition for Reconsideration (“Helpline April Petition”) seeking reconsideration of the *2009 Fair Distribution Order* with respect to NCE MX Group 377.⁴⁸ Upon dismissal of the Harrisonville Application, Helpline filed a second Petition for Reconsideration (“Helpline June Petition”), seeking the reinstatement and grant of the application, and incorporating by reference arguments raised in the Helpline April Petition. Helpline argued that the Bureau erred by using the lower numbers provided in its original Harrisonville Application. The Bureau rejected this argument, stating that it had “repeatedly rejected NCE applicants’ attempts to enhance their fair distribution comparative standing after the close of the filing window.”⁴⁹ Accordingly, the Bureau dismissed the Helpline April Petition and denied the Helpline June Petition.

21. **NCE MX Group 508 – Fort Morgan Application.** The Fort Morgan Application was among nine mutually exclusive applications for an NCE FM station construction permit to serve six different communities in Colorado.⁵⁰ In performing a fair distribution analysis, the Commission refused to consider the population figures set forth in the amendment to the Fort Morgan Application. The Commission found that, because Helpline’s original application did not claim a fair distribution preference, its amendment constituted a “prohibited attempt to enhance its comparative position.”⁵¹ Two other applications from Group 508 proceeded to a points hearing, and the Commission identified Make a Difference Foundation, Inc. (“MDF”) as the tentative selectee in NCE MX Group 508.⁵²

22. Helpline filed a petition to deny MDF’s application (“Helpline October Petition”). Helpline acknowledged that it inadvertently failed to list the population that would receive first and

⁴⁵ The Commission designated these applications NCE MX Group 377. See *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, 3880 (MB 2009) (“*2009 Fair Distribution Order*”).

⁴⁶ See *2009 Fair Distribution Order*, 24 FCC Rcd at 3880, n.31. See also Exhibits 10 and 11 of the amended Harrisonville Application.

⁴⁷ See *2009 Fair Distribution Order*, 24 FCC Rcd at 3880.

⁴⁸ The staff found the Helpline April Petition to be procedurally improper because it sought reconsideration of the *2009 Fair Distribution Order*, which was an interlocutory action. The staff, however, considered the merits of the Helpline April Petition since they had been incorporated into the properly filed Helpline June Petition.

⁴⁹ *NCE MX Group 377 Decision*, 25 FCC Rcd at 7313.

⁵⁰ The Commission designated these applications NCE MX Group 508. See *Comparative Consideration of 24 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in the October 2007 Filing Window*, 25 FCC Rcd 12887, 12895-96 (2010).

⁵¹ *Id.* at 12895, n.37.

⁵² *Id.* at 12895-96.

second NCE aural services in its original Fort Morgan Application. Helpline argued, however, that its original Fort Morgan Application was in fact entitled to a fair distribution service preference for its proposed new first NCE service and that if its claim were considered, the Commission would have designated it the tentative selectee of NCE MX Group 508. Helpline also argued the Bureau was not barred from considering fair distribution preferences claimed for the first time in a post-window amendment. The Bureau rejected these arguments and denied the Helpline October Petition.

23. **Discussion. Procedural Issue.** The Harrisonville Application for Review, filed on August 18, 2010, is untimely. Helpline explains that its counsel did not receive a copy of the *NCE MX Group 377 Decision* until July 19, 2010, 42 days after the release of the decision, and that it was not postmarked until July 16, 2010, 39 days after the release of the decision. Helpline argues that the Commission must accept late-submitted filings “where the late filing is in some sense attributable to a procedural violation by the Commission.”⁵³

24. The Commission is required to mail copies of orders to parties.⁵⁴ The failure to promptly serve a party with a copy of an order can be grounds for a waiver of a filing deadline if the Commission action made it impossible for a party to meet a filing deadline.⁵⁵ Under *Gardner*, a party seeking such a waiver has the burden to show: (a) when and how it received notice in fact; (b) that the time remaining was inadequate to allow it reasonably to timely file; and (3) that it acted promptly on receiving actual notice.⁵⁶ Parties typically become aware of the release of decisions in various ways prior to mail receipt. Accordingly, “it will be an extraordinary case . . . where a petitioner can meet this burden.”⁵⁷ Helpline fails to satisfy this three-part test. Specifically, while its pleading recites the fact that the letter was received in the mail on July 19, 2010, Helpline does not explicitly state when it first learned of the Bureau’s decision.⁵⁸ We note that the full text of the Bureau’s letter was published on June 8, 2010.⁵⁹ Accordingly, we dismiss the Harrisonville Application for Review as untimely.

25. **Substantive Issue.** The Harrisonville and Fort Morgan Applications for Review raise the same argument as Helpline’s previous petitions: that the Commission should accept a post-window amendment that alters fair distribution claims in a manner favorable to the applicant.⁶⁰ Helpline again notes that, with respect to the evaluation of applicants under the point system, the FCC Form 340 explicitly provides that “Applicants will not receive any additional points for amendments made after the close of the application filing window,”⁶¹ and again argues that the Bureau is not so constrained with respect to applications evaluated under a fair distribution analysis because a “similar statement is **not** made in Section III Fair Distribution of Service Pursuant to 47 U.S.C. Section 307(b).”⁶² It also reasserts that, “absent amending an applicant’s engineering proposal to specify a new site or greater effective radiated power, there is no way an applicant can manipulate its responses [regarding first and second

⁵³ Harrisonville Application for Review at 2, citing *Gardner v. FCC*, 530 F.2d 1086, 1091 (D.C. Cir. 1976) (“*Gardner*”).

⁵⁴ See 47 C.F.R. § 0.445(a).

⁵⁵ See *Gardner*, 530 F.2d at 1092.

⁵⁶ *Id.* at 1092 n.24.

⁵⁷ *Id.*

⁵⁸ Fort Morgan Motion for Leave File at 1.

⁵⁹ See Daily Digest, Vol. 29, No. 110 (rel. Jun. 10, 2010).

⁶⁰ To the extent that Helpline asks the Commission to revise its policy of not considering post-window amendments that affect an applicant’s comparative standing, this issue should be raised in a petition for rulemaking pursuant to Section 1.401 of the Rules. See 47 C.F.R. § 1.401.

⁶¹ Fort Morgan Application for Review at 3.

⁶² *Id.* (emphasis in original).

service].”⁶³ Finally, Helpline contends that because it was not permitted to claim a fair distribution preference, the Fort Morgan Application was not considered on the same basis as the other applications in NCE MX Group 508. Therefore, Helpline avers, the Commission should have used the figures contained in its amended application and found that its proposal was entitled to a preference based on new first and second NCE service.

26. The Commission has repeatedly disallowed the late submission of requested information in comparative cases, finding that such an allowance would “inevitably lead to abuse of the Commission’s processes, applicant gamesmanship, and unfair advantage.”⁶⁴ Moreover, as noted above, the *Procedures Notice* explicitly stated that fair distribution analyses “will be based on service and population data as of the close of the window.”⁶⁵ Helpline’s amendments to its Harrisonville Application and Fort Morgan Application were filed almost three months after the close of the window.

27. As discussed in the staff decisions, in situations similar to the ones at hand, the Commission and the Bureau have consistently rejected similar post-window amendments, which claim, for the first time, a fair distribution preference, or which attempt to correct population figures.⁶⁶ Therefore, we reject Helpline’s assertion that we should consider the enhanced population numbers provided in its amended Fort Morgan Application. Accordingly, we dismiss Helpline’s Harrisonville, deny its Fort Morgan Applications for Review and affirm the related staff actions.

B. NCE MX Group 538

28. This group consists of: (1) an application filed by Austin Airwaves, Inc. (“AAI”) for a new NCE FM station at Ellinger, Texas (“AAI Application”);⁶⁷ and (2) an application filed by Michael Atherton Ministries, Inc. d/b/a Christ is Life Church (“Atherton”) for a new NCE FM station at East Bernard, Texas (“Atherton Application”).⁶⁸ AAI, Atherton, and 25 other applications were initially determined to be mutually exclusive and designated as NCE MX Group 538. In the *18 Group Comparative Order*,⁶⁹ the Commission eliminated 25 of the applicants based on inferior fair distribution claims. Although AAI would provide a first NCE service to the largest population (30,541 persons, as opposed to Atherton’s claimed 17,683 persons), the Commission concluded that AAI’s claim was

⁶³ *Id.*

⁶⁴ *Silver Springs Communications*, Memorandum Opinion and Order, 3 FCC Rcd 5049, 5050 (1988), *rev. denied*, 4 FCC Rcd 4917 (1989) (concluding that the rejection of an untimely filed notice of appearance in a comparative case is necessary in order to maintain the integrity of the Commission’s processes and to ensure that an applicant’s gamesmanship does not result in an unfair advantage). *See also LRB Broadcasting*, Memorandum Opinion and Order, 8 FCC Rcd 3076 (1993) (same).

⁶⁵ *Procedures Notice*, 22 FCC at 15052.

⁶⁶ *See, e.g., Comparative Consideration of 52 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 8793, 8799 (2010) (“52 Group Comparative Order”) (finding that applicant’s post-filing window amendment was a prohibited attempt to enhance where the amendment claimed, for the first time, eligibility for a fair distribution preference); *Threshold Fair Distribution Analysis of 28 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 12390, 12394-12395 (MB 2009) (finding that an applicant’s amendment was a prohibited attempt to enhance its comparative position when the initial application erroneously used population data from a different community than that which applicant proposed to serve).

⁶⁷ File No. BNPED-20071015AID.

⁶⁸ File No. BNPED-20071018AAB.

⁶⁹ *See Comparative Consideration of 18 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 26 FCC Rcd 803 (2011) (“18 Group Comparative Order”).

overstated and, therefore, that AAI was not entitled to a dispositive first service preference. Correcting for this error, we concluded that AAI's first service was within 5,000 people of Atherton's next best proposal, and neither was eligible for a dispositive fair distribution preference.⁷⁰

29. We then proceeded to the point system analysis between AAI and Atherton in which Atherton, with a total of seven points, was declared the tentative selectee over AAI, with two points.⁷¹ AAI timely filed its Petition to Deny ("Petition") the Atherton Application on February 25, 2010. In its Petition, AAI argues that it should have been the sole tentative selectee from Group 538. It claims that the Commission erred in concluding that was required to take into account service proposed in a pending minor change application for Station KUBJ(FM).⁷² Further, AAI states that the transmitter for Station KYCM(FM), Alamogordo, New Mexico, sits more than 900 kilometers away from its proposed site and thus no overlap exists between the contours of Station KYCM(FM) and AAI's proposed station.⁷³

30. We have reexamined the NCE service figures for AAI and Atherton in light of the Petition. We agree with AAI that the staff erred in taking into account a modification application for Station KUBJ(FM) that was still pending during the 2007 filing window. In reviewing prior calculations, we also find that AAI incorrectly excluded a small contour overlap from Station KHIB(FM). Similarly, Atherton did not account for a small overlap from Station KZBJ(FM), Bay City, Texas, that reduces its first NCE service to 16,940 persons. Accounting for the changes in population figures from these respective contour overlaps, we have confirmed that the number of persons in AAI's first NCE service exceeds that of Atherton, the next closest applicant, by 13,427 persons. Accordingly, we will rescind our prior action and designate the AAI Application as the new tentative selectee in MX Group 538.

C. NCE MX Group 971114

31. This group consists of three applications for two different communities in Indiana. American Family Association, Inc. ("AFA") and CSN International ("CSN") would each serve Valparaiso, Indiana. The WBEZ Alliance, Inc. ("WBEZ") proposes to serve South Haven, Indiana. Pursuant to established procedures,⁷⁴ the Bureau previously conducted a threshold fair distribution analysis using numbers provided by the applicants. AFA, the only applicant to claim a first service preference, was designated the tentative selectee in Group 971114.⁷⁵

⁷⁰ *Id.* at 824.

⁷¹ Atherton claimed three points as an established local applicant and two points for diversity of ownership, and it was awarded two points for best technical proposal; AAI claimed two points for diversity of ownership. *Id.* at 824-5.

⁷² File No. BMPED-20070907AAT, granted on July 7, 2008. AAI cites to the procedures and filing requirements in the Public Notice announcing the 2007 window for new NCE FM station applications. *See Procedures Notice*, 22 FCC Rcd at 15050. The notice explains that "vacant allotments and pending applications are not counted for determining first and second NCE service levels. Analyses will be based on service and population data as of the close of the window." *Id.* (citing *NCE MO&O*, 16 FCC Rcd at 5083).

⁷³ The station previously identified as KYCM(FM) is actually licensed to Bastrop, Texas, Facility ID No. 85291. It subsequently changed its call letters to KHIB-FM. The station in Alamogordo, New Mexico, referenced in AAI's Petition, Facility ID No. 93483, was previously an unbuilt construction permit and received the call letters KYCM(FM).

⁷⁴ *See* 47 C.F.R. § 73.7002 (procedures for selecting among mutually exclusive applicants for stations proposing to serve different communities).

⁷⁵ *See American Family Association, Inc., et al.*, Letter, 20 FCC Rcd 10042 (2005). AFA claimed to provide first service to 43,487 of the 100,540 people within its proposed 60 dBu contour.

32. WBEZ subsequently filed a timely petition to deny, asserting that AFA was not entitled to a first service preference.⁷⁶ Specifically, WBEZ claims that AFA's first service claim is overstated because it failed to consider the outstanding modified construction permit of NCE FM station WHLP(FM), Hanna, Indiana, in its NCE service calculations. We agree.

33. The applicants in NCE MX Group 971114 were required to base their "fair distribution" analysis on the "snapshot" date of June 4, 2001,⁷⁷ thus ensuring that all applications in a group are judged from the same date of reference.⁷⁸ As of June 4, 2001, Station WHLP held a modified construction permit,⁷⁹ which overlaps the proposed WBEZ and AFA facilities. WBEZ correctly accounted for the authorized WHLP facilities in its NCE service calculations. AFA did not.

34. We have confirmed that when overlap from the modified WHLP permit is properly taken into account, AFA would provide first service to just 5,839 people, not 43,487 people as initially claimed, and should not have been awarded a dispositive fair distribution preference.⁸⁰ Rather, the AFA, WBEZ, and CSN facilities are comparable under the fair distribution criteria.⁸¹ Specifically, AFA, WBEZ, and CSN would provide comparable first NCE service to 5,839 people, 5,839 people, and 8,395 people, respectively. The applicants' combined first and second NCE service population totals of 49,242 people, 49,242 people, and 52,510 people, respectively, are also comparable because none exceeds the next best by at least 5,000.⁸² We therefore rescind AFA's tentative selectee status, and AFA, WBEZ, and CSN proceed to a point system analysis.

35. None of the applicants claim points as an established local applicant, a statewide network, or for diversity of ownership. With respect to technical parameters, the AFA and WBEZ proposed 60 dBu contours would each encompass 532 square kilometers with a population of 100,540. CSN's proposed 60 dBu contour would encompass 624 square kilometers with a population of 115,022. CSN qualifies for one point under the best technical proposal criterion because its proposal will serve at least 10 percent more area and population than AFA's and WBEZ's next best proposal. Accordingly, CSN is credited with a total of one point; AFA and WBEZ are each credited with zero points. CSN is therefore the new tentative selectee in Group 971114.

⁷⁶ See WBEZ Petition to Deny, filed July 7, 2005. Also before us are: (1) AFA's Opposition to the Petition, filed July 14, 2005; and (2) WBEZ's Reply to the Opposition, filed July 21, 2005.

⁷⁷ See 47 C.F.R. 73.7003(f)(2); *Supplements and Settlements to Pending Closed Groups of Noncommercial Educational Broadcast Applications Due by June 4, 2001*, Public Notice, 16 FCC Rcd 6893 (MB 2001); see also *Deadline for NCE Settlements and Supplements Extended to July 19, 2001; Date for Calculating Comparative Qualifications Remains June 4, 2001*, Public Notice, 16 FCC Rcd 10892, 10893 (MB 2001).

⁷⁸ In the NCE context, the snapshot date is a specific date used as a reference for all comparative filings in a given MX window and used in conducting a fair distribution or a point system analysis. See, e.g., *NCE MO&O*, 16 FCC Rcd at 5083 ("Of overall concern to us in this area is that we are comparing applications that use the same data. Reliance on information as of the close of the window will ensure that applicants have essentially a common reference date. With a common reference date and a common method of calculating population, the staff will analyze applicants on a similar basis.").

⁷⁹ File No. BMPED-20010214AAV (granted May 25, 2001).

⁸⁰ See, e.g., *Alan Korn, Esq., et al.*, Letter, 24 FCC Rcd 12948 (2009) (finding applicants' failure to consider an unbuilt construction permit fatal to its Section 307(b) claim).

⁸¹ In fact, as noted in the WBEZ Engineering Statement, "the proposed first and second service areas of the AFA and WBEZ applications are identical ... The site locations are identical. The effective radiated powers, antenna systems and radiation centers are identical." Engineering Statement in Support of WBEZ Petition at 3.

⁸² The AFA and WBEZ proposed 60 dBu contours would each encompass 100,540 people. CSN's 60 dBu contour encompasses 115,022 people.

V. ESTABLISHED LOCAL APPLICANT CHALLENGE

36. As discussed previously, applicants with a headquarters, campus, or 75 percent of their board members residing within 25 miles of the reference coordinates of the community of license, and government entities within their jurisdiction, are considered “local.”⁸³ To qualify for the three established local applicant points, applicants must demonstrate that they been local and established for at least two years immediately prior to the filing of their application. The Commission purposefully adopted a narrow definition of “established local” entities to increase the likelihood that organizations most knowledgeable, responsive, and accountable to their local community would be awarded licenses, to keep such points meaningful, and to avoid possible abuses.⁸⁴ In the group discussed in this Section, the petitioner alleges that the tentative selectee in its group did not satisfy our stringent standard for local established applicant points and was improperly awarded such points. We agree and adjust the points accordingly.

A. NCE MX Group 430

37. This group originally consisted of nine mutually exclusive applications for eight different communities in Texas, including applications filed by Marfa Public Radio (“MPR”) and Houston Christian Broadcasters (“HCB”). After conducting a fair distribution analysis that resulted in the elimination of seven applications, the MPR application (“Application”) and the HCB application proceeded to a points hearing.⁸⁵ The Commission found that MPR was entitled to three points as an established local applicant; HCB was awarded two points for diversity of ownership. Accordingly, MPR was identified as the tentative selectee in Group 430.⁸⁶

38. **Petition to Deny.** HCB filed a Petition to Deny the Application (“HCB Petition”),⁸⁷ asserting that MPR was not entitled to points as an established local applicant. HCB argues that MPR did not satisfy the criteria for those points because, during the two-year period prior to the filing of the Application, i.e., from October 17, 2005 to October 17, 2007, (1) 75 percent of MPR’s board members did not reside within 25 miles of Marfa, and (2) MPR was not headquartered within 25 miles of Marfa.⁸⁸ HCB notes that MPR amended its Articles of Incorporation on September 26, 2007, less than a month

⁸³ See *supra* ¶ 9; 47 C.F.R. § 73.7000.

⁸⁴ See *NCE MO&O*, 16 FCC Rcd at 5091.

⁸⁵ See *Comparative Consideration of 26 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 11108, 11125-26 (2010) (“*26 Group Comparative Order*”).

⁸⁶ The other applications in the group were dismissed on September 10, 2010. See *Broadcast Actions*, Public Notice, Report No. 47321 (Rel. September 15, 2010). Radio Bilingue, Inc. (“RBI”) and Hispanic Outreach Ministry (“HOM”) filed Petitions for Reconsideration, on September 27 and 29, 2010, respectively, seeking reinstatement of their respective applications pending Commission action on the HCB Petition. Because we had not ruled on the HCB Petition – and therefore had not made a finding that there was “no substantial and material question concerning the grantability of the tentative selectee’s application,” – dismissal of these competing applications was premature. Thus, we reinstate the RBI and HOM applications presently and dismiss their petitions as moot.

⁸⁷ The HCB Petition was filed on August 31, 2010. In response to the HCB Petition, MPR filed an Opposition on September 9, 2010 (“MPR Opposition”). HCB filed a Reply on September 16, 2010 (“HCB Reply”). The HCB Petition was procedurally defective because it did not contain an affidavit supporting its allegations. 47 U.S.C. § 309(d). On September 8, 2010, HCB filed a Supplement to the HCB Petition, purporting to include a declaration. Because the deadline for filing petitions to deny had passed by this time, and HCB did not, in fact, provide the referenced declaration, we will treat HCB’s Petition to Deny as an Informal Objection. This action moots the need for our consideration of MPR’s September 24, 2010 Motion to Strike the Supplement and HCB’s September 28, 2010 Opposition and Comments thereto, which we accordingly dismiss.

⁸⁸ HCB Petition at 3; see FCC File No. BNPED-20071017AEC.

before it filed its application, to change its registered office from an Austin address⁸⁹ to a Marfa address, at 111 S. Highland Avenue, P.O. Box 238, Marfa, Texas (“Marfa Studio”).⁹⁰ HCB likewise points out that MPR lists an Austin address on tax returns filed for the 2006 and 2007 fiscal years.⁹¹

39. In its Opposition, MPR asserts that it did not base its claim as an established local applicant on the residence of its board members but “on its own presence and activities, as a corporate entity, within Marfa.”⁹² MPR states that the Austin addresses listed in its earlier Articles of Incorporation and tax returns are simply those of its commercial registered agent, CT Corporation Systems, and its accountant, respectively, and have no bearing on its status as an established local applicant.⁹³ MPR asserts that it entered into a Time Brokerage Agreement on October 1, 2005, with Matinee Media LLC (“Matinee Media”), then the prevailing auction applicant for a new FM station in Marfa, Texas, to operate that future station. MPR contends that it maintained the Marfa Studio for “several years” prior to the filing of the Application in connection with programming activities under the Time Brokerage Agreement.⁹⁴ MPR claims that its operation of the Matinee Media station (KRTS-FM) and related activities in the community demonstrate “significant levels of contact, operations, and a continuing interaction with the community for over two years prior to October 2007.”⁹⁵ In Reply, HCB argues that the documentation MPR provides fails to establish that it was “headquartered” in Marfa prior to October of 2005. It notes that MPR provides no leases for office space, no real estate documents, and no utility bills or cancelled checks showing a Marfa headquarters address.⁹⁶ It also notes that MPR lists an Austin address in the Time Brokerage Agreement. HCB asserts that the documentation provided by MPR merely shows that MPR’s principals or agents occasionally spent time in Marfa, but does not demonstrate that it maintained a headquarters in Marfa prior to October 2007.⁹⁷

40. **Discussion.** The Commission assigned the established local applicant criterion the highest point value, but limited the award of points to “truly local” applicants.⁹⁸ Qualifying “local” headquarters must serve as the locus for significant and sustained contacts between station policy makers and area residents.⁹⁹ Thus, a local headquarters must be a primary place of business and may not be, for

⁸⁹ MPR amended its original Articles of Incorporation on July 15, 2005, to state that the company’s registered office was in Austin. Thus, from that date until September 26, 2007, MPR’s registered office was in Austin.

⁹⁰ HCB Petition at 5 and Attachment F.

⁹¹ See HCB Petition at 4 and Attachments D and E.

⁹² MPR Opposition at 3.

⁹³ MPR Opposition at 4-7.

⁹⁴ MPR Opposition at 9. The construction permit was granted on August 10, 2007, and the station was assigned the call sign KRTS-FM. See File No. BNPH-20050103AAU. On January 4, 2008, Matinee Media assigned the station’s construction permit to MPR. See File No. BAPH-20070911AAW.

⁹⁵ MPR Opposition at 11. MPR submits documentation purportedly showing its activity in the Marfa community starting in early 2005. These documents show that on May 4, 2005, MPR hired Tom Michael to, among other things, develop a plan for KRTS-FM on a part-time basis. Subsequent emails to and from Tom Michael show that between May and August 2005, he was looking at various potential studio and transmitter sites. A flyer shows that MPR sponsored a screening of the film *Giant* on July 2, 2005, at a hotel in Marfa. Finally, MPR provides documents showing that it held an open house and launch party at the Marfa Studio on October 8, 2005.

⁹⁶ HCB Reply at 3.

⁹⁷ *Id.* at 5, 7-8.

⁹⁸ See *NCE Order*, 15 FCC Rcd at 7408.

⁹⁹ See *NCE Order*, 15 FCC Rcd at 7410; *NCE Reconsideration Order*, 17 FCC Rcd at 13137.

example, a post office box, vacation home, attorney's office, or branch office, which are more easily feigned and/or present less of an opportunity for meaningful contact with the community.¹⁰⁰

41. The Commission has stated that when a substantial question is raised about an applicant's claim of points as an established local applicant, the applicant can resolve the challenge by showing activities during the relevant timeframe, such as meetings with the community, classes at a local campus, community programs, regular income or expenses from community-based assets, active planning of program service for the community, and/or similar ongoing community-based operations.¹⁰¹ Here, we find that MPR has failed to establish its qualifications as an established local applicant.

42. While MPR's documents show that it was active in Marfa and building support for its future NCE station, they do not establish that MPR maintained its headquarters in Marfa as of October 17, 2005.¹⁰² First, all of Marfa's pre-2007 corporate documents, including the Time Brokerage Agreement, listed MPR's address in Austin, not Marfa. Second, the Time Brokerage Agreement itself does not establish that MPR maintained a Marfa headquarters. At most, it indicates that, as of October 1, 2005, MPR committed to provide programming to KRTS-FM, a station that was owned by Matinee Media until January 4, 2008. Indeed, under the Time Brokerage Agreement itself, Matinee Media was required to retain ultimate control of the Marfa Studio until the assignment of the station to MPR was consummated in 2008.¹⁰³ Significantly, Commission precedent has established that the mere existence of a studio in a community is not sufficient to support a claim as an established local applicant.¹⁰⁴

43. Accordingly, MPR cannot rely on its claimed use of the Marfa Studio unless it can specifically show that it was engaged in local activities there. MPR has been unable to document any business operations at the purported "headquarters" during the period in question, instead relying on the planning activities of its principals in getting KRTS-FM up and running.¹⁰⁵ The only record evidence before us demonstrating any MPR activity at the Marfa Studio is a pamphlet indicating an open house there on October 8, 2005.¹⁰⁶ This event only establishes that MPR played a role in developing the Marfa Studio, not that the Marfa Studio was used as a headquarters by MPR.¹⁰⁷ Notably, as stated by HCB,

¹⁰⁰ *NCE Order*, 15 FCC Rcd at 7410.

¹⁰¹ *NCE Reconsideration Order*, 17 FCC Rcd at 13138.

¹⁰² As noted above, MPR indicates that it held a launch party for KRTS at the Marfa Studio on October 8, 2005. However, at that time, Matinee, not MPR, was the permittee for KRTS, and, pursuant to the Time Brokerage Agreement, Matinee was responsible for the day to day operation of the Station, including payment of all station operating expenses, including "all studio and tower facilities rent." See HCB Reply, Attachment B, Time Brokerage Agreement, Section 5(a).

¹⁰³ HCB Reply at Attachment B.

¹⁰⁴ See *NCE Omnibus Order*, 22 FCC Rcd at 6115-16 (denying local applicant points to an applicant that attempted to establish that a studio it operated out of the community at issue constituted its "headquarters," where its true headquarters were located hundreds of miles away; Commission noted that this was akin to a "branch" office, which is insufficient to establish local applicant credentials).

¹⁰⁵ See *33 Group Comparative Order*, 26 FCC Rcd at 9089-92 (2011)(finding that applicant was not entitled to established local applicant points where it did not demonstrate any business activity took place at its identified office and only showed that its principals were involved in planning for a future station).

¹⁰⁶ Opposition at Exhibit.

¹⁰⁷ See *NCE Reconsideration Order*, 17 FCC Rcd at 13137-8 ("It has never been our intent to award the established local applicant credit to organizations engaged in virtually no activities in the community of interest... A shell organization's mere paper existence for two or more years establishes no "operations," "contact," or "continuing interaction with the community" from which the organization might "hit the ground running." Paper existence serves neither to "establish the applicant's educational credentials in a particular locality" nor "to foster participation by truly local entities in noncommercial educational broadcasting.").

apart from the isolated open house event, MPR has failed to provide us with any objective evidence, such as a lease or utility bills or similar business records, demonstrating activities by MPR at the Marfa Studio between October 2005 and October 2007.

44. Accordingly, we grant, as an Informal Objection, the HCB Petition and conclude that MPR was not entitled to points as an established local applicant. This finding alters the outcome of the point hearing for this group. Without the established local applicant points awarded to it, MPR is awarded no points, and HCB prevails with the two diversity points. HCB is therefore the new tentative selectee in Group 430.

VI. DIVERSITY – CONTINGENT DIVESTITURE COMMITMENTS

45. As noted previously, to receive two points for diversity of ownership, an applicant must certify that the principal community contour of its proposed station does not overlap with those of any other station in which any party to the application holds an attributable interest.¹⁰⁸ We, however, have granted diversity of ownership points to applicants with interests in secondary authorizations if they commit to divest such interests when the NCE FM application is granted. In NCE MX Group 990512 below, we address and reject an argument that we should have accepted an NCE full service station contingent divestiture commitment and awarded an applicant diversity of ownership points on the basis of that pledge.

A. NCE MX Group 990512

46. This group consists of the mutually exclusive applications of the University of Massachusetts (the “University” and the “University Application”) and The Talking Information Center (“TIC”) for a new NCE FM station to serve Marshfield, Massachusetts (“Marshfield”). Before us is an Application for Review filed by TIC on July 27, 2007,¹⁰⁹ seeking review of the Bureau letter of June 19, 2007, (the “*Staff Decision*”),¹¹⁰ denying a Petition to Deny the University Application, granting that application, and dismissing TIC’s application.¹¹¹

47. **Background.** The University and TIC applications were designated as NCE MX Group 990512. In the March 27, 2007 *NCE Omnibus Order*,¹¹² the Commission found that the University was entitled to five points for being an established local applicant and for diversity, whereas TIC received only three points, for being an established local applicant, after the Commission disallowed two points which it determined TIC had improperly claimed under the “local diversity of ownership” criterion.¹¹³ The two points were deducted because TIC’s treasurer and board member, Edward F. Perry, Jr. (“Perry”), owns a local commercial station, WATD-FM, in Marshfield. TIC, however, had claimed that Perry’s interest in WATD-FM was not attributable to TIC because: (1) Perry had made a contingent divestiture commitment, *i.e.*, pledged that he would resign as a principal of TIC if it were granted a construction permit; and (2) Perry’s statement to TIC’s Executive Director that “[s]hould the Commission’s policies require an earlier resignation to ensure diversity, my resignation from both [TIC] posts should be considered as effective immediately.”¹¹⁴ The Commission, however, held that, even given the contingent

¹⁰⁸ See *supra* ¶ 10.

¹⁰⁹ The University filed a timely Opposition to Application for Review on August 13, 2007; TIC filed a Consent Request for Extension of Time and a Consent Request for Further Extension of Time and, thereafter, a Reply on September 12, 2007. We grant the extension requests and accept the Reply.

¹¹⁰ *Talking Information Center*, Letter, 22 FCC Rcd 11120 (MB 2007) (“*Staff Decision*”).

¹¹¹ File No. BNPED-20000118ADQ (the “TIC Application”).

¹¹² *NCE Omnibus Order*, 22 FCC Rcd 6101.

¹¹³ See *NCE Omnibus Order*, 22 FCC Rcd at 6119-6120, 6159; *Staff Decision*, 22 FCC Rcd at 11122.

¹¹⁴ *NCE Omnibus Order*, 22 FCC Rcd at 6119.

divestiture proposal, Perry's ownership of WATD-FM precluded TIC from receiving points for local diversity of ownership. It found that Perry had remained a TIC principal, and owner of WATD-FM, beyond the "snapshot date" – the date after which applicants may not enhance their comparative positions.¹¹⁵ The Commission stated that Perry's ownership of WATD-FM was cognizable against TIC because: (a) TIC had never accepted Perry's contingent agreement to resign as a TIC principal, and (b) TIC had specifically represented – after the snapshot date – that Perry remained its treasurer and board member.¹¹⁶ The Commission therefore tentatively selected the University application.

48. TIC timely filed a Petition to Deny on May 2, 2007, disputing the Commission's determination that Perry's ownership of WATD-FM precluded awarding TIC two points for local diversity of ownership.¹¹⁷ It focused principally on the Commission's statement in the *NCE Omnibus Order* that "[a]pplicants may not enhance their position based on matters that require additional Commission or applicant action."¹¹⁸ TIC argued that Perry's contingent resignation from the TIC board did not require "additional Commission or applicant action" because it was self-executing, and, therefore, Perry did not hold a cognizable interest in TIC as of the snapshot date.¹¹⁹ In the alternative, it urged the Commission to expand the scope of effective divestiture pledges in this diversity point context.

49. In the *Staff Decision*, the Bureau stated that the Commission had announced that it "would not credit enhancements initiated, but not completed, prior to the snapshot date."¹²⁰ It found, therefore, that Perry's prospective commitment to resign as a TIC principal if a construction permit were granted – an event that could not be "completed" until after the snapshot date – was insufficient to insulate him from TIC prior to the snapshot date. The staff also found that Perry's alternative proposal to resign to "ensure diversity [credit] should the Commission's policies require an earlier resignation" – reported in TIC's July 17, 2001, point supplement amendment – was "immaterial because the resignation did not occur by June 4, 2001."¹²¹ It also stated that, to the extent that TIC contended that the Commission should alter its policies by crediting generally contingent NCE divestiture pledges made by the snapshot date, such arguments were appropriately raised in petitions for rule making, not petitions to deny.¹²² The Bureau accordingly held that TIC was not entitled to the two-point credit for diversity of ownership and denied TIC's Petition to Deny,¹²³ granted the University Application,¹²⁴ and dismissed the TIC application.

¹¹⁵ The "snapshot date" for these applications filed under former NCE comparative procedures was June 4, 2001. *Id.* at 6120.

¹¹⁶ *NCE Omnibus Order*, 22 FCC Rcd at 6119.

¹¹⁷ See *Staff Decision*, 22 FCC Rcd at 11121. The Petition to Deny also challenged the Commission's award of two points to the University for local diversity of ownership. *Id.* at 11121-11122. In the instant Application for Review, however, TIC seeks review of the *Staff Decision* only "insofar as it held that TIC is not entitled to two points for ownership diversity." Application for Review at 2. Accordingly, we will not discuss the University's point status further herein.

¹¹⁸ *NCE Omnibus Order*, 22 FCC Rcd at 6120 n.118 (emphasis supplied) (quoting *NCE MO&O*, 16 FCC Rcd at 5085 n.24).

¹¹⁹ See *Staff Decision*, 22 FCC Rcd at 11122.

¹²⁰ *Staff Decision*, 22 FCC Rcd at 11123. See also *NCE Omnibus Order*, 22 FCC Rcd at 6119 (post-snapshot date change in applicant's governing documents rejected as inconsistent with Commission policy of "maintaining fairness and transparency in the comparative process").

¹²¹ *Staff Decision*, 22 FCC Rcd at 11123.

¹²² *Id.*

¹²³ The *Staff Decision* pointed out that, to the extent TIC was challenging the Commission's policies on contingent divestitures, that challenge would be more appropriately mounted in a petition for rulemaking, not in an adjudicatory context. *Id.*

50. **Application for Review.** In its Application for Review, TIC repeats its argument that the “automatic” character of Perry’s resignation commitment meant that no further action was required by either the Commission or TIC.¹²⁵ TIC also urges the Commission to revisit its position on divestiture commitments in the context of the NCE FM comparative point system. It contends that the public interest is not served when an applicant principal with other broadcast interests must resign his or her office prior to the snapshot date in order for the applicant to qualify for a diversity of ownership credit. It claims that such resignation, prior to the snapshot date, unnecessarily disrupts applicants’ ownership structures during the “indefinite period of limbo” between the snapshot date and award of a construction permit.¹²⁶ TIC reasons that contingent divestiture commitments are permitted in various commercial and NCE contexts and that the Commission should expand the scope of this policy in this adjudicatory proceeding. TIC requests that the Commission vacate the *NCE Omnibus Order* to the extent it denied the comparative diversity points claimed by TIC, reinstate TIC’s application *nunc pro tunc*, and reevaluate the parties’ comparative position with TIC’s increased point total.

51. The University disagrees with TIC’s assertion that Perry’s contingent divestiture commitment was self-executing.¹²⁷ Addressing TIC’s policy arguments, the University points out that the Commission adopted the snapshot date cutoff, *inter alia*, to promote administrative efficiency and avoid unnecessary cost, and that the Commission crafted the point system to prevent “gamesmanship” by applicants.¹²⁸ It also maintains that TIC has failed to show why the Commission should reverse course six years after it adopted the divestiture requirement, especially “after all other affected parties conducted themselves accordingly.”¹²⁹

52. In Reply, TIC rejects the administrative efficiency argument, pointing out that the Commission allows an applicant for an NCE station to maintain its interest in an existing LPM station if it commits to divest that interest if its NCE application is granted, and that the Commission has waived its Rules to permit an NCE applicant to commit to divest its Class D FM station in similar circumstances.¹³⁰ Finally, it questions the policy rationale for limiting divestitures to secondary authorizations.

53. **Discussion.** Regardless of whether Perry’s contingent resignation required “additional Commission or applicant action,” the contingent divestiture pledge suffers from a fatal defect not considered below. It was submitted on July 17, 2001, 43 days after the June 4, 2001, snapshot date.¹³¹

(Continued from previous page) _____

¹²⁴ University subsequently constructed its station, chose the call sign WUMT(FM), and filed a covering license application (BLED-20111020AET), which the staff granted on November 8, 2011.

¹²⁵ Application for Review at 3.

¹²⁶ *Id.* at 4.

¹²⁷ The University also argues that TIC’s Application for Review should be dismissed for non-compliance with Section 1.115 of the Commission’s Rules because TIC fails to state with particularity which of the five factors in the Rule its Application for Review purports to address. *See* Opposition at 2. We reject this argument. TIC’s Application for Review is procedurally adequate because it seeks reversal of a “precedent or policy which should be overturned or revised,” i.e., the prohibition against post-snapshot date comparative enhancements. *See* 47 C.F.R. § 1.115(b)(2)(iii).

¹²⁸ Opposition at 5.

¹²⁹ Opposition at 6.

¹³⁰ Reply at 3-4 (citing *Procedures Notice*, 22 FCC Rcd at 15052-15053). *See also NCE Omnibus Order*, 22 FCC Rcd at 6120.

¹³¹ The offer was conveyed when TIC filed a point supplement amendment on July 17, 2001. *See* TIC Point Supplement, Exhibit 2 (July 17, 2001).

Accordingly, it constitutes a prohibited attempt to obtain a post-snapshot date comparative upgrade.¹³² Thus, even assuming that the pledge did not require “additional Commission or applicant action,” it cannot be credited. Under these circumstances, acceptance of TIC’s divestiture commitment would be contrary to our established processing policies. Accordingly, we deny the TIC Application for Review.

VII. ESTABLISHED LOCAL APPLICANT DOCUMENTATION CHALLENGE

54. As noted above, applicants are required to timely document their point claims, certify that they have placed documentation supporting their certifications in a local public inspection file and submit copies to the Commission.¹³³ Every NCE FM applicant claiming points as an established local applicant must certify and document that it has been local and established for at least two years.¹³⁴ The failure to timely submit the requisite documentation is fatal to a point claim. In NCE MX Group 381, we defer to an applicant’s reasonable interpretation that it was not required to have a provision in its governing documents ensuring the maintenance of its local headquarters and uphold the award of points as an established local applicant

A. NCE MX Group 381

55. **Background.** This group consists of an application filed by Brice’s Creek Bible Church (“Brice”) for a new NCE FM station at Newport, North Carolina (“Brice Application”) and an application, filed by Down East Communications/CDC & Center for Performing Arts (“DEC”) for a new NCE FM station at Oriental, North Carolina (“DEC Application”). Before us is DEC’s December 21, 2010 Application for Review of the Bureau’s grant of the Brice Application and denial of DEC’s Petition to Deny (“Petition”).¹³⁵ For the reasons set forth below, we deny review.

56. The mutually exclusive Brice and DEC Applications were designated, along with three other applicants, as NCE MX Group 381.¹³⁶ In the *52 Group Comparative Order*, the Commission tentatively selected the Brice Application for grant based on a point determination.¹³⁷ DEC timely filed its Petition to Deny on July 27, 2010, arguing that Brice was not entitled to established local applicant points because: (1) fewer than seventy-five percent of Brice’s board members reside within 25 miles of the proposed community of license, Newport, North Carolina; and (2) alternatively, (a) it did not certify its headquarters as being within 25 miles of Newport; and (b) Brice’s governing documents do not require that such status regarding Newport be maintained, as required by Sections 73.7000 and 73.7003(b)(1) of the Commission’s Rules.¹³⁸ In particular, DEC cited Brice’s organizing documents as requiring that

¹³² See *Deadline for NCE Settlements and Supplements Extended to July 19, 2001; Date for Comparative Qualifications Remains June 4, 2001*, Public Notice, 16 FCC Rcd 10892, 10893 (MB 2001) (reaffirming June 4, 2001 snapshot date “for determining an applicant’s maximum non-technical qualifications”).

¹³³ See *supra* ¶ 14.

¹³⁴ See 47 C.F.R. § 73.7003(b)(1); FCC Form 340, Instructions, Section IV, Question 1; Worksheet #4.

¹³⁵ *Letter to Dan J. Alpert, Esq., and Peter Guttmann, Esq.*, Ref. 1800B3-KV (MB rel. Nov. 30, 2010) (“*Staff Decision*”).

¹³⁶ See *Comparative Consideration of 52 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 8793, 8829 (2010) (“*52 Group Comparative Order*”). The three other applications were dismissed by staff on August 9, 2010, and no appeal of any of these dismissals was filed. See *Broadcast Actions*, Public Notice, Report No. 47298 (rel. Aug. 12, 2010).

¹³⁷ The Commission found that Brice and DEC were each entitled to five points, comprised of three points for being an established local applicant and two points for diversity of ownership. Brice and DEC then proceeded to the tie-breaker rounds, and Brice prevailed under the second tie-breaker.

¹³⁸ 47 C.F.R. §§ 73.7000; 73.7003(b)(1).

seventy-five percent of Brice's members reside within 25 miles of New Bern, North Carolina¹³⁹ and that its principal office be located in New Bern.¹⁴⁰ On November 30, 2010, the Bureau found that Brice was correctly awarded three points for being an established local applicant because the staff's independent engineering review confirmed that Brice's headquarters was located within 25 miles of Newport. The Bureau further noted that Brice's headquarters was listed in the Brice Application, and that it reported building a new headquarters approximately one-half mile closer to Newport, from its current site of 19.0 miles from Newport to a location 18.6 miles from Newport.¹⁴¹ Therefore, the Bureau denied DEC's Petition to Deny, granted the Brice Application and dismissed the DEC Application.¹⁴² On December 21, 2010, DEC timely filed its Application for Review.¹⁴³

57. **Application for Review.** On review, DEC asserts that the *Staff Decision* is inconsistent with the Rules.¹⁴⁴ Specifically, DEC argues that "the plain meaning of the applicable Rules, as well as the relevant certification in the application form and the policies which the localism preference was designed to advance, all mandate that a commitment to remain local be evident from an applicant's governing documents."¹⁴⁵ DEC claims that the *Staff Decision* erroneously states that only status as an established local applicant based on the board members' residency requires the maintenance of such residency through the applicant's governing documents. It asserts that Section 73.7003(b)(1) of the Rules does not distinguish between credit as an established local applicant based on residency or headquarters, but rather requires that all such attributes be maintained by the applicant's governing documents. Moreover, DEC asserts, there is no policy reason to make a distinction because "a headquarters office can be moved just as readily as a board member can be replaced with non-residents."¹⁴⁶ DEC concludes that Brice cannot be awarded points because its governing documents fail to ensure that its headquarters would be maintained within 25 miles of Newport.

58. In Opposition, Brice counters that the *Staff Decision* correctly stated and applied well established standards for the award of established local applicant points and that it reasonably relied on these standards. Citing the Commission's *NCE Order*, Brice argues that the Commission required only applicants which qualify as established local applicants because of their board members' residency to document the commitment to maintain this status through their organizational documents.¹⁴⁷ This interpretation, Brice contends, also appears in the instructions to FCC Form 340, which requires the maintenance of such attributes via the applicant's governing documents solely for established local

¹³⁹ DEC cited the following Brice provision:

Each Elder shall also concurrently serve as a Director of the corporation and the Board of Elders shall serve concurrently as the corporation's Board of Directors. At least seventy five (75%) percent of the members of the Board of Elders/Directors shall live within a twenty five mile radius of the City of New Bern, North Carolina.

Engineering Exhibit at 4 (*quoting* Article IV, Articles of Amendment of Brice's Articles of Incorporation, Exhibit 12, Brice Application).

¹⁴⁰ DEC cited the following Brice provision: "The principal office of the Corporation shall be located in New Bern, North Carolina." *Id.* at 3 (*quoting* Article II, Bylaws of Brice, A Non-Profit Corporation, Exhibit 12, Brice Application).

¹⁴¹ See *Staff Decision* at 3 (*quoting* Brice's Opposition to Petition to Deny at 4).

¹⁴² *Id.*

¹⁴³ On January 5, 2011, Brice filed an Opposition to Application for Review ("Opposition"), to which DEC replied ("Reply") on January 13, 2011.

¹⁴⁴ Application for Review at 3.

¹⁴⁵ *Id.* at 7.

¹⁴⁶ *Id.* at 6.

¹⁴⁷ Opposition at 3-4.

applicant status based on the residences of the applicant's local governing board. Brice argues that if DEC disagrees with the Commission's policies, it should seek a rule change. Brice further asserts that the Commission's interpretation is logical because "there can be little doubt that mere individuals . . . freely and frequently change residences much more readily than would an established church . . . [and personal] residences cannot be as easily tracked . . ." ¹⁴⁸ Moreover, Brice states that it is committed to Newport and that the Commission is free to monitor, through random audits, Brice's headquarters location.

59. In Reply, DEC reiterates its argument that the "clear language of the Rule [Section 73.7003(b)(1)], and the corresponding certification on the FCC application form, speak in terms of requiring that *any* claim of localism be bolstered by a legal mandate contained in the applicant's organizational documents."¹⁴⁹ It also faults Brice for failing to cite to case law supporting Brice's contention that a claim based on a headquarters location may be credited without governing document restrictions on relocations.

60. **Discussion.** As an initial matter, we acknowledge that there is a discrepancy between the requirements for established local applicant points as outlined in the Rules and as explained in the Instructions and worksheets to Form 340. Section 73.7003(b)(1) of the Rules provides that NCE applicants in comparative selection hearings are entitled to three points if they demonstrate they are "[established] local applicants as defined in § 73.7000 . . . if the applicant's own governing documents (e.g., by-laws, constitution, or their equivalent) require that such localism be maintained."¹⁵⁰ The Instructions to the FCC Form 340, however, may reasonably be read to not require that an applicant claiming local applicant points based on its headquarters location have a parallel provision in its governing documents ensuring that the applicant will maintain a local headquarters.¹⁵¹ Similarly, Worksheet # 4 to FCC Form 340 distinguishes these two categories of local applicants, and requires only those applicants relying on the residences of the members of their governing board to amend their governing documents.¹⁵² Additionally, the orders adopting the current NCE point system also make this distinction.¹⁵³

61. When the Bureau addressed this issue previously, it deferred to the applicant's interpretation.¹⁵⁴ In *Trent*, the applicant relied on its headquarters location to support its established local

¹⁴⁸ *Id.* at 7.

¹⁴⁹ Reply at 2 (emphasis original).

¹⁵⁰ 47 C.F.R. § 73.7003(b)(1).

¹⁵¹ The Instructions provide, in pertinent part:

An applicant claiming points as an established local applicant, must place supporting documentation in a local public inspection file and submit to the Commission copies of the documentation. Examples of acceptable documentation include corporate material from the secretary of state, lists of names, addresses, and length of residence of board members, *copies of governing documents requiring a 75% local governing board*, and course brochures indicating that classes have been offered at a local campus for the preceeding two years, etc.

Instructions to FCC Form 340, Question 1, at 9.

¹⁵² See Instructions to FCC Form 340, Worksheet # 4, Items 1.b and 1.c.

¹⁵³ See *NCE Order*, 15 FCC Rcd at 7419 ("So that points awarded to an applicant based on the composition of its governing board will remain meaningful, despite anticipated board changes, we will award points only to organizations whose own documents, (e.g. bylaws, constitution, or their equivalent) establish requirements for maintaining the characteristics of the board for which it claims credit."). See also *NCE Reconsideration Order*, 17 FCC Rcd at 13134 n.10 ("To be considered "local," an applicant must have a headquarters, campus, or 75 percent of its governing board residing within 25 miles of the proposed community of license . . . An applicant *relying on a local board residence* to claim points as an established local applicant must demonstrate that its governing documents, *i.e.* bylaws, require that such localism be maintained for at least four years of station operations" (emphasis supplied)).

¹⁵⁴ See *John C. Trent, Esq. et al.*, Letter, 27 FCC Rcd 6397 (MB 2012) ("*Trent*").

applicant claim, but its governing documents did not require that it maintain that headquarters location. In upholding the applicant's established local applicant points, the Bureau reasoned that where there is ambiguity between the Rules and FCC form instructions, the Commission generally defers to an applicant's reasonable interpretation of both.¹⁵⁵ We believe that it would be unfair to Brice to change course here given this precedent as well as the Instructions to Form 340 and Worksheet #4 to Form 340. Thus, we accept Brice's determination that it was only required to demonstrate that it had maintained a headquarters within 25 miles of Newport. Further, Commission engineering staff has confirmed that Brice's headquarters at Brice's Creek Bible Church, located at 3998 Hwy 70 East, New Bern, North Carolina, is within 25 miles of Newport and this location was clearly identified in the Brice Application.¹⁵⁶ Regarding Brice's intention to relocate its headquarters, DEC does not dispute Brice's statement in its Opposition to Petition to Deny that its new headquarters will in fact be one-half mile closer to Newport and, hence, will maintain its required proximity to Newport. For all of these reasons, we uphold the award of established local applicant points to Brice and deny the DEC Application for Review.

62. However, we also believe that there should not be a conflict between the plain text of Section 73.7003(b)(1) of our Rules and Commission practice. Therefore, if the Commission does not amend Section 73.7003(b)(1) by the time of the next NCE application window to specify that an applicant is not required to include in its governing documents a requirement that its headquarters be maintained within 25 miles of the proposed community of license, we instruct the Bureau to change the Instructions to Form 340 and Worksheet #4 to Form 340 to conform with the plain meaning of Section 73.7003(b)(1).

VIII. NEXT STEPS

63. **Acceptability Studies and Filing of Petitions.** The staff has examined the applications of each successor tentative selectee for application defects.¹⁵⁷ Each new tentative selectee identified in this Order appears to be fully qualified to become the licensee of the new NCE FM station it has proposed. We tentatively conclude that the grant of these applications would serve the public interest, convenience and necessity. Accordingly, the applications of the tentative selectees are accepted for filing. This triggers a 30-day period from release of the Order for the filing of petitions to deny.

64. Any argument that the newly tentatively selected application should not be granted must be raised in such a petition, even if the objection relates only indirectly to the tentative selectee's comparative points. For example, an applicant that concedes that the tentative selectee is qualified for the points received but believes its own proposal should have received a greater number of points than the tentative selectee's should make its argument in a petition to deny. In cases where we have declared a new tentative selectee, parties may not raise such matters as petitions for reconsideration of the instant Order because the point hearings herein take no final action on the application, and petitions for reconsideration do not lie against such interlocutory decisions.¹⁵⁸ Any such petition to deny must contain

¹⁵⁵ See, e.g., *Trinity International Foundation, Inc.*, Letter, 23 FCC Rcd 4000, 4004 (MB 2008) (finding that applicant's interpretation of Rules was reasonable where ambiguity existed between Rules and form instructions), citing *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 632 (D.C. Cir. 2000) (finding that, where regulations are unclear and where the petitioner's interpretation is reasonable, a regulated party is not "on notice" of the agency's ultimate interpretation of the regulations).

¹⁵⁶ *Staff Decision* at 4.

¹⁵⁷ If a tentative selectee's application is found unacceptable for filing, it is returned. The applicant is then given one opportunity to submit a curative amendment. See 47 C.F.R. § 73.3522(b)(2). A tentative selectee that is unable to cure the defect with a minor amendment is disqualified, and the applicant with the next highest point tally becomes the new tentative selectee. See 47 C.F.R. § 73.7004(d).

¹⁵⁸ See *id.* § 1.106 (a) (1). See also *Patrick J. Vaughn, Esq.*, Letter, 22 FCC Rcd 11165 (MB 2007).

allegations of fact supported by an affidavit of a person or persons with personal knowledge thereof.¹⁵⁹ Responsive pleadings, if any, should be submitted as provided for in Section 73.7004(c) of the Rules.¹⁶⁰

65. **Forthcoming Staff Action.** We direct the staff, once the petition to period has run, to conduct a final study of each new tentatively selected application in accordance with the Bureau's routine processing procedures. The staff studies should consider any petitions, comments, and objections to determine whether there is any substantial and material question of fact concerning whether grant of the tentatively selected application would serve the public interest. If no such question exists, we direct the staff to grant the applications on the basis of the point system determinations made herein and dismiss all competing applications.

66. With the exception of issues that are new or novel or require Commission or Administrative Law Judge consideration by statute or rules, the staff shall act on the tentatively selected applications pursuant to delegated authority. We delegate to the staff authority to act on any routine matter that may be raised, including whether the applicant is eligible, as certified, for the points awarded herein, and whether the application complies with all relevant Commission Rules and policies.¹⁶¹ The staff need not refer such matters to the Commission or designate such matters for hearing before an Administrative Law Judge unless the issues are new or novel, or raise a substantial and material question of fact regarding the award of points. Generally, the staff should refer only those issues to the Commission where the exclusion or inclusion of challenged or claimed points could alter the outcome in the particular NCE group, or where there is a new or novel issue.¹⁶² In such cases, the staff would refer the mutually exclusive group to the Commission for resolution of the new or novel issue and/or the determination of a successor tentative selectee. In cases where there is a substantial and material question of fact, the staff should designate the issue for hearing before an Administrative Law Judge.

67. **Severance for Purposes of Petitions, Appeals and Finality.** We are including a provision in the ordering clauses herein that each decision involving a mutually exclusive group is to be considered distinct and separate for purposes of petitions to deny, petitions for reconsideration, review on the Commission's own motion, and appeals. The timing of any action disposing of a petition or appeal affecting a particular group will not delay the finality of our decision with respect to any other group discussed herein.

IX. ORDERING CLAUSES

68. Accordingly, IT IS ORDERED, that each decision involving a mutually exclusive group in this Memorandum Opinion and Order shall be deemed a distinct and separate decision for purposes of petitions to deny, petitions for reconsideration, review on the Commission's own motion, and appeals.¹⁶³ If any decision in this Memorandum Opinion and Order is declared invalid for any reason, the remaining portions shall be severable from the invalid part and SHALL REMAIN in full force and effect to the fullest extent permitted by law.

¹⁵⁹ See 47 C.F.R. § 73.7004(b).

¹⁶⁰ See 47 C.F.R. § 73.7004(c).

¹⁶¹ See, e.g., *Central Florida Educational Foundation, Inc.*, Letter, 23 FCC Rcd 1695 (MB 2008) (staff dismissal of defective application tentatively selected in a point hearing, and staff award of permit on a non-comparative basis to only remaining acceptable applicant).

¹⁶² See generally *NCE Omnibus Order*, 22 FCC Rcd at 6162 n.230 (2007) (standards for staff evaluation of petitions).

¹⁶³ See 5 U.S.C. §§ 702, 704, 706; 47 U.S.C. §§ 309(d), 402(b), 405; 47 C.F.R. §§ 1.106-08, 73.7004. In cases that involve separate mutually exclusive groups but present common issues, the petitions or appeals may be filed jointly or may be consolidated at the discretion of the Commission or a reviewing court. See, e.g., FED. R. APP. P. 3(b).

69. **NCE MX Group 377.** Accordingly, IT IS ORDERED, that the Application for Review filed on August 18, 2010, by The Helpline, IS DISMISSED.

70. **NCE MX Group 381.** Accordingly, IT IS ORDERED, that Application for Review filed on December 21, 2010, by Down East Communications/CDC & Center for Performing Arts, IS DENIED.

71. **NCE MX Group 430.** Accordingly, IT IS ORDERED, that the tentative selection of the application of Marfa Public Radio (File No. BNPED-20071017AEC) for a new NCE FM station in Marfa, Texas, IS RESCINDED. IT IS FURTHER ORDERED, that the applications of Hispanic Outreach Ministry, Inc. (File Nos. BNPED-20071022ANN, 20071022ANO, and 20071022AST), and Radio Bilingue, Inc. (File No. BNPED-20071016AEY), ARE REINSTATED, and the Petition for Reconsideration filed by Radio Bilingue, Inc. on September 27, 2010, and the Petition for Reconsideration filed by Hispanic Outreach Ministry on September 29, 2010, ARE DISMISSED as moot. IT IS FURTHER ORDERED, that the Petition to Deny filed by Houston Christian Broadcasters on August 31, 2010, treated as an Informal Objection, IS GRANTED. IT IS FURTHER ORDERED, that Houston Christian Broadcasters is TENTATIVELY SELECTED to be awarded a construction permit for a new NCE FM station in Alpine, Texas, and its application (File No. BNPED-20071018AJM) IS ACCEPTED FOR FILING, establishing a deadline thirty (30) days from the date of release of this Order for the filing of petitions to deny. If, after the petition to deny period has run, there is no substantial and material question concerning the grantability of the tentative selectee's application, we direct the staff, by public notice, TO DISMISS the mutually exclusive applications of Marfa Public Radio, Hispanic Outreach Ministry, Inc., and Radio Bilingue, Inc., and TO GRANT the application of Houston Christian Broadcasters, CONDITIONED UPON that selectee's compliance with Section 73.7005 of the Commission's Rules, 47 C.F.R. § 73.7005, which sets forth a four-year holding period for applicants that are awarded permits by use of a point system.

72. **NCE MX Group 508.** Accordingly, IT IS ORDERED, that the Application for Review filed on January 10, 2011, by The Helpline, IS DENIED.

73. **NCE MX Group 538.** Accordingly, IT IS ORDERED, that the tentative selection of the application of Michael Atherton Ministries, Inc. d/b/a Christ is Life Church (File No. BNPED-20071018AAB) for a construction permit for a new NCE FM station in East Bernard, Texas, IS RESCINDED. IT IS FURTHER ORDERED, that the February 25, 2011, Petition to Deny filed by Austin Airwaves, Inc. IS GRANTED. IT IS FURTHER ORDERED, that Austin Airwaves, Inc. is TENTATIVELY SELECTED to be awarded a construction permit for a new NCE FM station in Ellinger, Texas, and its application IS ACCEPTED FOR FILING, establishing a deadline thirty (30) days from the date of release of this Order for the filing of petitions to deny. If, after the petition to deny period has run, there is no substantial and material question concerning the grantability of the tentative selectee's application, we direct the staff, by public notice, TO DISMISS the mutually exclusive application of Michael Atherton Ministries, Inc. d/b/a Christ is Life Church, and TO GRANT the application of Austin Airwaves, Inc. (File No. BNPED-20071015AID) CONDITIONED UPON compliance with Section 73.7005 of the Commission's Rules, 47 C.F.R. § 73.7005, which sets forth a four-year holding period for applicants that are awarded permits by use of a point system and which also provides that an applicant receiving a Section 307(b) preference that is decisive over another applicant must operate technical facilities substantially as proposed until the facility has achieved four years of on-air operations.

74. **NCE MX Group 971114.** Accordingly, IT IS ORDERED, that the tentative selection of the application of American Family Association (File No. BPED-19971112MA) for a construction permit for a new NCE FM station in Valparaiso, Indiana, IS RESCINDED. IT IS FURTHER ORDERED, that the July 7, 2005, Petition to Deny, filed by WBEZ Alliance, Inc., IS GRANTED. IT IS FURTHER ORDERED, that CSN International is TENTATIVELY SELECTED to be awarded a construction permit for a new NCE FM station in Valparaiso, Indiana, and its application (File No. BPED-19980512MP) IS ACCEPTED FOR FILING, establishing a deadline thirty (30) days from the date of release of this Order for the filing of petitions to deny. If, after the petition to deny period has run, there is no substantial and material question concerning the grantability of the tentative selectee's application, we direct the staff, by

public notice, TO DISMISS the mutually exclusive applications of American Family Association and The WBEZ Alliance, Inc. (File No. BPED-19980512MV), and TO GRANT the application of CSN International, CONDITIONED UPON compliance with Section 73.7005 of the Commission's Rules, 47 C.F.R. § 73.7005, which sets forth a four-year holding period for applicants that are awarded permits by use of a point system.

75. **NCE MX Group 990512.** Accordingly, IT IS ORDERED, that the Application for Review filed on July 27, 2007, by Talking Information Center, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary