

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

In the Matter of)
Greene/Sumter Enterprise Community) File No. BNPED-20071017AFJ
Application for Construction Permit for A New) Facility ID No. 172733
Noncommercial Educational FM Radio Station,)
Livingston, Alabama)
Cedar Ridge Fellowship of SDA) File No. BNPED-20071022APS
Application for Construction Permit for A New) Facility ID No. 175728
Noncommercial Educational FM Radio Station,)
Shoals, Florida)
Maranatha Broadcasting Ministry Inc.) File No. BNPED-20071019ACL
Application for Construction Permit for A New) Facility ID No. 175879
Noncommercial Educational FM Radio Station,)
Hot Springs, Arkansas)
San Bernardino Community College District) File No. BNPED-20071019AXE
Application for Construction Permit for A New) Facility ID No. 173635
Noncommercial Educational FM Radio Station,)
Barstow, California)
and)
Cross of Our Lord Jesus Christ Ministries) File No. BNPED-20071022AFC
Application for Construction Permit for A New) Facility ID No. 174607
Noncommercial Educational FM Radio Station,)
White Deer, Texas)

MEMORANDUM OPINION AND ORDER

Adopted: July 16, 2015

Released: July 17, 2015

By the Commission:

1. The Commission has before it Applications for Review filed by Greene/Sumter Enterprise Community ("Greene"), Cedar Ridge Fellowship of Seventh Day Adventists ("Cedar Ridge"), Maranatha Broadcasting Ministry, Inc. ("Maranatha"), San Bernardino Community College District ("San

Bernardino”), and Cross of Our Lord Jesus Christ Ministries (“Cross”) (collectively, “Petitioners”).¹ Each filed an application for a new noncommercial educational (“NCE”) FM station in October 2007, during the first filing window for NCE FM reserved band applications.² Each application addressed herein was mutually exclusive (“MX”) with at least one other application. None was chosen as a tentative selectee, none was MX to the chosen tentative selectee(s) in its group, and each was dismissed subsequent to selection of the tentative selectee(s) in each group. Petitioners contest the Commission’s policy to grant only one application from each NCE FM MX application group and to dismiss all other applications in the same group (“One Grant Policy”).³ Maranatha, Cedar Ridge, Cross, and San Bernardino request reinstatement of their applications *nunc pro tunc*. Greene also requests a waiver of the One Grant Policy. For the reasons set forth below, we deny the Applications for Review and Greene’s waiver request.⁴

2. **Discussion. The One Grant Policy.** The Commission is statutorily required to allocate frequencies fairly, efficiently, and equitably⁵ in accordance with the public interest, convenience, and necessity.⁶ It is also required, per *Ashbacker*, to conduct a comparative hearing whenever there are before it MX applications for a broadcast authorization.⁷ In accordance with these mandates, among others, the Commission developed the One Grant Policy. The Commission initially adopted the One Grant Policy as part of a notice-and-comment rulemaking commenced to reexamine the comparative licensing standards for NCE FM stations.⁸ In that proceeding, the Commission considered a processing proposal that would

¹ Filed on October 29, 2010, July 1, 2011, May 5, 2011, December 16, 2009, and May 26, 2011, respectively.

² 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); *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).

³ See, e.g., *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, 1716 (2010) (“2010 NCE Comparative Order”) (“only one application should be granted out of each mutually exclusive group, while providing the competing applicants the opportunity to file again in the next filing window”). See also *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000) (“2000 NCE Comparative Order”); Memorandum Opinion and Order, 16 FCC Rcd 5074, 5105 (2001) (“NCE Comparative MO&O”); *vacated in part on other grounds, NPR v. FCC*, 254 F.3d 226 (D.C. Cir. 2001).

⁴ The Bureau decisions on review are: *NCE October 2007 Window MX Group Number 306*, Letter, 25 FCC Rcd 13672 (MB 2010) (“Greene Decision”); Broadcast Applications, Public Notice, Report No. 27498 (Jun. 1, 2011) (Cedar Ridge) (denying, without written disposition, Cedar Ridge’s petition for reconsideration because Cedar Ridge had failed to eliminate all technical conflicts with all other members of NCE MX Group 349B, citing *2010 NCE Comparative Order*, 25 FCC Rcd at 1716); *Letter from Peter H. Doyle, Esq., Chief, Audio Division, to Donald E. Martin, Esq.*, (rel. Mar. 31, 2011) (Maranatha); and *Letter from Peter H. Doyle, Esq., Chief, Audio Division, to Dennis J. Kelly, Esq.* (rel. Apr. 14, 2011) (“Cross Decision”). See also Broadcast Actions, Public Notice, Report No. 47112 (Nov. 16, 2009) (dismissing San Bernardino’s application pursuant to the comparative analysis undertaken for, *inter alia*, NCE MX Group 507 in *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, 12399-400 (MB 2009) (“San Bernardino Fair Distribution Order”).

⁵ 47 U.S.C. § 307(b).

⁶ 47 U.S.C. § 309(a).

⁷ *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1956) (“*Ashbacker*”) (where two parties’ applications are MX, the grant of one application without first considering the second application violated the due process rights of the second).

⁸ See *2000 NCE Comparative Order*, 15 FCC Rcd at 7386–88 (discussing the point system selection process).

have sanctioned the tentative selection of more than one applicant in an NCE FM MX group.⁹ However, it rejected this approach, noting that although it might be beneficial to select more than one applicant, doing so could potentially result in the selection of an inferior applicant as a secondary selectee.¹⁰ The Commission instead concluded that the One Grant Policy would be preferable as the most “administratively efficient” approach and one likely to lead to the selection of the best qualified applicants.¹¹ More recently, it upheld the One Grant Policy and the dismissal of non-MXed applications in comparative licensing actions.¹² The Bureau has consistently applied the One Grant Policy, permitting additional grants from a single NCE MX group only if an applicant, solely by technical amendment(s),¹³ the voluntary dismissal of competing application(s),¹⁴ and/or a valid settlement agreement,¹⁵ eliminates all conflicts to all other applications in the group.

3. *Treatment of Non-MX Applications.* In their applications for review, San Bernardino, Maranatha, Cedar Ridge, and Cross argue that the Bureau’s application of the One Grant Policy was arbitrary and capricious because it resulted in fewer application grants in their respective MX groups and conflicts with the Commission’s mandate “to provide a fair, efficient, and equitable distribution of radio service,” insofar as “there is a demand for the same,” under Section 307(b) of the Act.¹⁶ Citing *Rural Radio*, Cross similarly argues that the dismissal of its application violated the Commission’s statutory duty, per Section 307(b) of the Act, to provide service to rural areas.¹⁷ However, as the Bureau noted in the *Cross Decision*, the Commission is not obligated by Section 307(b) or *Rural Radio* to grant every grantable application or every grantable application proposing to serve a rural area.¹⁸ To the contrary, the Commission enjoys substantial discretion under Section 307(b) to allocate broadcast spectrum.¹⁹ We also

⁹ *NCE Comparative MO&O*, 16 FCC Rcd at 5104.

¹⁰ *Id.* at 5105 (“... after the best qualified applicant is selected, it is possible that remaining applicants that are not mutually exclusive with this primary selectee and thus potentially secondary selectees, may also be significantly inferior to other applicants that are eliminated because they are mutually exclusive with the primary selectee.”).

¹¹ *Id.* at 5104-05.

¹² *See 2010 NCE Comparative Order*, 25 FCC Rcd at 1716.

¹³ *See, e.g., Window Opened to Expedite Grant of New NCE FM Station Construction Permits; Bureau Will Accept Settlements and Technical Amendments*, Public Notice, 22 FCC Rcd 19438, 19438 (MB 2007).

¹⁴ *See, e.g., NCE October 2007 Window MX Group Number 363*, Letter, 25 FCC Rcd 9060 (MB 2010) (differentiating between a voluntary withdrawal that facilitated a settlement agreement and our “one selectee per NCE MX group” policy) (subsequent history omitted) (“*Christian Music*”). The Commission ultimately affirmed the Bureau’s decision and rationale in *Christian Music*. *Christian Music Network, Inc.*, 29 FCC Rcd 13268, 13270 (2014) (“*Christian Music II*”).

¹⁵ 47 C.F.R. § 73.7003(d).

¹⁶ 47 U.S.C. § 307(b). Cross Application for Review at 6-8, 10; Maranatha Application for Review at 2-4; Cedar Ridge Application for Review at 2-4; San Bernardino Application for Review at 2.

¹⁷ Cross Application for Review at 9. *See Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Notice of Proposed Rulemaking, 24 FCC Rcd 5239, 5246-47 (2009) (subsequent history omitted) (“*Rural Radio*”).

¹⁸ *Cross Decision* at 3. The Bureau observed that the *Rural Radio* text cited by Cross addressed changes to Commission rules preventing licensees and permittees from community of license changes that would deprive a community of a minimum service floor. The Bureau held that nothing in the *Rural Radio NPRM* suggested that the Commission must grant any application that would increase service to rural areas and it observed that the Commission specifically rejected alternative methods of evaluating MX groups that would have increased the number of applications granted from each MX group in favor of a method selecting only the best qualified applicant.

¹⁹ *Mary V. Harris Foundation v. FCC*, 776 F.3d 21, 24-27 (D.C. Cir. 2015) (“*Mary V. Harris*”); *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347, 352 (D.C. Cir. 1989), judgment affirmed and remanded by *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990), overruled on other grounds, *Adarand Constructors, Inc. v. Peña*, 515

(continued....)

note that the consistent application of the One Grant Policy will provide incentives to future applicants in future windows to submit superior proposals when historic filing data evidences high demand for limited radio spectrum and, thus, will promote the selection of the “best” applications over time through the window filing process.²⁰ We thus find these arguments meritless.

4. *Application of Policy to Groups Resolved Under Fair Distribution Criteria.* San Bernardino argues that the Commission intended to selectively apply the One Grant Policy only to MX groups resolved under the point system, and not to those, such as its MX Group 507,²¹ resolved under fair distribution criteria.²² We find San Bernardino’s textual analysis unpersuasive. The fair distribution and point system criteria are designed to operate *in tandem* to select in each instance the proposal(s) that would best serve the public interest. The identical inefficiencies, contingencies, and processing delays would result from attempting to make iterative grants under either criterion. In these circumstances, the Commission has reasonably concluded that the One Grant Policy should apply in both the fair distribution and point system contexts.²³

5. *Due Process Issues.* Greene next argues that the One Grant Policy is inconsistent with the Supreme Court’s *Ashbacker* precedent²⁴ and Section 309(a) of the Act.²⁵ Greene’s premise is that each MX group contains two types of applications: those MX to the tentative selectee, and those – like Greene’s – that are not. Greene argues that by simply dismissing and failing to perform a secondary comparative analysis of applications not MX to the tentative selectee, the Bureau violated the entitlement, allegedly granted by *Ashbacker*, “to be compared on all relevant differences . . .” and violated the requirement in section 309(a) that the Commission examine its application, consider such other matters as the Commission may officially notice, and, upon finding that the public interest, convenience and necessity would be served, grant the application. Similarly, Cross argues lack of due process and loss of the “cut-off protection” to which it claims its application is entitled.²⁶ We disagree. Both the Greene and Cross applications were considered, as *Ashbacker* and section 309(a) require, under rules applicable to all applications filed in the window.²⁷ We explicitly reject Greene’s argument that *Ashbacker* or section 309(a) in some unexplained manner *require* the Commission to engage in secondary analyses of inferior

(Continued from previous page) _____

U.S. 200 (1995); *Loyola University v. FCC*, 670 F.2d 1222, 1226 (D.C. Cir. 1982). Section 307(b) was amended in 1936 to change the Commission’s mandate from “equal” allocation of frequencies to “fair and equitable.” See H.R. Rep. No. 2589 and Sen. Rep. No. 1588, 74th Cong., 2d Sess. (1936). This amendment has been interpreted “to provide the Commission with greater discretion in distributing frequencies . . .” See, e.g., *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations*, Report and Order, 4 FCC Rcd 8084, 8084 (MMB 1989).

²⁰ See 2000 *NCE Comparative Order* at 7393-94 (goal of comparative criteria is to select applicants that will provide ‘diversity and excellence’ in educational broadcasting; point system can provide impetus for future applicants to manifest characteristics which will promote the public interest).

²¹ See *San Bernardino Fair Distribution Order*, 24 FCC Rcd at 12399-400.

²² San Bernardino Application for Review at 6. San Bernardino argues that, when read in context, the passage from the *NCE Comparative MO&O* used by the Bureau to defend the One Grant Policy implicates only those applications processed under the point system. *Id.*

²³ *Christian Music II*, 29 FCC Rcd at 13270 (denying review of a 2012 Bureau decision that dismissed, as repetitive, a petition for reconsideration of a prior Bureau decision affirming application of the One Grant Policy in the fair distribution context).

²⁴ *Ashbacker*, *supra* n.7.

²⁵ 47 U.S.C. § 309(a), which requires the Commission to examine the application, to consider such other matters as it may officially notice, and upon finding that the public interest, convenience, and necessity would be served, shall grant such application.

²⁶ Cross Application for Review at 9.

²⁷ See 47 C.F.R. §§ 73.7002 and 73.7003 (procedures for selecting among mutually exclusive applicants).

applications simply because they do not conflict with the tentative selectee.²⁸ Additionally, as noted by the Bureau in the *Cross Decision*, it is well established that applications properly dismissed pursuant to our comparative licensing procedures do not retain cut-off rights established by the initial window filing.²⁹

6. *Treatment of Applications Granted Pursuant to Technical Amendments and Settlements.* Maranatha and Cedar Ridge next argue that the Commission's practice of allowing settlement agreements that can result in multiple grants among MX NCE FM applicants demonstrates that the One Grant Policy is arbitrary and capricious.³⁰ Citing *Christian Music*³¹ and *The Helpline*,³² Greene claims that there is no rational basis to distinguish between multiple grants *via* settlements as opposed to multiple grants *via* secondary comparative analysis.³³ However, settlement agreements involve no comparison of the applicants' relative qualifications and therefore eliminate the requirement for full Commission consideration. Our concern about inferior applications is limited to secondary selectees chosen through iterative comparative analyses, not those that become singletons by acceptable technical amendments and settlements.³⁴ Settlement agreements are opportunities for applicants to negotiate an agreement *outside* the comparative process, thus conserving administrative resources by obviating the need for comparative evaluation of MX proposals by the staff.³⁵

7. *Failure to Impose Holding Periods on Non-Comparative Grants.* Similarly, Maranatha and Cedar Ridge argue that the One Grant Policy is inconsistent with the Commission's acceptance of settlement agreements because an applicant qualified to be tentative selectee could settle to avoid the four-year holding period by which tentative selectees must abide.³⁶ The Commission considered

²⁸ See *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1555 (D.C. Cir. 1987) (rejecting the argument that *Ashbacker* endowed in applicants a right to a specific procedure for awarding a license, rather finding that *Ashbacker* mandated that the Commission use the same set of procedures to process the applications of all similarly situated persons who come before it seeking the same license).

²⁹ *Cross Decision* at 3 ("Permitting these applications to remain on file would undermine the Commission's goal of selecting only the best qualified applicants."), citing *Greene Decision*, 25 FCC Rcd at 13675.

³⁰ Maranatha Application for Review at 6; Cedar Ridge Application for Review at 6.

³¹ See *Christian Music*, 25 FCC Rcd at 9063.

³² *The Helpline, New NCE (FM), Athens, Ohio*, Letter, 25 FCC Rcd 2597, 2599 (MB 2010) (denying a petition for reconsideration and dismissing a settlement agreement reached by member of an NCE MX group. The Bureau later disavowed this decision as inconsistent with Section 311(c)(4) of the Act and Section 73.3525(h) of the Rules.). See *Christian Music*, 25 FCC Rcd at 9063 n.15.

³³ Greene Application for Review at 7-10.

³⁴ See *Application for Review of Sacred Heart University for New FM Translator Stations*, 8 FCC Rcd 672, 673 (1993) citing *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, Report and Order, 5 FCC Rcd 157 (1990) (finding that it is possible that applications granted *via* settlement may be inferior, but the reduction in caliber would be marginal, if at all, and such a drawback is outweighed by the way in which "settlements expedite the provision of new broadcast service to the public" and conserve government resources) (subsequent history omitted).

³⁵ See *Creation of a Low Power Radio Service*, Fifth Order on Reconsideration and Sixth Report and Order, 27 FCC Rcd 15402, 15475 n.501 (2012) (citing the administrative efficiency of settlements); *NCE Comparative MO&O*, 16 FCC Rcd at 5107 (finding that settlements "allow[] immediate grant of an authorization" and thus are beneficial both to applicants and to the Commission, enabling "applicants . . . to achieve a solution that is most acceptable to the parties, and the Commission is able to conserve the resources we would spend to select among them").

³⁶ Maranatha Application for Review at 6; Cedar Ridge Application for Review at 5-6. The holding period, codified in 47 C.F.R. § 73.7005, requires applicants selected through the point system to maintain the credentials that formed the basis of their selection for a four-year period. This rule does not apply to construction permits that are awarded on a non-comparative basis, such as those awarded to non-mutually exclusive applicants or through settlement.

(continued....)

broadening the scope of the holding period in 2001, but reasonably concluded that it would be overly restrictive to impose holding periods on applications granted on a non-comparative basis.³⁷ The holding period was imposed to uphold the integrity of the comparative licensing system and to prevent speculation.³⁸ Those concerns are not relevant to grants made outside the comparative licensing rules. We decline to revisit that determination and, accordingly, reject this argument.

8. *Waiver.* Finally, Greene asks for review of the Bureau's denial of its request for waiver of the Commission's One Grant Policy.³⁹ It argues that neither administrative efficiency nor the inferior status of secondary grantees applied to its case because, under its proposal, any additional grant would be to the most superior applicant not MX with the tentative selectee.⁴⁰ Greene emphasizes that no superior applicant is being dismissed, and thus the Bureau erroneously denied the request. We disagree. In the *Greene Decision*, the Bureau stated that such waiver ignored the fact that, in adopting the One Grant Policy, the Commission cited not simply concerns about granting inferior applications but also concerns about administrative efficiency. It found that grant of Greene's waiver request would "vastly expand staff burdens" and entail "multiple iterative comparative analyses of virtually all NCE MX groups" and denied the request.⁴¹ We agree. It would require significant Commission resources to implement Greene's proposal, e.g., to identify the "best inferior application," to dispose of challenges to such determinations, etc., and create a licensing process under which potential secondary grantee applications could languish for many years during appeals of earlier selected and contingently related applications. In contrast, the strict application of the One Grant Policy will promote the efficient licensing of comparatively superior proposals. As the Court of Appeals for the District of Columbia Circuit recently noted: "An agency does not abuse its discretion by applying a bright-line rule consistently in order both to preserve incentives for compliance and to realize the benefits of easy administration that the rule was designed to achieve."⁴² Finally, we note that Greene has failed to show special circumstances or that strict application of the One Grant Policy would frustrate the rule's purposes. In particular, we reject the argument that being the "best inferior application" constitutes special circumstances. It is likely that hundreds of other applications filed in the 2007 window could make the same argument. At base, Greene's dispute is with the NCE licensing criteria and not about any distinguishing aspect of its proposal. In any case and as noted above, granting the requested waiver would substantially increase processing inefficiencies, slow the introduction of new service, and undermine the Commission's goal to promote the licensing of stations which best serve the public interest.⁴³ Accordingly, we find no error in the Bureau's decision on this matter. Additionally, such a proposal would constitute a significant alteration in the way NCE FM MX groups are processed, and would best be considered under notice-and-comment rulemaking procedures.

(Continued from previous page) _____

Permittees acquiring authorizations pursuant to a fair disposition analysis are required to construct and operate for four years "technical facilities substantially as proposed and shall not downgrade service to the area on which the preference was based." 47 C.F.R. §73.7002(c).

³⁷ See *NCE Comparative MO&O*, 16 FCC Rcd at 5089-90 ("We believe that it would be overly restrictive to require applicants to maintain attributes for which they claimed points if those attributes are not decisional. What matters in the fair distribution context is that any successor in interest continues to provide service to the area for which the original applicant received its fair distribution preference, as our current rules already require.")

³⁸ *Id.*

³⁹ Greene Application for Review at 12-16.

⁴⁰ *Id.*

⁴¹ *Greene Decision*, 25 FCC Rcd at 13676.

⁴² *Mary V. Harris*, 776 F.3d at 28-29 (citing *Comcast Corp. v. FCC*, 526 F.3d 763, 767 (D.C. Cir. 2008)).

⁴³ *Id.* at 29 (citing *Turro v. FCC*, 859 F.2d 1498, 1500 (D.C. Cir. 1988) ("[S]trict adherence to a general rule may be justified by the gain in certainty and administrative ease, even if it appears to result in some hardship in individual cases.")).

9. **Conclusion.** Accordingly, IT IS ORDERED that the Applications for Review filed on October 29, 2010, by Greene/Sumter Enterprise Community; on July 1, 2011, by Cedar Ridge Fellowship of SDA; on May 5, 2011, by Maranatha Broadcasting Ministry, Inc.; on October 29, 2010, by Greene/Sumter Enterprise Community; on December 16, 2009, by San Bernardino Community College District; and on May 26, 2011, by Cross of Our Lord Jesus Christ Ministries ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary