

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

In the Matter of	)	
	)	
Open Arms Community of El Paso	)	File No. BNPED-20071022BGV
	)	Facility ID No. 173586
Application to Construct a New Noncommercial Educational FM Station at Horizon City, Texas	)	
	)	
Christian Ministries of El Paso, Inc.	)	File No. BNPED-20071019AHM
	)	Facility ID No. 175773
Application to Construct a New Noncommercial Educational FM Station at Horizon City, Texas	)	
	)	
NCE October 2007 Window, MX Group 431	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 26, 2016**

**Released: October 27, 2016**

By the Commission:

**I. INTRODUCTION**

1. The Commission has before it a November 18, 2015, Petition for Reconsideration (Petition) filed by Open Arms Community of El Paso (Open Arms), and a November 18, 2015, Petition for Reinstatement *Nunc Pro Tunc* and Application for Review (AFR) filed by Christian Ministries of El Paso, Inc. (CMEP). Open Arms and CMEP each challenge a Media Bureau (Bureau) *October 2015 Staff Decision*,<sup>1</sup> which dismissed the mutually exclusive applications of both Open Arms and CMEP for a new noncommercial educational (NCE) FM station at Horizon City, Texas. For the reasons set forth below, we: (1) grant Open Arms' Petition in part, and otherwise defer action on the Petition; (2) reinstate the Open Arms application; and (3) designate Open Arms as the tentative selectee in NCE MX Group 431.<sup>2</sup> We also dismiss CMEP's Petition for Reinstatement *Nunc Pro Tunc* and AFR as moot.

**II. BACKGROUND**

2. During the October 2007, NCE FM filing window, Open Arms and CMEP, along with five additional applicants, filed mutually exclusive (MX) applications for a new NCE FM station construction permit and were designated MX Group 431.<sup>3</sup> After conducting a fair distribution analysis,<sup>4</sup> which resulted in the elimination of four of the applicants, Open Arms, CMEP and Iglesia Jesucristo es

<sup>1</sup> *NCE MX Group 431*, Letter, Ref. 1800B3-ATS (MB October 19, 2015) (*October 2015 Staff Decision*).

<sup>2</sup> Reconsideration is appropriate if the petitioner shows a material error or omission in the original order or raises additional facts not previously known. See *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686, paras. 2-3 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 CFR § 1.106.

<sup>3</sup> *Media Bureau Identifies Groups of Mutually Exclusive Applications Submitted in the October 2007 Filing Window for Noncommercial Educational FM Stations*, Public Notice, 23 FCC Rcd 9508 (MB 2008).

<sup>4</sup> See 47 CFR § 73.7002.

Mi Refugio, Inc. (IJMRI) proceeded to a point system analysis.<sup>5</sup> Open Arms received three points as an established local applicant and one point for the best technical proposal; CMEP was awarded three points for localism and two points for diversity of ownership; and IJMRI received two points for diversity of ownership.<sup>6</sup> Although Open Arms certified that it also qualified for diversity of ownership points, the Commission found that Open Arms failed to provide the required supporting documentation and, therefore, denied Open Arms the two points under this criterion.<sup>7</sup> Consequently, Open Arms was credited with only four points, while CMEP, with five points, prevailed and was identified as the tentative selectee in MX Group 431.<sup>8</sup>

3. On September 2, 2010, Open Arms filed a Petition to Deny the CMEP application, asserting that Open Arms had timely submitted documentation to support its diversity claim, and therefore, should have received two additional points and been designated the tentative selectee in MX Group 431. Concurrently, Sin Fronteras Organizing Project (SFOP), another applicant in MX Group 431,<sup>9</sup> filed a Petition to Deny both the CMEP and Open Arms applications (the SFOP Petition). SFOP alleged that neither CMEP nor Open Arms had a reasonable assurance of site availability at their proposed tower sites, and therefore, each application must be denied.

4. On May 18, 2011, the Bureau released a letter in which it, *inter alia*, found that Open Arms should have received two points for diversity of ownership, but withheld further action on the SFOP Petition and the Open Arms and CMEP applications.<sup>10</sup> The Bureau subsequently released its *October 2015 Staff Decision* and acknowledged that the Commission failed to consider Open Arms' Amended Bylaws, which were timely filed in the Open Arms application, to support the diversity claim. The Bureau, however, determined that the Amended Bylaws were insufficient to support an award of diversity points because the Bylaws did not specifically prevent current or future Open Arms board members from acquiring interests in broadcast stations.<sup>11</sup> Further, the Bureau concluded that Open Arms and CMEP each lacked reasonable assurance of site availability, and accordingly, dismissed each application.<sup>12</sup>

5. In its Petition, Open Arms argues that the *October 2015 Staff Decision* must be reconsidered because the Bureau: (1) improperly considered and erroneously reversed its previous determination that Open Arms sufficiently documented its commitment to maintain diversity of ownership; and (2) improperly examined, and then erroneously concluded, a question with respect to

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<sup>5</sup> See 47 CFR § 73.7003 (point system selection procedures); see also *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000) (*NCE R&O*); Memorandum Opinion and Order, 16 FCC Rcd 5074 (2001) (*NCE MO&O*), *reversed in part on other grounds*, *NPR v. FCC*, 254 F.3d 226 (D.C. Cir. 2001).

<sup>6</sup> 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, 11126, para. 59 (2010) (*26 Group Order*).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> SFOP did not claim eligibility for a fair distribution preference, and accordingly, it did not proceed to the point system analysis. The SFOP application (File No. BNPED- 20071022BNM) was dismissed on June 10, 2014, per its request. See *Broadcast Actions*, Public Notice, Report No. 48260 (MB June 13, 2014).

<sup>10</sup> See *NCE MX Group 431*, Letter, Ref. 1800B3-ATS (MB May 18, 2011) ("*May 2011 Decision*"). The Bureau found deficiencies in Open Arms' technical exhibit, and therefore, directed Open Arms to submit a revised exhibit and deferred further action on the applications.

<sup>11</sup> *October 2015 Staff Decision* at 5.

<sup>12</sup> *Id.* at 6-8.

Open Arms' reasonable assurance of site availability. In its AFR, CMEP asserts that the dismissal of its application for lack of reasonable site assurance was in error, and must be reversed.<sup>13</sup>

### III. DISCUSSION

6. The Commission awards two points for local diversity of ownership if the principal community contour of the applicant's proposed NCE FM station does not overlap with those of any other radio station in which either the applicant or any party to the application holds an attributable interest.<sup>14</sup> To qualify for such points, an applicant must certify that: (1) neither it nor any party to the application currently has such interests; (2) the organization's governing documents, *i.e.*, its bylaws, require maintenance of diversity into the future (the Governing Document Requirement); and (3) it has submitted documentation to the Commission.<sup>15</sup> It is uncontroverted that Open Arms timely submitted documentation to support its diversity claim. The issue is whether Open Arms' documentation was sufficient to merit two points for diversity of ownership.

7. To support its diversity claim, Open Arms submitted a copy of its Amended Bylaws, which included the following provision: "Section 3, Diversity – Finally, in the event the Permit is secured, pursuant to the requirements of the Federal Communications Commission set forth at 47 CFR 73.7003(b)(2), the organization will maintain its 'local diversity of ownership' as claimed in the Application throughout the Commitment Term. Specifically, during this period, the organization will not own any other broadcast stations whose principal community or 'city-grade' contour (as defined by the Commission's Rules) overlaps that of the Station."<sup>16</sup>

8. In the *October 2015 Staff Decision*, the Bureau concluded that the language of the Amended Bylaws was insufficient to support an award of diversity points because "it does not prevent [Open Arms'] current or future board members from acquiring interests in broadcast stations, including stations within the city-grade contour of Open Arms' proposed NCE station."<sup>17</sup> On reconsideration, Open Arms argues that the language is sufficient because it "commits Open Arms to maintaining its eligibility for the ownership diversity credit pursuant to the Commission's Rules" and, accordingly, "such a commitment includes a prohibition on officers and directors of Open Arms acquiring attributable broadcast interests ... [and] applies not only to the organization *writ large* but also to its parents, subsidiaries, directors and officers."<sup>18</sup> We agree.

9. The Governing Document Requirement aims to ensure that an applicant will maintain the diversity characteristics for which it received credit, despite inevitable changes in board composition and interests, and that current and future board members will be aware of their ongoing compliance

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<sup>13</sup> CMEP specified an incorrect tower site in its initial application, and accordingly, amended its application to correct the coordinates. In the *October 2015 Staff Decision*, the Bureau held that CMEP's clerical error could not be corrected by amendment because: (1) there was no documentation in the original application identifying the correct site; and (2) CMEP lacked reasonable assurance of the availability of the site identified in its initial application. *See October 2015 Staff Decision* at 6.

<sup>14</sup> *See* 47 CFR § 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 CFR § 73.7000. Interests of certain entities providing more than 33 percent of the applicant's equity and/or debt are also attributable. *Id.*

<sup>15</sup> *See, e.g., 26 Group Order*, 25 FCC Rcd at 11112, para. 11. *See also* FCC Form 340, Section IV, Question 2.

<sup>16</sup> *See* File No. BNPED-20071022BGV at Attachment 14.

<sup>17</sup> *October 2015 Staff Decision* at 5.

<sup>18</sup> Open Arms Petition at 9.

obligations.<sup>19</sup> Every applicant entity has the flexibility to word the Governing Document Requirement language as it deems best for the organization.<sup>20</sup>

10. We find that Open Arms' supporting diversity documentation differs in two key respects to documentation the Commission has previously deemed insufficient, including the *Three Group Order*.<sup>21</sup> First, in its Amended Bylaws, Open Arms directly references the Commission's pertinent rule, declaring that "pursuant to the requirements of the Federal Communications Commission set forth at 47 CFR 73.7003(b)(2), the organization will maintain its 'local diversity of ownership' as claimed in the Application<sup>22</sup> throughout the Commitment Term." Section 73.7003(b)(2) of the Rules, in turn, incorporates the Section 73.7000 definition of "attributable interest," which specifically includes governing board members.<sup>23</sup> We acknowledge that the Commission's directive in the *NCE R&O* to award diversity points "only to organizations whose own documents ... establish requirements for maintaining the characteristics of the board for which it claims credit"<sup>24</sup> could be interpreted to call for some formal and explicit mention of board members. We believe, however, that in the absence of any information to the contrary regarding the intent of the organization to bind board members, it is appropriate to credit board members if the applicant directly references the relevant rule in its governing documents. Accordingly, we find that Open Arms' commitment to comply with the entire relevant rule evidences its intention to bind any party to the applicant organization, including governing board members, to honor the applicant's commitment, and thereby appropriately limits the degree to which board members can have interests in other local radio stations.<sup>25</sup>

<sup>19</sup> See *Comparative Consideration of Three Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 2016 WL 3906050, para. 7 (rel Jul. 14, 2016) (*Three Group Order*); *NCE MO&O*, 16 FCC Rcd at 5095, para. 58.

<sup>20</sup> See *NCE MO&O*, 16 FCC Rcd at 5095, para. 58.

<sup>21</sup> See *Three Group Order*, *supra* note 19 (finding (1) language which simply prohibits the organization itself from holding an attributable interest in an overlapping radio station insufficient because it lacks any intent of the applicant to also prohibit the parties to the application from having attributable interests in nearby radio stations; and (2) clarifying that for applicants without traditional governing documents, the Commission requires specificity and exactitude in supporting diversity documentation and explicit mechanisms to clearly communicate the diversity requirements to current and future board members and enforce such requirements).

<sup>22</sup> See FCC Form 340, Section IV, Question 2 (certifying that "the principal community (city grade) contour of the proposed station does not overlap the principal community contour of any other authorized station ... in which any party to the application has an attributable interest as defined in 47 C.F.R. Section 73.3555, and that its governing documents require that such diversity be maintained...").

<sup>23</sup> Section 73.7003(b)(2) states, in relevant part:

Local diversity of ownership. Two points for applicants with no attributable interests, as defined in § 73.7000, in any other broadcast station or authorized construction permit (comparing radio to radio and television to television) whose principal community (city grade) contour overlaps that of the proposed station, if the applicant's own governing documents (e.g. by-laws, constitution, or their equivalent) require that such diversity be maintained.

Section 73.7000 defines "attributable interest" as:

An interest of an applicant, its parent, subsidiaries, their officers, and members of their governing boards that would be cognizable under the standards in the notes to § 73.3555. Also an interest of an entity providing more than 33 percent of an applicant's equity and/or debt that also either (1) supplies more than 15% of the station's weekly programming, or (2) has an attributable interest pursuant to § 73.3555 in media in the same market.

<sup>24</sup> *NCE R&O*, 15 FCC Rcd at 7419, para. 78.

<sup>25</sup> See, e.g., *NCE MX Group 389*, 27 FCC Rcd 7670 (MB 2012) (finding the commitment to maintain diversity present in a resolution which provided that applicant "commits itself to maintain ... 'diversity of ownership' ... as

(continued...)

11. Second, unlike the applicants in the *Three Group Order*, Open Arms has official, traditional governing documents, including its Amended Bylaws. The additional safeguards, notification, and compliance steps, required of applicants without traditional governing documents, are *not* required of applicants, such as Open Arms, filing under the Governing Document Requirement. As the Commission has emphasized, bylaws “are generally preserved, consulted, and central to an organization’s operations.”<sup>26</sup> We can, therefore, be reasonably certain that Open Arms’ current and future board members will remain aware of the diversity requirements and commitments memorialized in the amended bylaws and the necessity of sustaining the requirements.<sup>27</sup> Accordingly, we conclude that Open Arms submitted sufficient documentation to support its diversity claim, and therefore, should be awarded two points under the diversity of ownership criterion.

12. In light of our determination that Open Arms was entitled to two points for diversity of ownership,<sup>28</sup> the outcome of MX Group 431 is altered. Accordingly, we will grant Open Arms’ Petition in part and reinstate its application. We will defer addressing the issue of Open Arms’ reasonable assurance of site availability.<sup>29</sup> Finally, we designate Open Arms as the tentative selectee in MX Group 431 and find that its application is acceptable for filing, triggering the 30-day period for filing petitions to deny.<sup>30</sup> CMEP would now receive fewer points than Open Arms. We, therefore, dismiss the CMEP AFR and the Petition for Reinstatement *Nunc Pro Tunc* as moot.

13. Accordingly, IT IS ORDERED, that the November 18, 2015, Petition for Reconsideration filed by Open Arms Community of El Paso is GRANTED to the extent discussed herein, that action on the Petition is otherwise DEFERRED, and its application (File No. BNPED-20071022BGV) IS REINSTATED. IT IS FURTHER ORDERED, that the November 18, 2015, Application for Review and the Petition for Reinstatement *Nunc Pro Tunc*, filed by Christian Ministries of El Paso, Inc., IS DISMISSED as moot. IT IS FURTHER ORDERED, that Open Arms Community of El Paso is TENTATIVELY SELECTED to be awarded a construction permit for a new NCE FM station at Horizon City, Texas, and its application (File No. BNPED-20071022BGV) IS ACCEPTED FOR FILING, establishing a deadline thirty (30) days from 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 GRANT

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set forth in the FCC Rules.”). We note that in the *Three Group Order* one applicant argued that its policy’s reference to Sections 73.7000 and 73.7003 of the Rules evidenced an intent to bind the Board. Because the Commission found the policy insufficient on other grounds, it did not address this argument. *See Three Group Order* at para. 9 (“the policy statements’ mention of two diversity-related rule sections is insufficient without some ongoing mechanism to communicate the policy to the board and to enforce its requirements.”).

<sup>26</sup> *Three Group Order* at para. 7.

<sup>27</sup> *Id.* (noting that “requirements expressed elsewhere, even if worded similarly, would not provide the same level of assurance, absent sufficient notification procedures.”).

<sup>28</sup> We note that in the Petition, Open Arms argues that the Bureau’s October 2015, reversal of its previous action in the *May 2011 Letter*, crediting the Open Arms’ diversity showing, was improper because the staff purported to “revisit, *sua sponte*, elements of the *May 2011 Decision* that are now final.” *See* Open Arms Petition at 3-4; *October 2015 Staff Decision* at 4-5. In light of our decision to again credit Open Arms with two points for diversity of ownership, this specific issue of finality is now moot.

<sup>29</sup> The Commission’s Rules provide that a petition to deny may only be filed against the tentative selectee of an MX Group. *See* 47 CFR §73.7004(a). The Open Arms application has never been tentatively selected and accepted for filing. It was, therefore, premature of the staff to address the issue of whether Open Arms had reasonable site assurance, and accordingly, act on the premature SFOP Petition to Deny the Open Arms application in the *October 2015 Staff Decision*. Accordingly, we set that determination aside.

<sup>30</sup> *See* 47 CFR §73.7004(b). We will consider and dispose of the portion of the Open Arms Petition regarding the issue of reasonable site assurance at the close of this 30-day period. This issue will be addressed in conjunction with any other pleadings that may be filed during this period.

the application of Open Arms Community of El Paso, CONDITIONED UPON the selectee's compliance with Section 73.7005 of the Commission's Rules, 47 CFR § 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.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary