

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

In the Matter of)
NCE Reserved Allotment Group 14)
Florida Community Radio, Inc.)
Application to Construct a New Noncommercial Educational FM Station at Otter Creek, Florida) File No. BNPED-20100226AGX Facility ID No. 185126
and)
Citrus County Association for Retarded Citizens, Inc.)
Application to Construct a New Noncommercial Educational FM Station at Otter Creek, Florida) File No. BNPED-20100226AGR Facility ID No. 185070

MEMORANDUM OPINION AND ORDER

Adopted: March 13, 2017

Released: March 13, 2017

By the Commission:

1. We have before us an Application for Review (AFR) filed by Florida Community Radio, Inc. (FCR), seeking review of a Media Bureau (Bureau) decision that dismissed FCR's March 28 and 30, 2016 petitions for reconsideration of an earlier Bureau decision denying FCR's application for a construction permit for a new noncommercial educational (NCE) FM station at Otter Creek, Florida (FCR Application), and granting the mutually exclusive application of Citrus County Association for Retarded Citizens, Inc. (CCARC), for a construction permit for a new NCE FM station at Otter Creek, Florida (CCARC Application). For the reasons stated below, we dismiss the AFR in part and otherwise deny the AFR.

2. FCR and CCARC filed their respective applications during the February 2010 filing window, each proposing service on vacant Channel 240A at Otter Creek, Florida, an allotment reserved for NCE use. On May 3, 2011, the Commission conducted a point system analysis pursuant to established procedures in which it awarded the FCR Application five points (three under the established local applicant criterion and two under the diversity of ownership criterion) and awarded the CCARC

1 NCE Reserved Allotment Group 14, Letter Order, Ref. 1800B3-ATS (MB Oct. 26, 2016) (Second Staff Decision).

2 NCE Reserved Allotment Group 14, Letter Order, Ref. 1800B3-ALV (MB Feb. 29, 2016) (First Staff Decision).

3 FCR filed the AFR on November 30, 2016. CCARC filed an Opposition on December 13, 2016. FCR filed a Reply on December 23, 2016.

4 See Media Bureau Announces Filing Window for Vacant FM Allotments Reserved for Noncommercial Educational Use, Public Notice, 24 FCC Rcd 12621 (MB 2009).

5 See 47 CFR § 73.7003 (point system selection procedures).

Application two points under the best technical proposal criterion.⁶ The Commission thus designated FCR the tentative selectee of NCE Reserved Allotment Group 14.⁷ In response to the *First Comparative Order*, CCARC filed a Petition to Deny the FCR Application, asserting that FCR failed to timely document its eligibility for any of its awarded points in the application as originally filed, and therefore, that the Commission erred in awarding FCR points under the established local applicant and diversity of ownership criteria.⁸

3. On May 13, 2015, the Commission granted CCARC's Petition to Deny and determined that the FCR Application was not entitled to any comparative points.⁹ The Commission also rejected FCR's argument, made in many of its earlier pleadings, that the CCARC Application should not have been awarded any points under the best technical proposal criterion on the basis of an amendment filed by CCARC on August 9, 2012 downgrading its claimed coverage because it had inadvertently overlooked an unbuilt station in its initial coverage claim in its application (August 2012 Amendment),¹⁰ noting that FCR's argument had relied on inaccurate data.¹¹ The Commission concluded that, based on its amended coverage figures, CCARC "continues to satisfy the third reserved allotment showing requirement and remains eligible for two points under the best technical proposal criterion."¹² The Commission thus designated CCARC as the new tentative selectee in NCE Reserved Allotment Group 14, accepted the CCARC Application for filing, and announced a 30-day period for filing petitions to deny the CCARC Application.¹³

4. FCR filed a Petition to Deny the CCARC Application, arguing that CCARC was not entitled to points under the best technical proposal criterion because the population figures in its original application were inaccurate and CCARC could not rely on the revised downgraded figures in its August 2012 Amendment.¹⁴ In the *First Staff Decision*, the Bureau rejected this argument.¹⁵ The Bureau stated that it had independently assessed the signal coverage areas for the CCARC proposal and confirmed that

⁶ See *Comparative Consideration of 37 Groups of Mutually Exclusive Applications*, Memorandum Opinion and Order, 26 FCC Rcd 7008, 7024, para. 43 (2011) (*First Comparative Order*).

⁷ *Id.*

⁸ Petition to Deny of CCARC, File No. BNPED-20100226AGX (filed June 2, 2011).

⁹ See *Comparative Consideration of Seven Groups of Mutually Exclusive Applications*, Memorandum Opinion and Order, 30 FCC Rcd 5135, 5143-44, paras. 22-23 (2015) (*Second Comparative Order*). See also Instructions to FCC Form 340, Section IV; 47 CFR § 73.7003(e).

¹⁰ The CCARC Application initially indicated that CCARC would provide first NCE service to 2,112 people, and second NCE service to 2,536 people, for an aggregate first and second NCE service to 4,648 people and total service area of 2,216 square kilometers and 14,638 people. Application at Exh. 13 and Section IV, Question 4. The August 2012 Amendment acknowledged that CCARC had failed to include an unbuilt construction permit for Station WWLC(FM) in calculating its first and second NCE coverage. August 2012 Amendment at Exh. 1. The August 2012 Amendment thus revised the CCARC Application's population figures downward to indicate that the proposed station would provide first NCE service to 994 people and second NCE service to 1,902 people, for an aggregate first and second NCE service to 2,896 people, and revised its total population served to 14,614. *Id.* at Exh. 13 and Section IV, Question 4.

¹¹ *Second Comparative Order*, 30 FCC Rcd at 5144, para. 23 ("We find the data submitted by FCR unconvincing because it was inaccurate and did not provide an accurate assessment of population served or area covered by CCARC's proposed facility"). FCR raised this argument in various pleadings which the Commission dismissed as unauthorized. *Id.* at 5142, n.50.

¹² *Id.*

¹³ *Id.* at 5156, para. 63.

¹⁴ Petition to Deny of Florida Community Radio, Inc. (filed Jun. 14, 2015).

¹⁵ *First Staff Decision* at 4.

CCARC would serve the areas and populations claimed in the amended application. Accordingly, based on CCARC's amended figures, the Bureau concluded that CCARC was eligible for two points under the best technical proposal criterion. However, the Bureau took no action on the CCARC Application in the *First Staff Decision* because CCARC had not registered its proposed tower with the Federal Aviation Administration, nor had it certified compliance with the Environmental Protection Act. The Bureau accordingly ordered CCARC to provide the required information.¹⁶ FCR also filed a second Petition for Reconsideration, seeking reconsideration of the *First Staff Decision*. The *Second Staff Decision* dismissed this Petition in part on the grounds that the *First Staff Decision* was itself also an interlocutory order of which reconsideration was not appropriate.¹⁷ The *Second Staff Decision* also granted the CCARC Application and dismissed the FCR Application as a non-tentative selectee.¹⁸

5. On review, FCR again argues that the Commission should not have awarded the CCARC Application two points under the best technical proposal criterion due to its amendment correcting its coverage showing. FCR claims that because CCARC's initial population figures provided in its original application were inaccurate, CCARC should not have been permitted to rely on the revised numbers provided in the post-window August 2012 Amendment.¹⁹

6. Initially, we reject FCR's argument that the August 2012 Amendment "is fatal to CCARC's [Section] 307(b) [of the Communications Act of 1934, as amended (Act)] point system analysis."²⁰ FCR conflates the appropriateness of a post-window amendment affecting a threshold Section 307(b) determination—an acceptability issue—and one impacting a comparative point analysis. In considering competing applications for reserved NCE allotments, the Commission conducts an initial Section 307(b) analysis by determining whether the application's population data satisfy the third channel reservation criteria based on its first or second NCE service.²¹ In the *Second Comparative Order*, the

¹⁶ *Id.* at 4-5. FCR also filed a Petition for Reconsideration of the *Second Comparative Order*, in which it argued that the Commission erred in rescinding the tentative selection of the FCR Application. The Bureau dismissed this Petition for Reconsideration as unauthorized, on the grounds that the *Second Comparative Order* was an interlocutory order. *First Staff Decision* at 3. However, the Bureau addressed the merits of the Petition for Reconsideration and found that the Commission correctly held that FCR was ineligible for comparative points for localism and diversity of ownership due to its failure to have timely provided the required supporting documentation. *Id.*

¹⁷ *Second Staff Decision* at 3-4. The *Second Staff Decision* also rejected FCR's argument that the CCARC Application should be dismissed on the basis of lack of reasonable assurance of site availability, and dismissed an amendment to the FCR Application that attempted to make that application a singleton by changing the proposed channel. *Id.* at 4-5. FCR does not seek Commission review of these determinations.

¹⁸ *Id.* at 5.

¹⁹ *Id.* at 11.

²⁰ *Id.* at 6-8. FCR argues that Bureau precedent holds that an applicant's failure to consider an unbuilt construction permit in its coverage analysis is "fatal to its Section 307(b) claims." *Id.* at 9 (citing *NCE MX Group 202*, Letter Order, 24 FCC Rcd 12948 (MB 2009)). FCR's reliance on *NCE MX Group 202* is misplaced. In that decision, the Bureau determined that when an unbuilt construction permit was taken into account, the application for a new NCE station in the reserved band filed by South Central Oklahoma Christian Broadcasting (SCOCB) was not entitled to a dispositive preference under Section 307(b) of the Act and referred the application to the Commission for a comparative points hearing. The Commission subsequently in fact considered SCOCB's claim for best technical proposal, but denied it those points on other grounds. See *Comparative Consideration of 32 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 5013, 5028, para. 47 (2010). Here, as noted herein, CCARC was properly found to be entitled to such points.

²¹ See *First Comparative Order*, 26 FCC Rcd at 7009, para. 3. See also *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Second Report and Order, 18 FCC Rcd 6691, 6703-05, paras. 30-38 (2003) (establishing third channel reservation criteria). By those criteria, a NCE applicant must show

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Commission found that CCARC's amended application, which takes into account the WWLC permit, continued to satisfy the third channel reservation criteria.²² The point system analysis for best technical proposal does not rely on first or second NCE service figures, as FCR contends, but instead relies on the total service area and total population figures provided in the materials that support the applicant's response to Section IV, Question 4 of the Application.²³ As the Commission noted, CCARC's amendment did not change the 2216 square kilometers coverage area claimed in the application and only reduced the population figure from the 14,638 originally claimed to 14,614 people, and therefore CCARC continued to meet the third channel reservation criteria.²⁴

7. Additionally, with regard to the appropriateness of the award to CCARC of the two points for its technical proposal, the Commission has previously held that an applicant may amend its application to *reduce*—but *not to increase*—its proposed first and second NCE service population figures for comparative purposes.²⁵ FCR provides no authority for its contention that the post-window *reduced* population figures may not be used in calculating the best technical proposal pursuant to Section 73.7003(b)(4) of the Rules.²⁶ We accordingly reject this argument as a basis to eliminate CCARC's points for best technical proposal. As stated in the *Second Comparative Order* and the *First Staff Decision*, CCARC properly amended its application on August 9, 2012, to account for the WWLC permit and reduce its claimed total population figure.²⁷ The reduced total population figure was appropriately considered in awarding points to the CCARC Application under the best technical proposal criterion.²⁸

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that its proposed facility would provide a first and/or second NCE service to at least ten percent of the population within the station's 60 dBu (1 mV/m) contour and that the affected population is at least 2000 persons. *Id.*

²² *Second Comparative Order*, 30 FCC Rcd at 5144, para. 23 and n.64.

²³ 47 CFR § 73.7003(b)(4).

²⁴ *Second Comparative Order*, 30 FCC Rcd at 5144, n.63.

²⁵ *Comparative Consideration of Seven Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, 30 FCC Rcd 5161, 5169-70, paras. 25-27 (2015) (applicant may not rely on enhanced population figures provided in a post-window amendment).

²⁶ See 47 CFR 73.7003(b)(4). As the Commission noted, the prohibition against an applicant enhancing its claimed population figures or comparative point showing after the filing window is meant to prevent "abuse of the Commission's processes, applicant gamesmanship, and unfair advantage." *Comparative Consideration of Seven Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, 30 FCC Rcd at 5170, para. 26. These concerns are not present where an applicant weakens its comparative posture in a post-window amendment, as CCARC did.

²⁷ *Second Comparative Order*, 30 FCC Rcd at 5144, para. 23 ("We find the data submitted by FCR unconvincing because it was inaccurate and did not provide an accurate assessment of population served or area covered by CCARC's proposed facility."); *Staff Decision* at 4 (Bureau staff independently confirmed CCARC's service area and population figures).

²⁸ Section 73.7003(b)(4) provides that an NCE-FM applicant will receive points for technical parameters as follows: one point to the applicant covering the largest area and population within its 60 dBu contour, provided that it covers both a ten percent greater area and a ten percent greater population than the applicant with the next best technical proposal; and two points, if the applicant's technical proposal covers both a 25 percent greater area and 25 percent greater population than the next best technical proposal. In the *First Comparative Order*, the Commission observed that CCARC would provide such service to 2,216 square kilometers and 14,638 people, while FCR would provide such service to 382 square kilometers and 11,653 people. Accordingly, the Commission concluded that CCARC qualified for two points under the best technical proposal criterion because its proposal would serve at least 25 percent more area and population than FCR's proposal. *First Comparative Order*, 26 FCC Rcd at 7024, para. 43. In the *Second Comparative Order*, the Commission concluded that, notwithstanding CCARC's amended figures, decreasing its population served to 14,614, it was still entitled to the two points. *Second Comparative Order*, 30 FCC Rcd at 5144, para. 23, n.63. We see no reason to disturb that conclusion. To the extent that FCR continues to

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8. To the extent that FCR again argues that the Commission erred in deducting the comparative points previously awarded FCR as a local applicant and for diversity of ownership,²⁹ we affirm the *Second Comparative Order* and the *First Staff Decision* for the reasons stated therein: FCR was required to provide documentation supporting its claims for such points at the time its Application was filed, but failed to do so.³⁰ We thus affirm the tentative selection and grant of the CCARC Application.³¹

9. As a final matter, throughout its AFR, FCR maintains that the selection of CCARC and dismissal of FCR's application were the result of bias against it by the Commission and by the Bureau.³² To the contrary, as demonstrated herein, those actions were fully consistent with the Rules and pertinent precedent. Accordingly, we reject FCR's allegations as without basis in fact.

10. Accordingly, IT IS ORDERED that the Application for Review filed on November 30, 2016, by Florida Community Radio, Inc.: (1) IS DISMISSED, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(c) of the FCC's Rules, to the extent that it relies on questions of fact or law not previously presented to the Media Bureau; and (2) otherwise IS DENIED, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(g) of the FCC's Rules.³³

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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challenge this conclusion in its AFR (pages 3-12), its arguments are based upon mischaracterizations of the Section 73.7003(b)(4) analysis and of CCARC's projected coverage.

²⁹ AFR at 7, 10.

³⁰ See note 15 *supra*.

³¹ FCR also argues for the first time on review: 1) that the Commission erred in its calculation of FCR's first, second and aggregate population figures; and 2) that the Bureau erred in granting the CCARC Application because it failed to demonstrate compliance with the Nationwide Programmatic Agreement and the National Historic Preservation Act. AFR at 5-6 and 13. Section 5(c)(5) of the Act and Section 1.115(c) of the FCC's rules bar applications for review that rely "on questions of fact or law upon which the [designated authority issuing the decision] has been afforded no opportunity to pass." See 47 U.S.C. § 155(c)(5); 47 CFR § 1.115(c); *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003) (upholding Commission's order dismissing arguments under Section 1.115(c) because that rule does not allow the Commission to grant an application for review if it relies upon arguments that were not presented below). Accordingly, we will dismiss this part of the AFR pursuant to Section 1.115(c).

³² See AFR at 1, 3-4, 9-11

³³ 47 U.S.C. § 155(c)(5); 47 CFR § 1.115(c), (g).