

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

In the Matter of	)	
	)	
Reexamination of the Comparative Standards and	)	MB Docket No. 19-3
Procedures for Licensing Noncommercial	)	
Educational Broadcast Stations and Low Power FM	)	
Stations	)	

**ORDER ON RECONSIDERATION**

**Adopted: September 1, 2020**

**Released: September 2, 2020**

By the Commission:

**I. INTRODUCTION**

1. In this *Order on Reconsideration*, we address the Petition for Reconsideration filed by Discount Legal seeking reconsideration of the *2019 NCE Report and Order*.<sup>1</sup> The Petition asks the Commission to authorize “secondary grants” in mutually exclusive (MX) FM radio noncommercial educational (NCE) groups, after the initial resolution of the MX applications. For the reasons set forth below, we dismiss the Petition as procedurally defective, and alternatively and independently, deny the Petition.

**II. BACKGROUND**

2. Conflicting NCE FM applications, which cannot all be granted consistent with the Commission’s technical rules, are considered mutually exclusive. The Commission places conflicting applications into MX groups, resolves the MX groups by applying the NCE comparative procedures, and tentatively selects an application for grant from each separate MX group.<sup>2</sup> Specifically, the Commission compares NCE MX groups under the point system and awards each application a maximum of seven merit points based on public-interest criteria such as diversity of ownership, localism, and technical superiority.<sup>3</sup> The application with the most points in an MX group is designated the tentative selectee. The Bureau staff then accepts the tentatively-selected applications for filing, which triggers a 30-day period for the filing of petitions to deny. Petitions based on claims that the exclusion, or inclusion, of challenged or claimed points could alter the outcome in the particular MX group are referred to the

<sup>1</sup> Discount Legal Petition for Reconsideration (rec. March 12, 2020) (Petition); *Reexamination of the Comparative Standards and Procedures for Licensing Noncommercial Educational Broadcast Stations and Low Power FM Stations*, Report and Order, 34 FCC Rcd 12519 (2019) (*2019 NCE Report and Order*). Notice of the filing of the Petition was published in the Federal Register on April 30, 2020. See Petition for Reconsideration of Action in Proceeding, 85 Fed. Reg. 23941 (April 30, 2020) (setting May 15, 2020, as deadline for oppositions and May 26, 2020, as deadline for replies).

<sup>2</sup> *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Memorandum Opinion and Order, 16 FCC Rcd 5074, 5076, para. 5 (2001) (*NCE Comparative MO&O*). When MX NCE FM applications propose to serve different communities, the Media Bureau (Bureau) first determines, pursuant to section 307(b) of the Communications Act of 1934, as amended, whether grant of any of the applications would best further the fair, efficient, and equitable distribution of radio service among communities. See 47 U.S.C. § 307(b); 47 CFR § 73.7002; *NCE Comparative MO&O*, 16 FCC Rcd at 5077, para. 6. If the section 307(b) analysis does not produce a winner, the remaining applicants proceed to a point system analysis.

<sup>3</sup> 47 CFR § 73.7003; *NCE Comparative MO&O*, 16 FCC Rcd at 5077, para. 7.

Commission for a new points analysis.<sup>4</sup> If the original tentative selectee is found unqualified, or qualified for fewer points, the Commission names the qualified applicant(s) with the highest point total after the revised analysis as the new tentative selectee.<sup>5</sup> Ultimately, after any petitions are resolved, and the Commission is satisfied that the tentative selectee is qualified, the Bureau grants the “tentative selectee” application and dismisses all others in the MX group.<sup>6</sup> Prior to dismissal, an applicant can seek to remove itself from the MX group to achieve grant as a “singleton” either by settling with other applicants in the group or by modifying its own engineering proposal.<sup>7</sup> Dismissed applicants are also free to reapply in the next application window.<sup>8</sup>

3. In 2001, when the Commission adopted the point system, it considered and rejected proposals to engage in secondary application analyses, whereby it would reevaluate the unsuccessful applications in an MX group that did not directly conflict with the ultimate tentative selectee of the group.<sup>9</sup> The Commission explained that “[r]ather than issue authorizations to applicants whose potential for selection stems primarily from their position in the mutually exclusive chain, we believe it is appropriate to dismiss all of the remaining applicants and permit them to file again in the next filing window.”<sup>10</sup> The Commission clarified that its primary goal was to select the “best qualified applicants” in an “administratively efficient way.”<sup>11</sup> The Commission also detailed the extensive administrative process following every tentative selection that would have to be repeated if a second round of grants were to occur during the same window.<sup>12</sup>

4. The Commission opened a filing window for new NCE stations in 2007,<sup>13</sup> and in 2010, the Commission issued the first of its comparative points orders resolving MX groups from the 2007 window. In the order, the Commission reiterated its policy “that 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.”<sup>14</sup> Accordingly, the Commission directed the Bureau staff “to deny petitions for reconsideration based on the theory that the dismissed application is not mutually exclusive with the granted application.”<sup>15</sup>

5. Despite this directive, several dismissed applicants subsequently challenged their dismissals and argued that their applications should also be granted because they were not mutually exclusive with the tentative selectees in their respective MX groups. The Commission again reaffirmed its one-grant policy in three 2015 Memorandum Opinions and Orders, rejecting petitioners’ requests for

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<sup>4</sup> See 47 CFR § 73.7004.

<sup>5</sup> *Id.*

<sup>6</sup> 47 CFR § 73.7004(d).

<sup>7</sup> 47 CFR § 73.7003(d).

<sup>8</sup> *NCE Comparative MO&O*, 16 FCC Rcd at 5104-05, para. 90.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 5077, para. 8.

<sup>13</sup> *Media Bureau Announces NCE FM New Station and Major Modifications Application Filing Window for New and Certain Pending Proposals; Window to Open on October 12, 2007*, Public Notice, 22 FCC Rcd 6726 (MB 2007).

<sup>14</sup> See, e.g., *Comparative Consideration of 59 Groups of Mutually Exclusive Applications*, Memorandum Opinion and Order, 25 FCC Rcd 1681, 1716, para. 139 (2010).

<sup>15</sup> *Id.*

secondary grants.<sup>16</sup> The Commission explained that its policy basis not to engage in secondary grants was supported by the dual reasons of not granting inferior applications and promoting administrative efficiency.<sup>17</sup>

6. Finally, in the *2019 Report and Order*, the Commission considered and rejected Discount Legal's suggestion that it adopt a secondary grant practice.<sup>18</sup> The Commission reaffirmed its longstanding policy and declined to pursue a process whereby non-winning applicants that are not mutually exclusive with the tentative selectee would proceed to a second round of analysis by the Commission.<sup>19</sup>

7. In the Petition, Discount Legal renews the arguments in favor of a secondary grant policy made in its comments.<sup>20</sup> Discount Legal disputes the Commission's long-standing rationale for its one-grant policy—that secondary grants would result in the approval of inferior applications and increase administrative burdens. Discount Legal also “dispute[s] that there exists” any Commission policy of granting only one application per MX group and suggests this policy was developed by the Media Bureau staff.<sup>21</sup>

### III. DISCUSSION

8. Pursuant to section 1.429 of the Commission's rules, parties may petition for reconsideration of final orders in a rulemaking proceeding.<sup>22</sup> But petitions for reconsideration are not to be used merely to reargue points previously advanced and rejected.<sup>23</sup> Reconsideration is generally appropriate only where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to respond.<sup>24</sup>

9. Discount Legal's Petition does not allege any change in circumstances or offer any newly discovered facts, but rather, reargues points previously advanced and rejected. Accordingly, we dismiss the Petition as repetitive and procedurally defective.<sup>25</sup> On alternative and independent grounds, we deny

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<sup>16</sup> *Greene/Sumter Enterprise Community*, Memorandum Opinion and Order, 30 FCC Rcd 7694 (2015) (*Greene/Sumter*); *Applications of Hawaii Public Radio, Inc.*, Memorandum Opinion and Order, 30 FCC Rcd 13775 (2015) (*Hawaii Public Radio*); *Hampton Roads Educational Telecommunications Association*, Memorandum Opinion and Order, 30 FCC Rcd 14906 (2015) (*Hampton Roads*).

<sup>17</sup> *Green/Sumter*, 30 FCC Rcd at 7699, para. 8; *Hawaii Public Radio*, 30 FCC Rcd at 13776, para. 4; *Hampton Roads*, 30 FCC Rcd at 14909, para. 7. The Commission also emphasized that a secondary-grant process would “vastly expand staff burdens” and entail “multiple iterative comparative analyses of virtually all NCE MX groups.” See, e.g., *Green/Sumter*, 30 FCC Rcd at 7699, para. 8.

<sup>18</sup> *2019 NCE Report and Order*, 34 FCC Rcd at 12528, n.68.

<sup>19</sup> *Id.* at 12528, para. 19.

<sup>20</sup> Petition at 2.

<sup>21</sup> *Id.* at 5.

<sup>22</sup> 47 CFR § 1.429(a).

<sup>23</sup> See *M&M Communications, Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 5100, para. 7 (1987). See also 47 CFR § 1.429(l)(3) (providing for staff dismissal of a petition for reconsideration that plainly does not warrant consideration by the Commission, for example, “if the petition rel[ies] on arguments that have been fully considered and rejected by the Commission within the same proceeding”); *Connect America Fund*, Sixth Order on Reconsideration and Memorandum Opinion and Order, 28 FCC Rcd 2572, 2573, para. 3 (2013).

<sup>24</sup> *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686, para. 2 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 397 U.S. 967 (1966).

<sup>25</sup> 47 CFR § 1.429(l)(3); see also *Authorizing Permissive Use of the “Next Generation” Broadcast Television Standard*, GN Docket No. 16-142, Second Report and Order and Order on Reconsideration, FCC 20-72 at 19, para.

(continued...)

the Petition as meritless and affirm our longstanding one-grant policy, which is supported by the dual rationales of expeditiously granting high-quality applications and limiting administrative burdens.

10. *High Quality Applications.* The Commission has repeatedly stressed that one of the fundamental bases underlying the NCE licensing process is to maximize the quality of grantees, not simply to grant the maximum number of applications.<sup>26</sup> Discount Legal dismisses potential disparities between the quality of unsuccessful applicants in an MX group as “irrelevant.”<sup>27</sup> We disagree. The Commission’s one-grant policy is designed to encourage the best possible application submissions in every filing window. The current policy creates competitive pressure toward this end because applicants know that only the best application in an MX group will win. No applicant can submit an inferior application and hope to win by default on a secondary analysis. By having only one grantee per MX group, but allowing all non-selectees to reapply in the next window, the Commission creates virtuous incentives, which yield a higher quality result than a policy of granting as many applications as possible, regardless of quality.<sup>28</sup>

11. Discount Legal also argues that “the idea than an applicant must be dismissed because it is comparatively inferior to an unqualified applicant being dismissed” violates the Supreme Court’s holding in *Ashbacker Radio Corp. v. FCC*.<sup>29</sup> Discount Legal, however, does not elaborate on this argument, which the Commission previously considered and rejected in a prior decision affirming the one-grant policy.<sup>30</sup> As the Commission explained, the one-grant policy does provide consideration to all applicants in an MX group, and *Ashbacker* “[does not] require the Commission to engage in secondary analyses of inferior applications simply because they do not conflict with the tentative selectee.”<sup>31</sup>

12. *Administrative Burdens.* Discount Legal also contends that the concern about administrative burdens “does not hold up,” maintaining that once the staff conducts an engineering analysis and calculates each application’s points, the results are simply “reduced to a spread sheet, then ranked, and a tentative selectee chosen,” and arguing that the “fruit of all that work remains available for secondary analysis.”<sup>32</sup> This argument, however, does not take into account the extensive work required following the issuance of tentative selectee orders.

13. A tentative selection is not final until the entire administrative process of resolving petitions to deny, and any subsequent pleadings, is complete. Commission review of any petitions and associated point audits is a weighty and oftentimes lengthy process, requiring extensive analysis to determine the status of every tentative selectee’s application and the merits of every petition to deny.<sup>33</sup> If

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38 (2020) (dismissing petitions for reconsideration as procedurally defective pursuant to section 1.429(l)(3) where they raised arguments that had been considered and rejected by the full Commission).

<sup>26</sup> *NCE Comparative MO&O*, 16 FCC Rcd at 5105, para. 90.

<sup>27</sup> Petition at 4.

<sup>28</sup> Discount Legal does not address the fact that the Commission is engaged in an iterative process of increasing the quality of NCE stations across all windows, rather than simply granting all technically possible applications in each window. For example, as Discount Legal proposed, in future windows we will award tie-breaker points to applicants who were unsuccessful in prior windows. See *2019 Report and Order*, 34 FCC Rcd at 12527-28, para. 19; Petition at 5.

<sup>29</sup> Petition at 4 (citing *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) (holding all MX applicants are entitled to comparative consideration)).

<sup>30</sup> *Greene/Sumter*, 30 FCC Rcd at 7697-98, para. 5.

<sup>31</sup> *Id.*

<sup>32</sup> Petition at 2.

<sup>33</sup> See, e.g., *Comparative Consideration of Seven Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, Memorandum Order and Opinion, 30 FCC Rcd 5161

(continued....)

a petition to deny is granted, a new tentative selectee must be chosen, and petitions to deny must again be entertained.

14. A secondary selection process could not begin until a first grant has been finalized. But since the Commission only reviews petitions to deny against the tentative selectee, the fruit of the Commission's work in selecting the first grantee would not, as Discount Legal suggests, alleviate burdens in a second round of review.<sup>34</sup> Rather, a secondary grant policy would essentially double the time and administrative burdens attendant to this process: another round of tentative selection, another adjudication of petitions to deny, and another order resolving the petitions. Such an iterative process would burden Commission resources.

15. Furthermore, the one-grant policy incentivizes applicants to resolve mutual exclusivities through the more expeditious settlement process, thereby accelerating new NCE service to the public. Currently, applicants know that they do not get a second bite at the apple if they are not the tentative selectee in the comparative-points analysis. It, therefore, benefits applicants to attempt to resolve MX conflicts among themselves before undergoing comparative review.<sup>35</sup> Discount Legal, however, argues that it is irrational to allow multiple grants in an MX group in the settlement context but not engage in secondary analysis through the point system.<sup>36</sup> This argument does not account for the fundamentally different nature of the two conflict-resolution methods and the time each process entails. Settlements are made between the parties and approved by the Bureau staff in a streamlined process. In contrast, each iteration of the point system is a lengthy process, entailing all of the administrative burdens discussed above. By encouraging applicants to resolve their mutual exclusivities among themselves, the settlement process reduces the administrative burden on the Bureau staff, avoids prolonged litigation, and expedites the grant of applications and introduction of new radio service.

16. Discount Legal also argues that its proposal would "serve the Commission's charge with fostering an 'efficient, Nation-wide. . . radio communication service with adequate facilities. . . ' 47 U.S.C. Sec. 152 [sic], and to 'generally encourage the larger and more effective use of radio in the public interest,' 47 U.S.C. 303(g)."<sup>37</sup> We reject the argument that secondary grants would better accomplish these statutory objectives. In our judgment, simply granting as many applications as possible in any given window will not result in greater long-term efficiency and effectiveness of radio use. Rather, as discussed above, the one-grant policy better serves the policy goals of sections 152 and 303(g) by incentivizing better applications as well as cooperative settlements that encourage more intensive and higher quality use of spectrum.

17. *Established One-Grant Policy.* Finally, despite the extensive historical record of the Commission's consistent one-grant policy, Discount Legal implausibly denies its existence.<sup>38</sup> Instead, it argues that the Commission staff used one paragraph from the *NCE Comparative MO&O* as the basis to

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(2015) (resolving petitions to deny for applications filed in the 2007 window); *Comparative Consideration of 37 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, 26 FCC Rcd 7008 (2011) (same).

<sup>34</sup> Petition at 2.

<sup>35</sup> 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 (MB 2007) (allowing applicants to resolve their mutual exclusivity through settlement prior to point selection orders).

<sup>36</sup> Petition at 4.

<sup>37</sup> Petition at 1. Although the Petition cites 47 U.S.C. § 152, the quoted text is actually from 47 U.S.C. § 151.

<sup>38</sup> Petition at 5 ("We dispute there exists any such Commission 'policy.'").

reject “the secondary grant idea,” avers that the staff misapplied the *NCE Comparative MO&O*,<sup>39</sup> and alleges that the policy was not endorsed by the Commission, but rather, originated with the Bureau staff.

18. We reject Discount Legal’s characterization, which is directly at odds with the Commission’s explicit mandate in the 2001 *NCE Comparative MO&O*,<sup>40</sup> the subsequent Commission decisions stating that the Bureau correctly applied the *NCE Comparative MO&O*,<sup>41</sup> and indeed, the Commission’s recent reaffirmation of the one-grant policy in the *2019 Report and Order*.<sup>42</sup> These decisions clearly reflect that it has been, and remains, the resolve of the Commission—not the staff—that the Bureau process applications based on a “one-grant” policy.<sup>43</sup>

#### IV. CONCLUSION

19. Accordingly, **IT IS ORDERED** that the Petition for Reconsideration filed on March 12, 2020, by Discount Legal **IS DISMISSED**, and alternatively and independently, **IS DENIED**.

20. **IT IS FURTHER ORDERED** that, should no further petitions for reconsideration or petitions for judicial review be timely filed, MB Docket No. 19-3 **SHALL BE TERMINATED**, and its docket **CLOSED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>39</sup> *Id.* at 6.

<sup>40</sup> *NCE Comparative MO&O*, 16 FCC Rcd at 5104-05, para. 89-90

<sup>41</sup> *See, e.g. Greene/Sumter*, 30 FCC Rcd at 7695, para. 2; *Hawaii Public Radio*, 30 FCC Rcd at 13777, para 4; *Hampton Roads*, 30 FCC Rcd at 14909, para. 8.

<sup>42</sup> *2019 NCE Report and Order*, 34 FCC Rcd at 12528, n.68.

<sup>43</sup> *See, e.g., Kingdom of God, Inc.*, Order on Reconsideration, 32 FCC Rcd 3654, 3655, para. 3 (2017) (“The Commissioners, not the staff, are the final decision makers on all action taken by the full Commission. . . . To the extent the Commission determines that a staff-level decision has failed to take into account material facts or law, we will not hesitate to overturn such a decision.”).