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Ref. No. 1800B3-TSN

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In re: **NCE MX Group 427**  
New NCE (FM), Hugo, Oklahoma  
One Creek Valley Church, Inc.  
Facility ID No. 177131  
File No. BNPED-20071022AON

**Petition to Deny**  
**Petition for Reconsideration**

Dear Counsel and Applicants:

This letter concerns the above-referenced application ("Application") of One Creek Valley Church, Inc. ("OCV") for a new noncommercial educational ("NCE") FM station at Hugo, Oklahoma.<sup>1</sup> OCV's Application was the tentative selectee in NCE Mutually Exclusive ("MX") Group 427.<sup>2</sup> Before us are: (1) a Petition to Deny ("EOSC Petition") filed by Eastern Oklahoma State College ("EOSC") on January 16, 2009, and (2) a Petition for Reconsideration ("Johnson Petition") filed by The Johnson Foundation ("Johnson") on March 9, 2009.<sup>3</sup> For the reasons set forth below, we deny the EOSC Petition, dismiss the Johnson Petition as untimely, and grant the Application.

**Background.** OCV, EOSC, and Johnson filed applications in the October 2007 NCE filing window, along with eight other applicants filing a total of 12 applications, comprising NCE MX Group

<sup>1</sup> File No. BNPED-20071022AON, filed October 22, 2007.

<sup>2</sup> *Threshold Fair Distribution Analysis of 26 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, 23 FCC Rcd 17983, 17996 (MB 2008).

<sup>3</sup> A second petition for reconsideration, filed January 28, 2009, by Iglesia Jesucristo es mi Refugio, Inc. ("Iglesia"), File No. BNPED-20071017AIE, was granted March 10, 2009. *Broadcast Applications*, Public Notice, Report No. 26941 (MB Mar. 13, 2009).

We disagree. EOSC attempts to liken this fair distribution analysis to the point system analysis, under which an applicant's maximum point eligibility is established as of the close of the filing window, but can be reduced due to subsequent events.<sup>10</sup> There is, however, an important distinction between the two sets of factors. The point system factors and tiebreakers encompass attributes largely within the applicant's control. For example, an applicant presumably controls the membership of its governing board, the location of its physical headquarters, and the number and technical parameters of the radio station applications that it files or the stations in which it has interests. Thus, any post-filing window changes to these factors are presumed due to the applicant's actions, and are therefore properly reduced when appropriate. On the other hand, fair distribution factors remain outside of an applicant's control. An applicant, for example, cannot control population shifts within the contours of its technical proposal, post-filing window modifications to other facilities, or the decisions of other, non-mutually exclusive applicants to apply during the same filing window for facilities in the same area. The Commission thus concluded that, for such fair distribution factors, applicants should compete on a level playing field, namely that as it exists at the end of a given filing window.

This distinction becomes particularly relevant where, as here, the subsequently granted applications that would reduce OCV's first NCE service claim were filed in the same filing window as OCV's application.<sup>11</sup> While EOSC claims it is "arbitrary and capricious" to ignore the effect of these applications on OCV's claim, an equally compelling – indeed, more compelling – argument could be made that it is arbitrary and capricious to deny an applicant a fair distribution preference based on nothing more than the fact that Commission staff processed other simultaneously filed applications before that applicant's.<sup>12</sup>

Although EOSC does not in so many words request such relief, in essence it asks us to waive the Commission's policy to determine fair distribution claims based on the facts existing as of the filing window's close. We find EOSC has not presented a meritorious claim for waiver relief. Waiver is appropriate on a showing of special circumstances warranting a deviation from the general rule, as well as a showing that such deviation is in the public interest.<sup>13</sup> The fact that some applicants' fair distribution claims are decided before others' is a fact of our processing policies, which favor the expeditious provision of new service to the public by releasing periodic orders as MX groups are analyzed, rather than waiting to analyze all window-filed applications and then releasing a single omnibus order much later in time. Post-filing window changed circumstances do not, in this instance, constitute special circumstances. Moreover, for the reasons set forth above, we find that deviation from the general policy is not in the public interest, but would in fact be even more arbitrary and capricious than the so-called "absurd result" alleged by EOSC. Accordingly, we deny the EOSC Petition.

*Johnson Petition.* Johnson filed its petition for reconsideration March 9, 2009. Section 405 of the Act and the Commission's Rules require any petition for reconsideration to be filed within 30 days

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<sup>10</sup> *Id.* at 7-8. See *NCE MO&O*, 16 FCC Rcd at 5082-83.

<sup>11</sup> The two subsequently granted applications are those of Golden Baptist Church on Channel 202C2 at Broken Bow, Oklahoma, File No. BNPED-20071022BFT, and Grace Community Church of Amarillo on Channel 212C3 at Antlers, Oklahoma, File No. BNPED-20071022BRN.

<sup>12</sup> Because the Commission's policy is not arbitrary and capricious, as EOSC claims, we find its citation of *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993) to be inapposite. See EOSC Petition at 6-7.

<sup>13</sup> See *Northeast Cellular Telephone Co. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("*Northeast Cellular*") ("[A] waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest," citing *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969)).

427. OCV's Application became the tentative selectee, based on its proposal to provide first NCE service to 15,894 people, over 5,000 more than the next-highest proposal, and was thus accepted for filing December 17, 2008.<sup>4</sup> EOSC timely filed its petition to deny, claiming that between the time OCV filed its Application in October of 2007 and its tentative selection and acceptance for filing, the Commission granted two other NCE applications, both filed in the October 2007 NCE filing window, with coverage areas overlapping that of OCV's proposal. As a result, claims EOSC, OCV would now provide first NCE service to a population of 48, rather than almost 16,000. Accordingly, EOSC claims that the award of a construction permit to OCV would not comport with the goals of fair distribution of service set out in Section 307(b) of the Communications Act of 1934, as amended (the "Act").<sup>5</sup>

Johnson's application was not tentatively selected to be awarded a construction permit, and its application was dismissed on January 21, 2009, with public notice of the dismissal given on January 26, 2009.<sup>6</sup> Johnson argues that the dismissal was premature, because of the pending EOSC Petition against OCV's Application, and because of the then-pending Iglesia petition for reconsideration.

**Discussion. EOSC Petition.** As EOSC acknowledges, the Commission clearly stated that the determination of populations receiving first and second NCE service is made as of the close of the filing window:

When future applicants report population and other stations serving an area, as they might for fair distribution purposes under 47 U.S.C. § 307(b) (citation omitted), they should use the data that is the most current at the close of any filing window. It is inevitable that there will be shifts in population and in number of services authorized in a region between close of a window and the time we act on an application. However, such inevitable changes will not reduce a future applicant's standing, and thus we will not require such applicants to notify us if these expected changes occur after the close of the window. 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 (citation omitted), the staff will analyze applicants on a similar basis.<sup>7</sup>

Despite this plain language, EOSC argues that, because two NCE applications have already been granted that would drastically reduce the first and second NCE service claims that OCV made in its Application, to adhere to the Commission's announced policy would yield "an absurd result."<sup>8</sup> In light of the fact that EOSC's own application would provide first NCE service to a population of 6,480 and second NCE service to 17,142, EOSC concludes that allowing OCV to remain the tentative selectee would be "arbitrary and capricious, contrary to Section 307(b)," and "entirely divorced from reality."<sup>9</sup>

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<sup>4</sup> *Id.* The next-highest proposal was that of Russell Ministries, Inc., for a new NCE FM station at Savanna, Oklahoma, that would have provided first NCE service to 9,567 persons. EOSC proposed first NCE service to a population of 6,599.

<sup>5</sup> 47 U.S.C. § 307(b).

<sup>6</sup> *Broadcast Actions*, Public Notice, Report No. 46908 (MB Jan. 26, 2009).

<sup>7</sup> *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Memorandum Opinion and Order, 16 FCC Rcd 5074, 5083 (2001) ("NCE MO&O").

<sup>8</sup> EOSC Petition at 4.

<sup>9</sup> *Id.* at 7.

from the date upon which public notice is given of an action or decision for which reconsideration is sought.<sup>14</sup> Johnson seeks reconsideration of its application's dismissal, which occurred January 21, 2009, with public notice given on January 26, 2009.<sup>15</sup> Thus, its petition for reconsideration was to have been filed no later than February 25, 2009. Accordingly, the Johnson Petition is dismissed as untimely filed.

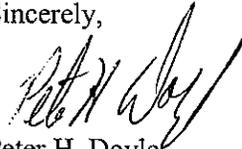
*OCV Application.* We have examined OCV's Application, and find OCV to be fully qualified to be a Commission licensee, and that grant of the application is in the public interest, convenience, and necessity. We therefore grant the application.

**Conclusion/Actions.** Accordingly, IT IS ORDERED that the January 16, 2009, Petition to Deny filed by Eastern Oklahoma State College IS DENIED.

IT IS FURTHER ORDERED that the March 9, 2009, Petition for Reconsideration filed by The Johnson Foundation IS DISMISSED AS UNTIMELY.

IT IS FURTHER ORDERED that the application filed by One Creek Valley Church, Inc., File No. BNPED-20071022AON, for a construction permit for a new noncommercial educational FM station at Hugo, Oklahoma, IS HEREBY GRANTED, subject to the condition that One Creek Valley Church, Inc., must operate technical facilities substantially as proposed for a period of four years of on-air operations.<sup>16</sup>

Sincerely,



Peter H. Doyle  
Chief, Audio Division  
Media Bureau

cc: Margaret L. Miller, Esq.  
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Joseph E. Dunne, III, Esq.  
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The Old Paths Broadcast, Inc.  
Russell Ministries, Inc.

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<sup>14</sup> 47 U.S.C. § 405(a) provides that a "petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of." Section 1.106 (f) of the Commission's Rules implements this statutory mandate and provides that the "petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of public notice of the final Commission action . . . ." 47 C.F.R. § 1.106(f).

<sup>15</sup> See *supra* note 6.

<sup>16</sup> See 47 C.F.R. § 73.7002(c).