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In re: NEW(FX), Westville, CT
Fac. Id. 122131
File No. BNPFT-19991227AAN
Sacred Heart University

NEW(FX), Westville, CT
Fac. Id. 123260
File No. BPTX-20000419AAJ
Connecticut Public Broadcasting

NCE FM Translator Group 37
Petition to Deny

Dear Counsel,

We consider herein a Petition to Deny ("Petition") filed by Sacred Heart University ("SHU") and responsive filings concerning the application of Connecticut Public Broadcasting ("CPB") to construct a new Noncommercial Educational ("NCE") FM translator station (the "CPB Application").¹ In 1999 and 2000, prior to the Commission's adoption of its current NCE comparative standards, SHU and CPB filed mutually exclusive applications to construct a new NCE FM translator station in Connecticut.² In 2001, the Commission adopted new NCE comparative standards and required pending applicants to provide comparative information by filing Supplements based on a "snap-shot" date of June 4, 2001.³ Supplements were due by July 19, 2001. The Media Bureau ("Bureau") tentatively selected the

¹ Specifically, SHU filed a timely Petition on July 1, 2011, CPB filed an Opposition on August 12, 2011, and SHU submitted a Reply on August 25, 2011. SHU consented to late-filing of CPB's Opposition, given service problems.

² CPB, SHU, and a third applicant were designated "Translator Group 37."

³ See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Memorandum Opinion and Order, 16 FCC Rcd 5074, 5103-04 (2001) ("NCE Order") subsequent history omitted. [Supplements](#)
(continued....)

CPB Application for grant on June 7, 2011.⁴ SHU filed a Petition to Deny. SHU argues that the Bureau should have treated the SHU application as a “fill-in” proposal and therefore that it was an error to tentatively select the CPB Application on this same basis. For the reasons herein, we deny SHU’s Petition and grant the CPB Application.

BACKGROUND. To resolve conflicts between two or more applications for new NCE FM translators, we first consider whether any applicant should receive a threshold preference for providing only “fill-in” service, *i.e.*, service located entirely within the 60 dBu contour of a co-owned primary station.⁵ Generally, a fill-in translator corrects for terrain obstructions or other local conditions that may impede reception of a primary station’s signal. Applicants self-reported their qualifications for the fill-in preference by responding to the following question in their Supplements: “Preliminary Matter: Does this application provide fill-in service only?” CPB was the only applicant in Translator Group 37 to answer “yes.”⁶ SHU answered “no” and, thus, was eliminated.

SHU now argues that it “clearly” claimed to provide fill-in service but that its claim was located in the engineering section (Section II) of its original application rather than in its Supplement (Section IV). Specifically, when SHU filed its application in 1999 (the “SHU Application”), it (1) provided a required contour map and (2) responded affirmatively to a question asking whether the map showed the translator’s contour entirely within the primary station’s contour.⁷ Additionally, SHU states that it supported those answers with the following language submitted in its Engineering Statement as part of the SHU Application: “The translator facilities proposed herein will provide a fill-in service for WSHU in the greater New Haven, Connecticut area” and “Figure 3 is a computer generated map depicting the WSHU and proposed Channel 206D 60 dBu F(50,50) contours. It is noted that the proposed 60 dBu lies entirely inside the WSHU 60 dBu.”⁸

With respect to SHU’s subsequent answer of “no” on its Supplement, SHU claims that it found the question’s use of the word “only” to be ambiguous and confusing. SHU explains that it understood the question to be asking whether it claimed a preference only for fill-in service and not for other comparative characteristics of its proposal. SHU asserts that it appropriately answered “no” because SHU, in addition to its earlier showing of fill-in service, was also claiming points as an established local entity.

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and Settlements to Pending Closed Groups of Noncommercial Educational Applications Due by June 4, 2001, Public Notice, 16 FCC Rcd 6893 (MB 2001); *Supplement Extension Notice*, 16 FCC Rcd 10892 (MB 2001). The filing deadline was later extended, while keeping the same snap-shot date. An applicant’s “technical qualifications” such as points for best technical proposal were locked-in using a date of April 21, 2000.

⁴ The lengthy period between the filing and analysis of translator supplements was due to court challenges of the NCE comparative standards as well as the need to substantially complete licensing of new full service NCE FM applicants before turning to secondary proposals to establish translator stations on the same spectrum.

⁵ 47 C.F.R. § 74.1233(e)(1).

⁶ See CPB Application Supplement (Section IV), Preliminary Matter. It would retransmit the signal of WPKT(FM), Meridan, Connecticut solely within that co-owned station’s 60 dBu contour.

⁷ SHU Application, FCC Form 340, Section II, Questions 11 and 12; Engineering Statement, Figure 3. SHU stated that it would rebroadcast, WSHU(FM), Westport, Connecticut.

⁸ SHU Application, Engineering Supplement at 14-15.

In opposition, CPB argues that the phrase “fill-in service only” is “crystal clear.” CPB contends that the question unambiguously asks whether the proposal offers only fill-in service as opposed to a combination of fill-in service plus service outside of the applicant’s full-service contour.⁹ CPB argues that SHU’s current claim for a fill-in priority amounts to a prohibited enhancement of SHU’s comparative position by changing a mistaken answer from “no” to “yes” ten years after the deadline for filing relevant snap-shot date information. CPB contends that such enhancements would prejudice competing applicants that relied on snap-shot date responses. Finally, CPB states that it recognizes that holding applicants to mistaken responses might appear harsh initially, but that the Bureau would not be able to process thousands of applications efficiently if it had to look beyond the applicants’ responses to plainly stated questions.

SHU replies that its response of “no” on the Supplement was not a mistake as alleged by CPB but a correct answer to an ambiguous question and that it is merely asking the Bureau to credit information from SHU’s original application. Because SHU filed that information prior to the snap-shot date, SHU contends that it is not making any prohibited post-snap-shot enhancement.

DISCUSSION. As described above, the form question at issue reads as follows: “Preliminary Matter: Does this application provide fill-in service only?” The question is phrased to elicit information on the type of *service* the applicant will *provide*, and not on the preferences the applicant is seeking. SHU’s professed interpretation of the question is, thus, contrary to the question’s plain language. We have closely examined the instructions to the form and also find no support therein for SHU’s interpretation.¹⁰

The “fill-in service only” question is most reasonably interpreted as asking whether the applicant proposes solely a fill-in service as distinguished from a proposal that would provide at least some service beyond the primary station’s service contours. Inclusion of the term “only” is necessary to satisfy the definition of fill-in service. A proposal to extend service to other areas would not qualify for a preference. SHU is, to our knowledge, the only applicant that had difficulty with the question. We reject SHU’s argument that it gave a correct answer to an ambiguous question.

Next, we consider whether to credit SHU with a fill-in preference based on its original submission despite its incorrect answer on the Supplement. SHU indicated the fill-in nature of its proposal several times in its original engineering documentation. We find, however, that SHU’s initial fill-in service claim cannot be credited. We reject SHU’s apparent view that the Commission is responsible for identifying application discrepancies and determining an applicant’s true intention. The staff correctly took into account the Supplement’s “no” certification. It is impossible, however, to resolve SHU’s conflicting claims within the four corners of the application and, more importantly, consistent with longstanding licensing procedures. When an amendment changes an NCE applicant’s comparative qualifications or introduces conflicting information, the Commission uses the least favorable information to determine an applicant’s comparative position.¹¹ In the present case, SHU’s least favorable response of

⁹ Opposition at 2-4.

¹⁰ See Instructions to FCC Form 349, Section IV [“On channels reserved for noncommercial educational use, the Commission will grant the application of a translator providing fill-in service over one that extends the area of the primary station. In the event of conflicting mutually exclusive applications of the same type (fill-in or non fill-in), however, the Commission will conduct a paper hearing process by applying a point system to select one application for grant.] See also 47 C.F.R. § 74.1233(e) (1)-(3) which similarly describes the fill-in priority.

¹¹ See, e.g., *Comparative Consideration of 32 Groups of Applications to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 25 FCC Rcd 5013, 5019 (2010).

“no” would govern. In this manner, the Commission keeps the comparative process fair to other applicants which, as CPB observes, could otherwise be prejudiced.

Finally, we observe that the Commission has prohibited NCE applicants from benefiting from changes made after the relevant snap-shot date¹² even when correcting mistakes.¹³ For example, the Commission declined to award established local entity points to an applicant that had erroneously certified “no” to the pertinent question. The Commission rejected that applicant’s later claim that it had checked the wrong box and therefore should be awarded the points.¹⁴ Accordingly, we decline to credit SHU’s post-snap shot disavowal of its “no” certification here.

Accordingly, the Petition to Deny by Sacred Heart University, Inc. IS DENIED. The Application filed by Connecticut Public Broadcasting (File No. BNPFT-20000419AAJ) is GRANTED. The application of Sacred Heart University, Inc. (File No. BNPFT-19991227AAN) IS DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

¹² See *NCE Order*, 16 FCC Rcd at 5083-85; 47 C.F.R. § 73.7003(f)(2).

¹³ See *Network of Glory*, Letter, 25 FCC Rcd 7311 (MB 2007) (amendment to correct erroneous population numbers). Cf. *Dennis J. Kelly*, Letter, 25 FCC Rcd 14352 (MB 2010) (mistaken use of east instead of west longitude in tech box could not be corrected without creating a major change although correct longitude contained elsewhere in the application).

¹⁴ See *Comparative Consideration of 37 Groups of Applications to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 26 FCC Rcd 7008, 7044 (2011).