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

In re Applications of:

ANNISTON SEVENTH-DAY
ADVENTIST CHURCH

Application for a New NCE FM
Station at Anniston, Alabama

BOARD OF TRUSTEES OF
JACKSONVILLE STATE UNIVERSITY

Application for a New NCE FM
Station at Anniston, Alabama

NCE Reserved Allotment Group #1

File No.: BNPED-20100226ABT
Facility Id.: 184996

File No.: BNPED-20100226AFB
Facility Id.: 184885

Accepted / Filed

MAR - 4 2015

**Federal Communications Commission
Office of the Secretary**

To: Office of the Secretary
Attn: The Commission

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

The Board of Trustees of Jacksonville State University ("JSU"), by and through its attorneys, hereby submits its Reply to the Opposition to Petition for Reconsideration filed by the Anniston Seventh-day Adventist Church ("ASDA") on February 20, 2015, with regard to the Commission's Memorandum Opinion and Order denying review of the Media Bureau's decision to reinstate and grant the above-referenced application of ASDA for a new noncommercial educational ("NCE") station at Anniston, Alabama, and to dismiss the JSU application, *Anniston Seventh-Day Adventist Church and Board of Trustees of Jacksonville State University*, FCC 14-203, released December 23, 2014 (the "MO&O"). With respect thereto, the following is submitted:

ASDA's argument in Opposition is primarily a procedural one, in that it claims that JSU has not advanced any newly available facts or legal developments. In this assertion, ASDA is mistaken. Quite to the contrary, in its Petition for Reconsideration, JSU pointed out the recent case of *Wynnewood Community Radio Association*, FCC 14-72, released June 5, 2014, in which another applicant was dismissed for failure to meet basic qualifications standards. This case represents a new legal development which occurred after JSU's last opportunity to present such matters to the Commission. JSU's application for review in this proceeding was filed on June 14, 2013, but *Wynnewood Community Radio* was not decided until almost a year later, on June 5, 2014. Accordingly, JSU's Application for Review does rely upon new matters which it did not have a previous opportunity to present to the Commission.

Moreover, the reasoning of *Wynnewood Community* is directly applicable to the instant proceeding, in that both the applicant in *Wynnewood Community Radio* and ASDA failed to meet basic threshold requirements to be qualified as an applicant, but one application was dismissed while the other was reinstated. Thus, *Wynnewood Community Radio* sheds new light on what the Commission considers to be sufficient notice of required applicant qualifications such that an application may properly be dismissed for failure to meet those qualifications.

In both *Wynnewood Community Radio* and in the instant case, there was a lack of full and explicit notice (referenced in this proceeding by the Commission in its *MO&O*) that an applicant that failed to meet basic qualifying standards would be dismissed. The issue in *Wynnewood Community Radio* was an applicant's failure to demonstrate that it was an established non-profit corporation or state-recognized unincorporated association at the time it filed its application. While the qualifying requirement that NCE licensees be "educational organizations" is mentioned in the Commission's rules (47 C.F.R. §73.503(a)), there is no mention of any required

state recognition of the organizational form or of any penalties for applicants that do not meet this requirement. Furthermore, neither the recent *Wynnewood Community Radio* decision nor the underlying Bureau decision in that matter cited to any FCC decision or notice that would have given the applicant in that proceeding, prior to filing its application, full and explicit notice in so many words that failure to establish its qualifications as a non-profit corporation or state-recognized unincorporated association would result in dismissal of its application without opportunity to amend. Nonetheless, the applicant in *Wynnewood Community Radio* was, in fact, dismissed without an opportunity to amend to cure its defect. Thus, such notice cannot be the *sine qua non* for dismissal of an unqualified applicant.

In contrast, the third channel reservation requirements at issue in this proceeding are quite explicitly spelled out in the order adopting the procedures for reserving otherwise non-reserved channels. *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 18 FCC Rcd 6691, 6705 (2003). Furthermore, the Public Notice announcing the filing window also made it quite clear that compliance with the third reservation standard was an absolute requirement and restated the standard in mandatory language under a heading of “Reservation Service Requirements.” *Media Bureau Announces Filing Window for Vacant FM Allotments Reserved for Noncommercial Educational Use*, Public Notice, 24 FCC Rcd 12621, 12623 (MB 2009). Nonetheless, despite the plain statement of these mandatory requirements, ASDA was deemed not to have sufficient warning that its decision to disregard them could lead to dismissal of its application.

Comparison and contrast of the outcomes of *Wynnewood Community Radio* and the instant proceeding demonstrates disparate treatment of similarly situated applicants. The *Wynnewood Community Radio* application was submitted in response to the same Public Notice

which prompted the filing of the ASDA and JSU applications. That Public Notice failed to spell out the possibility of dismissal for failure to meet the basic qualifications of being a state-recognized educational institution or of proposing service to meet the third channel reservation requirement. Nonetheless, one such failure resulted in dismissal of the defective application, while the other resulted in an opportunity to amend the application to cure the defect. Clearly, the two decisions are at odds. Accordingly, the Commission must reverse its decision in this proceeding, follow the precedent set by *Wynnewood Community Radio*, and dismiss the ASDA application for failure to meet threshold qualification standards.

A further, and separate, reason for the Commission to reconsider its decision is the fact that while the Commission reversed itself with regard to one decision involving dismissal of an applicant for failure to meet the third channel reservation requirement, it did not disturb or even address the two other instances in the same order in which it dismissed applicants for the same failure. *Comparative Consideration of 37 Groups of Mutually Exclusive Applications for Permits to Construct New and Modified Noncommercial Educational Stations File in the February 2010 and October 2007 Filing Windows*, 26 FCC Rcd. 70087021, 7028, 7036 (MB 2011). With the exception of the one reversal, the Commission's past treatment of other applications which it was aware failed to meet the basic, threshold qualification of compliance with the third channel reservation standard has been entirely consistent with finding this failure to be an incurable defect. This prior consistency underscores a conclusion that the Commission's first instinct was correct.

Moreover, in opposing JSU's Petition for Reconsideration, ASDA has made no demonstration that the potential abuses likely to result from allowing belated compliance with the third channel reservation standard would not occur. As noted, the abuse is not one related to


improving comparative qualifications after the end of a filing window, but rather of moving forward with impermissibly inflated comparative qualifications established prior to the close of the window. An applicant may propose an unrealistically large service area which does not comply with the third channel reservation standard, and claim the comparative credit for that area, in the hope that such non-compliance will not be noticed. It would rest secure in the knowledge that if its failure were caught, its only penalty would be that it would be required to come into compliance with established policies, as it should have done in the first place. In the meantime, an applicant will have had an opportunity to study applications submitted by competing applicants and may design its new proposal based on that knowledge. Clearly, continuing such a permissive policy encourages carelessly filed applications and gamesmanship.

In sum, a case decided after JSU last had an opportunity to make presentations establishes that the notice accorded ASDA was ample to support dismissal of its application. Reinstatement of ASDA's application represents impermissibly disparate treatment of similarly situated applicants. Moreover, the Commission's failure to enforce the third channel reservation standard as a matter of basic, threshold qualifications will encourage abuse and gamesmanship.

WHEREFORE, the premises considered, JSU respectfully requests that the ASDA application be dismissed, and that the JSU application be reinstated and granted.

Respectfully submitted,

**BOARD OF TRUSTEES OF
JACKSONVILLE STATE UNIVERSITY**

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March 4, 2015

Certificate of Service

I, Deborah N. Lunt, hereby certify that on this 4th day of March, 2015, I caused a copy of the foregoing "Reply to Opposition to Petition for Reconsideration" to be served via U.S. mail, postage prepaid, upon the following:

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