

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

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Federal Communications Commission
Office of the Secretary

In re Applications of:

ANNISTON SEVENTH-DAY
ADVENTIST CHURCH

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

Application for a New NCE FM
Station at Anniston, Alabama

BOARD OF TRUSTEES OF
JACKSONVILLE STATE UNIVERSITY

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

Application for a New NCE FM
Station at Anniston, Alabama

NCE Reserved Allotment Group #1

To: Office of the Secretary
Attn: The Commission

REPLY TO OPPOSITION TO APPLICATION FOR REVIEW

The Board of Trustees of Jacksonville State University ("JSU"), by and through its attorneys, hereby replies to the Opposition to Application for Review submitted by the Anniston Seventh-Day Adventist Church ("ASDA") with regard to the Media Bureau's letter decision denying reconsideration of its 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, *NCE Reserved Allotment Group 1, New NCE-FM, Anniston, Alabama*, DA 13-1104, released May 15, 2013 (the "*Reconsideration Decision*"). With respect thereto, the following is submitted:

In its Application for Review, JSU demonstrated that the Commission had provided adequate notice that failure to meet the basic qualifications requirement of the third channel

reservation standard would result in dismissal of a non-compliant application and analogized the situation to one in which the Commission would not hesitate to dismiss an applicant for an NCE facility that described itself as a for-profit entity. JSU further noted that *JEM Broadcasting Co., Inc. v FCC*, 22 F.3d 320, 75 R.R.2d 273 (D.C. Cir. 1994), a case cited by the Media Bureau as a basis for reinstating the ASDA application, does not stand for the proposition that a particular form of notice is required to inform basically ineligible applicants that their application may be subject to dismissal.

In its Opposition, ASDA argues that JSU's reading of *JEM Broadcasting Co.* is incorrect. Its own description of the case, however, states only that the Court had found that the Commission's "hard look" policy had given adequate notice that applications failing to include one of the specified items would be subject to dismissal. The fact that the Court found that one form of notice was adequate, however, in no way means that all others are inadequate. Regarding the third channel reservation standard, the Commission has issued clear rules that specify that meeting this standard is the *sine qua non* for reserving a channel in the otherwise non-reserved band. In addition, in adopting these rules, the Commission carried over the third channel reservation standard to the application stage as an eligibility requirement. *Id.* at 6705. This requirement not only is laid out in the Commission's rules but also was expressly restated in the *Public Notice* announcing the filing window in which ASDA submitted its application. 47 C.F.R. Section 73.202(a)(1); *Media Bureau Announces Filing Window for Vacant FM Allotments Reserved for Noncommercial Educational Use*, Public Notice, 24 FCC Rcd 12621. Finally, that *Public Notice* stated that "[t]he Commission staff will return applications and amendments not submitted in accordance with the procedures described in this Public Notice." *Media Bureau Announces Filing Window for Vacant FM Allotments Reserved for*

Noncommercial Educational Use, Public Notice, 24 FCC Rcd at 12623. The requirement to meet the third channel reservation standard is one of the procedures set forth in the Public Notice; therefore, there was, in fact, explicit notice to applicants that failure to meet it would result in return of their applications.

ADSA also argues that a comparison between failure to meet the third channel reservation standard and a failure to be qualified as a non-profit organization is inapposite, as the difference between for-profit and non-profit entities goes to the core of an applicant's purpose. In point of fact, however, the two are entirely analogous. Unless a channel allotment meets the third channel reservation standard, it is not eligible for reservation, and its basic purpose remains as a commercial allotment. Thus, the satisfaction or failure to satisfy the third channel reservation standard marks a dividing line between allotments that may be reserved and allotments which may not be reserved, just as for-profit or non-profit status determines eligibility or ineligibility to apply for a reserved channel. Likewise applicants which apply for a channel which has been reserved within the non-reserved band must possess the basic requirements which make it possible for the channel reservation to continue if its application were granted; without continuing those qualifications, it is no longer possible for the channel to be reserved, and, as a practical matter, a non-profit applicant is no longer eligible.¹ Thus, meeting the third channel reservation standard is a necessary qualification just as non-profit status is.

In its Application for Review, JSU also noted that the reinstatement of the ASDA application was an action by the Media Bureau which attempted improperly to overturn a decision by the full Commission to dismiss applicants which failed to meet the third channel

¹ While it is theoretically possible for a non-profit entity to apply for a non-reserved channel, if it does so, and a for-profit applicant also applies, the non-profit entity will be dismissed. *Re-examination of the Comparative Standards for Noncommercial Educational Applicants*, 18 FCC Rcd 6691, 6699-6700 (2003).

reservation standard. ASDA has tried to create a significant difference between one of the three applicants so dismissed by noting that the applicant had admitted its failure and thus not been chosen as a tentative selectee. The true significance of the applicant's admission of its failure to been the third channel reservation standard, however, is only that it was impossible for the qualifying defect to be overlooked. Nothing changes the fact that each and every time that the Commission was aware of the existence of this defect, the applicant was dismissed. Such dismissals contrast with the Commission's treatment of other defects, such as the failure to submit required documentation to support claims of localism or diversity, where the Commission simply refuses to award the claimed comparative points. *See, e.g., 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. 7008, 7027 (2011). Thus, it is clear that the Commission views a failure to satisfy the third channel reservation standard as a basic, disqualifying defect warranting dismissal. The ASDA application likewise should have been dismissed, as its application also was patently defective at the time of the closing of the filing window. The fact that it had not explicitly acknowledged the defect is irrelevant to whether or not it existed but only made it easier for the defect to elude detection.

Moreover, like the Big Pine Key applicant, ASDA apparently intended to proceed with its unqualified application. When JSU initially petitioned to deny the ASDA application, ASDA did not amend its application or otherwise claim compliance, but rather argued that it should not be required to come into compliance with the third channel reservation standard, as, in ASDA's opinion, the 10 percent benchmark embodied in that standard was bad policy and absurd. *See* ASDA "Opposition to Petition to Deny," filed June 30, 2011, at 4. It was only after its

application was dismissed that ASDA moved away from its arrogant position, decided that the Commission's Rules actually mean what they say, and attempted to amend its application.

At that point, ASDA was no longer a tentative selected, but a dismissed applicant, and another tentative selectee had been chosen. Thus, as previously explained, Section 73.3533(b)(2) of the Commission's Rules was inapplicable. The fact that the Commission has not always been as precise in its use of language as it might have been does not change the fact that the terms "dismiss" and "return" are terms of art.

Finally, while ASDA has claimed that its error was inadvertent, there is no way to know whether its claim is true, particularly in light of ASDA's initial refusal to modify its proposal to come into compliance with the Commission's requirements. In any event, the Commission cannot ignore the incentives that it creates with the precedent it sets in adjudicatory decisions. To let the current decision stand cannot but encourage gamesmanship and abuse.

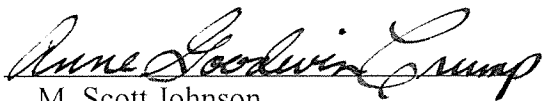
WHEREFORE, the premises considered, JSU respectfully requests that the ASDA application be dismissed, and that the JSU application be reinstated and granted.

Respectfully submitted,

**BOARD OF TRUSTEES OF
JACKSONVILLE STATE UNIVERSITY**

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July 18, 2013

By: 
M. Scott Johnson
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Certificate of Service

I, Deborah N. Lunt, hereby certify that on this 18th day of July, 2013, I caused a copy of the foregoing "Reply to Opposition to Application for Review" to be served via U.S. mail, postage prepaid, upon the following:

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Deborah N. Lunt