



Federal Communications Commission  
Washington, D.C. 20554

July 8, 2010

**DA 10-1272**

*In Reply Refer to:*

1800B3-HOD

Released: July 8, 2010

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**In re: NCE October 2007 Window  
MX Group Number 363**

New NCE(FM), Gloucester, Massachusetts  
Facility ID No. 165651  
Christian Music Network, Inc.  
File No. BNPED-20071012AEE

New NCE(FM), Middleboro, Massachusetts  
Facility ID No. 174732  
Home Improvement Ministries  
File No. BNPED-20071015AGL

New NCE(FM), Middleborough Center, Massachusetts  
Facility ID No. 177016  
Talking Information Center, Incorporated  
File No. BNPED-20071022BVV

**Petition for Severance and Grant  
Petitions for Reconsideration  
Joint Motion for Approval of Settlement Agreement**

Gentlemen:

We have before us three petitions for reconsideration: (1) a Petition for Reconsideration and Reinstatement *Nunc Pro Tunc* filed by Christian Music Network, Inc. ("CMN") on June 12, 2009 ("CMN Petition"), directed to the dismissal of its application for a construction permit to build a new NCE FM station at Gloucester, Massachusetts ("CMN Application"); (2) a Petition for Reconsideration filed by Talking Information Center, Incorporated ("TIC") on May 14, 2009 ("TIC Petition"), directed to the dismissal of its application for a construction permit to build a new NCE FM station at Middleborough

Center, Massachusetts (“TIC Application”); (3) a Petition for Reconsideration filed by Home Improvement Ministries (“HIM”) on June 10, 2009 (“HIM Petition”), directed to the dismissal of its application for a construction permit to build a new NCE FM station at Middleboro, Massachusetts (“HIM Application”). All three Petitions are directed to a May 13, 2009, *Public Notice* issued by the Chief, Audio Division, dismissing their applications.<sup>1</sup>

Also before us is a Petition for Severance and Grant (“Severance Petition”) filed by TIC on May 8, 2009, which seeks processing of the TIC and HIM applications separate from the remainder of the applications in MX Group 363. Finally, before us is a Joint Motion for Approval of Settlement Agreement filed by TIC and HIM on June 10, 2009 (“Joint Motion”), which requests that the Commission approve the parties’ Settlement Agreement and, consistent with that agreement, grant the TIC Application and dismiss with prejudice the HIM Application.

For the reasons set forth below, we (1) deny the CMN Petition; (2) grant the TIC and HIM Petitions and reinstate the TIC and HIM Applications *nunc pro tunc*; (3) grant the Joint Motion and approve the Settlement Agreement; (4) dismiss the Severance Petition as moot; and (5) accept the TIC Application for filing, establishing a deadline thirty (30) days hereafter for the filing of petitions to deny. If after the petition to deny period has run, there is no substantial and material question concerning the grantability of the TIC Application, we will grant the TIC Application and dismiss the HIM Application with prejudice.

*Background.* CMN, TIC and HIM submitted their applications during a filing window for NCE FM applications in October 2007. On June 18, 2008, the Bureau issued a Public Notice that grouped these three applications into NCE MX Group 363 along with ten other applications.<sup>2</sup> Pursuant to established procedures,<sup>3</sup> the Bureau determined that an application filed by the University of Massachusetts (“UMass”) was entitled to a dispositive preference under Section 307(b) of the Communications Act of 1934, as amended (“Act”),<sup>4</sup> and identified UMass as the tentative selectee in NCE MX Group 363.<sup>5</sup> The Bureau’s tentative selection of the UMass Application triggered a 30-day period for filing of petitions to deny.

No party filed a petition to deny the UMass Application. On May 4, 2009, Wellspring House, Inc. (“WHI”), one of the other applicants in NCE MX Group 363, withdrew its application. On May 8, 2009, TIC filed its Severance Petition, arguing that, as a result of the withdrawal of the WHI Application, the TIC and HIM Applications “are no longer part of MX Group 363.”<sup>6</sup> TIC submits an engineering exhibit that demonstrates that its and the HIM Application conflicted only with each other and the WHI

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<sup>1</sup> *Broadcast Actions*, Public Notice, Report No. 46984 (May 13, 2009) (“*Dismissal Public Notice*”).

<sup>2</sup> See *Media Bureau Identifies Groups of Mutually Exclusive Applications*, Public Notice, 23 FCC Rcd 9508 (MB 2008).

<sup>3</sup> See 47 C.F.R. § 73.7002 (procedures for selecting among mutually exclusive applicants for stations proposing to serve different communities); see also *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000) (“*NCE Comparative Order*”); Memorandum Opinion and Order, 16 FCC Rcd 5074, 5105 (2001) (“*NCE Comparative MO&O*”), reversed in part on other grounds, *NPR v. FCC*, 254 F.3d 226 (D.C. Cir. 2001).

<sup>4</sup> 47 U.S.C. § 307(b). A Section 307(b) analysis is ordinarily conducted at the staff level because the Bureau has delegated authority to make Section 307(b) determinations in NCE cases. See *NCE Comparative Order*, 15 FCC Rcd at 7397.

<sup>5</sup> See *Threshold Fair Distribution Analysis of 21 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, 24 FCC Rcd 3873, 3879-80, 3890 (MB 2009) (“*Tentative Selectee Order*”).

<sup>6</sup> Severance Petition at 3.

Application. Given this and the withdrawal of the WHI Application, TIC urges us to process its and the HIM Application as a separate NCE MX Group.

On the same day that TIC filed its Severance Petition, the Bureau dismissed the TIC and HIM Applications.<sup>7</sup> TIC immediately sought reconsideration. TIC argues that Bureau staff was “unaware” of its Severance Petition when it dismissed the TIC Application. TIC seeks reinstatement and grant of its application. On June 10, 2009, TIC filed a Supplement to its Petition, reporting that it had entered into a Settlement Agreement with HIM to increase its “likelihood of success on reconsideration.”<sup>8</sup> The Settlement Agreement provides for grant of the TIC Application and dismissal of the HIM Application with prejudice. That same day, TIC and HIM filed a Joint Motion for Approval of Settlement Agreement. The Joint Motion seeks approval of the Settlement Agreement to the extent we deem such approval a legally necessary condition precedent to grant of the TIC Application. Also, on June 10, 2009, HIM filed its Petition for Reconsideration of the dismissal of its application. HIM specifically states that it seeks reinstatement of its application “solely for the purposes of effectuating” the Settlement Agreement.<sup>9</sup>

Subsequently, on June 12, 2009, CMN filed its Petition for Reconsideration of the dismissal of its application, seeking reinstatement of its application *nunc pro tunc*.<sup>10</sup> CMN argues that its application does not conflict with the UMass Application and therefore may be granted.

*Discussion. CMN Application.* Based on controlling Commission case law, we deny the CMN Petition. In the *NCE Comparative MO&O*, the Commission considered a geographic-based processing proposal that would have sanctioned the tentative selection of more than one applicant in a mutually exclusive application group.<sup>11</sup> The Commission rejected this proposal, noting that although it might be beneficial to select more than one applicant, doing so could potentially result in the selection of an inferior applicant as a secondary selectee.<sup>12</sup> Instead, the Commission determined that the better approach would be to dismiss all non-selected applicants in a group, even if a particular application is not mutually exclusive with the primary selectee of the group.<sup>13</sup> Therefore, we reject the arguments that the CMN

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<sup>7</sup> See *Dismissal Public Notice*. The Bureau also dismissed the other ten applications included in MX Group 363. No other applicant challenged the dismissal of its application.

<sup>8</sup> Settlement Agreement, Recital I.

<sup>9</sup> HIM Petition at 3 (“Because approval of the Settlement Agreement would require HIM’s Application to be pending before the FCC, HIM hereby seeks reconsideration of the dismissal of HIM’s Application, and the reinstatement of HIM’s Application, solely for the purposes of effectuating the settlement with TIC.”). See also Settlement Agreement, § 2 (“HIM will ... file a Petition for Reconsideration of the dismissal of HIM’s Application, only for the purpose of the FCC staff’s consideration of the Joint Motion, and the FCC staff’s approval of this Agreement, if the FCC staff deems that such approval is necessary to a grant of TIC’s Application.”).

<sup>10</sup> University Petition at 1, 5.

<sup>11</sup> *NCE Comparative MO&O*, 16 FCC Rcd at 5104.

<sup>12</sup> *Id.* at 5105 (“... after the best qualified applicant is selected, it is possible that remaining applicants that are not mutually exclusive with this primary selectee and thus potentially secondary selectees, may also be significantly inferior to other applicants that are eliminated because they *are* mutually exclusive with the primary selectee. Rather 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.”) (emphasis in original).

<sup>13</sup> *Id.* The Commission recently reiterated that only one application from each mutually exclusive group would be granted and that the remaining applications, even if not mutually exclusive with the tentative selectee, should be dismissed. See *Comparative Consideration of 59 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in the October 2007 Filing Window*, Memorandum Opinion and Order, 25 FCC Rcd 1681, 1716 (2010) (“Finally, we note that we previously concluded 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. Accordingly we direct the staff to deny petitions

Application should be granted based solely on the absence of any direct conflict with the tentative selectee, UMass. Accordingly, we affirm the staff dismissal of the CMN Application.<sup>14</sup>

TIC and HIM Applications. We grant the TIC and HIM Petitions in order to consider the Settlement Agreement reached by these applicants. As discussed above, TIC and HIM have entered into a Settlement Agreement and filed a Joint Motion seeking our approval of the agreement.<sup>15</sup> We have reviewed the Joint Motion and attached declarations, and the Settlement Agreement. We find that it complies fully with Section 311(c) of the Act and Section 73.3525 of the Rules, which govern settlement agreements among mutually exclusive broadcast applicants. Specifically, both TIC and HIM have certified that they did not file their applications for the purpose of reaching or carrying out a settlement. In addition, the Settlement Agreement specifies the exact nature of the consideration that HIM will receive from TIC, which both TIC and HIM have certified will not exceed the out-of-pocket expenses HIM incurred in preparing, filing and prosecuting its application.<sup>16</sup> TIC and HIM further state that the agreement will serve the public interest by expediting the inauguration of new NCE(FM) service to the community of Middleborough Center, Massachusetts, and by conserving the Commission's, TIC's and HIM's resources. Finally, the settlement does not raise any Section 307(b) questions as TIC and HIM propose to serve the same community.<sup>17</sup>

We find that the grant of the Joint Motion would serve the public interest. It would enable the grant of the TIC Application and, as a result, expedite the provision of new NCE(FM) service to Middleborough Center, Massachusetts. As we have stated, we “will process any settlement ... which results in our ability to grant at least one singleton application.”<sup>18</sup> We note that the TIC Application is in a significantly different procedural posture than the CMN Application. We deny reconsideration of our dismissal of that application herein because any grant of the CMN Application would have been premised on the dismissal as part of the comparative process of at least one other application that was mutually exclusive with the CMN Application. Here, in contrast, grant of the TIC Application is premised upon the fact that, as a result of the unilateral withdrawal of the WHI Application and the Settlement Agreement between TIC and HIM, the TIC Application is no longer mutually exclusive with any application. Grant of the TIC Application will not undermine the comparative process or raise the concerns that led the Commission to determine that only one application from each mutually exclusive group would be granted and that the remaining applications, even if not mutually exclusive with the

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for reconsideration based on the theory that the dismissed application is not mutually exclusive with the granted application.” (internal citations omitted).

<sup>14</sup> CMN may refile its application in the next available NCE filing window.

<sup>15</sup> 47 U.S.C. § 311(c); 47 C.F.R. § 73.3525. While staff previously dismissed the TIC and HIM Applications, both TIC and HIM have sought reconsideration. As a result, the TIC and HIM Applications remain pending and eligible to settle. See 47 U.S.C. § 311(c)(4) (“an application shall be deemed to be ‘pending’ before the Commission from the time such application is filed with the Commission until an order of the Commission granting or denying it is no longer subject to rehearing by the Commission or to review by any court”); 47 C.F.R. § 73.3525(h) (“an application shall be deemed to be ‘pending’ before the FCC and a party shall be considered to have the status of an ‘applicant’ from the time an application is filed with the FCC until an order of the FCC granting or denying it is no longer subject to reconsideration by the FCC or to review by any court). See also *NCE Comparative Order*, 15 FCC Rcd at 7418 (“we stress that parties are free to settle at any time during the process”). To the extent that our action here is inconsistent with our treatment of the Settlement Agreement at issue in *The Helpline*, Letter, 25 FCC Rcd 2597 (MB 2010), we disavow that decision, which was inconsistent with Section 311(c)(4) of the Act and Section 73.3525(h) of the Rules.

<sup>16</sup> HIM has submitted a detailed accounting of these expenses.

<sup>17</sup> *Tentative Selectee Order*, 24 FCC Rcd at 3879.

<sup>18</sup> *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).

tentative selectee, should be dismissed. Accordingly, we grant the Joint Motion, approve the Settlement Agreement and, consistent with that agreement, accept the TIC Application for filing.<sup>19</sup>

*Conclusion/Action.* IT IS ORDERED, that the Petition for Reconsideration and Reinstatement *Nunc Pro Tunc* filed by Christian Music Network, Inc. on June 12, 2009, IS DENIED.

IT IS FURTHER ORDERED that the Petition for Reconsideration filed by Talking Information Center, Incorporated on May 14, 2009, and the Petition for Reconsideration filed by Home Improvement Ministries on June 10, 2009, ARE GRANTED, and that the application for a new noncommercial educational FM station at Middleborough Center, Massachusetts (File No. BNPED-20071022BVV) filed by Talking Information Center, Incorporated and the application for a new noncommercial educational FM station at Middleboro, Massachusetts (File No. BNPED-20071015AGL) filed by Home Improvement Ministries ARE REINSTATED *NUNC PRO TUNC*.

IT IS FURTHER ORDERED that the Joint Motion for Approval of Settlement Agreement filed by Talking Information Center, Incorporated and Home Improvement Ministries on June 10, 2009, IS GRANTED and the Settlement Agreement IS APPROVED.

IT IS FURTHER ORDERED that the application for a new noncommercial educational FM station at Middleborough Center, Massachusetts (File No. BNPED-20071022BVV) filed by Talking Information Center, Incorporated IS ACCEPTED FOR FILING. If, after a 30-day petition to deny period has run, there is no substantial and material question concerning the grantability of the application, we intend, by public notice, TO DISMISS the application for a new noncommercial educational FM station at Middleboro, Massachusetts (File No. BNPED-20071015AGL) filed by Home Improvement Ministries and to grant the application of Talking Information Center, Incorporated (File No. BNPED-20071022BVV).

Finally, IT IS FURTHER ORDERED that the Petition for Severance and Grant filed by Talking Information Center, Incorporated on May 8, 2009, is DISMISSED AS MOOT.

Sincerely,

Peter H. Doyle, Chief  
Audio Division  
Media Bureau

cc: Christian Music Network, Inc.  
Home Improvement Ministries  
Talking Information Center, Incorporated

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<sup>19</sup> Our actions render the Severance Petition moot. We dismiss it as such herein.