



**Federal Communications Commission
Washington, D.C. 20554**

November 18, 2010

In Reply Refer to:
1800B3-SS

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In Re: **NEW NCE FM, Leesport, PA**
Bible Broadcasting Network, Inc.
Facility ID No. 175920
File No. BNPED-20071019APD

Petition to Deny

Dear Applicants:

We have before us the application of Bible Broadcasting Network, Inc. ("BBN") for a new noncommercial educational ("NCE") FM station to serve Leesport, Pennsylvania (the "BBN Application"). We also have before us a September 2, 2010, Petition to Deny the BBN Application (the "Petition") filed by Berks Radio Association ("BRA") and related pleadings.¹ For the reasons set forth below, we deny the Petition.

Background. BBN, BRA, Berks Community Television, Inc. ("BCT"), and Bridgebuilders International Leadership Network ("BILN") submitted their applications during a filing window for NCE FM applications in October 2007.² On June 18, 2008, the Media Bureau ("Bureau") issued a public notice that identified these four applications as mutually exclusive and grouped them into NCE MX

¹ We also have before us BBN's September 15, 2010, Opposition to Petition to Deny (the "Opposition") and BRA's September 27, 2010, Reply to the Opposition (the "Reply").

² File Nos. BNPED-20071019BFI, Frackville, Pennsylvania (the "BRA Application"); BNPED-20071019AGT, Leesport, Pennsylvania (the "BCT Application"); and BNPED-20071022AKK, Robeson, Pennsylvania (the "BILN Application"). The BCT and BILN Applications were dismissed by the staff on September 10, 2010. *See Broadcast Actions*, Public Notice, Report No. 47321 (rel. Sep. 15, 2010).

Group 403.³ In the *Comparative Consideration Order*,⁴ the Commission applied NCE comparative selection criteria⁵ to twenty-six groups of mutually exclusive NCE FM applications, including Group 403, and tentatively selected one winner in each group. In Group 403, the Commission tentatively selected the BBN Application for grant based on a point determination. It found that BBN was entitled to two points and BRA was entitled to one point.⁶ The Commission then announced a 30-day period for filing petitions to deny the BBN Application. BRA timely filed its Petition on September 2, 2010.

In its Petition, BRA objects to the grant of tentative selectee status to the BBN Application,⁷ averring that: (1) BRA should have received points for being an established local applicant and for having diversity of ownership pursuant to Section 73.7003 (b)(1) and (2) of the Commission's Rules (the "Rules") even though it did not submit documentation with the BRA Application;⁸ (2) BRA received no notice as to when and how the subject documentation was to be submitted;⁹ and (3) BBN should not have received points for diversity of ownership because the BBN Application's exhibit "does not bind the principals of BBN . . . only binds future directors and officers . . . [and] does not address the status of BBN's current directors and officers."¹⁰ In its Opposition, BBN asserts that the Commission was correct in naming it as the tentative selectee in Group 403.¹¹ In its Reply, BRA reiterates its argument that BBN

³ See *Media Bureau Identifies Groups of Mutually Exclusive Applications*, Public Notice, 23 FCC Rcd 9508 (MB 2008).

⁴ See *Comparative Consideration of 26 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 11108, 11133 (2010) ("*Comparative Consideration Order*").

⁵ See 47 C.F.R. §§ 73.7000 – 05.

⁶ BRA claimed that it qualified for three points as an established local applicant. However, BRA did not submit any documentation to support its claim, and thus, it was not credited with any points under this criterion. BBN certified that it was not entitled to any points under this criterion. Each claimed two points for diversity of ownership. However, BRA provided no information from which the Commission or other parties could verify that BRA timely modified its governing documents to maintain diversity in the future. Accordingly, the Commission awarded two points to BBN and no points to BRA under this criterion. Neither applicant claimed points as a statewide network. With respect to technical parameters, BBN's proposed 60 dBu contour would encompass 527 square kilometers with a population of 144,445. BRA's proposed 60 dBu contour would encompass 2,047 square kilometers with a population of 162,271. BRA therefore qualified for one point under the best technical proposal criterion because its proposal would serve at least 10 percent more area and population than the BBN proposal.

⁷ BRA is a competing applicant in this mutually-exclusive NCE group. See *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940).

⁸ BRA argues that the instructions to FCC Form 340 do not mandate that such documentation be submitted, and that in any event it satisfied the requirements for providing documentation supporting its diversity points in two previously filed, unrelated applications. BRA cites File Nos. BNPED-20071018ATS, Hamburg, Pennsylvania ("BRA Hamburg") and BPED-9980923MA, Kutztown, Pennsylvania ("BRA Kutztown"). See Petition at 3-4. These applications were dismissed by the staff on January 28, 2010, and September 26, 2005, respectively.

⁹ *Id.*

¹⁰ See Reply at 1, citing BBN Application at Exhibit 12; see also Petition at 5.

¹¹ Opposition at 4.

is not entitled to points for diversity of ownership, and thus, BRA should be named tentative selectee in Group 403.¹²

Discussion. In assessing the merits of a petition to deny under Section 309(d) of the Communications Act of 1934, as amended, we first determine whether the petitioner makes specific allegations of fact that, if true, would demonstrate that grant of the application would be *prima facie* inconsistent with the public interest.¹³ If the Commission determines that the petitioner has satisfied the threshold determination, it proceeds to determine whether, on the basis of the application, the pleadings filed, or other matters which the Commission may officially notice, the petitioner has presented a "substantial and material question of fact" to warrant further inquiry.¹⁴ Using this standard, we consider BRA's allegations.

BRA's Point Total. The Commission compares mutually exclusive groups of NCE FM applications under the point system set forth in Section 73.7003 of the Rules.¹⁵ Three points are awarded to applicants that certify that they have been local and established for at least two years. Applicants with a headquarters, campus, or 75 percent of their board members residing within 25 miles of the reference coordinates of the community of license are considered local. The applicant also must certify that it has placed documentation supporting its certification in a local public inspection file, and that it has submitted that documentation to the Commission. Any applicant awarded localism points by the Commission must provide such support for its certification.¹⁶

Two points are awarded for local diversity of ownership if the principal community contours of the applicant's proposed station and any other station in which any party to the application holds an attributable interest do not overlap.¹⁷ Any applicant awarded diversity of ownership points by the Commission must submit copies of pertinent governing documents to support its certification.¹⁸

BRA is misguided in arguing that, although it did not submit documentation in the BRA Application supporting a claim of diversity and localism points, it provided such documentation in a local

¹² Reply at 2.

¹³ See *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). The Commission determines whether a petitioner has met this threshold inquiry in a manner similar to a trial judge's consideration of a motion for directed verdict: "if all the supporting facts alleged in the affidavits were true, could a reasonable fact finder conclude that the ultimate fact in dispute had been established." *Gencom Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987) ("*Gencom*"), cited in *Edwin L. Edwards*, Memorandum Opinion and Order and Notice of Apparent Liability, 16 FCC Rcd 22236, 22248 (2001).

¹⁴ *Gencom*, 832 F.2d at 181; see also 47 U.S.C. § 309(d)(2).

¹⁵ See 47 C.F.R. § 73.7003.

¹⁶ See *Comparative Consideration Order*, 25 FCC Rcd at 11110.

¹⁷ See 47 C.F.R. § 73.7003(b)(2). Parties with attributable interests are defined as the applicant, its parent, subsidiaries, their officers, and members of their governing boards. See 47 C.F.R. §§ 73.7000 and 73.3555. Interests of certain entities providing more than 33 percent of the applicant's equity and/or debt are also attributable. *Id.*; see also Section IV, Question 2, FCC Form 340.

¹⁸ *Comparative Consideration Order*, 25 FCC Rcd at 11110-11.

public inspection file and in the previously-filed BRA Hamburg and BRA Kutztown applications.¹⁹ The *Comparative Consideration Order* clearly states that applicant point claims must be readily ascertainable from timely-filed application exhibits.²⁰ Certifications which require the applicant to submit documentation, but which are not supported with any such timely submitted documentation cannot be credited.²¹ Furthermore, Section 73.7003(b) of the Rules unambiguously states: “Based on information provided *in each application*, each applicant will be awarded a predetermined number of points under the criteria listed. . . .”²² (emphasis added). In fact, in an earlier case involving another NCE applicant, the Commission rejected the argument BRA posits here that the staff could have derived required point determination information from previously-filed applications.²³ Accordingly, we find BRA’s argument that its point certifications in the BRA Application were properly supported by documentation in other applications it filed to be without merit.

BRA amended the BRA Application on March 22, 2010, to provide the missing documentation.²⁴ The instructions to FCC Form 340 and Commission precedent, however, are clear. The FCC Form 340 instructions provide, in pertinent part:

The applicant’s qualification for points is determined *as of the closing of the filing window* assuming the applicant continues to qualify for all points claimed at the time of selection. (emphasis added).²⁵

Section 73.7003(e) of the Rules is equally clear – if an applicant, such as BRA here, did not qualify for localism and/or diversity points during the filing window, the rule prohibits an applicant from enhancing its point system claims as established at the time of filing.²⁶ BRA had until October 22, 2007, the cut-off

¹⁹ BRA cites File Nos. BNPED-20071018ATS, Hamburg, Pennsylvania (“BRA Hamburg”) and BPED-9980923MA, Kutztown, Pennsylvania (“BRA Kutztown”). See Petition at 3. These applications were dismissed by the staff on January 28, 2010, and September 26, 2005, respectively. In addition, BBN notes that it could not find the alleged documentation in BRA Hamburg and that BRA Kutztown is not available on-line. See Opposition at n.6 and Attachment 2.

²⁰ See *Comparative Consideration Order*, 25 FCC Rcd at 11111 (“[E]very applicant claiming points for diversity of ownership must certify that no party to the application has an attributable interest in a station with an overlapping service contour to the proposed station, that its governing documents require that such diversity be maintained, and ‘that it has placed documentation of its diversity qualifications in a local public file and has submitted to the Commission copies of that documentation.’”).

²¹ *Id.*

²² See 47 C.F.R. § 73.7003(b).

²³ See *Comparative Consideration of 76 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations, Memorandum Opinion and Order*, 22 FCC Rcd 6101, 6109 (2007) (no points awarded to applicant claiming that the staff could have determined applicant’s eligibility for diversity of ownership points from its disclosure in a previously-filed application that it had no other attributable broadcast station interests).

²⁴ BRA explains that the amendment was filed “for the purpose of correcting a possible omission of documentation in the original application.” See BRA Application, as amended, at Exhibit 1.

²⁵ See FCC Form 340, “Instructions for Section IV – Point System Factors.”

²⁶ See 47 C.F.R. § 73.7003(e); see also Instructions for FCC Form 340, Section IV (“The applicant’s qualification (continued . . .)

date, to provide any documentation to support the point certifications in the BRA Application. It did not. Accordingly, we find that the amendment BRA filed two and one-half years after the established cut-off date is untimely and cannot be considered.

BRA's argument that it "did not receive sufficient notice as to when and how the required documentation establishing localism and diversity needed to be submitted,"²⁷ is also incorrect.²⁸ Indeed, Section IV, Question 2 of the FCC Form 340 requires applicants to certify that such documentation *has been submitted* to the Commission.²⁹ Accordingly, we find that BRA has failed to find a substantial and material question of fact to warrant further inquiry on this issue.

BBN's Diversity of Ownership Point Total. BRA's argument that BBN is not entitled to its two points for diversity of ownership because the BBN Application's exhibit does not bind the principals of BBN, only binds future directors and officers, and does not address the status of BBN's current directors and officers, is equally misguided. BBN, as the *Comparative Consideration Order* dictates,³⁰ has submitted copies of pertinent governing documents to support its certification. BBN's supporting documentation³¹ also includes a provision to maintain diversity in the future.³² Although BBN may have

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for points is determined as of the closing of the filing window. . . . Thus, points cannot be enhanced by changes made after the close of the deadline for filing of competing applications, but may be reduced by such changes. . . . An applicant claiming points for diversity of ownership must place supporting documentation in a local public inspection file and submit to the Commission copies of the documentation." See *Santa Monica Community College District; Living Way Ministries*, Hearing Designation Order, 9 FCC Rcd 3134 (MB 1994) ("[A]n applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.").

²⁷ Petition at 4.

²⁸ See 47 C.F.R. § 73.7003(e) and Instructions for FCC Form 340, Section IV, *supra* n.26; *Media Bureau Announces NCE FM New Station and Major Change Filing Procedures for October 12-October 19, 2007 Window*, Public Notice, 22 FCC Rcd 15050 (MB 2007) (announcing filing requirements, noting that applicants must submit documentation in support of point system claims to the Commission and strongly recommending that this documentation be submitted as exhibits to the application); *Reexamination of Comparative Standards for Noncommercial Educational Applications*, Report and Order, 15 FCC Rcd 7386, 7423 (2000) (notes that point system documentation filed at the Commission should be submitted "concurrently with filing"). See also *Comparative Consideration of 26 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 11108, 11121, ¶40, 11122, ¶42, 11124, ¶47 (2010) (MX NCE group cases denying diversity credit for failure to include corporate governing documents requiring diversity to be maintained).

²⁹ See FCC Form 340, Section IV, Question 2: "Applicant certifies that . . . its governing documents require that such diversity be maintained, and . . . [it] *has submitted to the Commission copies of the documentation.*" (emphasis added).

³⁰ See *Comparative Consideration Order*, 25 FCC Rcd at 11110-11.

³¹ See BBN Application at Exhibit 12.

³² See *Comparative Consideration Order*, 25 FCC Rcd at 11110-11. "[N]either [BBN] . . . nor any parent or subsidiary of . . . [BBN] shall seek, through application or otherwise, to acquire any interest in any radio station whose principal community contour overlaps the principal community contour of [the proposed] station. Notwithstanding any other provision herein, no person shall become a director or officer of . . . [BBN] unless that person shall first verify in writing that he or she does not now, and will not during his or her tenure as a director or (continued . . .)

inartfully neglected to mention specifically its current members, directors and officers in its supporting exhibit,³³ we note that Section IV, Question 2, of FCC Form 340's "Diversity of Ownership" certification binds "any party to the application [that] has an attributable interest," which Sections 73.7000 and 73.3555 of the Rules define as current "officers and members of their governing boards."³⁴ We believe that: (1) BBN's affirmative certification to Section IV, Question 2 that "the principal community (city grade) contour of the proposed station does not overlap the principal community contour of any other authorized station . . . in which any party to the application has an attributable interest . . .," and (2) the specific language of BBN's accompanying exhibit which states that once its proposal is granted "no person shall become a director or officer of . . . [BBN] unless that person shall first verify in writing that he or she does not now, and will not during his or her tenure as a director or officer . . . of [BBN] serve as an officer, director, partner, member or management employee . . . of any such overlapping station neither" demonstrates compliance with our diversity of ownership certification requirements.³⁵ Accordingly, we find we find that BRA has failed to find a substantial and material question of fact to warrant further inquiry on this issue.

Conclusion/Actions. Accordingly, IT IS ORDERED, that the Petition to Deny filed on September 2, 2010, by Berks Radio Association, IS DENIED.

IT IS FURTHER ORDERED, that the application of Bible Broadcasting Network, Inc., to construct a new NCE FM station at Leesport, Pennsylvania (File No. BNPED-20071019APD), IS GRANTED, CONDITIONED UPON its compliance with Section 73.7005 of the Rules, which sets forth a four-year holding period for applicants that are awarded permits by use of a point system.

IT IS FURTHER ORDERED, that the mutually exclusive application of Berks Radio Association (File No. BPNED-20071019BFI), IS DISMISSED.

Sincerely,



Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Berks Community Television, Inc.
Bridgebuilders International Leadership Network

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officer . . . of [BBN] serve as an officer, director, partner, member or management employee . . . of any such overlapping station." See BBN Application at Exhibit 12.

³³ See *id.*

³⁴ See n.17, *supra*.

³⁵ See, e.g., *Central Texas Broadcasting*, Memorandum Opinion and Order, 46 RR 2d 951 ¶ 48 (1979) (Commission cites exhibit as evidence of application's substantial compliance).