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ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FILED/ACCEPTED

SEP 10 2012

Federal Communications Commission  
Office of the Secretary

In re Applications of	)	
	)	
Maka'ainana Broadcasting Company, Ltd.	)	File No. BPED-19960418MB
	)	Facility ID No. 81548
For a construction permit for a	)	NCE MX Group 95083E
new noncommercial educational FM station	)	
at Kaneohe, Hawaii	)	
	)	
Calvary Chapel of Honolulu, Inc.	)	File No. BPED-19960416MA
	)	Facility ID No. 81538
For a construction permit for a	)	NCE MX Group 95083E
new noncommercial educational FM	)	
station at Honolulu, Hawaii	)	

TO: Marlene H. Dortch, Secretary

For transmission to the Commission

**APPLICATION FOR REVIEW**

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September 10, 2012

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## SUMMARY

The decision of the Audio Division, set out in a letter, *Harry F. Cole et al.*, DA 12-1314 (released August 10, 2012) (“*2012 Division Letter*”), is flawed in multiple respects.

The decision purports to dismiss a petition for reconsideration which was not addressed to the Division and which was devoted to matters over which the Division has no statutory authority. Those matters – which relate to the comparative “point” credits to which Maka’ainana Broadcasting Company, Ltd. (“MBC”) is entitled – can be resolved administratively only by the full Commission. The arguments which MBC presented in the petition which the Division assertedly dismissed in the *2012 Division Letter* are re-submitted herein. In summary, it is beyond dispute that MBC is an “established local applicant” entitled to full “local” comparative credit.

With respect to the competing application of Calvary Chapel of Honolulu, Inc. (“CCHI”), the Division’s waiver of Section 73.3573 is not supported by the type of “special circumstances” necessary for regulatory waivers. *See, e.g., Network IP, LLC v. FCC*, 548 F.3d 116 (D.C. Cir. 2008). The sole such “circumstance” mentioned in the *2012 Division Letter* – the 16-year pendency of the MBC and CCHI applications – is immaterial to the violation to which the waiver is directed. And further with respect to CCHI, the record below raises substantial and material questions concerning CCHI’s honesty and candor before the Commission – a fact that the Division circumvented only through a self-serving approach that relied improperly on hindsight and ignored the circumstances that existed at the time of CCHI’s non-candid claims.

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Pursuant to Section 1.115 of the Commission's rules, Maka'ainana Broadcasting Company, Ltd. ("MBC") hereby requests review, by the full Commission, of the actions of the Media Bureau's Audio Division ("Division") set out in a letter, *Harry F. Cole et al.*, DA 12-1314 (released August 10, 2012) ("*2012 Division Letter*"), addressing matters raised with respect to the above-captioned applications in a Petition for Reconsideration and a separate Petition to Deny, both filed by MBC. As set forth in detail below and in the attached materials, to the limited extent that the Division had any authority at all to act here, it acted incorrectly.

### **QUESTIONS PRESENTED**

Where an applicant is an "established local applicant" as that term is defined in the Commission's rules, and where the principals of the applicant have extensive and long-term local contacts and involvement, is that applicant not entitled to comparative point credits as an "established local applicant"?

Was it not erroneous for the Division to waive Section 73.3573 when (a) the circumstances under which more than 50% of CCHI's board changed were neither routine, nor inevitable, nor gradual and (b) no special circumstances justified a waiver?

Where an applicant faces the prospect of dismissal of its application for violation of Section 73.3573, and where the applicant demonstrates a lack of candor both in advising the Commission of circumstances that would have disclosed that violation and otherwise, is it not erroneous for the Division to conclude that the applicant had no motive to deceive the Commission?

### **FACTORS WARRANTING COMMISSION CONSIDERATION**

This case requires resolution of comparative "point" assessments which are statutorily required to be resolved by the full Commission. Additionally, Commission consideration is warranted because the Division's actions below: conflict with the Communications Act and the Commission's rules; involve questions of law and policy that has not previously been resolved by the Commission; and are based on erroneous findings as to an important and material question of fact.

## ARGUMENT

### I. Background

1. The captioned applications were filed more than 16 years ago. They remain pending today.<sup>1</sup> Their procedural history is relatively simple, and is recounted at pages 2-4 of MBC's Petition for Reconsideration, filed July 21, 2011, a copy of which is included as Attachment A hereto. That history is hereby incorporated by reference. The only material developments that have occurred since then are: (a) the filing of MBC's Petition for Reconsideration and Petition to Deny (and oppositions and replies thereto) and (b) the Division's letter rejecting both of those pleadings.

2. For purposes of the instant pleading, the following circumstances are the most relevant to orient the reader. In 2007, more than a decade after the applications had been filed, the Commission determined MBC to be the preferred applicant based on the comparative point system. *Comparative Consideration of 76 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, 22 FCC Rcd 6101, 6133 (2007) ("*Omnibus Order*"). When that determination was challenged by Calvary Chapel of Honolulu, Inc. ("CCHI"), a competing applicant, the Media Bureau referred the challenge to the Commission in 2007, *Calvary Chapel of Honolulu, Inc.*, 22 FCC Rcd 17654, 17660 (MB 2007), and in 2011 the Commission reversed its earlier determination and declared CCHI to be the preferred applicant, again based on the point system, *Comparative Consideration*

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<sup>1</sup> The obvious and deplorable delay in the processing of these applications appears, ironically enough, to have arisen *not* from any dilatoriness on the applicants' part, but rather from the Commission's implementation and utilization of the comparative "point" system to resolve proceedings involving mutually exclusive applications for noncommercial FM authorizations. That is ironic because the Commission's goal in adopting the point system was to "streamline" the process and make it "faster". *Reexamination of Comparative Standards for Noncommercial Educational Applications*, Report and Order, 15 FCC Rcd 7386 at, e.g., ¶¶1, 10, 37 (2000).

*of 33 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial FM Stations*, 26 FCC Rcd 9058, 9091 (2011).

3. In particular, the Commission concluded in 2011 that MBC was not entitled to credit as a “local” applicant despite the fact that it complied in all respects with both the letter and the underlying intent of that particular criterion. In its Petition for Reconsideration MBC asked the full Commission to re-think that conclusion. In the *2012 Division Letter*, the Division purports to dismiss MBC’s petition as “procedurally improper”.

4. In its Petition to Deny the CCHI application, MBC renewed arguments it had advanced as early as 2007 relative to CCHI concerning a change of more than 50% of CCHI’s directors, a change that required the dismissal of CCHI’s application. The change occurred because of the abrupt departure of a CCHI director under questionable circumstances, circumstances which CCHI has assiduously declined to address, despite multiple opportunities to do so. Not only did the fact of the change – acknowledged only after MBC brought the matters to the Commission’s attention – mandate dismissal, but CCHI’s less than accurate disclosures concerning the change raised serious questions concerning CCHI’s honesty and candor before the Commission. Those questions were aggravated by other instances in this proceeding in which CCHI’s assertions to the Commission were demonstrably lacking in veracity. In the *2012 Division Letter*, the Division waives Section 73.3573 with respect to CCHI’s transfer of control and puzzlingly – and inaccurately – concludes that CCHI had no “evident motive supporting an intent to deceive”.

## **II. The Division has no authority to dismiss the MBC Petition for Reconsideration.**

5. The Division’s purported dismissal of MBC’s Petition for Reconsideration is odd because the petition was addressed to the Commission – *not* the Division – and concerned

matters beyond the Division's delegated authority. It is not clear how the Division came to consider the Petition for Reconsideration at all or how the Division might view itself as having the delegated authority to dispose of the petition in any event. The matter had been referred by the Division to the Commission in 2007, after all, for the Commission's "final disposition" (as the *2012 Division Letter* accurately recites at page 2). In its 2011 decision, the Commission reassessed the point credits to which MBC was entitled.<sup>2</sup>

6. It is well-established that only the Commission (or, in some situations unrelated to the instant case, an administrative law judge) has the statutory authority to address issues relating to point credits. 47 U.S.C. §155(c)(1). Thus, the *only* agency authority able to consider and correct the Commission's erroneous 2011 decision relative to MBC's point credits was the Commission itself. Addressing its Petition for Reconsideration relative to point credits to any agency office other than the Commission would have made no sense and would have put MBC at risk of a claim that it failed to properly preserve its arguments before the proper forum. With all due respect, MBC submits that the Division had no authority to dismiss MBC's Petition for Reconsideration and that its discussion of the substance of MBC's presentation can have no effect at all, since that discussion relates to a matter which Congress has reserved exclusively to the Commission itself.<sup>3</sup>

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<sup>2</sup> It is not entirely clear that the Division recognizes that the 2011 decision was a *Commission* decision, as opposed to a Bureau decision as to which the Division would have had considerably greater latitude for review. The Division's citation to the 2011 decision, at Footnote 2 of the *2012 Division Letter*, includes the parenthetical notation "(MB 2011)", which MBC understands to be an indication that the decision was issued by the Media Bureau (*i.e.*, "MB") rather than the Commission. And at page 4, the Division expressly states that, in the 2011 decision, "the **Bureau** repeatedly emphasized" certain points (emphasis added). It is, of course, clear that the 2011 decision was issued by the Commission, and not the Bureau.

<sup>3</sup> MBC also notes for the record that, according to the *2012 Division Letter*, review of the Commission's 2011 decision could not be sought because that decision was merely interlocutory  
(Footnote continued on next page)

### III. MBC is an “established local applicant” entitled to “Local” Point Credits.

7. Because the Division short-circuited MBC’s Petition for Reconsideration, thereby preventing the Commission from considering it, MBC is, as noted above, including a copy of the petition as Attachment A hereto and hereby incorporates it by reference. As set forth therein, the record indisputably demonstrates that MBC satisfies the definition of “established local applicant” contained in Section 73.7000 of the Commission’s rules. Moreover, the record also conclusively establishes that MBC’s principals are all “local” and locally active, with a long and deep history of community engagement.

8. Such involvement is precisely what the Commission sought in establishing the “established local applicant” criterion. According to the U.S. Court of Appeals for the D.C. Circuit, that criterion was designed to “reward[ ] applicants *who are controlled by locals*”. *American Family Association v. FCC*, 365 F.3d 1156, 1164 (D.C. Cir. 2004) (emphasis added). MBC is unquestionably “controlled by locals”, and the Court would no doubt be surprised to learn that the Commission may now be attempting to alter the position which the Court expressly endorsed eight years ago. Any such attempt is plainly arbitrary and capricious.

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*(Footnote continued from preceding page)*

– and it was interlocutory because it took no action granting (or dismissing) any application. But the *2012 Division Letter* itself similarly takes no action on any application and, at least according to the Division’s approach, may thus be similarly interlocutory and immune from review. However, the *2012 Division Letter* does not so state expressly. To the contrary, the *2012 Division Letter* appears on its face to constitute an action by the Division which is susceptible to review at this time. MBC is constrained to observe that the Commission’s process (at least as interpreted by the Division) – with the issuance of decisions at various levels seemingly disposing, conclusively, of various issues, some but not all of which may be subject to immediate review – is not a model of “streamlined” administrative process. Rather, such a process promotes unfortunate confusion and delay.

**IV. No justification exists for waiver of Section 73.3573 for the benefit of CCHI.**

9. The *2012 Division Letter* acknowledges that a change of 50% of an applicant's governing board would "generally be considered" impermissible. *2012 Division Letter* at 5. It also acknowledges that such a change occurred to CCHI's board. But then, with uncharacteristic magnanimity, the Division opts to waive Section 73.3573, which would otherwise have mandated the dismissal of CCHI's application. The waiver is said to be based on a number of considerations, none of which – individually or in combination – holds up under scrutiny.

10. First, a review of the available information concerning CCHI's unauthorized change is in order.

11. When its application was first filed in 1996, CCHI was governed by a five-member board. Two of those members went away prior to 2000, leaving three, a bare majority of the original membership, in place. In 2007, MBC called the Commission's attention to the fact that, in a routine report filed by CCHI with the state of Hawaii in early 2007, CCHI had reported a four-member board including only two of the directors who had been listed in CCHI's application. In other words, a greater-than-50% change in CCHI's board had occurred.

12. In response, CCHI claimed that its report to Hawaii was not accurate and that the missing director, Stephen Holck, was still on the board at that time – and at the time of CCHI's pleading to the Commission, *i.e.*, June, 2007. *See* CCHI Reply to Opposition (filed June 4, 2007) at 2-4. According to CCHI, Mr. Holck was merely on a "leave of absence" because of "emotional trauma" arising from his wife's death. *Id.*

13. But MBC proffered information indicating that, contrary to CCHI's claims, Mr. Holck's tenure on the CCHI board had been terminated in November, 2006, by CCHI *not* because of "emotional trauma" arising from his wife's death, but because Mr. Holck had, since that death, re-married and was already having marital disputes with his second wife (whom he

reportedly wed in June, 2006, within approximately seven months of his first wife's death).

MBC understands that those disputes ran counter to the tenets of CCHI's faith, as a result of which Mr. Holck was abruptly cast out of CCHI's board in November, 2006. *See* MBC Statement for the Record (filed June 19, 2007).

14. Over the five years since MBC submitted its showing, CCHI has not sought to rebut the accuracy of MBC's assertions. To the contrary, CCHI has confirmed an important element of those assertions, *i.e.*, that Mr. Holck's departure from the board did indeed involve, *inter alia*, "his subsequent remarriage", *see* CCHI Opposition to Petition to Deny (filed August 3, 2011) at 3. Recall that, in its initial response to MBC, CCHI said nothing at all about a remarriage, choosing instead to characterize Mr. Holck's departure as solely the result of "trauma" relating to his first wife's death. CCHI's failure even to attempt to demonstrate any specific inaccuracy in MBC's showing gives rise to an inference adverse to CCHI and a corresponding inference that MBC's showing was, indeed, accurate. *See, e.g., Coastal Broadcasting Partners*, 6 FCC Rcd 4242 (Rev. Bd. 1991); *Columbia Union College Broadcasting, Inc.*, 21 FCC Rcd 316 (GC 2006).

15. What we thus have here is the abrupt removal of Mr. Holck, a removal which resulted in a greater than 50% change in the membership of CCHI's original board. This was not a situation involving "gradual" attrition of membership over time. Nor was it the type of "routine" or "inevitable" change to which the Commission alluded in *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, 6133 (2007) ("*2007 Omnibus Order*"). As MBC has previously argued, the illustrative cases described by the Commission there do not resemble in the least CCHI's

situation. The summary dismissal of an unfavored director is qualitatively and quantitatively different from the gradual shift in board membership arising from state laws or complex organizational structures involving scores of participating voters. *See id.* at 23-24.

16. Perhaps most importantly, CCHI has been and continues to be less than forthcoming about the precise facts and circumstances surrounding Mr. Holck's departure. If, in fact, that departure had been "routine" or "inevitable" for whatever reason, CCHI could and should have been happy to disclose and explain those circumstances in detail as soon as the question was raised by MBC in 2007. CCHI declined to take the candid and forthright approach. To the contrary, it initially provided a misleadingly truncated version of the situation and has since remained curiously mum. If the Commission is willing to accept an approach akin to CCHI's as establishing a "routine", "inevitable", "gradual" shift, then virtually *any* greater-than-50% shift in an applicant's controlling board will similarly qualify.

17. Waiver of Commission rules ordinarily requires the identification of some "special circumstances". *Network IP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C.Cir.1990). According to the *2012 Division Letter*, the special circumstance that justifies a waiver of Section 73.3573 for CCHI's benefit is "the 16-year pendency of the CCHI Application". *2012 Division Letter* at 7. But the regrettable fact that it's taken the Commission more than a decade and a half to process these applications had *nothing at all to do* with Mr. Holck's departure. If his departure had occurred because of some state law requiring replacement of directors over the course of time (as occurred in the Iowa State Board of Regents example described at Paragraph 57 of the *2007 Omnibus Order*), then the passage of time might be relevant here. But here, to suggest any

connection between Mr. Holck's dismissal from the CCHI board and the passage of time is a *non sequitur*. Such a suggestion cannot legitimately support a waiver.

**V. Substantial and materials questions exist concerning CCHI's honesty and candor before the Commission.**

18. MBC has consistently insisted that CCHI has lacked candor, if not engaged in affirmative misrepresentation, before the Commission. The *2012 Division Letter* dismisses those charges by claiming that "no evident motive supporting an intent to deceive" has been shown – and that's because, according to the Division, "whether Mr. Holck was fired or placed on leave November of 2006 and ultimately replaced is irrelevant to the central issue of whether the change in CCHI's board occurred gradually". *2012 Division Letter* at 8. But that "analysis" is precisely backwards.

19. Whether or not the Division ultimately chose to view Mr. Holck's sudden departure from the CCHI board as gradual, the fact is that, when CCHI advanced its less-than-forthright version of that departure in 2007, CCHI had no idea what the Division's ultimate decision might be. In the assessment of questions of motive and intent, the focus must be on the state of mind of the entity in question *at the time of its questionable statements*, not in light of subsequent events.

20. MBC first argued in June, 2007, that, because of the greater-than-50% change in its board membership, CCHI had no standing to challenge MBC's application. That is, CCHI was facing the prospect of dismissal of its application. If, as MBC has alleged and CCHI has not denied, Mr. Holck's tenure on the CCHI board had been terminated more than six months earlier, CCHI could and should have acknowledged that – and if, as the Division seems to believe, CCHI knew or should have known that it was entitled to a waiver of Section 73.3573, then CCHI could and should have requested such a waiver then and there. CCHI did not do so.

21. Instead, CCHI claimed that Mr. Holck was still a director, despite the fact that CCHI had reported to the state of Hawaii in January, 2007, that that was not the case.

22. CCHI plainly had a motive to conceal the fact of Mr. Holck's earlier departure. By doing so, CCHI would not risk dismissal of its application. To be sure, CCHI could arguably have sought a waiver, but it had no guarantee at that point that a waiver would be granted – particularly if CCHI were to disclose the abrupt nature of Mr. Holck's dismissal. CCHI thus has a clear incentive to shade the truth in order to avoid the serious threat of dismissal.

23. In fact, the Division's purported explanation that the circumstances of Mr. Holck's departure are "irrelevant to the central issue of whether the change in CCHI's board occurred gradually" confirms MBC's analysis here, not CCHI's. If Mr. Holck's departure had been part of a "gradual" change in the board, and if CCHI believed that CCHI would thus be entitled to a waiver of Section 73.3573, then CCHI would ordinarily have acknowledged the facts, requested the waiver, and not have had a thing to worry about. In that case, the departure would arguably have been "irrelevant", as the Division asserts.

24. But CCHI did *not* take that approach. Instead, it presented a demonstrably incomplete claim. From this we can conclude that CCHI did not deem Mr. Holck's departure to have been "irrelevant"; rather, CCHI perceived a serious risk to its position and, in an effort to avoid that risk, it was willing to shade the truth.

25. Significantly, as MBC has previously pointed out, this was not the only time that CCHI chose to shade the truth before the Commission. *See, e.g.*, MBC Petition to Deny (filed July 21, 2011) at 8-9; MBC Opposition to Petition to Deny (filed May 16, 2007) at 10-12.

26. One of the most basic and longstanding tenets of the Commission's regulatory process is that all applicants, permittees and licensees are expected to exercise the utmost candor

and honesty in their dealings with the Commission. *E.g., Fox River Broadcasting, Inc.*, 93 FCC2d 127 (1983). Broadcasters are held to “high standards of punctilio” and must be “scrupulous in providing complete and meaningful information” to the Commission. *E.g., Lorain Journal Co. v. FCC*, 351 F.2d 824, 830 (D.C. Cir. 1965). Absolute candor is perhaps the foremost prerequisite for Commission licenseeship. *E.g., Catocin Broadcasting Corp. of New York*, 2 FCC Rcd 2126 (Rev. Bd. 1987), *aff’d in pertinent part*, 4 FCC Rcd 2553 (1989), *recon. denied*, 4 FCC Rcd 6312 (1989); *Mid-Ohio Communications*, 104 FCC2d 572 (Rev. Bd. 1986), *rev. denied*, 5 FCC Rcd 940 (1990), *recon. dismissed in part, denied in part*, 5 FCC Rcd 4596 (1990).

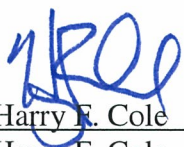
27. The duty of candor requires applicants to be fully forthcoming as to all facts and information that may be decisionally significant to their applications. *E.g., Swan Creek Communications v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994). This is because the Commission, with a limited staff and limited resources, relies heavily on the honesty and probity of its licensees in a regulatory system which is largely self-policing. *See Leflore Broadcasting Co. v. FCC*, 636 F.2d 454, 461 (D.C. Cir. 1980). It is well recognized that the Commission may disqualify an applicant who deliberately makes misrepresentations or lacks candor in dealing with the agency. *E.g., Schoenbohm v. FCC*, 204 F.3d 243, 247 (D.C. Cir. 2000), *quoted in Contemporary Media, Inc. v. FCC*, 214 F.3d 187 (D.C. Cir. 2000); *see also FCC v. WOKO, Inc.*, 329 U.S. 223, 225-27 (1946).

28. The available evidence strongly indicates that CCHI has engaged in misrepresentation – or, at the very least, a serious lack of candor – in its representations to the Commission.

**RELIEF SOUGHT**

The action of the Division should be reversed, MBC should be deemed an “established local applicant” and awarded all comparative point credits associated with that status, MBC’s application should be granted, and CCHI’s application should be dismissed (both as a result of (a) the grant of MBC’s application and (b) the change in CCHI’s board of directions in violation of Section 73.3573). In the alternative, in the event that CCHI’s application is not dismissed, it should be designated for hearing to determine whether CCHI engaged in misrepresentation and/or lack of candor and, if so, whether CCHI is qualified to be a Commission licensee.

Respectfully submitted,

  
/s/ Harry F. Cole  
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September 10, 2012

**ATTACHMENT A**

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

PLEASE STAMP  
AND RETURN  
THIS COPY TO  
FLETCHER, HEALD & HILDRETH

In re Application of

Maka'ainana Broadcasting Company, Ltd. ) File No. BPED-19960418MB  
 ) Facility ID No. 81548  
For a construction permit for a ) NCE MX Group 95083E  
new noncommercial educational FM )  
station at Kaneohe, Hawaii )

FILED/ACCEPTED

TO: Marlene H. Dortch, Secretary

JUN 21 2011

For transmission to the Commission

Federal Communications Commission  
Office of the Secretary

**PETITION FOR RECONSIDERATION**

1. Maka'ainana Broadcasting Company, Ltd. ("MBC") hereby seeks reconsideration of the dismissal of its above-captioned application. That dismissal, reflected in *Comparative Consideration of 33 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations* ("2011 Decision"), FCC 11-99, released June 21, 2011, was based on a determination that MBC was not entitled to any comparative points for being an "established local applicant". As demonstrated in detail below, that determination was plainly arbitrary, capricious and fundamentally at odds with the Commission's explicit goals underlying that particular comparative criterion.

**Background**

2. MBC's application was filed in April, 1996 – more than 15 years ago. Four years later, the Commission adopted a new "point system" by which mutually exclusive noncommercial educational (NCE) applications were to be compared. *Reexamination of Comparative Standards for Noncommercial Educational Applications*, 15 FCC Rcd 7386, 7407-08 (¶49) (2000). Under

that system, points were to be awarded to each “established local applicant”. Those terms were defined in the rules (Section 73.7000) as follows:

*Established local applicant.* An applicant that has, for at least the two years (24 months) immediately preceding application, met the definition of local applicant.

*Local applicant.* An applicant physically headquartered, having a campus, or having 75% of board members residing within 25 miles of the reference coordinates for the community to be served, or a governmental entity within its area of jurisdiction.

As an entity formally established in 1996<sup>1</sup> with physical headquarters within 25 miles of Kaneohe (MBC’s proposed community of license), MBC clearly satisfied that express regulatory definition of “established local applicant” and was, thus, entitled to the points available to such applicants.

3. MBC’s application was tentatively selected as the preferred applicant in NCE MX Group 95083E.<sup>2</sup> However, one of the other applicants in that group – Calvary Chapel of Honolulu, Inc. (“CCHI”) – petitioned to deny MBC’s application. CCHI alleged, *inter alia*, that MBC did not have a local headquarters and that, therefore, MBC did not meet the definition of “local applicant”. CCHI’s allegation was based on the purported<sup>3</sup> inability of a CCHI employee, on a single occasion, to locate MBC’s headquarters.

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<sup>1</sup> In applying the 2000 definition of “established local applicant” to applications filed prior to the adoption of that definition, the Commission announced that the June 4, 1999, would be the date by which an applicant would have to have been “established” in order to qualify for comparative points under that criterion. *See Public Notice, Supplements and Settlements to Pending Closed Groups of NCE Broadcast Applications Due by June 4, 2001*, 16 FCC Rcd 6893 (2001).

<sup>2</sup> *See Comparative Consideration of 76 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, 22 FCC Rcd 6101 (2007).

<sup>3</sup> As MBC also demonstrated, serious questions exist surrounding the *bona fides* of the CCHI employee’s supposed efforts to find MBC’s headquarters. Those questions are addressed separately in a petition to deny CCHI’s application which is being submitted simultaneously herewith.

4. MBC demonstrated in response that its headquarters were at the time of that single visit, had been since 1997, and continued to be at the address MBC had consistently listed in Honolulu, within 25 miles of Kaneohe.

5. Despite that showing, the Bureau concluded that MBC was not entitled to “established local applicant” points because:

MBC is unknown by [the parking attendant in MBC’s headquarters building]; is not listed in the building’s directory and signs; has no telephone listing; and that public record of MBC consists primarily of routine corporate filings with governmental agencies. There is no indication that MBC was in regular contact with the community, and it appears highly unlikely that the community would be able to contact MBC readily.

*Letter to Calvary Chapel of Honolulu, Inc. from Peter H. Doyle, DA 07-4138, released October 3, 2007.* The matter was referred to the Commission, with both MBC and CCHI given the opportunity to provide further documentation concerning MBC’s entitlement to “established local applicant” status.

6. In response to that invitation, MBC submitted an extensive description of MBC’s principals and their deep, longstanding, continuing active involvement in local affairs. MBC also demonstrated that its headquarters are marked by a sign, and explained that the unusual design of the building – a block long, with no access to first floor suites (such as the suite occupied by MBC) from the foyer from which the CCHI employee supposedly started his search – may have contributed to any supposed confusion as to the location of the office. A copy of that showing is included as Attachment A hereto.

7. Despite that showing, in the *2011 Decision* the Commission has concluded that “designation of a headquarters from which [an applicant] conducts virtually no business is [not] equivalent to having been physically present at a primary place of business for at least two years”. The Commission also rejects MBC’s showing of its principals’ extensive community involvement

because, supposedly, “the Commission looks beyond those who formed the organization, to the applicant entity.”

### Argument

8. With all due respect, the moving target definition of “established local applicant” which the Commission invokes to deprive MBC of its comparative points is arbitrary, capricious and inconsistent with the Commission’s own repeated explanations of just what that criterion was designed to achieve.

9. As an initial matter, the definition which the Commission now applies diverges substantially from the definition in the Commission’s own rules. The rule specifies that, to be a “local applicant”, the applicant must be “physically headquartered” within 25 miles of the proposed community of license; to be an “established local applicant”, that condition must have been satisfied for at least two years prior to the relevant starting point (in MBC’s case, June 4, 2001). *See* Section 73.7000. MBC has been “physically headquartered” within 25 miles of Kaneohe since 1997. It therefore satisfies the standard as spelled out in the rule.

10. But the Commission (and the Bureau in its antecedent decision) would now revise that definition substantially. According to the Commission, not only must an applicant meet the rule’s criteria, but the applicant must also be able to demonstrate some level of specific activity *by the applicant in its own particular name*. Importantly, the Commission rejects the notion that such activity by the applicant’s principals (as opposed to the entity itself) might suffice.

11. But in its initial adoption of the “established local applicant” preference, the Commission said nothing about any such activity. *Reexamination of the Comparative Standards for Noncommercial Applicants*, 15 FCC Rcd 7386 (2000). Ditto for its decision on reconsideration of that initial adoption. *See Reexamination of the Comparative Standards for Noncommercial Applicants*, 16 FCC Rcd 5074 (2001). Indeed, the Commission’s discussion of

the two-year “establishment” standard in that 2001 decision makes clear that the overriding concern was *not* that the applicant entity be “active” during those two years; rather, the Commission believed that the two-year requirement would serve to prevent *non*-local organizations from setting up entities using “‘straw-men’ local incorporators”. *Id.* at ¶52. There is no basis at all to believe that MBC’s purely local nature has in any way or at any time been tainted by such non-local involvement.

12. In a 2002 clarification of the “established local applicant” criterion, the Commission did vaguely allude to an intent to “favor local applicants that have been operating in the community prior to receiving a broadcast permit”, *Reexamination of the Comparative Standards for Noncommercial Applicants*, 17 FCC Rcd 13132 (2002) at ¶15. But the Commission illustrated that intent by referring to “an expectation of ‘contact’ between *the station’s policy makers* and the area to be served.” *Id.* (emphasis added). It also referred to the importance of having “the knowledge and accountability needed to ‘hit the ground running’”. *Id.* The Commission distinguished this from an unacceptable “shell organization”, which would lack such “contact” or “continuing interaction with the community”. *Id.* As the Commission’s own reference to a “station’s policy makers” reflects, an entity is nothing more nor less than its principals, particularly when the entity (like MBC) is a small closely-held company. MBC does not “contact” or “interact” with the community – MBC’s principals do. MBC has no “knowledge” or “accountability” beyond what its principals possess. And, as MBC unquestionably demonstrated, its principals have in fact been deeply and consistently involved in the community for far more than two years, and possess extensive knowledge of that community. It is silly to suggest that MBC is not an “established local” entity.

13. The Commission’s latter-day revision of its definition of “established local applicant” is especially odd in view of the fact that, according to the U.S. Court of Appeals for the

D.C. Circuit, the “established local applicant” criterion was designed by the Commission “to reward local control over programming” – it was a means of “rewarding applicants who are controlled by locals”. *American Family Association v. FCC*, 365 F.3d 1156, 1164 (D.C. Cir. 2004). Thus, in defending that criterion, the Commission – with the Court’s endorsement – focused *not* on the level of activity *vel non* of the applicant, but rather on the local nature of its principals.

14. That, of course, makes sense. As noted above, a business entity – whether partnership or corporation or LLC or whatever – is nothing more nor less than its principals. In this particular case, we have MBC, a company comprised of a small number of like-minded acquaintances who have in common not only long personal histories of involvement in the community, but also an interest in serving the community through a local radio station. As is clear from the biographical information included in MBC’s November 2, 2007 submission, MBC’s principals have diverse backgrounds with extensive involvement in a wide variety of locally-oriented activities. Whether or not any of them happened to be wearing a “Maka’ainana Broadcasting” t-shirt or handing out “Maka’ainana Broadcasting” business cards while engaged in those activities is immaterial: MBC’s principals are involved in the community, have established and maintained “contacts” in the community, have “interacted” with the community, and are ready (in the Commission’s terminology) to “hit the ground running”. MBC is entitled to credit as an “established local applicant”.

15. Does the Commission seriously think that MBC’s principals should, upon forming MBC, have abandoned their other activities in order to devote full time and attention to MBC – even though, thanks to the Commission’s snail-like processing, it took more than a decade even to get a preliminary decision, and it’s taken another four years to get to where we are today – with further appellate processes (if necessary) likely to add still more years? Bear in mind that, after

filing the application, MBC's principals did indeed continue their involvement in the community – but they did so as themselves or in connection with other organizations with which they were involved. Does the Commission seriously think that, by failing to identify themselves as MBC principals, they lessened in any discernible way the effectiveness of their “contacts” or “interaction” with the community or diminished in any way their ability to “hit the ground running” if and when the MBC application is finally granted?

16. The Commission's insistence on business activities in the name of MBC uber alles ignores the fact that individuals can (and do) interact with a community in ways that a business entity cannot. MBC could not, for example, have run for Lieutenant Governor of Hawaii; MBC principal Danny Kaleikini did. MBC could not serve as Deputy Mayor and Managing Director of Honolulu (Kaneohe is a Census Designated Place located in Honolulu), or CEO of the Hawaii Tourism Authority; MBC principal Robert Fishman did. MBC could not serve as Chairman of a Honolulu non-profit organization established to promote the interests of working individuals in Hawaii; MBC principal James Boersma did.<sup>4</sup> These activities have all occurred while the MBC application has been pending. There are multiple other such examples<sup>5</sup>, but the point is clear: refusing to acknowledge and credit the local involvement and activities of an applicant's principals hinders, rather than advances, the Commission's interest in assuring locally-

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<sup>4</sup> More recently, Mr. Boersma has become the Chairman of Olelo Community Media, which provides access to video production training and equipment, studio production space, edit facilities and air time for those interested in delivering non-commercial messages through community access television opportunities in Hawaii. See <http://www.olelo.org/aboutus/>.

<sup>5</sup> MBC principal Christopher Racine, for example, has been and remains heavily involved in a wide range of locally-oriented activities. It should be noted, though, that Dr. Racine is no longer a principal of the licensee of noncommercial educational television Station KALO(TV). The license of that station was assigned in 2009.

knowledgeable, locally-responsive licensees.<sup>6</sup> Because of that, that approach is arbitrary and capricious.

17. In view of the foregoing, MBC submits that the Commission should reconsider its decision and award MBC full point credit as an “established local applicant”. The result of such an award would be the re-designation of MBC as the tentative selectee in MX Group 95083E.

Respectfully submitted,

/s/  Harry F. Cole  
Harry F. Cole

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Company, Ltd.*

July 21, 2011

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<sup>6</sup> By contrast, the “analysis” which the Commission assertedly used here – *i.e.*, “look[ing] beyond those who formed the organization, to the applicant entity” – affords the Commission zero assurance that its interest in localism will be advanced. Under that analysis, a non-local individual could breeze into town, establish a “local” entity, rent a local office to serve as that entity’s headquarters, hire an office manager to conduct business from those headquarters, get a local phone listing, put up a sign, introduce itself to the nearest parking attendant . . . and then leave town for good. As long as the entity was set up at least two years prior to filing the application, that entity could claim credit as an “established local applicant”: it would have been “physically headquartered” in the community for the requisite two years – and, with its on-going business operated from those headquarters, it would pass the test that, according to the Commission, MBC flunks. Note that the Commission does not appear to impose any limits on the kind of business that the non-local entity must conduct in order to claim “local” credit – so the business might not have anything at all to do with the community. Nor does the Commission appear to require any particular level of “contact” or “interaction” with the community.

## **Attachment A**

HARRY F. COLE  
ANNE GOODWIN CRUMP  
VINCENT J. CURTIS, JR.  
JOSEPH M. DI SCIPIO  
PAUL J. FELDMAN  
JEFFREY J. GEE  
KEVIN M. GOLDBERG  
FRANK R. JAZZO  
M. SCOTT JOHNSON  
MITCHELL LAZARUS  
STEPHEN T. LOVELADY\*  
SUSAN A. MARSHALL  
HARRY C. MARTIN  
FRANCISCO R. MONTERO  
PATRICK A. MURCK  
LEE G. PETRO\*  
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MICHAEL W. RICHARDS\*  
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November 2, 2007

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AND RETURN  
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FLETCHER, HEALD & HILDRETH  
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NOV - 2 2007

Federal Communications Commission  
Office of the Secretary

BY HAND DELIVERY

Marlene H. Dortch, Secretary  
Federal Communications Commission  
236 Massachusetts Avenue, N.E. - Suite 110  
Washington, D.C. 20002

Attention: Peter Doyle, Chief  
Audio Division


Re: Maka'ainana Broadcasting Company, Ltd.  
NEW(FM), Kaneohe, HI  
File No. BPED-19960418MB  
MX Group No. 95083E

Dear Ms. Dortch:

Submitted herewith in triplicate on behalf of Maka'ainana Broadcasting Company, Ltd. ("MBC") is supplemental documentation concerning MBC's status as an established local applicant. This is being submitted in response to the letter, DA 07-4138, addressed to Calvary Chapel of Honolulu, Inc., from Peter Doyle, Chief, Audio Division on October 3, 2007.

Please call me if you have any questions about this matter.

Sincerely,

  
Harry F. Cole

Cc (w/enc.): Matthew McCormick, Esquire  
Gary Smithwick, Esquire

\* NOT ADMITTED IN VIRGINIA

**SUPPLEMENTAL DOCUMENTATION CONCERNING STATUS  
OF MAKA'AINANA BROADCASTING COMPANY, LTD.  
AS AN ESTABLISHED LOCAL APPLICANT**

Maka'ainana Broadcasting Company, Ltd. ("MBC") hereby submits the following supplemental documentation concerning its status as an "established local applicant". This showing is being submitted in response to the invitation extended to MBC in a letter ("*Division Letter*"), dated October 3, 2007, from Peter Doyle, Chief, Audio Division ("the Division"). In its letter, the Division invited MBC to submit any additional documentation "concerning MBC's claim to be an 'established local applicant'".

The regulatory definition of the term "established local applicant" is set out in Section 73.7000 of the Commission's rules, which defines the terms "established local applicant" and "local applicant" as follows:

*Established local applicant.* An applicant that has, for at least the two years (24 months) immediately preceding application, met the definition of local applicant.

*Local applicant.* An applicant physically headquartered, having a campus, or having 75% of board members residing within 25 miles of the reference coordinates for the community to be served, or a governmental entity within its area of jurisdiction.

Those definitions were adopted in 2000, four years *after* the MBC application was filed. In adopting the rule, the Commission emphasized that it was seeking to avoid any "artificially complex formula that elevates quantitative over qualitative considerations", and was instead opting for "minimum eligibility requirements only as necessary to ensure that the credit is reserved for truly local applicants". *Reexamination of Comparative Standards for Noncommercial Educational Applications*, 15 FCC Rcd 7386, 7407-08 (¶49) (2000) ("*NCE R&O*"). As originally conceived, the term "established local applicant" was intended to refer to "a local applicant whose educational goals are limited to a specific geographic region, [rather]

than to a non-local applicant who could apply in other locations where the spectrum was more readily available” *Id.*, 15 FCC Rcd at 7404 (¶41). The Commission emphasized that the “decision and policy makers” of an applicant claiming “established local” credit should have “contact” with the area to be served. *Id.*, 15 FCC Rcd at 7410 (¶54).

In an initial reconsideration decision released in 2001, *Reexamination of Comparative Standards for Noncommercial Educational Applications*, 16 FCC Rcd 5074 (2001) (“*First Recon. MO&O*”), the Commission shed further light on the regulatory significance of an applicant’s “local” status. According to the Commission, a “local” organization is “more likely to be aware of locally produced programs that are available and thus to consider such programs”. *Id.*, 16 FCC Rcd at 5091 (¶47). Additionally, an established local organization – as distinct from a new, non-local entity – will have already acquired “the knowledge of the community to be responsive to its educational needs” and would thus be able to “hit the ground running” upon award of its construction permit. *Id.*

In a second reconsideration decision released in 2002, *Reexamination of Comparative Standards for Noncommercial Educational Applications*, 17 FCC Rcd 13132 (2002) (“*Second Recon. MO&O*”), the Commission reiterated the importance of the ability of a local applicant to “hit the ground running” (a phrase repeated by the Commission twice in consecutive sentences in that decision), and emphasized that a “shell” organization – *i.e.*, the antithesis of an “established local” entity – would lack any “contact” or “continuing interaction with the community”. *Id.*, 17 FCC Rcd at 13137 (¶15). If any question as to the “established local” character of an applicant were raised, the Commission suggested that an applicant could confirm its “established local” status by demonstrating that it, *inter alia*, met with the community, undertook community

programs or activities, or engaged in active planning of its program service for the community or similar on-going community-based operations. *Id.*, 17 FCC Rcd at 13138 (¶16).

As has previously been conclusively demonstrated, MBC was established in 1996, easily satisfying the two-years-in-existence criterion which was established *post hoc* in the *First Recon MO&O* and codified in Section 73.7000. Further, MBC has certified that its primary place of business (*i.e.*, its headquarters) has, since 1997, been at 875 Waimanu Street, Honolulu, well within the 25-mile limit also established, *post hoc*, in the *First Recon. MO&O*. But in a petition to deny directed against MBC's application, Calvary Chapel of Honolulu, Inc. ("CCHI") alleged that one of CCHI's employees was unable to find MBC's headquarters.

As MBC argued in its opposition to the petition, CCHI's allegations were of, at best, dubious reliability because both the employee in question *and* CCHI's President had repeatedly visited those offices and thus knew precisely where they were. Nevertheless, the Commission has questioned whether MBC may be an "inchoate organization" with only a "paper" address and no "contact or interaction with the community" since 1999. *Division Letter*, page 7-8. As set forth in detail below, MBC and its principals have had, and continue to have, extensive contacts and interaction with Kaneohe and the residents who would receive service from the proposed station. It is beyond argument that MBC is an "established local" entity and that it has been, is now, and will be able to "hit the ground running" upon grant of its application. Any suggestion to the contrary is flatly without merit.

As a preliminary matter, with respect to signage, MBC wishes to clarify the record. There *is* a sign reflecting MBC's presence in Suite 110 of 875 Waimanu Street. A photograph of that sign is included as Attachment A. Because of the somewhat unusual nature of the Waimanu Street building, some explanation is warranted.

The Waimanu Street building is a block long and includes office space which can be used for multiple purposes, including warehousing. It is six stories tall, with a foyer and elevators to the upper floors located at one corner of the building. But first floor suites – such as Suite 110 – are *not* accessible from the foyer. Rather, Suite 110 is accessible by one of two doors opening onto Waimanu Street nearly a full block away from the building's corner foyer/elevator bay. One of those doors is a single-width door located in a small alcove, while the other is a double-width door opening directly onto the street. That latter, double-width door is the primary entrance to the suite, and is used for delivery of packages and the like. It is next to that door that the sign is installed, listing various companies (all controlled by MBC principal Christopher Racine) along with MBC.

It is not clear why CCHI's agent, Clif Burchfield, failed to notice the sign when he undertook his purported search for MBC in April, 2007. As MBC has previously advised the Commission, Mr. Burchfield was no stranger to Suite 110, as he had routinely visited the suite to drop off and pick up materials there. But in so doing, Mr. Burchfield normally used the single-width door which is a considerable distance – in the range of 40 feet – from the double-width doors. Thus, he may not have looked carefully at the double-width doors and, since cars which are often parked immediately next to the double-width doors (notwithstanding the “no parking” sign posted next to the doors) would likely have blocked his view, it is possible that he simply did not see the sign. But to the extent that the existence *vel non* of a sign may be deemed to be important, MBC wishes to point out that there was and is a sign identifying MBC as a business in that suite.<sup>1</sup>

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<sup>1</sup> MBC was not listed in the directory in the building's foyer because only one business per suite may be listed there. As is clear from the sign which was posted, there are multiple businesses operating out of Suite 110.

But, with all due respect, the existence or non-existence of a sign does not establish whether an applicant has “contacts” with the community, has “interacted” with the community, or is ready to “hit the ground running”. Those qualities are established by the entity through its principals’ active involvement in the community. And in MBC’s case, there is no question but that MBC has been, is and will be able to hit the ground running.

First and foremost, MBC’s principals are longstanding Hawaii residents with extensive involvement in civic and local affairs.

Danny Kaleikini is a native Hawaiian who has been prominent in island entertainment and charitable activities for decades. He has helped to raise hundreds of thousands of dollars for local charities, including the Hawaii Humane Society and the Easter Seals, and he has been recognized and celebrated by a number of organizations, including St. Francis Hospital and the University of Hawaii at Manoa, where a scholarship (available only to graduates of Hawaii high schools) was established in his honor in the 1980s. Most recently Mr. Kaleikini assisted a city-sponsored food drive for the homeless in Hilo. Mr. Kaleikini was named Hawaii’s “Ambassador of Aloha” by Governor John Waihee in 1988, and has represented the state both locally and abroad on many occasions. In 1998, he ran unsuccessfully for Lieutenant Governor of Hawaii.

Robert Fishman has served as the Chief of Staff to the Governor of Hawaii (1980-1981) and as the Governor’s Director of Communications (1992-1993). He was the manager of the Honolulu Stadium from 1993-1994 and the Deputy Mayor and Managing Director of Honolulu from 1994-1998. (Kaneohe, the proposed community of license, is a Census Designated Place located in the city and county of Honolulu.) He also served as Chief Executive Officer of the Hawaiian Tourism Authority from 1999-2001. Mr. Fishman has also been active in a wide variety of local charitable activities, including the Boards of Directors of the local affiliates of

the American Red Cross, the Salvation Army, the Boy Scouts of America, the Aloha Bowl Charities, Aloha Week Festivities, and the Oahu Economic Development Board. (Kaneohe and Honolulu are located on the island of Oahu).

James Boersema is a local businessman who served as Communications Director for the Lieutenant Governor of Hawaii (1987-1988). As a partner (1989-2003) in Starr Seigle, a prominent communications and public relations firm established in Honolulu more than half a century ago, he worked closely on campaigns for local Hawaiian corporations and non-profit organizations as well as numerous elected officials. He has served on the Boards of Directors of the Hawaii Chapters of the American Heart Association, and the American Lung Association, as well as the American Red Cross in Hawaii, the Arizona Memorial Association, Palama Settlement and the Hawaii Special Olympics. He was a highly decorated (Purple Heart, Silver Star) officer in the U.S. Army, retiring in 2006 as a full Colonel.

In 2006, U.S. District Judge David Ezra appointed Mr. Boersema to serve as Chairman and a director of Unity House, a Honolulu non-profit organization established to promote the true and proper interest of, and to assist, the working individuals of the State of Hawaii. Mr. Fishman also serves on that Board.

Christopher Racine has a Doctor of Divinity degree from Hawaii Theological Seminary, Inc., and has served as Chairman of the Board of Regents of Hawaii's only accredited Bible college and seminary. He has spent years working with Pacific Islanders of all nationalities and ethnicities in Kaneohe, Kahaluu, Waimanalo, Kahuku and other Hawaiian communities. For nearly two decades, through his many contacts at all levels of the community, he has personally recruited Pacific Islander individuals, including particularly persons of Tongan and Fijian descent, to learn technical broadcasting skills so that they can produce and assist in producing

programming targeted for Pacific Islander audiences. He has also provided opportunities for such trainees to work at broadcast stations throughout the South Pacific, where they have been able to hone their skills in program production.

As the President of the licensee of a full-power non-commercial television station in Honolulu which commenced operation in 1999, Dr. Racine has since its inception devoted the resources of that station to local Hawaiian organizations. Approximately 30%-50% of that station's programming is produced locally in Hawaii and, per the direction of Dr. Racine, no local programmer has ever been charged for broadcast time on the station since it commenced operation.<sup>2</sup> As noted above, Dr. Racine has sought to provide educational training opportunities to a broad variety of Hawaiian residents, including particularly those for whom English is a second language. Local programming broadcast on his station includes programs in Tongan, Fijian, Samoan and other non-English languages. Because of the tremendous number of different cultures, nationalities and ethnicities present throughout Hawaii (and particularly in Kaneohe and Honolulu), the provision of informational and educational programs in a diversity of tongues is essential, in Dr. Racine's view.

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<sup>2</sup> MBC notes that the established track record of Dr. Racine with respect to the promotion of local programming is in stark contrast to the performance of CCHI. According to Dr. Racine's personal observation of CCHI's programming on its existing AM radio station in the Honolulu market, CCHI broadcasts no more than three hours per day of locally-produced programming, and that programming is entirely CCHI's own self-produced material (featuring either Calvary Chapel church programs or presentations by CCHI's President, Mr. Stonebraker, or his son). CCHI does not, to the best of MBC's knowledge, broadcast *any* programming in a language other than English, despite the fact that persons for whom English is the primary language are in the significant minority in the poly-cultural environment of Hawaii. Moreover, MBC understands that at least one published report indicated that, if CCHI's application were to be granted, CCHI plans simply to broadcast the same programming on the FM that it currently broadcasts on its AM station. In other words, not only would there be no increase in diverse, locally-oriented programming, but there would no increase in *any* kind of diversity – rather, all that would be gained would be an additional outlet over which CCHI could provide non-local content which is now, and would continue to be, otherwise available on its AM station.

Through his involvement with local charities, Dr. Racine has become actively involved in a number of community-based programs. For example, since 1990 he has worked with the Hope Chapel in Kaneohe Bay (led by Pastor Ralph Moore), which conducts a tutoring program in the Kaneohe public schools and has established a website to publicize and promote community events and services in Kaneohe. Hope Chapel presently produces a television program broadcast on Dr. Racine's station, and it is anticipated that it will produce a separate radio program for MBC's proposed station. Dr. Racine has also involved himself in the Kaneohe Literacy Project, a program to promote the reading skills of local students. Additionally, for more than a decade he has contributed financially to the Tokaikolo Literacy Project (Sangster Salala, Director), a Tongan program in Kaneohe, and more recently, he has assisted Common Grace, a similar local literacy program.

Through their various relationships which were developed over decades of deep and meaningful community involvement, the MBC principals have established and maintained *precisely* the kinds of contacts and interactions which afford them close familiarity with the community and which assure that members of the community can and will reach out to those principals to seek their assistance. Those contacts have long provided, and continue to provide, MBC's principals with insight into the needs and interests of Kaneohe and Honolulu area.

As indicated in its application (filed more than a decade ago), MBC proposes to place special emphasis on locally-produced programming designed to educate and assist Native Hawaiians, Pacific Islanders and Asians, groups which often lack the funds and resources with which to communicate their own particular ethnic or cultural message. Through their active involvement and many connections throughout Kaneohe, Honolulu, Oahu and the rest of Hawaii, MBC's principals (and through them, of course, MBC itself) have successfully sought out

individuals and organizations with whom MBC will be able to work to achieve its goals. Hope Chapel in Kaneohe Bay, with whom Dr. Racine has worked since 1990, and the local literacy projects with which he has been involved for years are examples. Further, because Dr. Racine already owns a broadcast television station, MBC and its principals have been able to identify, work with and train local programmers in the production of locally-oriented programming on that station. Dr. Racine has provided to many native Hawaiians and other local minorities access to broadcast production facilities and instruction in their use. Those skills have then been put to use through a number of groups located throughout the South Pacific, including OBN-Tonga, Ltd. (Malia Mailangi, Director), Oceania Broadcasting Network-American Samoa Company (Hemaloto Alatini, CEO), Harvest Bible College (Dr. Moses Cakau, President) (a Fijian company). MBC expects that the relationships it has forged with individuals and groups through these efforts will provide an immediate source of local input, and local programming, for its FM station.

Over the course of the decade during which MBC's application has been pending, MBC's principals have regularly conferred concerning their programming plans. They remain committed to the goals set out in their application as originally filed, which include a commitment to pay special attention to Hawaii's large and unique ethnic population, an effort to emphasize local production by working with local private and state organizations, and a goal of producing programming addressing the culture and lives of Islanders that can be made available for broadcast on other stations elsewhere in the U.S., as well as South Pacific countries which have a desperate need for informational and children's programming (and the like) not otherwise available to them. (Through his own contacts and interests throughout the South Pacific, Dr. Racine is able to assure that such programming is aired in many such non-U.S. countries.)

More than 10 years ago, MBC's principals formed MBC for the purpose of seeking a new noncommercial FM station to serve Kaneohe. The FCC failed to take any action on that application for a decade. But during that decade of inaction, the FCC overhauled its comparative process for evaluating such applications, changing the standards and imposing less than crystal-clear criteria, which were subsequently tweaked repeatedly, years after MBC's application was first filed. The end result of these changes was to provide disappointed also-rans like CCHI the opportunity to interpose bogus objections to legitimate applications like MBC's, thereby delaying unnecessarily the initiation of new and diverse programming. Note that CCHI did not even suggest, much less argue expressly, that MBC and its principals have not been and are not now in direct contact with the local community, or that MBC and its principals have not interacted with that community (including, through Dr. Racine's television station, the provision of training in broadcast production), or that MBC and its principals are not in a position to "hit the ground running" when their FM permit is granted. All that CCHI alleged was that its employee couldn't find MBC's headquarters -- even though both he and CCHI's President had been to those offices repeatedly and knew or should have known precisely where they were.

But even if it were conceded, purely for the sake of argument, that MBC's headquarters may have been difficult to locate, that would *not* indicate that those offices did not and do not exist. MBC's headquarters do exist (and have, since 1997, existed) at 875 Waimanu Street -- and the Commission's rule does not require more than that. More importantly, in the circumstances presented here, the ability of the public to find the headquarters is a matter of, at most, secondary importance. After all, for more than 10 years MBC was simply an entity which had filed an application for a new FM station. Why, precisely, would members of the public be trying to beat a path to MBC's door? To read an application which the FCC might someday act on? And why,

given the uncertainty that the FCC would *ever* act on the application, would MBC and its principals have sought in, say, 1997, or 1999, or even 2002, to attract members of the public to its headquarters? To generate enthusiasm for a station that didn't then exist and the future of which was completely at the whim of a Federal agency? The most that MBC could say to the public was that it had filed an application and hoped, someday, that the FCC would grant it – when that might be, nobody could say. Why again would MBC invite the public to its headquarters to give them that less-than-useful information?

No, the more important question here is *not* whether MBC's headquarters were easy to find, but whether, during the decade-long pendency of MBC's application, MBC and its principals have maintained contact with the community, interacted with the community and prepared themselves to "hit the ground running" upon grant of the MBC application. This they have done. Rather than sit in their supposedly unfindable headquarters, twiddling their thumbs and waiting for the public to come to them, MBC's principals have affirmatively engaged themselves in the community in a wide range of activities.<sup>3</sup> They have been personally involved in organizations and activities through which they have not only helped the community directly, but also established contacts which will serve to link MBC's station directly to the community.

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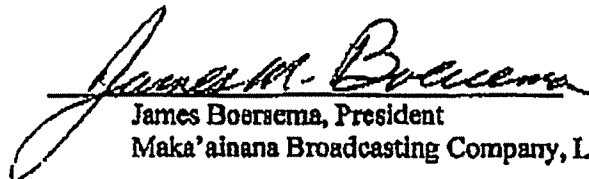
<sup>3</sup> MBC anticipates that CCHI may attempt to criticize the instant showing by asserting that the actions of MBC's principals cannot properly be attributed to MBC. But let's get real. The Commission's goal here is to assure "contacts" and "interaction" between the applicant and the community. Plainly, the most effective "contacts" are interpersonal ones, and a corporation cannot itself "interact" with anything without the personal involvement of its principals. A small corporation (such as MBC) is itself nothing more than its members. Indeed, in the *NCE R&O* (at ¶54), the Commission admonished that it expected that "contact" with the community would be maintained by "decision and policy makers" of the applicant. So where, as here, a corporation's members have established and maintained connections and activities which clearly provide them with extensive insight into the community's needs, it would be idle to suggest that that insight cannot be attributed to the corporation.

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Far from being a mere "inchoate" "shell" entity lacking any "contact" or "interaction" with the community, MBC has, through the extensive, long-standing and continuing community involvement of its principals, demonstrated that it is deeply committed to serving its community. That commitment, reflected in, *e.g.*, the participation of MBC's principals in numerous community-based organizations and activities, has provided and continues to provide MBC with precisely the type of "knowledge of the community" to enable MBC to be responsive to the community's educational needs – just as the Commission expected, *see First Recon. MO&O*. The contacts and interactions thus far have established not only strong community ties, but also concrete results in terms of broadcast-related training (through the cooperation of Dr. Racine's television station) and identification of groups who are expected to assist in the production of programming for the new station (including, *e.g.*, Hope Chapel of Kaneohe Bay).

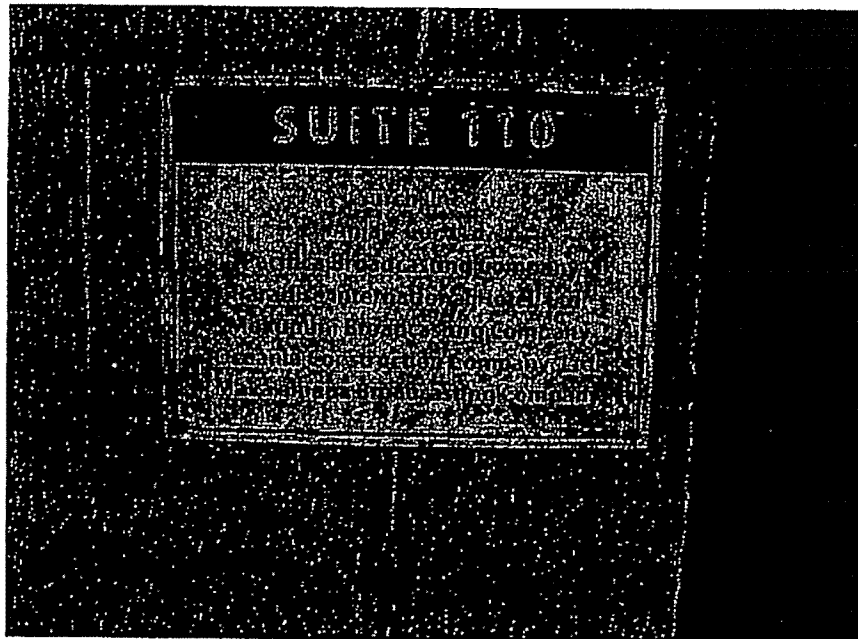
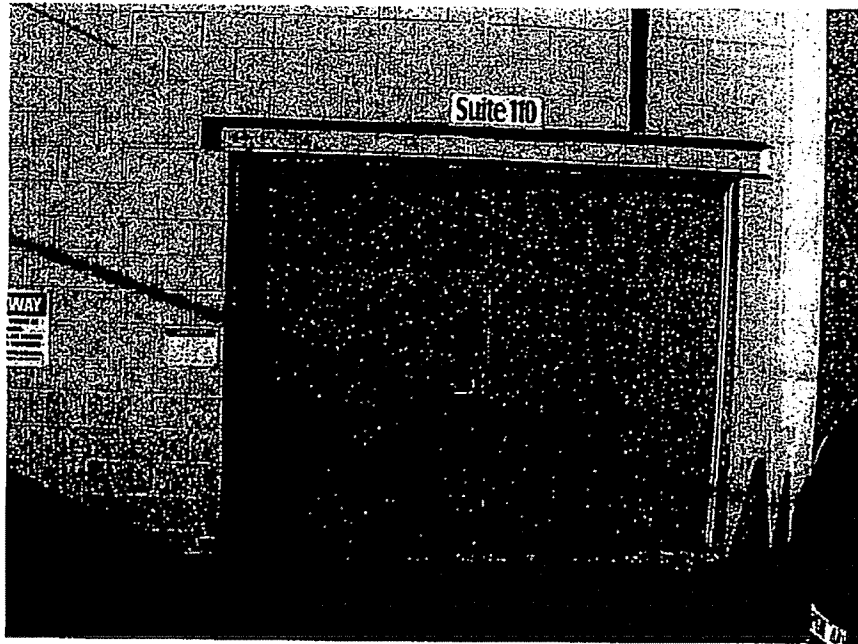
In view of all of the foregoing, MBC submits that it is without question an "established local applicant" as required by the Commission's rules.

I hereby declare, under penalty of perjury, that the foregoing is true and correct.

  
James Boersma, President  
Maka'ainana Broadcasting Company, Ltd.

Date: Nov. 1, 2007

**ATTACHMENT A**



**CERTIFICATE OF SERVICE**


I, Harry F. Cole, hereby certify that on this 21st day of July, 2011, I caused copies of the foregoing "Petition to Reconsideration" to be placed in the U.S. Postal Service, first class postage prepaid addressed to the following persons:

Peter H. Doyle, Esquire  
Chief, Audio Division  
Media Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Scott Woodworth, Esquire  
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Gary Smithwick, Esquire  
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1920 N Street, N.W.  
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Washington, D.C. 20036  
Counsel for Mt. Wilson FM Broadcasters, Inc.

  
/s/ Harry F. Cole  
Harry F. Cole

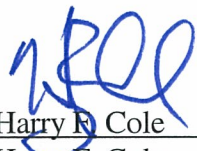
## CERTIFICATE OF SERVICE

I, Harry F. Cole, hereby certify that on this 10th day of September, 2012, I caused copies of the foregoing "Application for Review" to be placed in the U.S. Postal Service, first class postage prepaid, addressed to the following persons:

Peter H. Doyle, Esquire  
Chief, Audio Division  
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/s/ Harry F. Cole  
Harry F. Cole