Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In re Applications of	)	
	)	
ANNISTON	)	File No. BNPED-20100226ABT
SEVENTH-DAY ADVENTIST CHURCH	)	Facility ID #184996
	)	
BOARD OF TRUSTEES OF	)	File No. BNPED-20100226AFB
JACKSONVILLE STATE UNIVERSITY	)	Facility ID #184885
	)	
For a Construction Permit for a New	)	
Noncommercial FM Station at	)	
Anniston, Alabama	)	

Rec'd
11/20/12

TO: The Secretary
ATTN: Chief, Audio Division,
Media Bureau

OPPOSITION TO PETITION FOR RECONSIDERATION

The Anniston Seventh-day Adventist Church ("ASDA"), by counsel, hereby opposes the November 5, 2012 Petition for Reconsideration filed by Jacksonville State University ("JSU") in which JSU asks the Media Bureau to reverse its action reinstating and granting ASDA's above identified application in *Anniston Seventh-day Adventist Church*, DA 12-1588, released October 4, 2012 (the "Letter Decision"). The Petition should be denied because JSU's argument is based upon a misinterpretation the law underlying the Letter Decision.

ASDA was named the Tentative Selectee in NCE Reserved Allotment Group No. 1, and it was accepted for filing.[1] In response to a Petition to Deny filed by JSU, the Bureau dismissed

[1] *See, Comparative Consideration of 37 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations filed in the February 2010 and October 2007 Filing Windows*, Memorandum Opinion and Order, 26 FCC

ASDA's application on the grounds that the proposal would not provide the first or second NCE FM service to at least ten percent of the population within the proposed 60 dbu contour.[2] ASDA cured that defect with an amendment to its application filed on June 22, 2012 and timely filed a Petition for Reconsideration of the dismissal action, relying upon §73.3522(b)(2) of the Commission's rules. The Bureau determined that the amendment did indeed cure the defect, reinstated ASDA's application and granted it in the Letter Decision.

In its Petition for Reconsideration, JSU asserts that ASDA was not entitled to correct the deficiency with its June amendment because "Section 73.3522 provides one and only one opportunity for the submission of a curative amendment."[3] This argument seems to be based, at least in part, on the fact that ASDA had filed an earlier engineering amendment on December 27, 2011, that corrected the statement of the coordinates for its proposed antenna site. JSU does not claim that ASDA's June amendment failed to correct the defect for which its application was dismissed. JSU apparently then concedes that ASDA's application as amended and granted is entirely rule-compliant.

JSU's interpretation of §73.3522(b)(2) completely disregards the everyday common sense meanings of the words in the text. The rule section pertains to amendments by Tentative Selectees chosen pursuant to §73.7003. This section sets out the procedures for naming Tentative Selectees on the basis of comparative points. ASDA was identified as the Tentative

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Rcd 7008, 7015-7016 (2011). (Hereinafter, the MO&O.)

[2] *See, Anniston Seventh-day Adventist Church,* 27 FCC Rcd 5710 (MB, 2012).

[3] Petition, at 3.

Selectee on the basis of the comparative points that it earned.[4] ASDA therefore is a §73.7003 Tentative Selectee. The text of §73.3522(b)(2) reads, in part, as follows:

> (b) A §73.7003 Tentative Selectee. . . . If any Tentative Selectee's application is determined unacceptable, the application will be returned and the Tentative Selectee will be provided one opportunity for curative amendment by filing a petition for reconsideration requesting reinstatement of the application. All amendments filed in accordance with this paragraph must be minor and must claim the same number of points as originally claimed or more points than claimed by the applicant with the next highest point total.

The Commission reiterated the availability of this rule in the MO&O at footnote 203: "If a tentative selectee's application is found unacceptable, it is returned. The applicant is then given one opportunity to submit a curative amendment."[5] ASDA's amendment was a minor amendment and ASDA continued to claim five comparative qualitative points as it did in the original application, which continued to be more points than claimed by the applicant with the next highest point total – JSU.

The Commission has repeatedly reaffirmed in numerous NCE comparative selection orders that §73.3522(b)(2) is available to Tentative Selectees whose applications are dismissed. It has confirmed it again is follow-up proceedings, such as *Hampton Roads Educational Telecommunications Association, Inc.*, 23 FCC Rcd 7376, 7381 (MB, 2010), where the Bureau acknowledged that an NCE FM applicant with a Channel 6 TV interference problem in its original application could cure it through the process allowed under §73.3522(b)(2).

JSU argues that ASDA has exceeded the one-amendment allowance permitted by the rule because it filed two amendments – one in December, 2011, to correct the site coordinates, and

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[4] MO&O, 26 FCC Rcd, at 7015-7016.

[5] MO&O, 26 FCC Rcd, at 7048, n. 203.

one in June, 2012, to meet the so-called third channel reservation standard. The problem with this analysis is that the December amendment was not filed pursuant to §73.3522(b)(2) and is not to be included under its rubric. As of December, 2011, the Bureau had not dismissed ASDA's application and that amendment therefore obviously was not filed in response to such a ruling. There was no need to seek reinstatement of the application, as provided for in the rule. Furthermore, the December amendment was not intended to correct a disqualifying defect in the application. It only served to relocate the proposed antenna site from one place to another – both of which were theoretically viable and legal. Absent the December application, the Commission could have granted the application with an antenna site at an unintended location but with no disqualifying effect. The December, 2011 amendment was not the type anticipated by §73.3522(b)(2) and it did not preclude the legitimate filing of a subsequent amendment as allowed by the rule.

Despite the fact that ASDA was clearly named the Tentative Selectee, and §73.3522(b)(2) is specifically directed to Tentative Selectees, JSU posits that ASDA cannot take advantage of the rule because it never deserved to be the Tentative Selectee in the first place. When the corrective amendment was filed, it no longer held that title, and was instead merely a dismissed applicant. This claim is illogical on its face. The purpose of the rule is to allow a dismissed applicant to seek the reinstatement of its application. The rule clearly states that a petition for reconsideration should be filed with the corrective amendment to request reinstatement of the dismissed application. If the applicant loses its status as the Tentative Selectee when the application is dismissed, that apparently does not and cannot affect its eligibility to take advantage of the rule.

The other premise underlying JSU's contention is also invalid. JSU asserts that ASDA was not entitled to use the rule because it should never have been named the Tentative Selectee due to the defect in the application. However, the very existence of the rules assumes the existence of a problematic application owned by the applicant named as the Tentative Selectee. If a Tentative Selectee never had a defective application, there would be no need for the rule whose purpose is to provide a process for correcting defective applications for otherwise meritorious applicants.

JSU also theorizes that the deficiency in ASDA's original application, i.e., that it failed to meet the third channel reservation standard, cannot be cured with or without the benefit of §73.3522(b)(2).[6] The only authority that JSU cites in support of this concept is the MO&O. Three other NCE Reserved Allotment groups each included an applicant that failed to meet the third channel reservation standard on the initial review.[7] In each case, the applicant was summarily dismissed. Here again, JSU's analysis is unavailing. None of these cases presented facts that would bring them within the purview of §73.3522(b)(2). None of these applicants was named a Tentative Selectee, and none of them sought reconsideration of the dismissal of its application.

The application in Group 11 of Serendipity Educational Broadcasting, Inc.[8] poses a scenario that JSU attempted to exploit. Serendipity originally stated in its application that it could not meet the third channel reservation standard. However, it subsequently amended its

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[6] Petition, at 4-7.

[7] MO&O, at ¶¶ 34, 59 and 79.

[8] File No. BNPED-20100225ADK.

application and stated in the amendment that it had mistakenly counted a local commercial station as a noncommercial station. Upon discovering the error, Serendipity corrected its calculations and filed an amendment prior to the release of the MO&O. Serendipity did not change any of its technical parameters nor any of its coverage figures – except that with a proper count of the existing NCE signals, it could now certify to meeting the third channel reservation standard. JSU makes much of the fact that this applicant was dismissed even though it had corrected its error. However that means nothing with respect the purpose of §73.3522(b)(2). The rule was never implicated because Serendipity was never named a Tentative Selectee and never petitioned the Commission to reinstate its application.

Finally, JSU attacks the method ASDA used to bring its application into compliance with the third channel reservation requirement.[9] ASDA directionalized its coverage pattern in such a way as to give the underserved population within its new contour greater mathematical significance so that that population group would constitute at least 10% of the total population within the service area and the application would therefore meet the requirement. JSU self-servingly opines that an amendment reducing the population within the proposed service area "is not generally thought to serve the public interest."[10] This unsupported claim cuts against JSU's arguments posed in previous pleadings that ASDA's application prior to the amendment did not serve the public interest as much as one that would comply with the third channel reservation requirement. If ASDA's original application had proposed the service area now proposed in the amended application, no such negative implication would have been raised. The fact that the

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[9] Petition, at 7.

[10] Petition, at 7.

amended application is deemed to be more in the public interest under the Commission's current polices than the original application demonstrates the vacuous nature of this attack.

JSU has failed to meet the minimal criteria for a reconsideration request. The Commission will consider a petition for reconsideration only when the petitioner shows either material error in the agency's original order, or presents additional facts not known or existing at the petitioner's last opportunity to plead. JSU has not demonstrated either of these conditions and its Petition must be denied.

Respectfully submitted,

ANNISTON SEVENTH-DAY ADVENTIST CHURCH

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November 20, 2012

CERTIFICATE OF SERVICE

I, Donald E. Martin, hereby certify this 20th day of November, 2012, that I have caused a copy of the foregoing document to be served by United States first class mail upon the following:

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