



Federal Communications Commission
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In Reply Refer to:
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David G. O'Neil, Esq.
Rini Coran, PC
1140 19th Street, N.W.
Suite 600
Washington, DC 20036

Barry S. Persh, Esq.
Dow Lohnes PLLC
1200 New Hampshire Ave., N.W.
Suite 800
Washington, DC 20036

In re: **NCE October 2007 Window
MX Group Number 393**

NEW NCE(FM), Brewster, New York
WAMC
Facility ID No. 174780
File No. BNPED-20071019APS

New NCE(FM), Brewster, New York
Mission Connecticut, Inc.
Facility ID No. 172347
File No. BNPED-20071015AEN

Petition to Deny

Dear Counsel:

We have before us (1) the captioned application of WAMC for a new noncommercial educational ("NCE") station in Brewster, New York ("WAMC Application"); (2) the captioned application of Mission Connecticut, Inc. ("Mission") for a new NCE station in Brewster, New York ("Mission Application"); and (3) a Petition to Deny ("Petition") filed by Mission against the WAMC Application.¹ For the reasons stated below, we deny the Petition, dismiss the Mission Application, and grant the WAMC Application.

Background. The WAMC Application and the Mission Application were among those applications designated NCE MX Group 393.² Pursuant to established procedures,³ the Commission

¹ Mission filed the Petition on June 1, 2011. WAMC filed an Opposition on June 13, 2011. Mission filed a Reply on June 22, 2011.

² *Media Bureau Identifies Groups of Mutually Exclusive Applications Submitted in the October 2007 Filing Window for Noncommercial Educational FM Stations*, Public Notice, 23 FCC Rcd 9508 (MB 2008).

³ See 47 C.F.R. § 73.7003 (point system selection procedures); see also *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000); Memorandum Opinion and Order, 16 FCC Rcd 5074, 5105 (2001), *reversed in part on other grounds*, *NPR v. FCC*, 254 F.3d 226 (D.C. Cir. 2001).

determined that no applicant in NCE MX Group 393 was entitled to a dispositive fair distribution preference under Section 73.7002 of the Commission's Rules ("Rules"),⁴ and consequently engaged in a point system selection process.⁵ WAMC and Mission were credited two points each for diversity of ownership; Mission was credited three points as an established local applicant; and WAMC was credited two points under the best technical proposal criterion.⁶ Consequently, WAMC finished with four points, while Mission, with five points, prevailed.⁷ Thus, the Commission identified Mission as the tentative selectee of NCE MX Group 393, accepted the Mission Application for filing, set a 30-day period for filing petitions to deny that application, and indicated that, if, after that 30-day petition period had run, there was no substantial and material question concerning the Mission Application, it would, by public notice, dismiss the competing applications and grant the Mission Application.⁸

WAMC filed a Petition to Deny the Mission Application on July 27, 2010, arguing that the Commission erred in awarding Mission's proposal three points under the local applicant criterion. In its original application, Mission checked "No" in response to Section IV, Item 1, which asks whether the applicant certifies that it is entitled to points as an established local applicant. Mission did, however, attach to its application, as Exhibit 12, a statement that it had amended its articles to require that localism be maintained. On February 4, 2008, well after the close of the filing window, Mission amended its application to answer Section IV, Item 1, as "Yes." In an Exhibit, Mission explained that the certification of "No" was a clerical error. The Commission agreed with WAMC that it was an error to award Mission local applicant points, stating that Mission's qualifications for points were established at the close of the filing window and could not be enhanced afterwards.⁹ The Commission rescinded the tentative selection of Mission, identified WAMC as the new tentative selectee of Group 393, and began a new 30-day period for filing petitions to deny the WAMC Application, after which the application would be granted.¹⁰ Mission then filed the subject Petition, arguing that the Commission erred in stripping it of its local applicant points.

Discussion. Section 309(d)(1) of the Communications Act of 1934, as amended,¹¹ provides that any party in interest may file a petition to deny an application. In order to assess the merits of a petition to deny, a two-step analysis is required.¹² First, the petition must make specific allegations of fact sufficient to demonstrate that the petitioner is a party in interest and that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity.¹³ This threshold

⁴ 47 C.F.R. § 73.7002.

⁵ See *Comparative Consideration of 52 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 8793, 8832 (2010).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 8850.

⁹ 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 Window*, Memorandum Opinion and Order, 26 FCC Rcd 7008, 7043 (2011).

¹⁰ *Id.* at 7060.

¹¹ 47 U.S.C. § 309(d)(1).

¹² See, e.g., *Artistic Media Partners, Inc.*, Letter, 22 FCC Rcd 18676, 18676 (MB 2007).

¹³ See *id.*; *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

determination is made by evaluating the petition and the supporting affidavits. If the petition meets this threshold requirement, the Commission must then examine all of the material before it to determine whether there is a substantial and material question of fact calling for further inquiry and requiring resolution in a hearing.¹⁴ If no such question is raised, the Commission will deny the petition and grant the application if it concludes that such grant otherwise serves the public interest, convenience, and necessity.

Mission's sole argument for denying the WAMC Application is that the Commission erred in denying its own application three points as an established local applicant and that, with those three points, it would have remained the tentative selectee of NCE MX Group 393. Mission argues that it was entitled to those points because its original application contained an exhibit in support of localism, and its February 2008 amendment merely corrected a clerical error.¹⁵

The Public Notice establishing the procedures for the October 2007 NCE window ("*2007 Public Notice*") explicitly stated that:

Maximum qualifications for new applications filed in the window are established at the time of filing. Maximum qualifications for pending applications are established as of the close of the window. The Commission will take into account any negative change in an applicant's comparative position after the close of the window. The Commission will not take into account any enhancement in an applicant's comparative position after the close of the window.¹⁶

The subject NCE window opened on Friday, October 12, 2007, and closed on Friday, October 19, 2007.¹⁷ Mission's amendment was filed after the close of the window and therefore was outside the period to be considered in making the comparative standing analysis. Mission could have submitted a correct certification for its established local applicant claim by the close of the filing window, but did not. Even if, as Mission maintains, the exhibit in the initial application would have demonstrated its eligibility to claim points as an established local applicant, Mission's certification that it did not qualify for local applicant points precludes reliance upon the exhibit in our comparative consideration. To hold otherwise would be unfair to the other applicants in MX Group 393, who were subject to the deadline for point claims, and would undermine the integrity of the NCE licensing process.

In similar circumstances, the Bureau has rejected amendments that enhance applicants' comparative standings even though the amendments allegedly served to only correct mistaken data or

¹⁴ 47 U.S.C. § 309(d)(2).

¹⁵ Petition at 4.

¹⁶ *Media Bureau Announces NCE FM New Station and Major Change Filing Procedures for October 12 – October 19, 2007 Window; Limited Application Filing Freeze to Commence on September 8, 2007*, Public Notice, 22 FCC Rcd 15050, 15051 (MB 2007) (internal citations omitted). See also Instructions for FCC Form 340, Section IV ("The applicant's qualification 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); 47 C.F.R. § 73.7003(e) ("For applications filed after April 21, 2000, an applicant's maximum qualifications are established at the time of application"); *NCE Order*, *supra* note 12, 15 FCC Rcd at 7423 (noting that point system documentation filed at the Commission should be submitted "concurrently with filing").

¹⁷ *Id.* at 15050.

clerical errors in the initial application.¹⁸ Likewise, the Commission has rejected untimely claims for fair distribution preferences.¹⁹ Here, Mission's amendment had the effect of enhancing its comparative standing after the deadline and was properly not considered.

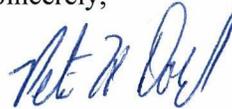
Additionally, we have examined the WAMC Application and find that it complies with all pertinent statutory and regulatory requirements and that its grant will further the public interest, convenience, and necessity.

Conclusion/Actions. Accordingly, IT IS ORDERED that Mission Connecticut, Inc.'s, Petition to Deny filed on June 1, 2011, IS DENIED.

IT IS FURTHER ORDERED that the application for a new noncommercial educational FM station at Brewster, New York (File No. BNPED-20071015AEN), filed by Mission Connecticut, Inc., IS DISMISSED.

IT IS FURTHER ORDERED that the application for a new noncommercial educational FM station at Brewster, New York (File No. BNPED-20071019APS), filed by WAMC IS GRANTED, CONDITIONED UPON WAMC's compliance with Section 73.7005 of the Rules, 47 C.F.R § 73.7005, which sets forth a four-year holding period for applicants that are awarded permits by use of a point system.²⁰

Sincerely,



Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: WAMC
Mission Connecticut, Inc.

¹⁸ See *Network of Glory*, Letter, 25 FCC Rcd 7311 (MB 2007) (finding that applicant's amendment was a prohibited attempt to enhance its comparative position when the amendment attempted to correct allegedly erroneous population numbers). See also *Threshold Fair Distribution Analysis of 28 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in October 2007 Window*, Memorandum Opinion and Order, 24 FCC Rcd 12390, 12394-12395 (MB 2009) (finding that an applicant's amendment was a prohibited attempt to enhance its comparative position when the initial application erroneously used population data from a different community than that which applicant proposed to serve).

¹⁹ See, e.g., *Comparative Consideration of 59 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in the October 2007 Filing Window*, Memorandum Opinion and Order, 25 FCC Rcd 1681, 1697 (2010) (finding that applicant's amendment was a prohibited attempt to enhance where the amendment claimed, for the first time, eligibility for fair distribution preference and was filed after the close of the filing window); see also *Threshold Fair Distribution Analysis of 28 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, 24 FCC Rcd 12390, 12399 (MB 2009) (same).

²⁰ See 47 C.F.R. § 73.7005.