

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In re the Application of)	
)	NCE FM MX Group 82
Our Lady of the Snows Foundation, Inc.)	
)	Application File 0000167668
)	
)	FCC Identifier 763565
For Permit to Construct)	
New Noncommercial Educational)	Pleading File
FM Station, Ketchum, ID)	0000204232

To: Office of Secretary
Attention: Chief, Audio Division, Media Bureau

OPPOSITION TO PETITION TO DENY

Our Lady of the Snows Foundation, Inc. (“Our Lady”), by counsel, hereby opposes the *Petition to Deny* submitted in the above-referenced matter by Idaho State Board of Education (“ISBE”), on November 23, 2023 (the “*Petition*”). ISBE has failed to supply an adequate basis for reducing the point calculation that the agency initially determined was appropriate. As explained below, neither of the *Petition*’s assertions attempting to justify a reduction is valid.

However, inasmuch as ISBE lacks standing even to challenge the captioned application, the agency staff need not delve into the lack of merit to the *Petition*’s assertions. The ISBE application, as originally submitted and at the close of the Filing Window (the “Freeze Date”), suffered from an un-curable defect, and in any event cannot improve its competitive posture from that for which it was eligible as of the Freeze Date. Thus, even if, *arguendo*, a reduction of points was appropriate here, Our Lady’s application would

remain the tentative selectee. Since ISBE can posit no harm that it suffers by the naming of the captioned application as the tentative selectee, ISBE has no standing to support its *Petition*. Accordingly, both the ISBE application and the *Petition* must be dismissed, and the captioned application of Our Lady should be processed as a singleton.

STANDING

Section 309(d) of the Communications Act permits any interested party to petition the Federal Communications Commission to deny an application for a broadcast authorization.¹ Although ISBE submitted an application that superficially appears to be mutually exclusive with the captioned application, the ISBE application was technically defective in a manner that most likely cannot be cured with a minor amendment. As of the Freeze Date, no application could be amended with a major modification, and no application can become more competitive than it was on the Freeze Date. The ISBE application originally proposed a transmission site from which the proposed community of license could not, in fact, be covered.² It was therefore defective and must be dismissed. Moreover, this is almost certainly an incurable defect, since any effort to cure this defect after the Freeze Date would almost certainly constitute a major amendment. Thus, the ISBE application must be dismissed.

Moreover, even if the ISBE application could have been saved via a curative amendment, its competitive posture with respect to any other applications cannot be improved after the Freeze Date. As of the Freeze Date, the ISBE application was not, in

¹ 47 U.S.C. §309(d); *see also Serafyn v. FCC*, 149 F.3d 1213 at ¶13 (DC Cir. 1998).

² *Exhibit A* at Engineering Statement.

fact, technically acceptable and mutually exclusive with the captioned application of Our Lady. Any analysis that is premised on technical acceptability and mutual exclusivity therefore improperly applies competitive criteria which are inapplicable to the ISBE application.

In view of the foregoing, the application of Our Lady is in fact a singleton application, and in any event, ISBE can demonstrate no harm to ISBE by the tentative selectee status of the captioned application. ISBE therefore has no standing to challenge the granting of a permit to Our Lady.

ARGUMENT

To warrant denial, a petition must set forth specific facts demonstrating that a grant of the application would be *prima facie* inconsistent with the public interest,³ and must supply a “totality of evidence [casting] sufficient doubt on the point that further inquiry is called for.”⁴ As explained below, the *Petition* falls well short of these threshold considerations.

The *Petition*’s contention that the agency should reduce the point total for Our Lady is premised entirely on the notion that Our Lady is not entitled to full credit for the many decades in which it has been established and local to the community it intends to serve merely because the date of its incorporation preceded by fewer than two years the date of its submission of an application for the permit to construct a new noncommercial

³ 47 U.S.C. §309(d)(1); see *Rocky Mountain Radio Co, LLP*, 15 FCC Rcd 7166 at ¶2 (1999), citing *Astroline Communications v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988).

⁴ *Gencor, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987).

educational FM facility.⁵ Inexplicably, the *Petition* further contends that this alleged obstacle for Our Lady's application also eliminates its eligibility for the completely unrelated claim to local diversity of ownership.⁶ The *Petition* cites no legal authority for either of these claims. Neither of the *Petition*'s assertions is valid.

* * *

I. An incorporation date is not dispositive as an indicator of an institution's establishment in a community.

There is no un-rebuttable presumption recognized by the FCC and that favors an incorporation date as the only indicator of when an institution became established in its community. An incorporation date may be the beginning, but certainly is not the end, of an inquiry as to establishment in a community.

In the instant matter, Our Lady provided evidence of incorporation not to establish a new and independent entity but rather to demonstrate recognition by a state as a non-profit in good standing. The Commission's emphasis on incorporation to demonstrate the threshold eligibility question – which we reference as the *Nonprofit Recognition Policy* -- presented Catholic Church entities with particular challenges. In numerous states and in many Church diocesan jurisdictions, Church entities are universally treated as nonprofit in nature and often pre-date in establishment the government of the state in which they are headquartered, albeit many have not incorporated and have little in the way of state recognition of their unique status.

⁵ *Petition* at 2.

⁶ *Id.*

Our Lady is the relatively recently incorporated manifestation of a previously unincorporated foundation founded five years prior to the Freeze Date. Moreover, the foundation is merely one arm of a Catholic school that pre-exists the Freeze Date by decades. Furthermore, the school is operated by a Catholic parish that has been established and local in the community for half a century.

Neither the school nor the parish is incorporated. As of the Freeze Date, only the incorporated arm was relatively “new”; the school and the parish had pre-existed the Freeze Date by decades. Many Catholic institutions, including Our Lady, if faced with such a choice, would be able to produce documentation of tax-exempt recognition by the Internal Revenue Service (“IRS”) under an “umbrella ruling” regarding thousands of Catholic institutions. While this implies state recognition, as well, it does not – strictly speaking – evidence state recognition of nonprofit status, much less evidence good standing. For the Commission to adopt the *Petition*’s asserted interpretation of its comparative criteria, a prospective applicant which in fact had maintained a substantial established presence in the community but which had only incorporated relatively recently would be forced either to cede credit for its long tenure (in order to demonstrate its *bona fides* as a nonprofit) or to cede its own ability to cite incorporation as a means of demonstrating state recognition as a nonprofit in good standing. To force applicants into such a false choice would render the comparative criteria arbitrary and capricious.

While the *Petition* is silent on this point (or even suggests no effort for Our Lady to document its established local presence), Our Lady was forthright in explaining and documenting its claims. As set forth in the comparative criteria Exhibit:

As noted in the Applicant history and the government recognition documents provided herewith and in the Eligibility Certifications Exhibit, the foundation itself was established in 2016; it operated for several years under an umbrella tax exempt ruling, and more recently received state recognition as a corporate aggregate. However, the foundation is merely a corporate aggregate expression of the Catholic parish long established in the community and known as Our Lady of the Snows Catholic Church. The parish and foundation operate a common website and share the same headquarters and staff. The parish/foundation headquarters church building by the name “Our Lady of the Snows” was dedicated on August 16, 1974, and it was replaced with a larger building at the same site in 2007. Thus, although the foundation as a corporate entity has been established local for five years, Applicant’s established local presence in the community has existed for more than 51 years.

The exhibit in full and all supporting documentation set forth in the captioned application of Our Lady are hereby incorporated by reference into this pleading.

If the instant situation is not sufficiently illustrative, consider, for example, the hypothetical application of a California parish church tracing its presence back to its status as an unincorporated mission established before California even existed as a state. Would that parish church, in the event it sought a FCC authorization pursuant to NCE comparative criteria, lose its claim to established local status merely because, as a threshold eligibility matter, it incorporated and thus obtained “good standing” recognition within two years of a FCC Filing Window? Of course not. Such an interpretation would force the agency’s entire comparative criteria scheme into a nonsensical outcome.

In any event, attached hereto as Exhibit B is a sworn declaration in support of the material facts in this matter, including the assertion that the applicant is an incorporated extension of the pre-existing foundation, itself an arm of the school, and both of which are ministries of the Catholic church parish community that has been established locally for more than half a century.

II. The *Petition* advocates an interpretation of the FCC Rules that would disproportionately burden Catholic institutions and that would interfere with the Church's authority to determine its own governing structures and administrators.

Presumably because it is inconveniently contrary to ISBE's arguments, the *Petition* ignores the evidence submitted in Our Lady's application. Instead, ISBE presumably imagines the FCC would force Catholic institutions, as well as similarly situated religious institutions, into a false choice between satisfying the requirement of demonstrating state recognition of a nonprofit in good standing, on the one hand, and on the other hand, claiming credit for longstanding ties to the community a prospective radio licensee wishes to serve. We respectfully submit this could not have been the Commission's intent in adopting its comparative criteria.

However, even if, *arguendo*, an unintended consequence of the Commission's Rules is to deny recognition of the long-established status of such applicants who incorporated solely as a means of satisfying the FCC's policy, then such a result would invite strict scrutiny under the Religious Freedom Restoration Act of 1993 ("RFRA"), which prohibits federal agencies from substantially burdening a particular religious "person" -- even with a rule of general applicability -- unless the regulation is the least restrictive means of achieving a compelling government interest.⁷

As noted, we do not actually believe the contention on which the *ISBE Petition* is premised, *i.e.*, that the FCC intended to compel Catholic institutions to lay down their claims to establishment in a local community to demonstrate their qualifications to hold a

⁷ 42 U.S.C. §§ 2000bb-2000bb-4 (2006).

NCE FM authorization. But if indeed that had been the Commission's intent -- or even if it were the unintended consequence of the agency's application of its comparative criteria -- we respectfully submit that this effect cannot survive strict scrutiny under RFRA.

III. The *Petition* advocates an interpretation of the FCC Rules that is not supported by any legal authority.

We can make no sense of the *Petition*'s unsupported assertion that, if in fact the captioned application of Our Lady was not entitled to three points for established local status, it was likewise ineligible for local ownership diversity points. No legal authority or elaboration of this contention is provided within the *Petition*. We are aware of no legal theory that would support this contention. The established local credit set forth in the FCC Rules is distinct from the local ownership diversity credit set forth in a separate subsection of the Rules.⁸ The analysis of eligibility for the former has nothing to do with the analysis of eligibility for the latter, and vice versa. The *Petition*'s erroneous assertion in this respect only serves to underscore our previous showing that ISBE has no standing because it cannot suffer a harm by way of the granting of the captioned application of Our Lady.

CONCLUSION

In view of the foregoing, ISBE has fallen short of petitioner's burden. Petitioner has no standing and thus its own application, as well as the *Petition*, must be dismissed. Even if the *Petition* was evaluated on its merits, it fails to provide grounds for reducing the comparative points eligibility of the tentative selectee; thus, the *Petition* must be de-

⁸ 47 C.F.R. §73.7003(b)(1) and §73.7003(b)(2), respectively .

nied. Accordingly, the captioned application of Our Lady should be processed as a singleton.

Respectfully submitted,

OUR LADY OF THE SNOWS FOUNDATION, INC.

A handwritten signature in blue ink, appearing to read "Stuart W. Nolan, Jr.", written over a horizontal line.

By:

Stuart W. Nolan, Jr.
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Its attorney

Dated: December 5, 2022

CERTIFICATE OF SERVICE

I, Stuart W. Nolan, Jr., hereby certify that on this date of December 5, 2022, I caused the foregoing “Opposition to Petition to Deny” to be served by electronic mail, on the following:

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Stuart W. Nolan, Jr.

Dated: December 5, 2022

EXHIBIT A
Engineering Exhibit

See separately uploaded Engineering Exhibit.

EXHIBIT B
Sworn Declaration

See Separately uploaded Sworn Declaration.