



Federal Communications Commission
Washington, D.C. 20554

July 25, 2007

In Reply Refer to:
1800B3-KD

Living Proof, Inc.
c/o Harry C. Martin, Esq.
Fletcher Heald & Hildreth, PLC
1300 North 17th Street
11th Floor
Arlington, VA 22209

University of Massachusetts
c/o John F. Garziglia, Esq.
Womble Carlyle Sandridge & Rice, PLLC
1400 Eye Street, N.W.
Seventh Floor
Washington, D.C. 2005

CSN International
c/o Cary S. Tepper, Esq.
Booth, Freret, Imlay & Tepper, PC
14356 Cape May Road
Silver Spring, MD 20904

Maynard School Committee
c/o Mark R. Masterson, Ed.D.
1 Tiger Drive
Maynard, MA 01754

In Re: Living Proof, Inc.
NEW (NCE FM), Lunenburg, MA
Facility ID No. 122297
BNPED-20000118ACZ
Application for NCE FM Construction Permit

CSN International, Inc.
NEW (NCE FM), Lexington, MA
Facility ID No. 122201
BNPED-20000118AAG
Application for NCE FM Construction Permit

University of Massachusetts
NEW (NCE FM), Stow, MA
Facility ID No. 122279
BNPED-20000118ABW
Application for NCE FM Construction Permit

Maynard School Committee
NCE Station WAVM(FM), Maynard, MA
Facility ID No. 40791
BPED-19990726MA
Application to Make Major Change

**Joint Request for Approval of Settlement
Agreement**

Dear Applicants:

We have before us a Joint Request for Approval of Settlement Agreement ("Joint Request") filed April 12, 2006, by Maynard School Committee ("Maynard"), University of Massachusetts ("UMass") and

Living Proof, Inc. (“Living Proof”) (collectively, the “Settling Parties”), seeking approval of a settlement of the Settling Parties’ mutually exclusive applications for new or modified noncommercial educational (“NCE”) FM broadcast stations. The Joint Request asks us to approve the proposed Settlement Agreement, to grant the Settling Parties’ above-captioned applications, as amended, and to dismiss the above-captioned application filed by CSN International (“CSN”) for an NCE FM construction permit at Lexington, Massachusetts (the “CSN Lexington Application”). For the reasons discussed below, we will grant the Joint Request, approve the Settlement Agreement, grant the above-captioned applications filed by the Settling Parties, as amended, and dismiss the CSN Lexington Application.

Background. Maynard is the licensee of Class D NCE Station WAVM(FM), Maynard, Massachusetts. It filed an application with the Commission on July 26, 1999, to increase the effective radiated power (“ERP”) of Station WAVM(FM) and to convert to Class A status, listing the purpose of the application as a “MAJOR change in licensed facilities” (the “Maynard Application”).¹ On December 17, 1999, the Commission released an “A List” Public Notice, accepting the Maynard Application and establishing a January 18, 2000, cut-off date for any competing applications.² UMass,³ CSN⁴ and Living Proof⁵ filed applications for new NCE stations that conflicted with the Maynard Application. These applications were designated as Group No. 990705.

Thereafter, on May 31, 2000, Maynard and UMass entered into a “Time Share Agreement” and subsequently amended their applications on August 8, 2000, and August 23, 2000, respectively, to incorporate this Time Share Agreement.

In accordance with the Commission’s NCE Point System rules, the Bureau then called for the applicants in Group No. 990705 to submit their fair distribution point system supplements.⁶ On October 6, 2005, the Chief of the Media Bureau’s Audio Division issued a letter that examined the applications in Group No. 990705 and determined that Living Proof was entitled to a decisive Section 307(b) fair distribution preference (the “Letter Decision”).⁷ Specifically, the Letter Decision concluded that Living Proof’s proposal would provide a first or second local service to 25,567 persons, and none of the other

¹ File No. BPED-990726MA (emphasis in original).

² See *Public Notice, Non-Commercial Educational FM Broadcast Applications Accepted For Filing And Notification Of Cut-Off Date*, Report No. A-357, released Dec. 19, 1999.

³ BNEPD-20000118ABW.

⁴ BNEPD-20000118AAG. CSN also filed a second NCE FM application by the cut-off date, but that application was granted after it was amended so as to remove the conflict with the other applications. See FCC File No. BNEPD-20000118AAI, for NCE FM construction permit at Gardner, Massachusetts (the “CSN Gardner Application”). That station, WJWT(FM), was granted a license recently. See FCC File No. BLED-20060623ABM.

⁵ BNEPD-20000118ACZ.

⁶ See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000), modified, 16 FCC Rcd 5074 (2001) (“NCE Comparative Standards”); see also 47 C.F.R. §§ 73.7002 and 73.7003.

⁷ *Letter to Harry Martin, et al.*, 20 FCC Rcd 15165 (MB 2005); see 47 U.S.C. § 307(b).

applicants could make an equivalent or better showing. Thus, the Letter Decision identified Living Proof as the tentative selectee and ordered its application accepted for filing.⁸

On November 14, 2005, Maynard and UMass filed a Joint Petition to Deny, arguing that the Maynard Application was improperly processed by the FCC as a major modification application. It contends that Maynard proposed a minor change and that, as such, a tentative selectee should never have been named. Living Proof filed a Consolidated Opposition on December 19, 2005, arguing that the Joint Petition raised new arguments relating to the classification of the Maynard Application as a major change proposal that should have been raised when the Commission called for competing applications. In a Joint Reply filed on January 30, 2006, Maynard and UMass contended that the arguments set forth in the Joint Petition to Deny were timely and appropriate.

On April 12, 2006, Maynard, Living Proof and UMass filed a Joint Request for Approval of Settlement Agreement. The proposed settlement contemplates the acceptance of the Maynard Application as a minor change application and the approval of the Settling Parties' above-captioned applications, as amended, to remove the mutual exclusivity among them. In addition to the UMass/Maynard time-share proposal, the settlement includes amendments to the Living Proof and Maynard applications to remove the mutual exclusivity of their technical proposals.

The Settling Parties contend that our acceptance of the Maynard Application as a minor change application also would require the Commission to effectively rescind the "A List" Public Notice which invited applications in competition with the Maynard Application and to dismiss the CSN Lexington Application.⁹

Discussion. Section 73.3573(a)(1) of the Commission's Rules limits the definition of a "major change" application for Class D FM stations like Station WAVM(FM) to an application for "any change in community of license, any change in frequency except changes to first, second or third adjacent channels, and any change in antenna location where the station would not continue to provide 1 mV/M service to some portion of its previously authorized 1 mV/m service area."¹⁰ We agree with the Settling Parties that the Maynard Application's requests for an increase in power and for conversion from Class D to Class A status do not meet the definition of a major change application. Instead, the Maynard Application falls under Section 73.3573(a)(2), which covers "applications for licenses and all other changes in the facilities of authorized stations." Such applications are deemed minor modifications.¹¹

When the Maynard Application was initially filed, Maynard incorrectly indicated that the application was for a major change filing, when, under the Commission's Rules, it qualified as a minor change application. Therefore, the staff processed the Maynard Application as a major change application. We now remedy this oversight and will process the Maynard Application as a minor modification application. Under the Commission's rules, this application reclassification normally would result in the dismissal of *all* later filed applications, as minor change applications are processed "on a

⁸ Public Notice of the acceptance for filing was given on October 12, 2005, Report No. 26088.

⁹ See note 2 *supra*.

¹⁰ See 47 C.F.R. § 73.3573(a)(1).

¹¹ See 47 C.F.R. § 73.3573(e)(1) ("Applications for minor modifications for reserved channel FM broadcast stations, as defined in paragraph (a)(2) of this section...").

‘first come/first served’ basis, with the first acceptable application cutting off the filing rights of subsequent, competing applicants.”¹² We find, however, that dismissal of all of the applications would not serve the public interest in the unique circumstances of this case. The CSN Gardner Application, also filed by CSN in response to the “A-List” Public Notice accepting the Maynard Application, was granted long ago and the Settling Parties have presented us with a proposal allowing us to grant not one, but three, applications that would collectively serve a larger geographic area than the Maynard Application alone would have covered. In consideration of the public interest factors described below, we will waive the minor change application processing rule to accept and grant all the applications that have been amended to eliminate the mutual exclusivity with the Maynard Application and with each other, as the Settlement Agreement contemplates.¹³

A party seeking a waiver must demonstrate that deviation from the general rule is warranted by special circumstances and will serve the public interest.¹⁴ In this case, we conclude that granting a waiver will serve the public interest in several respects. As discussed above, approval of the Settlement Agreement would allow us to grant three applications instead of one. UMass and Living Proof’s applications will provide first aural services to their communities. Maynard will be able to upgrade Station WAVM from Class D to Class A, thereby securing a permanent and improved facility for this 33-year old high school station. By co-locating with Maynard’s proposed 500-Watt facility at Maynard, UMass will be able to extend the unique folk programming of WUMB-FM, its primary station in Boston, to a wider audience at the western perimeter of the Boston metropolitan area. UMass and Maynard would each realize significant cost savings by sharing transmission facilities. We note that Living Proof’s amended 60 dBu contour still would provide an aggregated first and second service to 7,279 persons, representing 18.9% of the total population within that contour. We also believe that the applicants’ reliance on our initial treatment of the Maynard Application as a major modification and the subsequent publication of an “A List” Public Notice inviting applications is a special circumstance supporting a waiver.¹⁵ We also note that a waiver will permit these applications to receive the same treatment as the CSN Gardner Application (*i.e.*, a grant after the application is amended to remove the mutual exclusivity).

Although the CSN Lexington Application is the sole application now subject to dismissal pursuant to Section 73.3573(e), we do not believe that our action treats CSN differently from the other applicants. Just as each of the Settling Parties has removed itself from the conflicting group by means of

¹² See 47 C.F.R. § 73.3573(e).

¹³ CSN, as the sole applicant that has not amended its application to make it grantable, will be provided with one opportunity for curative amendment by filing a petition for reconsideration requesting reinstatement of the CSN Lexington Application, amended to eliminate mutual exclusivity, in accordance with the procedure set forth in 47 C.F.R. § 73.3522(b)(3). Any such amendment must be minor.

¹⁴ See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969)).

¹⁵ In at least one instance, the Commission has granted a waiver based on an applicant’s reliance on an error made by Commission staff. See, *e.g.*, *Star Development Group, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 13127 (2002) (applicant’s reliance on erroneous information provided by the Commission’s Consolidated Database System in preparing its application for a new AM broadcast station warranted a waiver of 47 C.F.R. § 73.3571(b), the “Major Change Rule,” to allow applicant to amend the application to specify a new frequency while maintaining its original filing date, where the waiver grant served as an “administratively feasible solution” and would not prejudice any other party).

minor engineering changes to its own application, we are giving CSN the opportunity to amend the CSN Lexington Application to eliminate the mutually exclusivity to make the application eligible for a grant.¹⁶ Moreover, we do not believe that our decision will cause CSN to suffer any undue prejudice. If we were to treat the Maynard Application as a minor modification *and* reject the Settlement Agreement, *all* competing applications, including CSN's, would be dismissed. The CSN Lexington Application would suffer the same fate if we were to continue processing the Maynard Application as a major modification, as Living Proof was designated as the tentative selectee in Group 99075 in *Living Proof, Inc.*, Letter, 20 FCC Rcd 15165 (MB 2005). Were that decision affirmed and the Living Proof application granted, the CSN Lexington Application similarly would be dismissed.¹⁷ In addition, it is important to note that the Settling Parties are only receiving the same treatment that CSN received with respect to the granted CSN Gardner Application.¹⁸

Finally, we believe that this action comports with basic due process requirements. Here, the Maynard Application did appear on a cut-off list, and that list effectively gave notice to the public of the opportunity to file an application either in conflict with that application or in conflict with any other application in conflict with the Maynard Application and filed by the cut-off date.¹⁹ Only UMass, Living Proof and CSN availed themselves of this opportunity to file applications by the cut-off date. For the reasons stated above, the CSN Lexington Application would be subject to dismissal whether we treated the Maynard Application as a minor change application or a major change application.

The Joint Request for Approval of Settlement Agreement complies fully with Section 311(c) of the Communications Act of 1934, as amended, and Section 73.3525(a) of the Commission's Rules, which govern Settlement Agreements among broadcast applicants in initial licensing proceedings.²⁰ Each party to the agreement has submitted a statement certifying that its application was not filed for the purpose of entering into a Settlement Agreement, that none of the parties or any of their principals, agents, or

¹⁶ See note 13 *supra*.

¹⁷ See *NCE Comparative Standards*, 16 FCC Rcd at 5105.

¹⁸ We note that our action does not abrogate any rights that CSN may have under *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) (FCC may not grant one application without considering mutually exclusive applications), as a result of the Bureau's treatment of the Maynard Application as a major change application, because the Bureau subjected all of the conflicting applications to a fair distribution of service analysis pursuant to 47 U.S.C. § 307(b) and 47 C.F.R. § 73.7002. Cf. *Cellular Communications Systems*, Report and Order, 86 FCC 2d 469, 500 (1981) ("the basic requirements of *Ashbacker* are twofold: an equitable and meaningful hearing for all applicants and a determination, based on an exercise of judgment, on where the public interest lies. Our 'paper' procedure meets both the equity and public interest requirements of *Ashbacker*").

¹⁹ *Id.*, citing *Kitty Hawk Broadcasting Corp.*, Memorandum Opinion and Order, 7 FCC 2d 153, 154-55 (1967), *recon. denied*, 10 FCC 2d 160 (1967), *app. dismissed sub nom. Cook, Inc. v. United States*, 394 F.2d 84 (7th Cir. 1968).

²⁰ See 47 U.S.C. § 311(e) and 47 C.F.R. § 73.3525(a). We also find that the Settlement Agreement comports with the policies adopted in the *NCE Comparative Standards*, where the Commission held that either universal or technical settlements would be acceptable among mutually exclusive NCE groups. See *NCE Comparative Standards*, 16 FCC Rcd at 5107. We consider the instant Settlement Agreement to be a technical settlement, in that each Settling Party, by means of minor engineering changes, has "removed itself from the group on the four corners of its own application." *Id.* In any event, we find that the rationale set forth in the *NCE Order* for not accepting partial settlement agreements does not apply here.

representatives have been paid or promised any payment or other consideration in excess of its or their legitimate and prudent expenses for entering into or carrying out of the agreement, and that approval of the agreement will serve the public interest by permitting the approval of three, instead of one, of the above-captioned applications. In addition, pursuant to Section 73.3525(a)(5), the parties have submitted supporting documentation itemizing the engineering expenses that Living Proof will reimburse to UMass.

Conclusion. ACCORDINGLY, IT IS ORDERED, pursuant to the authority delegated under 47 C.F.R. § 0.283:

(a) That the Joint Motion for Approval of Settlement Agreement is GRANTED, and the attached Settlement Agreement is APPROVED; and

(b) That the above-captioned applications filed by Maynard School Committee²¹ and Living Proof, Inc.,²² as amended, ARE GRANTED, the above-captioned application filed by University of Massachusetts,²³ as amended, is hereby accepted for filing and IS GRANTED, and the above-captioned application filed by CSN International, Inc.²⁴ IS DISMISSED.

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau

²¹ File. No. BNPED-19990726MA.

²² File No. BNEPD-20000118ACZ.

²³ File No. BNPED-2000118ABW.

²⁴ File No. BNEPD-20000118AAG.