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Ref. No. 1800B3-LAS

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In re: **NCE MX Group 401**

New NCE (FM), Siletz, Oregon
Firebare, Inc.
Facility ID No. 171967
File No. BNPED-20071015AKI

New NCE (FM), Siletz, Oregon
Confederated Tribes of Siletz Indians
of Oregon
Facility ID No. 175868
File No. BNPED-20071019AZQ

New NCE (FM), Selma, Oregon
Better Life Television, Inc.
Facility ID No. 173596
File No. BNPED-20071022AQE

Petitions to Deny
Petition for Reconsideration

Dear Counsel and Applicants:

This letter concerns the above-referenced mutually exclusive applications for a new noncommercial educational ("NCE") FM station. These three applications were included in NCE Mutually Exclusive ("MX") Group 401.¹ Before us are: (1) a Petition to Deny ("Firebare Petition") filed by Firebare, Inc. ("Firebare") on August 31, 2010; (2) a Petition to Deny ("Tribes Petition") filed by

¹ *Comparative Consideration of 26 Groups of MX Applications for Permits to Construct New or Modified NCE FM Stations Filed in the October 2007 Filing Window*, MO&O, FCC 10-142, ¶¶ 17-18, released August 3, 2010 ("August 2010 NCE Comparative Order").

Confederated Tribes of Siletz Indians of Oregon ("Tribes") on September 15, 2010; and (3) a Petition for Reconsideration ("BLT Petition for Reconsideration") filed by Better Life Television, Inc. ("BLT") on October 13, 2010. For the reasons set forth below, we dismiss the Firebare Petition, deny the Tribes Petition, and grant the BLT Petition for Reconsideration to the extent indicated, and deny it in all other respects. We also tentatively select Firebare to receive a construction permit for a new NCE FM station at Siletz, Oregon, accept the above-referenced Firebare application for filing, and establish a 30-day petition to deny deadline.

Background. In the *August 2010 NCE Comparative Order*, the Commission applied NCE comparative selection criteria² to 26 groups of mutually exclusive NCE FM applications and tentatively selected one winner in each group. The Firebare, Tribes, and BLT applications, as well as those filed by Community Presbyterian Church of Waldport ("CPCW"),³ Winds of Praise Broadcasting ("Winds"),⁴ Educational Broadcast Service ("EBS"),⁵ and the Oregon State Board of Higher Education for the University of Oregon ("Oregon Board"),⁶ were designated as NCE MX Group 401. Oregon Board, Firebare, CPCW and Tribes each claimed eligibility for a fair distribution preference. Winds, EBS, and BLT did not and were eliminated. None of the four fair distribution applicants served 5,000 more people than the next best applicant and therefore, the four proceeded to a points hearing. Oregon Board and Tribes each received three points; Firebare received five points; and CPCW received six points. Of the seven mutually exclusive applications, CPCW, for Toledo, Oregon, was found to be the tentative selectee.⁷ The CPCW application was accepted for filing and a thirty day deadline established for the filing of petitions to deny.⁸

Firebare timely filed its petition to deny, requesting that the Commission reject CPCW's application because it is not the real party in interest and not entitled to localism and diversity points under Section 307(b), because it has no intention of building and operating the facilities as proposed, and because it lacks sufficient financial resources. The Tribes Petition supports Firebare's request that the CPCW application should be denied, claiming a pattern of willful concealment as to the real party in interest.⁹ Tribes further assert that they should be the tentative selectee in NCE MX Group 401. The Tribes contend that they meet all of the criteria to qualify for the Section 307(b) Tribal Priority established in the *Rural Radio Order*, and argue that the Commission should have applied the Tribal Priority to the October, 2007 NCE filing window applications.¹⁰ Having met these criteria, Tribes contend that they should not have been compared to other mutually exclusive applicants on a fair distribution basis, but should instead have been chosen as the tentative selectee.

The Winds, EBS, Oregon Board, and BLT applications were subsequently dismissed on

² See 47 C.F.R. §§ 73.7000-05.

³ File No. BNPED-20071018ACY.

⁴ File No. BNPED-20071012AIR.

⁵ File No. BNPED-20071022BGO.

⁶ File No. BNPED-20071012API.

⁷ *August 2010 NCE Comparative Order* at ¶¶ 18, 82.

⁸ Petitions to deny were to be on file no later than 30 days from August 3, 2010.

⁹ Although dated September 2, 2010, the Tribes Petition was posted at the Commission on September 15, 2010.

¹⁰ *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, First Report and Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 1583 (2010) ("*Rural Radio Order*").

September 15, 2010, with public notice of the dismissals given on September 20, 2010.¹¹ In the BLT Reconsideration, BLT argues that its dismissal was premature, because two petitions to deny against the CPCW application had been filed and thus, the grantability of the tentative selectee's application had not yet been resolved. BLT further notes that its above-referenced application for a new NCE FM station at Selma, Oregon, had also been inadvertently included and dismissed in a September 13, 2010, Media Bureau Public Notice, which denied multiple requests for waiver of the October, 2007 NCE FM filing window deadline and dismissed the associated applications.¹² BLT had not filed such a waiver request for its Selma, Oregon, proposal.

At the applicant's request, the staff dismissed tentative selectee CPCW's application for a new NCE FM station at Toledo, Oregon, on October 25, 2010.¹³

Discussion. Firebare Petition. The arguments raised in the Firebare Petition relate directly to the tentative selectee's qualifications and comparative claims to which Firebare contends CPCW was not entitled. Petitioner concludes therefore, that the tentatively selected application of CPCW should not be granted. In light of the October 25, 2010, dismissal of the CPCW application, the Firebare Petition will be dismissed as moot.

Tribes Petition. Tribes recognize that the Commission, in the *Rural Radio Order*, considered and rejected an appeal by the Cherokee Nation to apply the new Tribal Priority to pending NCE applications.¹⁴ The Commission noted that tentative selections had been made in the majority of NCE MX groups by the time the *Rural Radio Order* was released, and chose not to change the rules for the few remaining undecided groups.¹⁵ Tribes state that NCE filing windows "appear to be rare," offering "little hope" of their obtaining a station to serve their tribal community.¹⁶ However, Tribes are not disadvantaged insofar as all interested parties must wait until the next NCE filing window opens to apply for new NCE service to their communities. At that time Tribes will be positioned to take full advantage of the Tribal Priority if their application proves to be mutually exclusive with other applications. For this filing window, however, the Commission's decision with regard to the Tribal Priority dictates that we deny the Tribes Petition.

BLT Petition for Reconsideration. BLT seeks reconsideration of its application's dismissal, which occurred once on September 13, 2010, by way of the Media Bureau's *NCE Omnibus Dismissal Notice*, and again on September 15, 2010, in CDBS, with public notice given on September 20, 2010. BLT is correct that its application should not have appeared on the September 13, 2010, *NCE Omnibus Dismissal Notice*, which dismissed 58 applications for failure to timely file an electronic application by the close of the October, 2007 NCE filing window.¹⁷ Moreover, because we had not ruled on the Firebare

¹¹ *Broadcast Actions*, Public Notice, Report No. 47324 (MB Sept. 20, 2010). Because Winds, EBS, and Oregon Board did not appeal the dismissals of their applications, those actions are now final.

¹² See *NCE FM New Station and Major Change Applications Dismissed for Failure to Timely File*, Public Notice, DA 10-1724 (MB Sept. 13, 2010) ("*NCE Omnibus Dismissal Notice*").

¹³ *Broadcast Actions*, Public Notice, Report No. 47351 (MB Oct. 28, 2010).

¹⁴ Tribes Petition at 3; *Rural Radio Order*, 25 FCC Rcd at 1595.

¹⁵ *Id.* We note that neither the Cherokee Nation nor any other parties petitioned for reconsideration of the *Rural Radio Order*.

¹⁶ Tribes Petition at 3.

¹⁷ As BLT notes, at about the same time that many of the requests for waivers of the filing deadline were filed, BLT had filed on November 26, 2007, a Petition for Waiver of Electronic Filing Requirement and for Acceptance of Amendment. BLT maintains that the online electronic filing system would not accept the amendment because it

Petition and the Tribes Petition, and therefore had not made a finding that there was “no substantial and material question concerning the grantability of the tentative selectee’s application,” dismissal of the BLT application was premature.¹⁸ We therefore grant the BLT Petition for Reconsideration to this extent. Substantively, however, we find that the BLT Petition for Reconsideration is without merit. BLT did not claim eligibility for a fair distribution preference and therefore the Commission properly eliminated their application in its point analysis.¹⁹ Because BLT never proceeded to the point hearing for NCE MX Group 401, it remains unaffected by the subsequent October 25, 2010, dismissal of the CPCW application and the consequent reanalysis of the group.

Firebare Application. In light of the foregoing, and in keeping with the Commission’s point system analysis in the *August 2010 NCE Comparative Order*, as the next best applicant in NCE MX Group 401 with a total of five points, we tentatively select Firebare to receive a construction permit for a new NCE FM station at Siletz, Oregon. By Public Notice, the Firebare application will be accepted for filing, establishing a deadline thirty days (30) thereafter for the filing of petitions to deny. If, after the 30-day petition to deny period has run, there is no substantial and material question concerning the grantability of the new tentative selectee’s application, the staff will grant the Firebare application.

Conclusion/Actions. Accordingly, IT IS ORDERED that the August 31, 2010, Petition to Deny filed by Firebare, Inc. IS DISMISSED.

IT IS FURTHER ORDERED that the September 15, 2010, Petition to Deny filed by Confederated Tribes of Siletz Indians of Oregon IS DENIED.

IT IS FURTHER ORDERED that the October 13, 2010, Petition for Reconsideration filed by Better Life Television, Inc. IS GRANTED TO THE EXTENT INDICATED, and DENIED IN ALL OTHER RESPECTS.

IT IS FURTHER ORDERED, that the application filed by Firebare, Inc. (File No. BNPED-20071015AKI), is TENTATIVELY SELECTED to be awarded a construction permit for a new NCE FM station at Siletz, Oregon, and by Public Notice its application will be ACCEPTED FOR FILING, establishing a deadline thirty days thereafter for the filing of petitions to deny. If, after a 30-day petition

involved a coordinate change for the proposed antenna site of more than one degree of latitude. In light of the action taken herein, this Petition for Waiver of Electronic Filing Requirement and for Acceptance of Amendment is dismissed as moot.

¹⁸ *August 2010 NCE Comparative Order* at ¶ 82.

¹⁹ *Id.* at ¶ 17.

to deny period has run, there is no substantial and material question concerning the grantability of the Firebare application, the staff, by Public Notice, WILL DISMISS the mutually exclusive application of the Confederated Tribes of Siletz Indians of Oregon (File No. BNPED-20071019AZQ) and WILL GRANT the referenced Firebare application (File No. BNPED-20071015AKI) CONDITIONED UPON that selectee's compliance with Section 73.7005 of the Rules,²⁰ which sets forth a four-year holding period for applicants that are awarded permits by use of a point system.

Sincerely,

Lisa Scanlan

Peter H. Doyle *for*
Chief, Audio Division
Media Bureau

²⁰ 47 C.F.R. § 73.7005.