



**Federal Communications Commission
Washington, D.C. 20554**

September 30, 2011

In Reply Refer to:
1800B3-ATS

Margaret L. Miller, Esq.
Dow Lohnes, PLLC
1200 New Hampshire Avenue, N.W., Suite 800
Washington, DC 20036

Milewski Nature Fund, Inc.
c/o Vicki Milewski
N15799 Fisher Avenue
Thorp, WI 54771

Stuart W. Nolan, Jr., Esq.
LegalWorks Apostolate, PLLC
4 Family Life Lane
Front Royal, VA 22630

Donald E. Martin, Esq.
Donald E. Martin, P.C.
P.O. Box 8433
Falls Church, VA 22041

Jeffrey D. Southmayd, Esq.
Southmayd & Miller
4 Ocean Ridge Boulevard South
Palm Coast, FL 32137

Christian Vision, Inc.
c/o Lois McLario
N88 W16783 Main Street
Menomonee Falls, WI 53051

In re: NCE MX Group 517A

New NCE (FM), Niagara, Wisconsin
Board of Regents of University of Wisconsin System
Facility ID No. 176534
File No. BNPED-20071019AIG

New NCE (FM), Thorp, Wisconsin
Milewski Nature Fund, Inc.
Facility ID No. 172793
File No. BNPED-20071012APU

Petitions to Deny

New NCE (FM), Rhinelander, Wisconsin
Northwoods Catholic Radio
Facility ID No. 171922
File No. BNPED-20071022ASC

New NCE (FM), Minocqua, Wisconsin
Lakeland Seventh-Day Adventist Church
Facility ID No. 175345
File No. BNPED-20071019ADB

New NCE (FM), Eagle River, Wisconsin
WRVM, Inc.
Facility ID No. 174696
File No. BNPED-20071019ARZ

New NCE (FM), Rhinelander, Wisconsin
Christian Vision, Inc.
Facility ID No. 175849
File No. BNPED-20071022AVQ

Joint Petition for Reconsideration

Dear Counsel and Petitioners:

We have before us: (1) the referenced application of University of Wisconsin System (“UWS”) for a new noncommercial educational (“NCE”) FM station in Niagara, Wisconsin (“UWS Application”);¹ (2) the referenced application of The Milewski Nature Fund, Inc. (“Milewski”) for a new NCE FM station in Thorp, Wisconsin (“Milewski Application”); (3) the referenced application of Northwoods Catholic Radio (“Northwoods”) for a new NCE FM station in Rhinelander, Wisconsin; (4) Milewski’s Petition to Deny (“Milewski Petition”) filed on December 7, 2010, against the UWS Application;² and (5) Northwoods’ Petition to Deny (“Northwoods Petition”) filed on November 29, 2010, against both the UWS Application and the Milewski Application.³ For the reasons stated below, we: dismiss the Milewski Petition; dismiss the Northwoods Petition; dismiss the Milewski Application; dismiss Northwoods’ application; and grant the UWS Application.⁴

Background. The staff designated the referenced applications NCE MX Group 517.⁵ On October 28, 2010, pursuant to established procedures,⁶ the Media Bureau (“Bureau”) determined that the

¹ In its application, UWS requested a waiver of the main studio rule, 47 C.F.R § 73.1125. See UWS Application at Exhibit 13.

² UWS filed an Opposition to the Milewski Petition (“UWS Opposition to Milewski”) on December 13, 2010.

³ UWS and Milewski filed Oppositions to the Northwoods Petition on December 13, 2010, and December 15, 2010, respectively.

⁴ A Joint Petition for Reconsideration (“Joint Petition”) was filed on January 10, 2011, by Northwoods, Lakeland Seventh-Day Adventist Church, WRVM, Inc., and Christian Vision, Inc. (collectively, “Dismissed Applicants”). The Dismissed Applicants request reconsideration of the dismissal of their respective applications as comparatively inferior to the UWS Application, citing the pendency of the Milewski and Northwoods Petitions. Because we dispose of these petitions herein, we will also dismiss the Joint Petition.

⁵ *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 14730 (MB 2008). MX Group 517 originally consisted of 27 applications, but was bifurcated by a settlement in which one application was voluntarily dismissed and one application amended to a singleton. The instant applications were part of MX Group 517A.

⁶ See 47 C.F.R. § 73.7002. See also *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386, 7397 (2000) (“NCE Comparative Order”) (delegating authority to staff to make fair distribution determinations).

UWS Application was entitled to a decisive fair distribution preference.⁷ Thus, the *Tentative Selectee Order* identified UWS as the tentative selectee of NCE MX Group 517A, accepted the UWS 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 UWS Application, it would, by public notice, dismiss the competing applications and grant the UWS Application.⁸ Milewski and Northwoods subsequently filed their Petitions.

Discussion. Section 309(d)(1) of the Communications Act of 1934, as amended,⁹ 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.¹⁰ 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.¹¹ This threshold 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.¹² 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.

Northwoods Petition. Northwoods does not object to the tentative selection of the UWS Application *per se*. Rather, it argues that Milewski prevented other applicants from entering into a settlement agreement.¹³ We find that the Northwoods Petition is defective because it seeks the dismissal of a non-tentative selectee, in violation of Section 73.7004(a) of the Rules.¹⁴ Thus, we dismiss it without further consideration.

Milewski Petition. We note that the Milewski Petition was untimely filed. Petitions were due by November 29, 2010. The Milewski Petition was filed with the Commission on December 7, 2010. Thus, we will dismiss it as late-filed. However, we will treat it as an informal objection¹⁵ and briefly address the merits herein.

Population Data. Milewski argues that the UWS Application relied on erroneous population figures. UWS stated that its proposal would provide first service to 8,085 people and second service to

⁷ See *Threshold Fair Distribution Analysis of 9 Groups of Mutual Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in the October 2007 Window*, Memorandum Opinion and Order, 25 FCC Rcd 15138 (MB 2010) (“*Tentative Selectee Order*”).

⁸ *Id.* at 15143.

⁹ 47 U.S.C. § 309(d)(1).

¹⁰ See, e.g., *Artistic Media Partners, Inc.*, Letter, 22 FCC Rcd 18676, 18676 (MB 2007).

¹¹ See *id.*; *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

¹² 47 U.S.C. § 309(d)(2).

¹³ Northwoods Petition at 3-4. Northwoods further claims that the Milewski Application is technically deficient because the proposal would cause prohibited interference to two existing stations. However, because we are dismissing the Northwoods Petition on procedural grounds, we need not reach the merits of this argument.

¹⁴ 47 C.F.R. § 73.7004(a). See also *Reexamination of the Comparative Standards for Noncommercial Educational Applicant*, Memorandum Opinion and Order, 16 FCC Rcd 5074, 5077 (2001) (“*NCE Comparative MO&O*”), *reversed in part on other grounds*, *NPR v. FCC*, 254 F.3d 226 (D.C. Cir. 2001) (“After completion of this process, we would conduct a study of the tentative selectee’s application to determine whether it meets all of our standards for acceptability. At that time we would also consider petitions to deny against the tentative selectee only.”).

¹⁵ 47 C.F.R. § 73.3587.

3,740 people.¹⁶ Milewski argues that the correct population figures are first service to 7,103 people and second service to 1,989 people.¹⁷ Milewski provides no technical study to support its allegation, nor does it explain how it derived these population figures. UWS provides a revised technical study, conducted in December of 2010, showing that its proposal would provide first service to 8,106 persons and second service to 3,733 persons.¹⁸ The staff's own analysis determined that the UWS Application would provide first service to 8,161 people and second service to 3,590 people. Thus, UWS' proposal provides a combined new first and second NCE service to more than 2,000 people, at least 10% of the population within its 60 dBu contour, and to at least 5,000 more people than Milewski's proposal. We therefore find that the fair distribution analysis in the *Tentative Selectee Order* was correct and Milewski's argument meritless.

Main Studio Waiver. UWS requests waiver of the Commission's main studio requirement in order to operate the proposed Niagara station as a satellite of commonly owned NCE station WERN(FM), Madison, Wisconsin.¹⁹ Milewski argues that grant of the UWS Application is not in the public interest because UWS' main studio will not be located in Niagara.

Pursuant to Section 73.1125(a) of the Rules,²⁰ a main studio must be located either (1) within a station's principal community contour; (2) within the contour of any other broadcast station licensed to its community; or (3) within 25 miles of the center of its community.²¹ However, under Section 73.1125(b)(2), the Commission will waive these requirements where good cause exists to do so and where the proposed studio location "would be consistent with the operation of the station in the public interest."²² Each waiver request by an NCE station seeking to operate as the satellite of another NCE station is considered on a case-by-case basis. The Commission has recognized the benefits of centralized operations for NCE stations, given their limited funding, and thus has found good cause exists to waive the main studio location requirement where satellite operations are proposed.²³ A satellite station must demonstrate, however, that it will meet its local service obligations to satisfy the Section 73.1125 public interest standard.

Milewski provides no evidence to demonstrate that waiver of the main studio Rule would be contrary to the public interest. UWS, together with the State of Wisconsin Educational Communications Board, operate the Wisconsin Public Radio ("WPR") network.²⁴ The proposed NCE FM station at Niagara, Wisconsin, will be operated as part of WPR.²⁵ UWS' request is based on the economies of scale that would be realized by grant of the waiver. Where there is considerable distance between parent and satellite stations, we are particularly concerned that a licensee takes adequate measures to maintain

¹⁶ UWS Application at Exhibit 10.

¹⁷ Milewski Petition at 6.

¹⁸ UWS Opposition to Milewski Petition, Exhibit C.

¹⁹ See 47 C.F.R. § 73.1125. A "satellite" station meets all of the Commission's technical rules; however, it originates no programming and instead rebroadcasts the parent station's programming. See *Amendment of Multiple Ownership Rules*, Memorandum Opinion and Order, 3 RR 2d 1554, 1562 (1964).

²⁰ 47 C.F.R. § 73.1125(a).

²¹ See *Review of the Commission's Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations*, Report and Order, 13 FCC Rcd 15691 (1998), *recon. granted in part*, 14 FCC Rcd 11113 (1999) ("Main Studio Reconsideration Order").

²² 47 C.F.R. § 73.1125(b)(2).

²³ *Id.* See, e.g., *American Family Association*, Hearing Designation Order, 12 FCC Rcd 15128 (MMB 1997).

²⁴ See UWS Application at Exhibit 13.

²⁵ *Id.*

awareness of the satellite station's community needs and interests. To that end, UWS has pledged that WPR will, *inter alia*: (1) operate a toll-free number that permits residents of Niagara contact the stations without long-distance charges; (2) maintain an Internet site with information about the proposed station's programming, as well as listing contact information; (3) subscribe to the print edition and/or monitor the online edition of the Niagara area's local newspaper; (4) hold meetings with residents of the region; (5) make efforts to solicit and broadcast public service and community calendar announcements of particular interest to Niagara area; and (6) provide news coverage of significant events in Niagara. In these circumstances, we are persuaded that UWS will meet its local service obligations and thus, that grant of the requested waiver is consistent with the public interest.²⁶ Thus, we conclude that there is good cause to waive Section 73.1125(a) of the Rules in these circumstances.

Fair Distribution Policy. Milewski criticizes the Commission for not utilizing in a fair distribution analysis the factors it uses in a points hearing, such as number of licenses held and diversity of ownership, and suggests that doing so will serve the public interest by increasing ownership opportunities for diverse local applicants.²⁷ It asserts that "local communities are being commoditized into a national and global community which has positive results but can also detract from a local communities' cohesion and communicability."²⁸

The Commission determined, though a rulemaking proceeding, that fair distribution would remain a threshold issue in the NCE comparative selection process.²⁹ Milewski's general criticisms of the current policy and its suggested revisions to that policy should be raised in a petition for rulemaking with the Commission, pursuant to Section 1.401 of the Rules.³⁰ The institution of a notice-and-comment rulemaking under the Administrative Procedure Act,³¹ if warranted, would allow the Commission to develop a complete record from which it could make an informed determination regarding Milewski's proposals. The Bureau is "bound by the decisions and guidelines set forth by the Commission"³² and "has no authority to alter or depart from Commission precedent."³³

After reviewing all of the arguments contained in the Milewski and Northwoods Petitions, we find that the parties have not raised any substantial and material questions of fact regarding the UWS Application sufficient to warrant its denial. Moreover, we have examined the UWS Application, and we find that it fully complies with all pertinent statutory and regulatory requirements and that grant of the application would further the public interest, convenience, and necessity.

²⁶ We remind UWS of the requirement that it maintain a public file for the Niagara station at the main studio of parent station WERN(FM). UWS must also make reasonable accommodation for listeners wishing to examine the file's contents. *See Main Studio Reconsideration Order*, 14 FCC Rcd at 11118-20, 11129-30. We further remind UWS that, notwithstanding grant of the waiver requested here, the public file for the Niagara station must contain the quarterly issues and programs lists required by 47 C.F.R. § 73.3527(e)(8).

²⁷ Milewski Petition at 8-9.

²⁸ *Id.*

²⁹ *See NCE Comparative Order*, 15 FCC Rcd at 7395-97.

³⁰ 47 C.F.R. § 1.401. *See also Community Television of Southern California v. Gottfried*, 459 U.S. 498, 511 (1984) (citation omitted) ("rulemaking is generally a 'better, fairer and more effective' method of implementing a new industry-wide policy than is the uneven application of conditions in isolated proceedings").

³¹ 5 U.S.C. § 553.

³² *RB Schools*, Letter, 21 FCC Rcd 6945, 6946 (MB 2006) (citing *WLDI, Inc.*, Order, 17 FCC Rcd 14750, 14752 (EB 2002)).

³³ *John F. Garziglia, Esq. and Arnold E. Martin, Esq.*, Letter, 22 FCC Rcd 8409, 8410 n.10 (MB 2007).

Conclusion/Actions. Accordingly, IT IS ORDERED that the Petition to Deny filed on December 7, 2010, by The Milewski Nature Fund, Inc., IS DISMISSED, and when treated as an Informal Objection, IS DENIED.

IT IS FURTHER ORDERED that the Petition to Deny filed on November 29, 2010, by Northwoods Catholic Radio, IS DISMISSED.

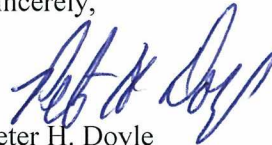
IT IS FURTHER ORDERED that the Joint Petition for Reconsideration filed on January 10, 2011, by Northwoods Catholic Radio, Lakeland Seventh-Day Adventist Church, WRVM, Inc., and Christian Vision, Inc., IS DISMISSED.

IT IS FURTHER ORDERED that the application of The Milewski Nature Fund (File No. BNPED-20071012APU) for a construction permit for a new noncommercial educational FM station in Thorp, Wisconsin, IS DISMISSED.

IT IS FURTHER ORDERED that the application of Northwoods Catholic Radio (File No. BNPED-20071022ASC) for a construction permit for a new noncommercial educational FM station in Rhinelander, Wisconsin, IS DISMISSED.

IT IS FURTHER ORDERED that the application of Board of Regents of the University of Wisconsin System (File No. BNPED-20071019AIG) for a construction permit for a new noncommercial educational FM station in Niagara, Wisconsin, IS GRANTED, conditioned upon Board of Regents of the University of Wisconsin System's compliance with Section 73.7002(c) of the Commission's Rules, 47 C.F.R. § 73.7002(c), which sets forth a four-year period of on-air operations substantially as proposed. Board of Regents of the University of Wisconsin System's request for a waiver of the main studio requirement, Section 73.1125(a) of our rules, for the proposed NCE FM station at Niagara, Wisconsin, IS GRANTED.

Sincerely,



Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Board of Regents of University of Wisconsin System
Northwoods Catholic Radio
Lakeland Seventh-Day Adventist Church
WRVM, Inc.