



Federal Communications Commission
Washington, D.C. 20554

October 24, 2011

In Reply Refer to:
1800B3-ATS

Aaron P. Shainis, Esq.
Shainis & Peltzman, Chartered
1850 M Street N.W., Suite 240
Washington, DC 20036

Gary S. Smithwick, Esq.
Smithwick & Belendiuk, P.C.
5028 Wisconsin Avenue N.W., Suite 301
Washington, DC 20016

In re: **NCE MX Group 403**

New NCE (FM), Leesport, Pennsylvania
Bible Broadcasting Network, Inc.
Facility ID No. 175920
File No. BNPED-20071019APD

Petition for Reconsideration

Dear Counsel:

We have before us a Petition for Reconsideration (“Petition”) filed on December 21, 2010, by Berks Radio Association (“BRA”). The Petition was filed in response to our November 18, 2010, staff decision¹ which granted the application of Bible Broadcasting Network, Inc. (“BBN”), for a new noncommercial educational (“NCE”) FM station to serve Leesport, Pennsylvania (“BBN Application”) and denied BRA’s Petition to Deny the BBN Application.² For the reasons stated below, we deny the Petition.

Background. As noted in the *Staff Decision*, BBN and BRA submitted their applications during the October 2007 NCE filing window. These applications were subsequently grouped into NCE MX Group 403. The Commission conducted a point system hearing, awarded the BBN Application two points and BRA’s application one point, and identified the BBN Application as the tentative selectee of the group.³

BRA challenged this selection in its Petition to Deny, arguing, *inter alia*, that the Commission erred in awarding the BBN Application two points for diversity of ownership.⁴ Specifically, BRA argued

¹ *Bible Broadcasting Network, Inc.*, Letter, Ref. 1800B3-SS (MB Nov. 18, 2010) (“*Staff Decision*”). See also *Broadcast Applications, Report No. 27368*, Public Notice (Nov. 23, 2010).

² We also have before us related responsive pleadings. BBN filed a Motion for Extension of Time on January 3, 2011, requesting that the Commission allow a two-week extension in which to file an opposition. BBN filed an Opposition to Petition for Reconsideration (“Opposition”) on January 19, 2011. BRA filed a Reply on January 31, 2011.

³ See *Comparative Consideration of 26 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 11108, 11133 (2010).

⁴ In the Petition to Deny, BRA also asserted that the Commission should have awarded its application points for being an established local applicant and for having diversity of ownership. The staff determined that the

that BBN had failed to require that its current board members abide by our diversity requirements because its governing documents purportedly only bound its future directors and officers. The *Staff Decision* rejected this argument and found that BBN's certification that its current board members did not have attributable interests, combined with the language of its governing documents prohibiting future directors or officer's from having attributable interests, was sufficient to satisfy our diversity of ownership certification requirements.⁵

In its Petition, BRA reiterates the argument that BBN's governing documents do not bind its current directors and officers to diversity of ownership requirements and therefore the BBN Application should not have received two points for diversity of ownership.⁶ BRA cites numerous decisions by the Review Board which denied integration credit to applicants that did not provide clear statements concerning their proposals. BRA states that "the distinction between an integration proposal and a diversification proposal is a distinction without a difference."⁷

In Opposition, BBN argues that it was entitled to diversity points because it certified in its application that none of its current directors or officers holds attributable interests and its bylaws prohibit future directors or officers from having such interests. It further argues that the Commission allows NCE applicants considerable leeway in formulating bylaws that will maintain this diversity requirement.⁸ BBN also argues that BRA's cited Review Board decisions have no precedential weight here because: 1) the integration credit criteria utilized in the Commission's prior comparative hearing system are not comparable to the points criteria in the current comparative system, and 2) the prior comparative process is a void policy.⁹ In Reply, BRA argues that the Commission still relies on Review Board decisions, and thus the decisions cited in the Petition remain binding precedent.

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order or raises changed circumstances or unknown additional facts not known or existing at the time of petitioner's last opportunity to present such matters.¹⁰ BRA has failed to meet this burden.

We initially find BRA's reliance on Review Board integration credit decisions misplaced. The Commission engaged in an extensive rulemaking process to replace the prior comparative selection

Commission properly denied BRA these points. In the Petition, BRA does not seek reconsideration of these determinations.

⁵ The *Staff Decision* relied on the following language in BBN's governing documents: "no person shall become a director or officer of . . . [BBN] unless that person shall first verify in writing that he or she does not now, and will not during his or her tenure as a director or officer . . . of [BBN] serve as an officer, director, partner, member or management employee . . . of any such overlapping station." See *BBN Application* at Exhibit 12.

⁶ Petition at 2-3.

⁷ Petition at 4-5, citing *Cuban-American Limited*, 67 RR 2d 1428 (1990); *Kenelwood Broadcasting Company, Inc.*, FCC Rcd 6657 (1990); *Stanly Group Broadcasting, Limited*, 66 RR 2d 341 (1988); *Margaret Garza*, Memorandum Opinion and Order, 1 FCC Rcd 1294 (1986); *Metro Broadcasting, Inc.*, Decision, 99 FCC 2d 688 (Rev. Bd. 1984); *Kennebec Valley Television, Inc.*, Decision, 2 FCC Rcd 1240 (Rev. Bd. 1987); *Blancett Broadcasting Co.*, Decision, 17 FCC 2d 227 (Rev. Bd. 1968); *Lewis Broadcasting Corp.*, Decision, 11 FCC 2d 889 (Rev. Bd. 1968).

⁸ Opposition at 6.

⁹ Opposition at 5, citing *FCC v. Bechtel*, 10 F.3d 875, 878 (D.C. Cir. 1993).

¹⁰ See 47 C.F.R. § 1.106; *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966); and *National Association of Broadcasters*, Memorandum Opinion and Order, 18 FCC Rcd 24414, 24415 (2003).

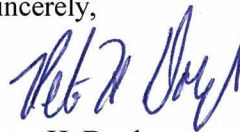
process and established new procedures for the awarding of NCE construction permits.¹¹ We therefore find that precedent involving that prior system unpersuasive when the revised NCE Rules and related decisions provide ample guidance for implementation of the current comparative selection process.¹² As BBN notes, under the current Rules, the Commission allows NCE applicants flexibility in determining how to best phrase their governing documents to meet our diversity requirements.¹³ Indeed, our further review of BBN's governing documents reveals that it amended its bylaws on October 17, 2009, prior to the filing of its application, to provide that:

With respect to each such Window Application that is granted, thereafter neither the Network, nor any parent or subsidiary of the Network, shall seek, through application or otherwise, to acquire any interest in any radio station whose principal community contour overlaps the principal community contour of such Window Application station.¹⁴

With this provision, combined with BBN's certification that its current board members and directors presently hold no attributable interests,¹⁵ and the prohibition in its amended bylaws against future board members and directors acquiring such interests,¹⁶ BBN has satisfactorily demonstrated that it was entitled to two points for diversity of ownership. While the *Staff Decision* did not rely on this particular provision of its amended bylaws in reaching the conclusion that BBN satisfied our diversity requirements, we find that it did not err in denying BRA's Petition to Deny

Conclusion/Actions. Accordingly, IT IS ORDERED that the December 21, 2010, Petition for Reconsideration filed by Berks Radio Association IS DENIED.

Sincerely,



Peter H. Doyle
Chief, Audio Division
Media Bureau

Cc: Berks Radio Association
Bible Broadcasting Network, Inc.

¹¹ See *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) ("*NCE MO&O*"), partially reversed on other grounds, *NPR v. FCC*, 254 F.3d 226 (D.C. Cir. 2001).

¹² BRA's reliance on the Commission citation of *Silver Springs Communications*, 65 RR 2d 426 (1988) in *Comparative Consideration of 52 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 25 FCC Rcd 8793, 8799, n.35 (2010) is likewise misplaced. The Commission cited that case to support the broad principle that late-submissions of information in comparative proceedings could allow for abuse of the system. Notably, this decision did not involve integration credit.

¹³ See *NCE MO&O*, 16 FCC Rcd at 5095 ("The governing document safeguard aims to maintain governing board characteristics for which the applicant received credit, even if the composition of that board and its attributable broadcast interests change due to resignation and replacement of board members... *Applicants may word the language as they deem best for their organization.*") (emphasis added).

¹⁴ See BBN Application at Exhibit 14.

¹⁵ See BBN Application at Section IV, Question 2.

¹⁶ See BBN Application at Exhibit 14.