



Federal Communications Commission
Washington, D.C. 20554

September 7, 2012

In Reply Refer to:
1800B3-KV

Community Broadcasting, Inc.
c/o Harry C. Martin, Esq.
Fletcher Heald & Hildreth, P.L.C.
1300 N. 17th Street
11th Floor
Arlington, Virginia 22209-3801

Hope Broadcasting, Inc.
c/o Cary S. Tepper, Esq.
Booth, Freret, Imlay & Tepper, PC
7900 Wisconsin Avenue
Suite 304
Bethesda, Maryland 20814-3628

Hispanic Family Christian Network, Inc.
c/o Dan J. Alpert, Esq.
Law Offices of Dan J. Alpert
2120 N. 21st Road
Arlington, Virginia 22201

In re: **Reserved Allotment Group 26**

NEW(NCE-FM), Farmersburg, Indiana
Community Broadcasting, Inc.
Facility ID No. 184958
File No. BNPED-20100226AAG

NEW(NCE-FM), Farmersburg, Indiana
Hispanic Family Christian Network, Inc.
Facility ID No. 185115
File No. BNPED-20100226AGY

Petition to Deny

NEW(NCE-FM), Farmersburg, Indiana
Hope Broadcasting, Inc.
Facility ID No. 184697
File No. BNPED-20100224AAA

Dear Counsel:

We have before us: the referenced applications of Community Broadcasting, Inc. (“Community” and “Community Application”) and Hope Broadcasting, Inc. (“Hope” and “Hope Application”) for a new noncommercial educational (“NCE”) FM station, on Channel 242A at Farmersburg, Indiana. Also before us is a “Petition to Deny” (“Petition”) filed by Hope on May 25, 2011.¹

¹ Community filed an “Opposition to Petition to Deny” (“Opposition”) on June 1, 2011.

Background. Community, Hope, and two other parties² filed mutually exclusive applications for a new NCE FM facility on Channel 242A at Farmersburg, Indiana³ during the February 2010 NCE filing window⁴ and were designated as NCE Reserved Allotment Group 26.⁵ In the *Comparative Consideration Order*, the Commission determined that each applicant would provide a first or second NCE service to at least ten percent of the population and to at least 2,000 people within their proposed service areas, and thus complied with the third channel reservation standard.⁶ Each applicant then proceeded to a point determination, in which Community was credited with a total of three points; Hope and HFCN with two points; and Serendipity with none. Therefore, the Commission declared Community to be the tentative selectee in NCE Reserved Allotment Group No. 26 and accepted for filing the Community Application, which triggered a 30-day deadline to file petitions to deny against the tentative selectee.⁷

In its Petition, Hope argues that it should have prevailed in NCE Reserved Allotment Group 26 because it should have been awarded a dispositive "fair distribution" preference under Section 307(b) of the Communications Act of 1934, as amended ("Act")⁸ because it is "only applicant . . . to propose first NCE aural service. . . ."⁹ In particular, Hope claims that "it is the only applicant that qualifies for fair distribution preference . . . [because only its proposal would provide] a first NCE aural service to at least 2,000 people."¹⁰ In its Opposition, Community counters that "the Commission determined that Section 307(b) threshold preference would be awarded only in cases involving applicants for different communities."¹¹ Here, Community observes, the NCE Reserved Allotment Group 26 applicants each proposed to serve the same community, Farmersburg, Indiana and the only standard applicable to

² Hispanic Family Christian Network, Inc., (File No. BNPED-20100226AGY) and Serendipity Educational Broadcasting, Inc. (File No. BNPED-20100226AHC) ("Serendipity"). See *Comparative Consideration of 37 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations filed in the February 2010 and October 2007 Filing Window*, Memorandum Opinion and Order, 26 FCC Rcd 7008, 7032 (2011) ("*Comparative Consideration Order*").

³ The allotment was reserved by means of the third channel reservation standard. See *Comparative Consideration Order*, 26 FCC Rcd at 7032.

⁴ See *Media Bureau Announces Filing Window for Vacant FM Allotments Reserved for Noncommercial Educational Use*, Public Notice, 24 FCC Rcd 12621 (MB 2009); *Filing Window for Vacant FM Allotments Reserved for Noncommercial Educational Use Rescheduled to February 19-26, 2010*, Public Notice, 24 FCC Rcd 12952 (MB 2009).

⁵ *Comparative Consideration Order*, 26 FCC Rcd at 7032.

⁶ *Id.* at n.93.

⁷ The HFCN and Serendipity applications were subsequently dismissed by the staff on June 7, 2011, and those applicants did not appeal the now-final dismissal. See *Broadcast Actions*, Public Notice, Report No. 47505 (rel. June 10, 2011) ("*June 2011 Public Notice*").

⁸ 47 U.S.C. § 307(b).

⁹ Petition at 4-5, citing 47 C.F.R. § 73.7002.

¹⁰ Petition at 2. Additionally, Hope challenges the HCFN Application's claim of first aural NCE service. Specifically Hope claims "the Commission wrongly concluded that HCFN also proposed first NCE aural service and that error deprived Hope of a clear victory in this proceeding" *Id.* Because the staff dismissed the HCFN Application on June 7, 2011, see June 2011 Public Notice, and that dismissal has become final we need not address this allegation.

¹¹ Opposition at 1, citing *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386, 7397 (2000) ("*2000 NCE Order*"), Memorandum Opinion and Order, 16 FCC Rcd 5074, 5105 (2001), *reversed in part on other grounds*, *NPR v. FCC*, 254 F.3d 226 (D.C. Cir. 2001). Moreover, Community opines, the Commission ruled that such "analysis would not be undertaken at the application stage when, as here, an allocation is listed in the Table of Allotments because 'the 307(b) analysis has previously been conducted in the rule making component of the process'" *2000 NCE Order*, 15 FCC Rcd at 7397.

applicants in that group that each applicant must propose an aggregated first or second NCE service to at least 10% of the population and that such population is at least two thousand people.

Discussion. Section 309(d)(1)¹² of the Act 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.¹³ 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.¹⁴ 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.¹⁵ 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.

We reject Hope's claim that it is entitled to a dispositive Section 307(b) preference based on its proposed first NCE service. Section 73.7002(a) of the Rules clearly states that the Commission's threshold fair distribution procedures are used when "timely filed applications for full service stations on reserved FM channels are determined to be mutually exclusive *and will serve different communities . . .*"¹⁶ That is not the case here, where all applicants in NCE Reserved Allotment Group 26 (necessarily) specify the same community of license. All applicants in that group must – and do – comply with the third channel reservation standard. However, this is a technical requirement, not a comparative qualifications issue: in this reserved allotment application proceeding.¹⁷ Therefore, we find that Hope failed to make a *prima facie* case that grant of the Community Application would be contrary to the public interest, convenience, and necessity.

Community Application. We have examined the Community Application and find Community to be fully qualified to be a Commission licensee and that grant of the application is in the public interest, convenience, and necessity. We therefore grant the application.

Conclusion/Actions. Accordingly, IT IS ORDERED, that the Petition to Deny filed by Hope Broadcasting, Inc., on May 25, 2011, IS DENIED.

IT IS FURTHER ORDERED, that the application of Community Broadcasting, Inc. (File No. BNPED-20100226AAG) for a construction permit for a new noncommercial educational FM station at Farmersburg, Indiana, IS GRANTED conditioned upon Community Broadcasting, Inc. compliance with Section 73.7005 of the Commission's Rules, 47 C.F.R. § 73.7005, which sets forth a four-year holding period for applicants that are awarded permits by use of a point system.¹⁸

¹² 47 U.S.C. § 309(d)(1).

¹³ See, e.g., *Artistic Media Partners, Inc.*, Letter, 22 FCC Rcd 18676, 18676 (MB 2007).

¹⁴ *Id.*; see also *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

¹⁵ 47 U.S.C. § 309(d)(2).

¹⁶ 47 C.F.R. § 73.7002(a). See also *2000 NCE Order*, 15 FCC Rcd at 7397 ¶ 25 ("for purposes of determining whether fair distribution of service dictates grant of one NCE radio application over another in a Section 307(b) context, we will first consider whether applicants who are proposing to serve different communities will provide the first or second NCE aural signal to at least 10% of the persons within the 60 dBμ (1mV/m) service contours of their proposed NCE FM stations . . . We will grant the permit to the applicant which will provide the highest level (first or second) NCE aural service to at least 5,000 more people than the other applicants.")

¹⁷ *Comparative Consideration Order*, 26 FCC Rcd at 7009.

¹⁸ See 47 C.F.R. § 73.7005.

IT IS FURTHER ORDERED, that the application of Hope Broadcasting, Inc. (File No. BNPED-20100224AAA) for a construction permit for a new noncommercial educational FM station at Farmersburg, Indiana, IS DISMISSED.

Sincerely,

A handwritten signature in blue ink, appearing to read "Peter H. Doyle", with a stylized flourish extending to the right. To the left of the signature is a small, handwritten mark that looks like "Ew".

Peter H. Doyle
Chief, Audio Division
Media Bureau