



Federal Communications Commission
Washington, D.C. 20554

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DA 12-809
In Reply Refer to:
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In re: **NCE Reserved Allotment Group No. 1**
New NCE-FM, Anniston, Alabama
Anniston Seventh-Day Adventist Church
Facility ID No. 184996
File No. BNPED-20100226ABT

Petition to Deny

New NCE-FM, Anniston Alabama
Board of Trustees of Jacksonville State
University
Facility ID No. 184885
File No BNPED-20100226AFB

Dear Counsel:

We have before us: (1) the referenced application, filed by Anniston Seventh-Day Adventist Church (“ASDA”), for a new noncommercial educational (“NCE”) FM station at Anniston, Alabama (“ASDA Application”); (2) the referenced application, filed by the Board of Trustees of Jacksonville State University (“JSU”), for a new NCE FM station at Anniston, Alabama (“JSU Application”); and (3) a Petition to Deny (“Petition”) the ASDA Application, filed by JSU on June 2, 2011.¹ For the reasons set forth below, we grant the Petition, rescind the prior tentative selection of the ASDA Application, dismiss the ASDA Application and tentatively select the JSU Application.

¹ ASDA filed an Opposition to Petition to Deny (“Opposition”) on June 30, 2011. JSU filed a Reply to Opposition to Petition to Deny (“Reply”) on July 13, 2011.

Background. ASDA, JSU and six other parties filed mutually exclusive applications for a new NCE FM facility on Channel 261C3 at Anniston, Alabama, during the February 2010 NCE filing window.² The Commission subsequently designated these applications as NCE Reserved Allotment Group No. 1.³ In the *Comparative Consideration Order*, the Commission concluded 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.⁴ Therefore, all applicants proceeded to an NCE point hearing. ASDA had the highest point total of all the applicants with five points, while JSU was credited with three points.⁵ Accordingly, the ASDA Application was tentatively accepted for filing, which triggered a 30-day period for parties to file petitions to deny against the tentative selectee.⁶

In its Petition, JSU argues that the ASDA Application does not meet the reservation standard and therefore should be dismissed.

Discussion. Section 309(d)(1) of the Act⁷ 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.⁸ 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.⁹ 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.¹⁰ 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.

The Commission will reserve a non-reserved FM band allotment if the petitioner demonstrates (1) that no reserved channel could be used without causing prohibited interference to TV channel 6 stations or foreign broadcast stations or (2) that it is (a) technically precluded from using a reserved band channel, and (b) it would provide a first and/or second NCE radio service to at least ten percent of the population within the 60 dBu (1 mV/m) contour of its proposed station, and that such population is at least 2,000

² In addition to ASDA and JSU, the other applicants were Equality Broadcasting Network (File No. BNPED-20100224ACV), Moody Bible Institute of Chicago (File No. BNPED-20100225AAY), Smile FM (File No. BNPED-20100226AIC), Covenant Communications (File No. BNPED-20100222ABJ), Serendipity Educational Broadcasting (File No. BNPED-20100225ADF), and Old Time Gospel Ministries (File No. BNPED-20100226AFM).

³ See *Comparative Consideration of 37 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial FM Stations filed in the February 2010 and October 2007 Filing Windows*, Memorandum Opinion and Order, 26 FCC Rcd 7008, 7014 (MB 2011) (“*Comparative Consideration Order*”).

⁴ *Id.* at 7014.

⁵ See *Id.* at 7015. Equality Broadcasting Network, Moody Bible Institute of Chicago, and Smile FM each received two points; and Covenant Communications, Serendipity Educational Broadcasting, and Old Time Gospel Ministries did not receive any points.

⁶ *Id.* at 7050.

⁷ 47 U.S.C. § 309(d)(1).

⁸ See, e.g., *Artistic Media Partners, Inc.*, Letter, 22 FCC Rcd 18676, 18676 (MB 2007).

⁹ See *id.*; *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

¹⁰ 47 U.S.C. § 309(d)(2).

people.¹¹ In upholding the latter reservation standard, in the *NCE Second Report and Order*¹² the Commission specifically advised prospective NCE applicants that the first or second NCE service requirement does not end upon allotment but remains applicable at the application stage.¹³ An application which relied on this reservation standard for allotment purposes but which fails to satisfy this requirement is eliminated and will not proceed to the point system analysis.¹⁴

In its application, ASDA asserted that the total population within its 60dBu contour is 199,229 people, and that a total of 48,196 people (approximately 24% of the total population) within its contour would receive either a first or second NCE service. Accordingly, ASDA contended that it met the reservation standard.

In its Petition, JSU claims that the total population in ASDA's 60dBu contour is actually 214,704 people, and asserts that ASDA's application failed to account for five NCE authorizations within its contour¹⁵ - one licensed NCE FM station and four NCE FM construction permit authorizations granted prior to the opening of the February 2010 Filing Window.¹⁶ When these authorizations are taken into account, JSU claims that ASDA's aggregate first and second NCE service would serve only 15,550 people (6.8 percent of the total population) within its proposed service area and therefore fails to meet the 10 percent threshold. We have reviewed JSU's calculations and confirm that ASDA does not meet the Commission's reservation standard.

In its Opposition, ASDA concedes that it overlooked existing NCE authorizations and thus does not meet the reservation standard. ASDA asserts, however that the Commission's ten percent threshold criterion is "irrational" and "absurd"¹⁷ and asks the Bureau to examine the total *number* of underserved people receiving the new NCE service, rather than the *percentage* they constitute of the total service area. We find ASDA's argument unpersuasive.

The Commission's decision to establish a percentage-based reservation standard rests on sound statutory policy goals. From the inception of the channel reservation standard, the Commission has been

¹¹ 47 C.F.R. § 73.202(a)(1). These population and percentage requirements are similar to those used in a threshold fair distribution analysis conducted pursuant to Section 307(b) of the Communications Act of 1934, as amended ("Act") in the reserved band context. However, as discussed above, the reservation standard is applied at the allotment stage, when an applicant seeks to take a non-reserved band channel and reserve it for NCE use, while a Section 307(b) analysis occurs as part of the comparative process in the reserved band. There is no 307(b) analysis in a non-reserved band comparison because all applicants are applying for the same community in the Table of Allotments.

¹² See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Second Report and Order, 18 FCC Rcd 6691, 6705 (2003) ("*NCE Second Report and Order*").

¹³ See *NCE Second Report and Order*, 18 FCC Rcd at 6705 ("Reserved allotments will be conditioned on the construction and licensing of an NCE station that provides the requisite level of first and second NCE service. In the event that all applications for a reserved band allotment fail to propose such service, the allotment will become unreserved by operation of law and subject to the Commission's competitive bidding licensing procedures."). See also 47 C.F.R. § 73.202(a)(1)(ii).

¹⁴ *Comparative Consideration Order*, 26 FCC Rcd at 7009.

¹⁵ JSU also claims that ASDA is unclear in its application about which site tower it plans to operate from and such ambiguity raises a question as to whether ASDA has reasonable site assurance. However, in light of our findings herein, we do not reach the merits of this argument.

¹⁶ Petition at 2.

¹⁷ Opposition at 1.

concerned with providing service to smaller communities, not only to large population centers.¹⁸ Indeed, the Commission continues to recognize that small communities have needs that sometimes outweigh those of larger cities.¹⁹ Had the Commission adopted a standard, as put forth by ASDA, based solely on population, proponents seeking to serve large cities would always be preferred over applicants proposing service to smaller communities. This outcome would be inconsistent with the Commission's statutory mandate to distribute radio licenses in a fair, efficient and equitable manner.²⁰

In addition, ASDA contends that the reservation standard is "irrational," based on its belief that had it applied for a channel in the reserved band, it would have been named tentative selectee.²¹ Specifically, it maintains that the Commission would have compared the respective population coverage totals of the ASDA and JSU proposals as part of the fair distribution analysis. It asserts that the fair distribution analysis would not have been dispositive because neither would provide a first service or aggregated first plus second service to at least 5,000 more people than the other, and that the applications would have proceeded to a points hearing, where ASDA claims it would have prevailed.²²

Assuming *arguendo* that ASDA is comparing "apples to apples,"²³ we find that its application of the fair distribution analysis is flawed. In reserved band NCE comparative proceedings that do not involve a Tribal Applicant, the Commission's first step is to determine whether any applicant is eligible for a threshold Section 307(b) preference, *i.e.*, whether any applicant would provide a first or second reserved channel NCE service to at least 10 percent of the population served.²⁴ If only one applicant will provide such service, that applicant will be selected as a threshold matter.²⁵ Thus, even in the reserved band context, an NCE FM applicant still must meet the 10 percent population threshold in order to receive a Section 307(b) preference. It is only when more than one applicant in a mutually exclusive group qualifies for a Section 307(b) preference that first service population coverage totals are compared.²⁶ Accordingly, the outcome of the current proceeding would have been exactly the same in a reserved band context. ASDA's application would have failed to qualify for a fair distribution preference because it did not meet the 10 percent threshold. As such, JSU would have prevailed.

¹⁸ See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Further Notice of Proposed Rulemaking, 13 FCC Rcd 21167, n.35 (1998).

¹⁹ See *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Report and Order, 26 FCC Rcd 2556, 2568-69 (2011).

²⁰ 47 U.S.C. § 307(b).

²¹ Petition at 2. To the extent that ASDA generally alleges that our processes are "ripe for gamesmanship," ASDA may raise this issue in a petition for rulemaking with the Commission, pursuant to Section 1.401 of the Rules. See 47 C.F.R. § 1.401.

²² JSU proposes to provide a new NCE service to 17,896 people; ASDA proposes to provide a new NCE service to 16,052 people.

²³ As noted above, the reservation standard is used at the allotment stage, while a Section 307(b) analysis occurs as part of the comparative process in the reserved band. All applications for an allotment specify the allotted community whereas Section 307(b) analyses are conducted in the reserved band only if applicants propose to serve different communities.

²⁴ 73 C.F.R. § 73.7002(b).

²⁵ *Id.*

²⁶ *Comparative Consideration Order*, 26 FCC Rcd at 7011.

Finally, ASDA points out that the priorities governing the FM Table of Allotments identify the number of *people* receiving first full-time service and second full-time service as the top two priorities.²⁷ As such, it maintains that the ten percent requirement diverges from the policies that govern the FM Table of Allotments.²⁸ We disagree with ASDA's interpretation of the Commission's allotment policy. In 2000, when the Commission adopted the reservation standard, it modified Section 73.202, the rule governing the FM Table of Allotments, to afford NCE applicants the "opportunity to rebalance the commercial/noncommercial channel mix of FM and TV channels if they can demonstrate that there is a greater need for noncommercial service in an area" and to facilitate NCE applicants' requests for non-reserved channels not already in the Table of Allotments to be added and reserved for NCE use.²⁹ The Commission found the reservation standard necessary to "mitigate any potential hardship that the auction process might impose on noncommercial entities."³⁰

Thus, after reviewing all of the arguments contained in the Petition and Opposition, we find that JSU demonstrates specific factual allegations sufficient to warrant dismissal of the ASDA Application, and ASDA fails to show any defect in the Commission's reservation standard that would preclude its use in the current case. We, therefore, will rescind our tentative selection of the ASDA Application and dismiss the ASDA Application as ineligible for consideration. Furthermore, we have determined that the JSU Application, the only remaining applicant in Group 1,³¹ is acceptable for filing. Therefore, we will accept the JSU Application for filing and tentatively conclude that the public interest, convenience, and necessity would be served by grant of the JSU Application for a construction permit for a new NCE FM station at Anniston, Alabama.³²

Conclusions/Actions. Accordingly, IT IS ORDERED, that the Petition to Deny filed by the Board of Trustees of Jacksonville State University on June 2, 2011, IS GRANTED.

IT IS FURTHER ORDERED, that the tentative selection of Anniston Seventh-Day Adventist Church's application (File No. BNPED-20100226ABT) IS RESCINDED and its application IS DISMISSED.

²⁷ ASDA Opposition at 4 (citing *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88, 92 (1982)).

²⁸ Petition at 2. To the extent that ASDA generally alleges that our processes are "ripe for gamesmanship," ASDA may raise this issue in a petition for rulemaking with the Commission, pursuant to Section 1.401 of the Rules. *See* 47 C.F.R. § 1.401.

²⁹ *See Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386, 7434 (2000), *reversed in part on other grounds, NPR v. FCC*, 254 F. 3d 226 (D.C. Cir. 2001).

³⁰ *Id.* at 7433.

³¹ JSU is the sole remaining applicant in this MX Group. The other applications in this group were dismissed by Public Notice on June 16, 2011. *See Broadcast Actions*, Public Notice, Report No. 47505 (MB Jun. 10, 2011) (dismissing applications of Equality Broadcasting Network (File No. BNPED-20100224ACV), Moody Bible Institute of Chicago (File No. BNPED-20100225AAY), Smile FM (File No. BNPED-20100226AIC), Covenant Communications (File No. BNPED-20100222ABJ), Serendipity Educational Broadcasting (File No. BNPED-20100225ADF), and Old Time Gospel Ministries (File No. BNPED-20100226AFM)).

³² *See* 47 C.F.R. § 73.7004(d) ("If an applicant is found unqualified, the application shall be denied, and the applicant(s) with the next highest point tally named as the new tentative selectee").

IT IS FURTHER ORDERED, that the application filed by the Board of Trustees of Jacksonville State University for a construction permit for a new NCE FM station at Anniston, Alabama, IS ACCEPTED FOR FILING, establishing a deadline thirty (30) days hereafter for the filing of petitions to deny. If, after the petition to deny period has run, there is no substantial and material question concerning the grantability of the application, we direct the staff, by public notice, TO GRANT the application of the Board of Trustees of Jacksonville State University (File No. BNPED-20100226AFB) CONDITIONED UPON that applicant's compliance with Section 73.7005 of the Commission's Rules,³³ which sets forth a four-year holding period for applicants that are awarded permits by use of a point system, and Section 73.202(a)(1)(ii) of the Commission's Rules,³⁴ which requires that the NCE station provide the requisite level of first and second NCE service.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

³³ See 47 C.F.R. § 73.7005(c).

³⁴ See 47 C.F.R. § 73.202.