



Federal Communications Commission
Washington, D.C. 20554

October 25, 2012

DA 12-1719
In Reply Refer to:
1800B3-ATS
Released: October 25, 2012

J. Geoffrey Bentley, Esq.
Bentley Law Office
2700 Cooper Creek Road
Oak Hill, VA 20171

John C. Trent, Esq.
Putbrese Hunsaker & Trent, PC
200 South Church Street
Woodstock, VA 22644

In re: **NCE MX Group 59**
New NCE (FM), Eustis, Florida
CSN International
Facility ID No. 120610
File No. BNPED-20071022DXQ

Petition for Reconsideration

Dear Counsel:

We have before us a Petition for Reconsideration ("Petition") filed by Cornerstone Broadcasting Corporation ("Cornerstone") seeking reconsideration of the grant of the application of CSN International ("CSN") for a new noncommercial educational ("NCE") FM station in Eustis, Florida ("Application").¹ For the reasons stated below, we deny the Petition.

Background. The Application, originally filed in 1999,² identified CSN's board members as being Charles W. Smith, Jeffrey W. Smith, John A. Laudadio, and Michael R. Kestler, each of whom had one vote on the CSN board.³ On August 8, 2008, the CSN Application was identified as the tentative selectee of NCE MX Group 59.⁴ The staff granted the uncontested Application on December 10, 2008.⁵ On January 5, 2009, CSN filed an Ownership Report in which it reported that Jeffrey Smith was now the

¹ Cornerstone filed the Petition on January 14, 2009. CSN filed an Opposition to "Petition for Reconsideration" ("Opposition") on January 23, 2009. PSDA filed a Reply to Opposition to Petition for Reconsideration ("Reply") on February 5, 2009.

² See *Threshold Fair Distribution Analysis of 12 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, 22 FCC Rcd 12721, 12723-24 (2010) ("*Tentative Selectee Order*"). As noted in the *Tentative Selectee Order*, the Application was filed before the adoption of the point system. The Application was not cut-off from competing proposals under the rules then in effect. Cornerstone filed an application for minor modification of the facilities of WJLH(FM), Flagler Beach, Florida which was mutually exclusive with CSN's proposal. See File No. BNPED-20070906ADM. As a minor modification, Cornerstone's proposal did not need to await the opening of a filing window. CSN and Cornerstone both amended their applications to include comparative information that was not required as part of their original applications. CSN's amended application was issued the current file number so that it could be considered alongside Cornerstone's proposal and the mutually exclusive application of Westminster Academy (File No. BNPED-20071022BLG), collectively designated MX Group 59.

³ See File No. BNPED-19991027AAB, Section II.

⁴ *Tentative Selectee Order*, 22 FCC Rcd at 12723-24.

⁵ See *Broadcast Actions*, Public Notice, Report No. 46883 (Dec. 15, 2008).

sole member of CSN's board of directors, and thus had 100% of the board's votes.⁶ Cornerstone filed the Petition on January 14, 2009, seeking reconsideration of the grant of the Application based on CSN's alleged prohibited major change in ownership.

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 additional facts, not known or existing at the time of the petitioner's last opportunity to present such matters.⁷ Petitions for reconsideration which rely on facts not previously presented to the Commission may be granted if the Commission determines that consideration of the facts relied on is required in the public interest.⁸

Pursuant to Section 73.3573(a) of the Commission's rules ("Rules"),⁹ a fifty percent change in the governing board of an NCE applicant would generally be considered a major change and would not be permissible outside of a filing window.¹⁰ Cornerstone argues that CSN has undergone three major changes in ownership and failed to amend the Application each time. The first was disclosed in a January 25, 2005, Ownership Report filed in relation to Station WJWD, Marshall, Wisconsin.¹¹ The next alleged major change in ownership occurred in August 2007, when Jeffrey Smith and Michael Kestler entered into a settlement agreement pursuant to which Kestler agreed to resign as a director of CSN.¹² Finally, Cornerstone states that the 2009 Ownership Report disclosed that CSN underwent a major change as a result of the removal of three of the four CSN board members, actions which left Jeffrey Smith with sole control of the applicant entity.¹³ Cornerstone also argues that the Application should be dismissed for CSN's failure to properly amend the Application to reflect the changes in the members of CSN's board of directors.¹⁴

In its Opposition, CSN explains that it has understood Section 73.3573 of the Rules "to mean that so long as at least one of the parties to the original application retained more than a 50 percent ownership interest there was no major change within the meaning of the rule" and it "saw no reason to amend the

⁶ See File No. BON-20090105AGQ. This report was filed pursuant to Section 73.3615, which requires an NCE permittee to file an Ownership Report on Form 323-E within 30 days of the grant of an application for original construction permit. 47 C.F.R. § 73.3615(e)(1).

⁷ See 47 C.F.R. § 1.106(c) and (d). See also *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).

⁸ See 47 C.F.R. § 1.106(c)(2). See also *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Scranton and Surfside Beach, South Carolina)*, Memorandum Opinion and Order, 4 FCC Rcd 2366 (MB 1989).

⁹ 47 C.F.R. § 73.3573(a). For noncommercial entities such as CSN, which are non-stock corporations, directors are treated as owners in proportion to their voting power on the board of directors. See *Transfers of Control of Certain Non-Stock Entities*, Notice of Inquiry, 4 FCC Rcd 3403 (1989).

¹⁰ See *Comparative Consideration of 76 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 22 FCC Rcd 6101, 6123 (2007).

¹¹ Petition at 5. See File No. BOA-200510125AJH (stating that CSN's two board members were Jeffrey Smith and Michael Kestler, each with 50% of the board's votes).

¹² Petition at 6.

¹³ *Id.* at 3. This change in ownership occurred before June 29, 2006, when CSN filed a Biennial Ownership Report identifying Jeffrey Smith as the sole voting board member. See BOA-20060629ACW. Cornerstone initially misinterpreted the January 2009 Ownership Report as stating that Jeffrey Smith, Patricia Sutton, John Laudadio, and Chad Smith were all board members with one vote each. However, it acknowledges it misinterpreted this report and that in fact, Jeffrey Smith now has 100% of the votes of CSN's board. Reply at 2.

¹⁴ Petition at 6-7, citing 47 C.F.R. § 1.65 (applicants must submit an amendment within 30 days of when the information in the pending application is no longer substantially accurate and complete in all significant respects).

Application to reflect the resignation of the directors other than Jeffrey Smith.”¹⁵ CSN explains that while the Application was pending, there was a dispute concerning the ownership of CSN, resulting in litigation, and that the January 2005 Ownership Report was not accurate and improperly filed by its former counsel.¹⁶ CSN states that Jeffrey Smith is in fact now the sole director of CSN, and that even if this did constitute a major change in ownership, a waiver of Section 73.3573 would be warranted because it would serve the mandate of Section 307(b) of the Communications Act of 1934, as amended, to allocate radio frequencies in a fair, efficient and equitable manner.¹⁷

In 1984, the Commission revised Section 73.3573 of the Rules to state that “a major change in ownership is any change where the original party or parties to the application do not retain more than 50 percent ownership interest in the application as originally filed.”¹⁸ Both the language of the Rule and the language the Commission used in adopting it specifically establish that a minority interest party may become a majority interest party without engaging in a major change so long as the party or parties to the application at the time of original filing retain more than 50 percent of the ownership interests.¹⁹ Here, Jeffrey Smith, an original party to the application and who held 25% interest in CSN, has retained at least 50% of the CSN board’s votes, and indeed now has a 100% interest. The Commission anticipated and approved of precisely this scenario. Therefore, the change in CSN’s board is not a “major change” within the meaning of Section 73.3573(a)(1), and CSN was not required to seek a waiver of that rule.

Section 1.65 Violation. Cornerstone alleges that CSN’s failure to update its application to reflect its ownership change is a violation of Section 1.65 of the Rules, which requires applicants to submit an amendment within 30 days of when the information in the pending application is no longer substantially accurate and complete in all significant respects.²⁰ Section 1.65 violations are potentially disqualifying only if an applicant intends to conceal information or if omissions of reportable information are so numerous and serious as to undermine the applicant’s basic qualifications.²¹ Cornerstone has submitted no evidence that CSN intentionally concealed its ownership change or had any motive to do so. We do, however, admonish CSN for failing to file any amendments disclosing changes in its board of directors, as required by Section 1.65 of the Rules.

¹⁵ Opposition at 2.

¹⁶ *Id.* at 2-3, n.1. CSN indicates that it subsequently sued its former counsel for malpractice.

¹⁷ *Id.* at 4-5.

¹⁸ *Processing of Broadcasting Applications*, First Report and Order, 56 RR 2d 941 (1984).

¹⁹ *Id.* at ¶9. There, the Commission stated that, “Under current policy with respect to the filing of Form 316, a party with an attributable interest or whose qualifications otherwise have been ‘passed on’ by the Commission, can acquire control by acquiring less than an additional 50% interest (e.g. a 30% interest becoming a 79% interest). The proposed revision would extend this policy to permit such a party to acquire more than a [sic] additional 50% interest (e.g. a 30% interest becoming a 100% interest). We feel that classifying both of these ownership changes as minor is a reasonable classification of an amendment in accordance with Section 309(g) of the Act.” *See also* Stephen F. Sewell, *Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934*, 43 Fed. Comm. L.J. 277, 322-323 (1991) (“The Commission now considers a change in ownership of an applicant for a new station to be “minor” if more than 50% of the voting control remains in the hands of those who were parties to the application as originally filed.”).

²⁰ 47 C.F.R. § 1.65.

²¹ *See David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253 (D.C. Cir. 1991) (citing *Valley Broadcasting Co.*, Decision, 4 FCC Rcd 2611, 2618 (Rev. Bd. 1989). Intentional deceit reflects upon an applicant’s basic qualifications, and “the fact of concealment may be more significant than the facts concealed.” *See Character Qualifications*, Report, Order and Policy Statement, 102 FCC 2d 1179, 1210, n.77 (1986) (quoting *FCC v. WOKO, Inc.*, 329 U.S. 223, 227 (1946)). Intention can be inferred from motive. *See, e.g., RKO General, Inc.*, Decision, 4 FCC Rcd 4679, 4684 (Rev. Bd. 1989).

Conclusion/Actions. Accordingly, IT IS ORDERED that the Cornerstone Petition for Reconsideration IS DENIED.

IT IS FURTHER ORDERED, that CSN International is hereby ADMONISHED for its failure to file timely amendments disclosing changes in its board of directors, as required by Section 1.65 of the Rules, 47 C.F.R. § 1.65.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: CSN International