Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Application of	)	MX Group No. 403
	)	
BIBLE BROADCASTING	)	File No. BNPED-20071019APD
NETWORK, INC.	)	Facility ID No. 175920
Leesport, Pennsylvania	)	
	)	
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	)	

To: Office of the Secretary
Attn: The Commission

APPLICATION FOR REVIEW

Berks Radio Association ("BRA"), by its attorney and pursuant to Section 1.115 of the Commission's rules, seeks review of the Media Bureau's October 24, 2011 denial of BRA's December 21, 2011 Petition for Reconsideration.[1] In support, BRA respectfully submits the following:

Background

1. On September 2, 2010, BRA filed a Petition to Deny the application of Bible Broadcasting Network, Inc. ("BBN") for a new noncommercial educational ("NCE") FM station to serve Leesport, Pennsylvania. The petition was filed as a result of the *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) ("*Comparative*

[1] The denial appeared on Public Notice on October 27, 2011, Report No. 27601.

Consideration Order"). In that Order, the Commission tentatively selected the BBN Application for grant based on a point determination. BBN was awarded two (2) points under the diversity criterion. BRA was awarded one point under the best technical proposal criterion because its proposal would serve at least 10 percent more area and population than the BBN proposal.

2. In its Petition, BRA argued that BBN should not have received any points for diversity of ownership because the BBN Application's exhibit did not bind the principals of BBN but only bound future directors and officers and did not address the status of BBN's current directors and officers. See Application, Exhibit 12.

The Commission in its November 18, 2010 letter ruling states, *inter alia*, the following:

> Although BBN may have inartfully neglected to mention specifically its current members, directors and officers in its supporting exhibits, we note that Section IV, Question 2 that "the principal contour (city grade) of the proposed station does not overlap the principal community contour of any other authorized station...in which any party to the application has an attributable interest..." and (2) the specific language of BBN's accompanying exhibit which states that once its proposal is granted 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 neither" demonstrates compliance with our diversity of ownership certification requirements.

3. In BRA's Petition for Reconsideration, it pointed out that the language focused upon by the Commission is applicable to the new members of the board yet to join, and that the current members are exempt. The plain reading of the language drafted by BBN and submitted to the Commission makes it clear that there is no requirement for the current directors, members or officers to maintain diversity.

4. BRA also cited in its Petition for Reconsideration numerous case precedent in support of its argument. Specifically, BRA cited precedent which clearly demonstrate the need for specificity in a proposal and that vagueness is unacceptable. See *Margaret Garza*, 1 FCC Rcd 1294 (1986); *Blancett Broadcasting Co.*, 17 FCC 2d 227, 15 RR 2d 1349 (Rev. Bd. 1968);

Lewis Broadcasting Corp., 11 FCC 2d 889, 12 RR 2d 627 (Rev. Bd. 1968). See also *Metro Broadcasting, Inc.*, 99 FCC 2d 688, 701, 57 RR 2d 440, 450 (Rev. Bd. 1984).

Discussion

5. The Media Bureau's October 24, 2011 letter ruling is incorrect. The Bureau in its ruling has ignored binding precedent. The Commission has been chastised for ignoring precedent. In *Communications Investment Corp. v. FCC*, 641 F. 2d 954 (DC Cir. 1981), the court stated:

> Distinguishing cases on the basis of principled differentiations is one thing; consciously setting out to "confine each case to its own facts," another - one which would virtually eliminate all precedent. After all, finding factual variations from case to case is a trivial task, and to say a case has been confined to its facts is just a polite way to say it has been ignored. But the Commission cannot be so cavalier with its own precedent and those of this court without suggesting that the rationale by which it is reaching its conclusions is either illogical or *sub rosa*, and thereby inviting reversal.

6. At the outset, the Bureau found BRA's reliance on Review Board integration decisions to be misplaced. It argues that the revised NCE Rules and related decisions provide ample guidance for implementation of the current comparative selection process. BRA notes that the precedent cited by BRA has never been overruled. Moreover, the principle for which the decisions were cited is still binding. In this regard, proposals that involve integration or diversification must be specific. Lack of specificity is fatal. See *Jarad Broadcasting Company, Inc.*, 61 RR 2d 389 (Rev. Bd. 1986). See also *Stanley Group Broadcasting Limited*, 65 RR 2d 341 (1988); *Leininger Geddes Partnership*, 2 FCC Rcd 3199 (Rev. Bd. 1987); *Kennebec Valley Television, Inc.*, 63 RR 2d 877, 2 FCC Rcd 1240 (Rev. Bd. 1987); and *Cuban-American Limited*, 67 RR 2d 1438 (1990). In finding that the cases cited by BRA have no precedential weight because 1) the integration credit criteria utilized in the Commissions' 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, the Bureau misses the point. The cases were cited for the proposition that similar to the comparative hearing process (e.g. claims for integration and diversification), under the point system an applicant must make specific claims and showings in order to support a claim for points. Under the comparative hearing process, and now the point system, the Commission is not permitted to speculate or assume. Those principles are still valid and have not been abolished by *FCC v. Bechtel*, 10 F. 3d 875, 878 (DC Cir. 1993).

7. In a truly amazing effort to create a *post hoc* rationalization for its decision, the Bureau states the following"

> 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 this 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.

Armed with this "ammunition," the Bureau reaches the following conclusion:

> With this provision, combined with BBN's certification that its current board members and directors presently hold no attributable interests, and the prohibition in its amended bylaws against future board members and directors acquiring such interests…

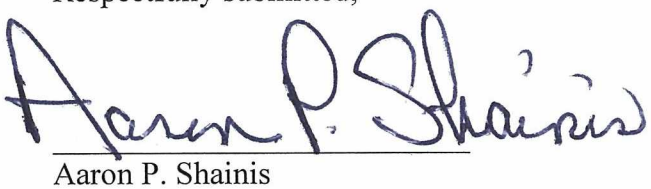
The Bureau utterly and totally misses the point. Nowhere in the BBN application or exhibits is there any language that binds the current BBN principals. In Section 73.700, attributable interest is defined in the first sentence as, "an interest of an applicant, its parents, subsidiaries, their officers and members of their governing boards that would be cognizable under the standard in the notes to 73.3555." There are five entities or groups or groups of persons explicitly listed in the first sentence of 73.7000. They are (1) applicant, (2) parent, (3) subsidiaries, (4) officers, and (5) members of government boards. BBN makes no mention of current officers and current members of its governing board.

8. The Bureau inferentially acknowledges this omission when it quotes verbatim the specific language of the October 17, 2009 bylaw amendment. That language does not mention officers or directors. Furthermore, it only prohibits future interest acquisition by the Network parent or subsidiary of the Network in radio. There is no prohibition from the acquisition of television. Thus, the Bureau's conclusion that BBN is entitled to two (2) points for diversity of ownership is undermined by the facts. Specifically, the October 17, 2009 bylaw amendment fails to bind current board members and directors; and BBN's certificate states that its current board members and directors hold no attributable interests but does not prevent its current board members and directors from acquiring other media interests. Thus, there is no basis for the Bureau's bald conclusion.

Conclusion

9. The Bureau is wrong. Its attempts to justify a decision where the facts, as recited by the Bureau itself, offers no support for the Bureau's conclusion. BRA urges that the ruling be reversed and BBN not receive any points for diversity.

Respectfully submitted,



Aaron P. Shainis
Counsel for
Berks Radio Association

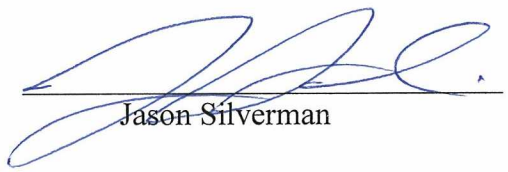
Shainis & Peltzman, Chartered
1850 M Street NW, Suite 240
Washington, DC 20036
202-293-0011

November 22, 2011

CERTIFICATE OF SERVICE

I, Jason Silverman, hereby certify that I have sent, this 22nd day of November, 2011, by First Class U.S. Mail, postage prepaid, copies of the foregoing APPLICATION FOR REVIEW to the following:

Gary S. Smithwick, Esq.
Smithwick & Belendiuk, PC
5028 Wisconsin Ave NW, Suite 301
Washington, DC 20016



Jason Silverman