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AUDIO DIVISION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	MX GROUP No. 403
Application of)	
)	
BIBLE BROADCASTING)	File No. BNPED-20071019APD
NETWORK, INC.)	Facility No. 175920
)	
For Construction Permit)	
For New Noncommercial Educational)	
FM Station WYBQ, Leesport, PA)	

FILED/ACCEPTED

DEC - 7 2011

Federal Communications Commission
Office of the Secretary

To: Office of the Secretary
Attention:
The Commission

OPPOSITION TO APPLICATION FOR REVIEW

Bible Broadcasting Network, Inc. (“BBN”), by its attorneys, pursuant to Section Title 47 C.F.R. § 1.115, hereby opposes the “Application for Review” (“AFR”) filed November 22, 2011, by Berks Radio Association (“BRA”) of the *Letter Decision on Reconsideration* of the Media Bureau’s Audio Division released October 24, 2011, in the above-captioned proceeding. The *Letter Decision on Reconsideration* correctly denied BRA’s Petition for Reconsideration of the grant of a construction permit to BBN for a new noncommercial educational (“NCE”) FM station at Leesport, Pennsylvania. For the reasons set forth below, BRA’s AFR must be denied.¹

¹ This Opposition is timely filed by December 7, 2011, as it was served by mail on November 22, 2011 (Oppositions to be filed within 15 days). N.B.: The Commission’s Public Notice, Report No. 27626, released December 4, 2011, indicates November 28, 2011, as the filing date of the AFR. BBN believes this

I. Background

BBN's above-captioned application for a construction permit for a new noncommercial educational FM station at Leesport, Pennsylvania, and three mutually-exclusive applications, including that of BRA, to serve Frackville, PA were filed in a 2007 filing window.² In a 2010 Memorandum Opinion and Order,³ the Audio Division "tentatively selected" BBN's application for grant. In its analysis of the mutually-exclusive applications, the Audio Division awarded two points to BBN under the "diversity" criterion, but refused to award any points to BRA under either the diversity or "established local applicant" criteria. The MO&O found that BRA qualified for one point under the best technical proposal. Accordingly, BBN was credited with a total of two points and BRA was credited with a total of one point and BBN was determined to be the tentative selectee in Group 403.⁴ BRA filed a Petition to Deny BBN's application. On November 18, 2010, in its *Letter Decision on Petition to Deny*, the Audio Division granted BBN's application.⁵

date to be in error.

² See Media Bureau Announces NCE FM New Station and Major Change Filing Procedures for October 12-19, 2007 Window, Public Notice, 22 FCC Rcd 15050, 15052 (MB 2007) ("Procedures Notice"). By Public Notice, 22 FCC Rcd 18680, DA 07-4355, released October 19, 2007, the Media Bureau announced that was extending the NCE FM filing window until 2 p.m. EDT, October 22, 2007, to avoid any hardship resulting from a CDBS system outage on October 19, 2010, between 1:30 a.m. and 8:00 a.m.

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 ("MO&O"), 51 Comm. Reg. 47, DA 10-142, released August 3, 2010.

⁴ 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 ("MO&O"), 51 Comm. Reg. 47, DA 10-142, released August 3, 2010.

⁵ On December 7, 2010, the Commission assigned call letters "WYBQ" to the construction permit.

On December 21, 2010, BRA filed a Petition for Reconsideration (“Petition”) of the grant. BRA argued that: (1) The Commission was incorrect in denying BRA point claims for diversity of ownership; (2) The Commission was incorrect in denying BRA point claims as an established local applicant; and (3) The Commission was incorrect in awarding diversity points to BBN. By a *Letter Decision on Reconsideration* released October 24, 2011, the Audio Division denied BRA’s Petition. BRA then filed its AFR, limiting its challenge to the Audio Division’s award of two points to BBN under the diversity criterion.⁶

As shown herein, the AFR is procedurally defective and substantively meritless. The Commission should promptly deny BRA’s AFR.

II. The AFR is Procedurally Defective and May Be Dismissed.

Section 1.115 of the Commission’s Rules is specific as to the form and substance required in an application for review. The AFR does not specify with particularity from among the factor(s) which BRA claims warrant Commission consideration.⁷ As such, the AFR does not meet this standard and may (and should) be dismissed on this ground alone. See *Blanchard, Louisiana and Stephens, Arkansas*, 10 FCC Rcd 9828 (1995)

⁶ BRA is no longer pursuing review of this finding by the Audio Division. The *Letter Decision on Petition for Reconsideration* notes that in its petition to deny BBN’s application, “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 Commission properly denied BRA these points. In the Petition, BRA does not seek reconsideration of these determinations.”

⁷ Section 1.115(b)(2) is mandatory, not permissive: “The application for review shall specify with particularity, from among the following, the factor(s) which warrant Commission consideration of the questions presented: (i) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy; (ii) The action involves a question of law or policy which has not previously been resolved by the Commission; (iii) The action involves application of a precedent or policy which should be overturned or revised; (iv) An erroneous finding as to an important or material question of fact; or (v) Prejudicial procedural error.” [Emphasis added.]

(“Under Section 1.115(b)(2), 47 C.F.R. § 115(b)(2), an application for review must list the factors warranting Commission consideration from among an enumerated list. Absent compliance, the application may be dismissed as procedurally defective. See *Chapman S. Root Revocable Trust*, 8 FCC Rcd 4223, 4224 (1993). The Application did not list the factors warranting Commission review. Accordingly, the Application is subject to dismissal as defective.”)⁸ Moreover, in violation of Section 1.115(c), as discussed *infra*, the AFR seeks review of a question of fact or law upon which the designated authority has been afforded no opportunity to pass.

III. BRA Has Not Shown Any Error in the Underlying *Letter Decision on Reconsideration*: The Audio Division Was Correct in Awarding Diversity Points to BBN.

BRA has failed to show that the *Letter Decision on Reconsideration* involves any of the factors listed in Section 1.115 warranting Commission review. The AFR is merely rehashes the same arguments that were presented to and rejected by the Audio Division.

A. BBN’s Documentation Was Sufficient to Bind Current and Future BBN Principals. If no party to an NCE application has an attributable interest in another authorized station with an overlapping principal community contour, the applicant can claim 2 points. BBN certified “yes” to Section IV, Question 2, of Form 340:

Diversity of Ownership: (a) Applicant certifies that the principal community (city grade) contour of the proposed station does not overlap the principal community contour of any other authorized station (comparing radio to radio and television to television, including non-fill-in translator stations other than those identified in 2(b) below) in which any party to the application has an attributable interest as defined in 47 C.F.R. Section 73.3555, that its governing documents require that such diversity be maintained, and that it has placed documentation of its diversity qualifications in a local public inspection file and has submitted to the Commission copies of the documentation.

⁸ In the cited case, despite its procedural deficiency, the Commission reviewed the matter on its own motion. BBN does not believe the AFR at bar warrants that grant of indulgence, and requests that it be dismissed.

BBN's application included an exhibit stating that "...neither the Network [BBN] nor any parent or subsidiary of the Network shall seek...to acquire any interest in any radio station whose principal community contour overlaps the principal community contour of such [application]." Despite BRA's protests, in the *Letter Decision on Petition to Deny*, the Bureau found BBN's supporting exhibits to be adequate and said:

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 of FCC Form 340's "Diversity of Ownership" certification binds "any party to the application [that] has an attributable interest," which Sections 73.7000 and 73.3555 of the Rules define as current "officers and members of the governing board."

BRA argues that "there is no requirement for the current board directors, members or officers to maintain diversity." However, BBN made its certification to maintain diversity in the application and the Audio Division, quite correctly, found this certification to be sufficient. Paragraphs 55 and 58 of the NCE MO&O addressed the issue of documents and the maintenance of diversity in the future:

A pending applicant can claim points for diversity if...it has no stations with overlapping principal community contours, and it has included in its governing documents a provision to maintain that diversity in the future.

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. We do not believe that the requirement is overbroad. **Applicants may word the language as they deem best for their organization.** [emphasis added].

The Audio Division was correct when in found, on reconsideration, that it was right to grant BBN points for diversity based on its showing. BRA has shown nothing to persuade the Commission to reverse the decision made on delegated authority. The Audio Division supported BBN's assertion that, "under the current Rules, the Commission allows

NCE applicants flexibility in determining how to best phrase their governing documents to meet our diversity requirements.” Then, the Audio Division found that its further review of BBN's governing documents revealed that BBN amended its bylaws on October 17, 2007⁹, 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.

In resolving this point adversely to BRA, the Audio Division found:

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, 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.

It is clear from the foregoing that the Commission allows flexibility in the wording of the documents. Accepting BRA's position would impose inappropriate hypertechnical drafting requirements on NCE applicants—a result the Commission has rightly avoided. BRA claimed that BBN's documentation only binds “future” directors or officers, and that the instant application “did not address the status of BBN's then-current directors and officers.” On the contrary, in light of its certification in its application (and related supporting documents), BBN is required to maintain the *status quo* now and in the future with respect to WYBQ. In a recent case,¹⁰ the Audio Division was challenged for “review[ing] on its own motion the lack of documentation in the [challenged application.]” The Audio Division noted that the issue of documentation had been properly raised and therefore appropriately addressed in the application proceeding. In

⁹ There is a typographical error in the *Letter Decision on Reconsideration*. The correct year is 2007; not 2009. This is harmless error.

other words, once the issue is raised, the Audio Division has latitude to review documents in connection with its application processing. It did so here and was satisfied BBN's documentation binds current and future principals.¹¹ The Audio Division was correct and its *Letter Decision on Reconsideration* should be affirmed by the Commission.

B. The Audio Division Did Not Ignore Binding Precedent. BRA also argues that the Audio Division ignored "binding precedent." This argument is preposterous, as BRA is relying, not only on cases that are inapposite, but cases that interpret a no longer valid process. BRA cites *Communications Investment Corp. v. FCC*, 641 F.2d 954 (D.C. Cir. 1981) for the proposition that the "Commission has been chastised for ignoring precedent." That case involved, not an NCE case, but the failure of the Commission to designate a contested commercial broadcast allotment issue for hearing; moreover, BRA has cited no binding precedent for the Commission to ignore.

In the Memorandum Opinion and Order, *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 16 FCC Rcd 5074 (2001) ("NCE MO&O"), the Commission discussed its new NCE comparative evaluation process in light of prior cases and a landmark U. S. Court of Appeals case that invalidated the prior comparative selection process which BRA longs to revisit:¹²

[S]everal events in the 1990's led to our eventual change of the comparative selection process both for NCE and commercial stations, and for both reserved and non-reserved

¹⁰ *Martin Bayou Management Corporation*, Letter Decision, released November 29, 2011.

¹¹ BRA did not show that BBN's directors and officers listed in Section II, Question 6, of FCC Form 340 have any plans to obtain an attributable interest in another authorized station with a principal community contour overlapping the proposed Leesport principal community contour.

¹² As a result of Commission proceedings soliciting public comment, and Congress' decision on related matters in the Balanced Budget Act of 1997, the Commission implemented a system of competitive bidding for awarding permits on non-reserved channels and adopted new point-based comparative standards for reserved channel noncommercial educational proceedings.

channels. These events included the conclusion of the Commission's Review Board that the NCE criteria had, over time, become "meaningless" in distinguishing between applicants, and a federal court's finding that the **core integration criterion used to evaluate non-reserved channel applications was "arbitrary and capricious, and therefore unlawful."** *FCC v. Bechtel*, 10 F.3d 875, 878 (D.C. Cir. 1993) (*Bechtel*); *Real Life Educational Foundation of Baton Rouge, Inc.*, 6 FCC Rcd 2577, 2580, n.8 (Rev. Bd. 1991) [emphasis added].

BRA argues that "The Bureau should reexamine its position in light of binding precedent;" that the "precedent cited by BRA has never been overruled;" and that "the principle for which the decisions were cited is still binding." This is, respectfully, nonsense. None of the cases¹³ cited by BRA are binding precedent. Most of the cases cited deal with how the now-defunct Review Board parsed damaging testimony elicited on cross-examination during "meaningless" comparative hearings to determine the permittee of a new **commercial** radio station. The instant matter concerns a NCE station and involves no live testimony. BRA's cases are inapposite because they interpret a void policy (a point which the Audio Division has not missed, as BRA claims). Contrary to BRA's assertion, without precedential support, a commercial integration proposal and a NCE diversification proposal are not similar. The Commission's process for deciding among mutually-exclusive applicants for new NCE construction permits follows an entirely different procedure.¹⁴ The Commission's rules pertaining to the "point system"

¹³ *Margaret Garza*, 1 FCC Rcd 1294 (1986) [vague statement of integration proposal]; *Blancett Broadcasting Co.*, 17 FCC 2d 227 (Rev. Bd. 1968) [integration proposals were "too nebulous and indefinite" to entitle either applicant to a preference]; *Metro Broadcasting, Inc.*, 99 FCC 2d 688 (Rev. Bd. 1984); *Stanly Group Broadcasting, Limited*, 65 RR 2d 341 (1988); *Leininger-Geddes Partnership*, 2 FCC Rcd 3199 (Rev. Bd. 1987); *Jarad Broadcasting Company, Inc.*, 61 RR 2d 389 (Rev. Bd. 1986); *Kennebec Valley Television, Inc.*, 2 FCC Rcd 1240 (Rev. Bd. 1987); and *Cuban-American Limited*, 5 FCC Rcd 3781 (1990) [but, See fn 5].

¹⁴ See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Notice of Proposed Rulemaking, 10 FCC Rcd 2877 (1995), *further rules proposed*, Further Notice of Proposed Rulemaking, 13 FCC Rcd 21167 (1998), *rules adopted*, Report and Order, 15 FCC Rcd 7386 (2000) ("NCE Order"), vacated in part on other grounds *sub nom.*, *National Public Radio v. FCC*, 254 F.3d 226, 349 U.S. App. D.C. 149 (D.C. Cir. 2001) *clarified*, Memorandum Opinion and Order, 16 FCC Rcd 5074 (2001) ("NCE MO&O"), *Erratum*, 16 FCC Rcd 10549 (2001), *recon. denied*, Memorandum Opinion and Second

and how it is administered have been fully reviewed by the same court that found the commercial comparative hearing procedures arbitrary and capricious. And the U. S. Supreme Court denied *certiorari*. The Audio Division correctly found:

BRA's reliance on Review Board integration credit decisions misplaced. The Commission engaged in an extensive rulemaking process to replace the prior comparative selection process and established new procedures for the awarding of NCE construction permits....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.¹⁵

Just so. The revised NCE Rules and related decisions “provide ample guidance.” Most telling is BRA’s failure to cite even one case post 2001 (when the NCE MO&O was adopted) that contradicts the Audio Division’s handling of the case at bar.

C. BRA’s Argument Concerning Television Interests May Not Be Raised at this Stage. For the first time, BRA argues that BBN’s bylaw amendment “only prohibits future interest acquisition by the Network [BBN] in radio. There is no prohibition from the acquisition of television.” Putting aside the fact that BBN has historically limited its activities to the ownership and operation of radio stations, BRA’s attempt to argue this point violates Section 1.115 (c) of the rules.¹⁶ BRA did not raise this matter either at the

Order on Reconsideration, 17 FCC Rcd 13132 (2002) (“*NCE Reconsideration Order*”), *aff’d sub nom. American Family Ass’n v. FCC*, 365 F.3d 1156, 361 U.S. App. D.C. 231 (D.C. Cir. 2004), *cert. denied*, 125 S.Ct. 634 (2004).

¹⁵ *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 15 FCC Rcd 7386 (2000); 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).

¹⁶ Section 1.115 (c) provides: “No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.

Note: Subject to the requirements of §1.106, new questions of fact or law may be presented to the designated authority in a petition for reconsideration.”

Petition to Deny or Petition for Reconsideration stage, and as the Commission has had no opportunity to pass on it, BRA may not raise it now in its AFR.

III. Conclusion

The *Letter Decision on Reconsideration* clearly explained the Audio Division's rationale in awarding 2 points to BBN, which was enough to tip the balance in BBN's favor over BRA. The Commission will not be confused by BRA's arguments. It was BRA, not BBN that failed to take the steps necessary at the appropriate time to support its claims for local applicant and diversity points. As a sore loser, it is unwilling to concede that its error was fatal to its cause and, instead seeks to blame the victor for troubles of BRA's own manufacture. The Audio Division did not err in its analysis of the two applications; neither did it err in its ultimate award of the construction permit to BBN.

Based upon the foregoing, BBN respectfully requests the Commission to deny BRA's AFR.

Respectfully submitted,

**BIBLE BROADCASTING
NETWORK, INC.**

By 

Gary S. Smithwick
Its Attorney

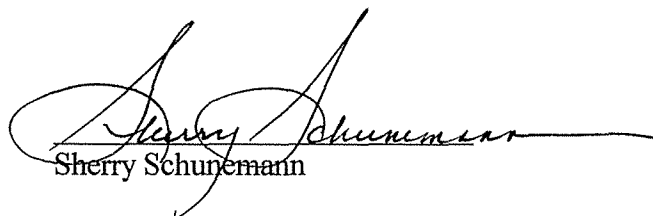
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December 7, 2011

CERTIFICATE OF SERVICE

I, Sherry L. Schunemann, do hereby certify that a copy of the foregoing "Opposition to Application for Review" was mailed, by First Class U.S. Mail, postage prepaid, this 7th day of December 2011, to the following:

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