

2015 JAN 26 A 9:50

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

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 In re Applications of: }  
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 ANNISTON SEVENTH-DAY }  
 ADVENTIST CHURCH }  
 }  
 Application for a New NCE FM }  
 Station at Anniston, Alabama }  
 }  
 BOARD OF TRUSTEES OF }  
 JACKSONVILLE STATE UNIVERSITY }  
 }  
 Application for a New NCE FM }  
 Station at Anniston, Alabama }  
 }  
 NCE Reserved Allotment Group #1 }  
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File No.: BNPED-20100226ABT  
Facility Id.: 184996

File No.: BNPED-20100226AFB  
Facility Id.: 184885

Accepted/Files

JAN 22 2015

Federal Communications Commission  
Office of the Secretary

To: Office of the Secretary  
Attn: The Commission

**PETITION FOR RECONSIDERATION**

The Board of Trustees of Jacksonville State University (“JSU”), by and through its attorneys, hereby submits its Petition for Reconsideration of the Commission’s Memorandum Opinion and Order denying review of the Media Bureau’s decision to reinstate and grant the above-referenced application of Anniston Seventh-Day Adventist Church (“ASDA”) for a new noncommercial educational (“NCE”) station at Anniston, Alabama, and to dismiss the JSU application, *Anniston Seventh-Day Adventist Church and Board of Trustees of Jacksonville State University*, FCC 14-203, released December 23, 2014 (the “MO&O”). With respect thereto, the following is submitted:

### **Background**

The *MO&O* mistakenly denies review and reversal of the Bureau's decision, *NCE Reserved Allotment Group 1, New NCE-FM, Anniston, Alabama*, 28 FCC Rcd 7094 (MB 2013) (the "*Reconsideration Decision*"), denying reconsideration of the Bureau's prior reversal of course to reinstate and grant the ASDA application in its decision in *NCE Reserved Allotment Group No. 1, New NCE-FM, Anniston, Alabama*, 27 FCC Rcd 12149 (MB 2012). That decision had, in turn, reversed a prior decision, *NCE Reserved Allotment Group No. 1, New NCE-FM, Anniston, Alabama*, 27 FCC Rcd 5710 (MB 2012) (the "*Letter Decision*") which had properly dismissed the ASDA applications as ineligible for its failure to meet the "third channel reservation standard," which requires that applicants must propose to provide a first or second NCE service to at least ten percent of the population within the proposed station's service area, and that this first or second NCE service must reach at least 2,000 people. The *Letter Decision* had itself corrected an apparent oversight when the Commission initially chose the ASDA application as the tentative selectee on a points evaluation, after erroneously concluding that all applicants satisfied the third reservation standard as required.

JSU continues to seek restoration of the outcome of the *Letter Decision*, reinstatement and grant of the JSU application, and dismissal of the ASDA application for its failure to satisfy basic eligibility requirements.

### **Questions Presented**

1. When the Commission has clearly set forth basic, mandatory eligibility requirements for applicants, may not the Commission dismiss applicants which fail to meet those requirements, without further notice?

2. Should the Commission adopt a permissive amendment policy which will encourage lack of sufficient care in original application and attempts to game the comparative system in the hope that application defects will be overlooked?

### Argument

#### Ample Notice Given of Third Channel Reservation Standard as Eligibility Requirement.

In the *MO&O*, the Commission rejected JSU's argument that the Commission had given ample notice that failure to meet the third channel reservation standard is a basic qualifying defect which will result in dismissal without opportunity to amend the application. The Commission stated that in order to dismiss an application for failure to meet basic qualifying standards, it must give full and explicit notice that an application filing requirement is a minimum filing requirement. *MO&O* at 2. JSU submits, however, that contrary to the Commission's concerns, it did actually give such notice more than amply. Clearly, ASDA knew that it was applying for a channel which had been specially reserved but was in the otherwise non-reserved band.

From the very inception of the policies allowing such allotments as the Anniston allotment, one which was reserved in the otherwise non-reserved band, the Commission made it clear that the threshold nature of the first and/or second NCE service requirement was a matter of basic qualifications, without which an applicant would be basically unqualified. *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 18 FCC Rcd 6691, 6705. Without meeting the third channel reservation standard of providing a first or second NCE service to at least ten percent of the population within the proposed station's service areas and a population of at least 2000 persons, the allotment could not have been reserved.

Furthermore, the Public Notice announcing the filing window also made it quite clear that compliance with the third reservation standard was an absolute requirement and stated in mandatory language that applicants for channels that has been reserved on the basis of the third channel reservation standard “must provide a first or second NCE service to at least ten percent of the population within the proposed station’s service areas and that population must be at least 2000 persons.” *Media Bureau Announces Filing Window for Vacant FM Allotments Reserved for Noncommercial Educational Use*, Public Notice, 24 FCC Rcd at 12623. This language is included under a heading of “Reservation Service Requirements.” *Id.*

Thus, the Commission gave far more notice of the requirement to meet the third channel reservation standard than it gave with regard to another basic qualification requirement that the applicant be a not-for-profit entity as opposed to a for-profit entity or an individual. While the requirement that NCE licenses be issued only to non-profit organizations is spelled out in the Commission’s Rules (*see* 47 C.F.R. Section 73.315(a); Section 73.621(a)), there was no statement in the Public Notice announcing the filing window that NCE applications submitted by for-profit, i.e. commercial, entities or individuals would be dismissed. *See, Media Bureau Announces Filing Window for Vacant FM Allotments Reserved for Noncommercial Educational Use*, Public Notice, 24 FCC Rcd 12621. Counsel for JSU is unaware, however, of any case in which a plainly for-profit commercial entity, or even an individual or an unincorporated organization without state recognition, has been allowed to apply for a reserved channel and then has been permitted to amend its application to discard for-profit commercial status and specify a non-profit entity or to report a newly organized non-profit status.

Indeed, the Commission recently upheld the dismissal of an application which had been filed by an unincorporated association with a sole member. *Wynnewood Community Radio*

*Association*, FCC 14-72, released June 5, 2014. Neither this decision nor the underlying Bureau decision cited to any FCC decision or notice that would have given the applicant in *Wynnewood Community Radio* explicit notice in so many words that failure to establish its qualifications as a non-profit corporation or state-recognized unincorporated association would result in dismissal of its application without opportunity to amend. The Wynnewood Community Radio application was submitted in response to the same Public Notice which prompted the filing of the ASDA and JSU applications. While the qualifying requirements for NCE licensees are mentioned in the Commission's rules, there is no mention of any penalties for applicants that do not meet them, and the third channel reservation requirements are even more clearly spelled out in the order adopting the procedures for reserving otherwise non-reserved channels. *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 18 FCC Rcd at 6705. As noted above, that Public Notice explicitly noted, in detail, the requirement that all applicants meet the third channel reservation requirement, but it made no mention of the requirement that applicants be a non-profit corporation or other state-recognized organization. Nonetheless, ASDA was found not to have sufficient notice of its failure to satisfy requirements for basic qualifications, while Wynnewood Community Radio was dismissed for just such a failure. This difference represents impermissibly disparate treatment of applicants.

Likewise, while the Public Notice announcing the filing window specified that "applicants must specify the exact community of license, channel and class as designated in the Table of Allotments and specified in Attachment A," (*id.* at 12623), it did not specify the penalty for failure to heed this application. Nonetheless, there is little doubt that had an applicant specified a different community, the Commission would have had no trouble in dismissing the errant application in light of the Public Notice's clear warning and would not have provided an

opportunity to amend the application to specify a different community. Hence, an explicit statement that applications filed by an ineligible entity will be subject to dismissal does not appear to be the *sine qua non* for actual dismissal of ineligible applicants.

Furthermore, while the Commission reversed itself and therefore found moot JSU's argument that the Bureau had impermissibly overturned the Commission decision with regard to Mutually Exclusive Group 11 and the application of Serendipity, the Commission did not address the two other instances in the same order in which it dismissed applicants for failure to meet the third channel reservation requirement. *Comparative Consideration of 37 Groups of Mutually Exclusive Applications for Permits to Construct New and Modified Noncommercial Educational Stations File in the February 2010 and October 2007 Filing Windows*, 26 FCC Rcd. at 7021, 7028, 7036.

While the Commission has noted that its reversal of its prior decision to dismiss the Serendipity application is ultimately of no decisional significance, its treatment of other applications which it was aware failed to meet the basic, threshold qualification of compliance with the third channel reservation standard has been entirely consistent with finding this failure to be an incurable defect. In the same 2011 order with regard to noncommercial applicants, NCE Reserved Allotment Group 21 was found to include three applicants which satisfied the reservation criteria and proceeded to a point analysis, and one which did not and, "accordingly" was eliminated without further consideration. *Id.* at 7028. Likewise, in NCE Reserved Allotment Group 31, two out of three of the applicants were found to comply with the third channel reservation criteria and went on to a points comparison, while the third applicant did not and was "therefore eliminated." *Id.* at 7036.

While the Commission has now found that one similarly situated application was improperly dismissed, the consistency of its prior decisions shows that the Commission's first

instinct was, in fact, correct. In each of these other cases, the Commission found that an applicant's failure to comply with the third channel reservation standard was disqualifying and was not a relatively minor tenderability or acceptability defect which could be corrected. In addition, the Commission's use of the words "accordingly" and "therefore" demonstrates the Commission's original view of the necessary cause and effect relationship between failure to meet the third channel reservation standard and dismissal of the application; if an application does not satisfy the third channel reservation requirement, then it must be dismissed. In this way, its treatment of these applications was consistent with its treatment of applicants which fail to demonstrate their qualifications as a non-profit organization. Those qualifications are also necessary threshold matters which must be set forth in an initial application and may not be corrected by an amendment after dismissal.

Acceptance of Late Third Channel Reservation Showing Amendments Leads to Abuses.

Moreover, for the Commission to reach any other conclusion would be to adopt a policy which encourages carelessly filed applications and gamesmanship. First of all, potential applicants would know that even if they fail at the time of filing to meet the basic eligibility requirements, they will nonetheless be allowed to fix their defective applications, and will be able to do so after having had the benefit of seeing details of opposing competitors' applications. Furthermore, while the Commission has pointed out that an applicant will not be allowed to improve its comparative qualifications after the window filing deadline, that statement rather misses the point. It must be remembered that there is a comparative advantage, under many circumstances, for the applicant which proposes the largest facility. With the instant ruling, an applicant may feel free to propose an impermissibly large facility, without regard to the third channel reservation standard, and simply hope that this deficiency will be overlooked, as was

initially the case with ASDA's application.<sup>1</sup> If the applicant's noncompliance is overlooked, it may claim the advantage of its larger coverage area. On the other hand, if the problem is detected, it may simply amend without penalty after the close of the filing window to reduce its coverage area sufficiently to come into compliance. In the meantime the applicant can see its competitors' proposals and can tailor its amendment to come into compliance with the eligibility requirements in the most advantageous way possible. Either way, the applicant proposing a noncompliant facility comes out ahead. Such a cynical attempt to have it both ways must not be countenanced and certainly not encouraged.

### **Conclusion**

In sum, the Commission has made it entirely clear, with ample prior notice, that satisfaction of the third channel reservation standard is a matter of basic eligibility which must be met initially in order for an applicant to be basically qualified. In similar circumstances, the Commission has dismissed applicants which fail to possess other required basic qualifications, such as non-profit organizational status, with less notice of its intent to do so. Additionally, while the Commission has reversed its decision to dismiss one applicant which failed to meet the third channel reservation standard, it let stand its dismissal of other applicants as a matter of course due to the same failure. These inconsistencies in treatment of basically unqualified applicants cannot stand. Further, if the Commission were to change its policies to allow such amendments, it would be encouraging slip-shop practices and increased gamesmanship among applicants.

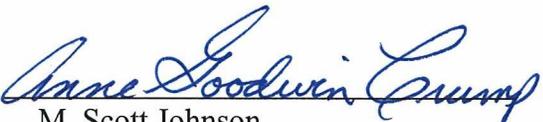
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<sup>1</sup> It should be noted that because the percentage of potential listeners receiving a first or second NCE service must be calculated with reference to the overall coverage area, by simply shrinking that coverage area, the percentages of first or second NCE service necessarily go up.

WHEREFORE, the premises considered, JSU respectfully requests that the ASDA application be dismissed, and that the JSU application be reinstated and granted.

Respectfully submitted,

**BOARD OF TRUSTEES OF  
JACKSONVILLE STATE UNIVERSITY**

By:   
M. Scott Johnson  
Anne Goodwin Crump

**FLETCHER, HEALD & HILDRETH, PLC**  
1300 North 17<sup>th</sup> Street, 11<sup>th</sup> Floor  
Arlington, Virginia 22209  
703-812-0400

Its Attorneys

January 22, 2015

**Certificate of Service**

I, Deborah N. Lunt, hereby certify that on this 22nd day of January, 2015, I caused a copy of the foregoing "Petition for Reconsideration" to be served via U.S. mail, postage prepaid, upon the following:

Donald E. Martin, P.C.  
P.O. Box 8433  
Falls Church, VA 22041  
*Counsel for Anniston Seventh-Day Adventist Church*

  
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Deborah N. Lunt