

174923

RIC

BEFORE THE
Federal Communications Commission

WASHINGTON, D. C. 20554

| | | |
|-----------------------------------|---|----------------------------|
| In re Applications of |) | NCE FM MX Group # 78 |
| |) | |
| NEW BOHEMIA GROUP, INC. |) | File No. BNPED-20071019BBN |
| Coggon, Iowa |) | Facility ID No. 174923 |
| _____ |) | |
| |) | |
| PLUS CHARITIES |) | File No. BNPED-20071022BMC |
| Coggon, Iowa |) | Facility ID No. 171762 |
| |) | |
| For Construction Permit for |) | |
| New NCE FM Station on Channel 204 |) | |

FILED/ACCEPTED

NOV 10 2010

TO: Honorable Marlene H. Dortch, Secretary

Federal Communications Commission
Office of the Secretary

ATTN: The Commission

APPLICATION FOR REVIEW

Dennis J. Kelly

LAW OFFICE OF DENNIS J. KELLY
Post Office Box 41177
Washington, DC 20018-0577
Telephone: 202-293-2300
dkellyfcclaw1@verizon.net

Counsel for:

October 10, 2010

PLUS CHARITIES

SUMMARY

The Audio Division of the Media Bureau returned Plus' application for a construction permit for a new NCE FM station at Coggon, Iowa because, inadvertently, the applicant checked the box "east longitude" rather than "west longitude" in question 3 of the "Tech Box" in the FCC Form 340 application. However, in question 5 to the same "tech box", Plus specified an existing tower, antenna structure registration (ASR) number 1225767, as its proposed transmitter site. This tower is located near Masonville, Iowa. Plus' engineering exhibits used "west longitude" and are consistent with ASR 1225767.

This action was inconsistent with FCC case precedents, most notably *Special Markets Media, Inc.*, 5 FCC Rcd 80 (1989). Although the FCC announced a change in its policies in a 1998 rulemaking report and order, that order did not indicate what would happen where there was conflicting information within the "tech box". The FCC could have reliably and confidently resolved the conflict between the responses to questions 3 and 5 in the Plus application in favor of Plus, consistent with *Special Markets*; in fact, such a resolution is mandated by the appellate precedents in *Glaser v. FCC*, 20 F.3d 1184 (D. C. Cir. 1994) and *Salzer v. FCC*, 778 F.2d 869 (D. C. Cir. 1985). Therefore, the dismissal of the Plus application was arbitrary,

capricious and contrary to law, in violation of the Administrative Procedure Act, 5 U.S.C. §706.

Also, Plus seeks review of the Audio Division's ruling finding that competing applicant New Bohemia Group, Inc.'s certification was not patently defective on its face, in violation of 47 C.F.R. §73.3513.

TABLE OF CONTENTS

| | |
|--|----|
| Timeliness | 2 |
| Questions of Law Presented | 2 |
| Section 1.115(b) (2) Factors | 3 |
| Statement of Facts | 3 |
| Argument | 5 |
| A. Plus' Right to Cure the Defect in Its Application | 5 |
| B. New Bohemia's Application Was Defective | 11 |
| Conclusion | 15 |

BEFORE THE
Federal Communications Commission

WASHINGTON, D. C. 20554

| | | |
|-----------------------------------|---|----------------------------|
| In re Applications of |) | NCE FM MX Group # 78 |
| |) | |
| NEW BOHEMIA GROUP, INC. |) | File No. BNPED-20071019BBN |
| Coggon, Iowa |) | Facility ID No. 174923 |
| _____ |) | |
| |) | |
| PLUS CHARITIES |) | File No. BNPED-20071022BMC |
| Coggon, Iowa |) | Facility ID No. 171762 |
| |) | |
| For Construction Permit for |) | |
| New NCE FM Station on Channel 204 |) | |

TO: Honorable Marlene H. Dortch, Secretary

ATTN: The Commission

APPLICATION FOR REVIEW

Plus Charities (Plus), by its attorney, and pursuant to Section 1.115 of the Commission's Rules, hereby respectfully submits this Application for Review of the letter ruling of the Chief, Audio Division, Media Bureau, DA 10-1958, released October 13, 2010, denying two separate pleadings filed by Plus: the March 12, 2009 "Petition for Reconsideration" ("First Petition") affirming the dismissal of the Plus application because of a defect in Plus' engineering section that the Audio Division refused to allow Plus to correct by an amendment; and the March 25, 2009 "Petition for Reconsideration, or, in the Alternative,

Application for Review" ("Second Petition") affirming the denial of Plus' "Petition to Deny" and granting the application of New Bohemia Group, Inc. (New Bohemia) for a construction permit for a new non-commercial FM Broadcast Station at Coggon, Iowa. In support whereof, the following is shown:

Timeliness

1. This pleading is timely filed pursuant to Section 1.115(d) of the Rules as it is being submitted prior to November 12, 2010, which is the 30th day subsequent to the release of DA 10-1958.

Questions of Law Presented

2. Pursuant to Section 1.115(b) of the Rules, this is to state the questions of law presented by this Application for Review:

- a. Whether Plus was entitled to acceptance of its application, and/or the opportunity to amend, under the 1989 precedent of **Special Markets Media, Inc.**, 5 FCC Rcd 80 and its progeny.
- b. Whether the Audio Division has misread the plain language of 47 CFR §73.3566(a), in that this rule section on its face is silent as to whether the Commission may grant a Petition for Reconsideration and Request for Leave to Amend *nunc pro tunc* to correct a tenderability and/or acceptability defect.
- c. Whether the Commission's dismissal of the Plus application is contrary to appellate precedents such as **Glaser v. FCC**, 20 F.3d

1184 (D. C. Cir. 1994), and **Salzer v. FCC**, 778 F.2d 869 (D. C. Cir. 1985), and therefore violates the Administrative Procedure Act requirement that the FCC act in accordance with law, 5 U.S.C. §706(2)(A).

- d. Whether the Audio Division failed to act in accordance with the letter of 47 C.F.R. §7513 and established precedents by accepting for filing and granting the New Bohemia application despite patent defects in the certification of the application.
- e. Whether the acceptance for filing of the New Bohemia application and the dismissal of the Plus application violated Plus' right to administrative due process under the appellate precedent of **Melody Music, Inc. v. FCC**, 345 F.2d 730 (D. C. Cir. 1965).

Section 1.115(b)(2) Factors

3. The rulings in this case must be reversed or vacated, because they implicate the following factors stated in 47 C.F.R. §1.115(b)(2):

- (i) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.
- (iv) An erroneous finding as to an important or material question of fact.
- (v) Prejudicial procedural error.

Statement of Facts

4. The Audio Division wrote a letter to Plus dated November 8, 2007 dismissing its application for the following reason:

An engineering study of the application reveals that the proposed facility fails to provide adequate community coverage as required by 47 C.F.R. §73.515. Specifically, the proposed 60 dBu contour

fails to cover at least 50 percent of the community of license of Coggon, Iowa. This constitutes an acceptance defect.

5. Plus timely prepared a curative amendment, and has attempted to file it electronically. However, the Commission's CDBS application filing system refused to accept the amendment; the CDBS system reported the following "error message":

Amendments to NCE window filings may only propose minor transmitter site changes. The amendment proposes a change of more than 1 degree latitude and/or 1 degree longitude. Value is: N

6. The reason the Commission returned Plus' application is that, inadvertently, the applicant checked the box "east longitude" rather than "west longitude" in question 3 of the "Tech Box" in the FCC Form 340 application. However, in question 5 to the same "tech box", Plus specified an existing tower, antenna structure registration (ASR) number 1225767, as its proposed transmitter site. This tower is located near Masonville, Iowa. Plus' engineering exhibits used "west longitude" and are consistent with ASR 1225767.

7. Plus argued that it was a minor amendment to change Section VII, question 3 from "east longitude" to "west longitude", as it was the applicant's intent to file for an FM station located in Iowa, not in China, and since it specified an ASR number and exhibits based on a tower

location near Coggon, Iowa. The amendment also made corrections to certain items, which are enumerated in Exhibit 1 of the amendment. Plus timely filed a "Petition for Reconsideration" on December 7, 2007, to which was attached a paper copy of the amendment it sought leave to file.

8. Meanwhile, New Bohemia's application contained a defective signature. At Section VI of its application, Michael Richards, identified at Section II, question 6, of the application as "Director, Founder" of New Bohemia, certified the application on "10/16/2007". Richards' title is not indicated in Section VI, the certification section. Directly beneath Richards' certification in Section VII is the certification of Todd Urick, "Technical Consultant", on "10/19/2007". Despite the fact that Plus raised this in a timely filed "Petition to Deny", the Audio Division looked the other way and accepted the New Bohemia application for filing, and then granted it.

Argument

A. Plus' Right to Cure the Defect in Its Application

10. The Audio Division bases its dismissal of the Plus application on its reading of Section 73.3566(a) of the Rules; see DA 10-1958, letter ruling at 2, nn. 6-13.

11. Section 73.3566(a), which was published in the Federal Record on July 2, 1979, 44 Fed. Reg. 38499, states as follows:

Applications which are determined to be patently not in accordance with the FCC rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective and will not be accepted for filing or if inadvertently accepted for filing will be dismissed. Requests for waiver shall show the nature of the waiver or exception desired and shall set forth the reasons in support thereof.

12. According to DA 10-1958, at page 2 and note 6, the Audio Division makes the statement that "Section 73.3566(a) of the Rules provides for dismissal of nonconforming applications without an opportunity for a corrective amendment". In point of fact, Section 73.3566(a) contains no mention of petitions for reconsideration or curative amendments, one way or the other. Therefore, it is reversible error for the Audio Division to read language into Section 73.3566(a) which the Commission never adopted and published in the Federal Register; that is arbitrary and capricious action in violation of 5 U.S.C. §706(2) (A).

13. Subsequent to the adoption of Section 73.3566(a) in 1979, the Audio Division indicated that it would accept petitions for reconsideration accompanied by curative amendments. Commission policy and practice for at least the past 26 years has clearly allowed curative amendments

to be filed where an application has been dismissed for an engineering defect. As stated most recently in the letter ruling in **Edward T. Czelada**, 22 FCC Rcd 16634 (Media Bureau, September 5, 2007):

The Commission will grant reconsideration and will reinstate a dismissed application *nunc pro tunc* where a relatively minor curative amendment is filed within 30 days of the date of the dismissal.

As authority for this proposition, the Media Bureau letter cited **Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications, Public Notice**, 56 RR 2d 776, 49 Fed. Reg. 47331 (rel. Aug. 2, 1984).

14. After the FCC suffered defeats in the appellate court in **Glaser** and **Salzer**, *supra*, relative to its failure to adequately apprise applicants of the requisite standard for application acceptance, the Commission came out with a policy and a line of decisions dealing with situations such as that posed by the error in the Plus application. An applicant for a new FM broadcast station construction permit had originally been dismissed for a discrepancy in the geographic coordinates stated in its application. On a petition for reconsideration, the Commission reinstated its application, stating:

Because Special Markets clearly proposes to co-locate on an existing tower of a Commission licensee, and because specific

reference is made to this tower in various places in the application, the staff could, drawing on the application as a whole, confidently verify the transmitter location by taking official notice of the street address and existing height of the tower in the Commission's files for WCPE. Accordingly, Special Markets is found to be acceptable for filing.

Special Markets Media, Inc., 5 FCC Rcd 80 (Bureau, December 27, 1989). See also *Major-Keene Partnership*, 4 FCC Rcd 8713, ¶12 (Bureau, 1989); *Burnett Broadcasting, Ltd.*, 4 FCC Rcd 8497, ¶3 (Bureau, 1989); *Gary L. Acker*, 4 FCC Rcd 6251, ¶2 (Bureau, 1989); *Majikas Enterprised, Ltd.*, 4 FCC Rcd 2409, ¶3 (Bureau, 1989); *Mexican American Communications Entertainment Group*, 4 FCC Rcd 528 (Bureau, 1989).

15. It is noteworthy that DA 10-1958 never mentions the *Special Markets* line of cases. In footnote 33 to DA 10-1958, the Audio Division cited in support of the dismissal of the Plus application paragraph 57 of *1998 Biennial Regulatory Review—Streamlining of Mass Media Applications*, 13 FCC Rcd 23056, 23081 (1998). Therein, the FCC stated:

We will employ a "tech box" to incorporate all critical technical data required for engineering review. In the event of any discrepancies between data in the "Tech Box" and data submitted elsewhere in the application, the data in the "Tech Box" will govern.

16. It must be emphasized that, even though Plus incorrectly checked East Longitude instead of West Longitude at question 3 of the "tech box", Plus responded

to question 5 of the "tech box" with Antenna Structure Registration (ASR) number 1225767, which specifies a tower located in Iowa in the western hemisphere. The Plus engineering exhibit at Attachment 15 was consistent with the ASR number and reflected West Longitude. Therefore, since Plus was applying for a transmitter site in Iowa, not in the People's Republic of China, the FCC could have verified the location of the transmitter site and the fact that the Plus engineering proposal did provide 60 dBu contour service to all of Coggon, Iowa; this could have been done, "drawing on the application as a whole, confidently verify the transmitter location by taking official notice of the street address and existing height of the tower in the Commission's files". **Special Markets**, supra. **1998 Biennial Regulatory Review—Streamlining of Mass Media Applications** is silent on what happens when there is an inconsistency in information submitted within the "Tech Box". There is no indication that an inconsistency in information submitted within the "Tech Box" will result in dismissal of an application. Likewise, the instruction to Form 340 referenced by the Audio Division in footnote 33 is not helpful in answering this inquiry.

17. We cannot find any case law which overrules the **Special Markets** line of cases, which should apply in the

event that there is a conflict in information within the tech box. The **Glaser** and **Salzer** precedents stand for the proposition that, when the sanction for an application defect is dismissal, the FCC is obligated to give applicants such as Plus crystal clear notice as to what is expected. It is a clear violation of **Glaser** and **Salzer** for the FCC to impose a new and harsher standard for application dismissal than what existed as of October 22, 2007, when Plus electronically filed its application.

18. Therefore, Plus should have been permitted to amend its application to specify "West Longitude" in lieu of "East Longitude" under the **Special Markets** line of cases. Failure of the Commission to permit such an amendment, which is a minor curative amendment since the application as a whole clearly shows that Plus had selected a transmitter site in the Coggon, Iowa area, is arbitrary and capricious and contrary to law, and is reversible error pursuant to 5 U.S.C. §706(2)(A).

19. The Commission en banc must grant review and reinstate the Plus application nunc pro tunc and accept its December 7, 2007 curative amendment because: (1) the Audio Division committed reversible error for reading language into Section 73.3566(a) that doesn't exist and by failing to issue a ruling consistent with the **Special Markets** line

of cases; (2) the Audio Division committed reversible error by making an erroneous finding of fact—that is to say, any reasonable person reading the Plus application as filed could confidently conclude that Plus proposed a transmitter site in the western hemisphere, not in the eastern hemisphere; and (3) the Audio Division committed prejudicial procedural error by failing to consider the rule of *Special Markets*, which constitutes reversible error pursuant to *Glaser* and *Salzer, supra*.

B. New Bohemia's Application Was Defective

21. Both Section 73.3513(a)(3) of the Rules and instruction M to Form 340 are unambiguous. An application submitted by a corporate applicant such as New Bohemia must be signed by an officer of the corporation. The rule as written does not contemplate that such an application can be validly signed by a director, shareholder or employee. On the face of New Bohemia's application, as of October 22, 2007, Michael Richards, the signer of the New Bohemia application, was not an officer of New Bohemia.

22. New Bohemia's application certification had other problems. First, on October 22, 2007, the NCE FM cut-off date, New Bohemia was unincorporated, as its charter had been administratively revoked by the Iowa Secretary of State prior to that date. Therefore, on the cut-off date,

New Bohemia had no officers or directors. In Section 73.3513(a)(4) of the FCC Rules, an application by an unincorporated association requires a signature by "a member who is an officer". We would note that the "title" box in Section VI of New Bohemia's Form 340 was left blank. Therefore, the certification did not comply with Section 73.3513(a)(4) either.

23. Additionally, Michael Richards certified the New Bohemia application on October 16, 2007, but the preparer of the engineering portion of the application, Todd Urick, didn't certify the application until October 19, 2007. The dating of the application violated the long-standing FCC precedent of *WMOZ, Inc.*, 36 FCC 201, 218 (1964). WMOZ states the following black letter law:

no material [may] be added to an application once it has been signed by the licensee... unless the application is thereafter redated, resigned, and reverified.

24. The law is clear that a defective certification of an application is fatal to an application, and the appropriate sanction is dismissal. *M. John Phillips*, 22 FCC Rcd 11562 (Audio Div., 2007); *Vernon T. Snyder*, 20 FCC Rcd 12066 (Audio Div., 2005). The FCC's case law shows that where defective application certification issues could not be resolved on the pleadings, basic character qualification issues were added and heard in a trial-type

hearings: **Lansing Community College**, 3 FCC Rcd 5491, ¶13 (HDO, MMB, 1988); **Triangle Broadcasting Co.**, FCC 81M-2346, 49 RR 2d 1601, 1602 (ALJ, 1981); **American International Development, Inc.**, 75 FCC 2d 67, ¶¶24-28 (Rev. Bd. 1979); **Badlands Broadcasting Company**, 60 FCC 2d 353, ¶¶4-6 (Rev. Bd. 1976); **Post-Newsweek Stations, Florida, Inc. (WJXT)**, 54 FCC 2d 254 (Rev. Bd. 1975).

25. Despite all this law and precedent, the Audio Division looked the other way and accepted for filing and granted the New Bohemia application. In doing so, the Audio Division violated Section 0.283(c) of the Commission's Rules, which requires that "matters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines" shall be referred to the Commission for en banc disposition. In violation of Section 0.283(c), the Audio Division created new law by overlooking a patently defective application certification, in the process throwing out Section 73.3513 of the Rules and the 45 year old **WMOZ** line of cases. It is interesting that the Audio Division cites its own cases in footnote 30 of DA 10-1958 where it deviated from the letter of Section 73.3513. Past violations of Section 0.283(c) cannot be used to justify the violation of that rule in this case. It is well settled that the FCC must follow its

own rules. *Way of Life Television Network, Inc. v. FCC*, 593 F.2d 1356, 1359 (D. C. Cir. 1979).

26. Simple logic dictates that the Commission cannot justify the dismissal of the Plus application on the one hand and the acceptance and grant of the New Bohemia application on the other hand. While both applications had facial defects, one could be confidently resolved—the Plus application. The other defect could not be confidently resolved—the New Bohemia application had a defective certification as of the cut-off date (close of the filing window), October 22, 2007. At the very least, we have a **Melody Music** problem—the inability and/or unwillingness of the FCC to treat similarly situated applications in a like and logical manner. The FCC will have a tough time indeed explaining to the appellate court how, under the venerable **Melody Music** precedent, it rejected the Plus application which had a defect which could be confidently resolved in favor of Plus from a review of the application as a whole, but granted the New Bohemia application, which contained a far more serious and, in fact, unfixable problem—a defective certification as of the cut-off date.

27. Therefore, the FCC must also grant review of the grant of the New Bohemia application under factors 1 and 5 of Section 1.115(b)(2)—the Audio Division committed

reversible error by ignoring the FCC's own rules and its own case precedent in violation of 5 U.S.C. §706(2)(A); and the Audio Division committed prejudicial procedural error by dismissing the Plus application for an application defect which could be resolved in favor of Plus, while retaining the New Bohemia application, which contained a signature defect which could not be fixed in accordance with the rules. This is a clear violation of the rule established by the District of Columbia Circuit in **Melody Music**.

Conclusion

28. Plus seeks the Commission to either vacate or reverse the ruling in DA 10-1598, to reinstate the Plus application, to permit it to amend its application to specify "west longitude" in the Tech Box of the engineering portion of the application. Additionally, Plus seeks that the Commission rescind the grant of the construction permit at Coggon, Iowa to New Bohemia, and either dismiss that application or, in the alternative, prepare a comparative "fair distribution" and/or "point system" ruling between the Plus and New Bohemia applications.

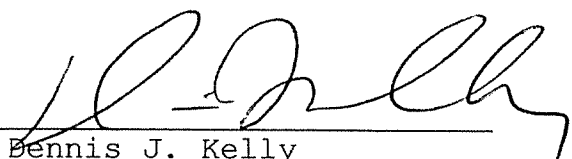
WHEREFORE, Plus Charities urges that this Application for Review **BE GRANTED**, that the application of Plus Charities for a new non-commercial educational FM station

at Coggon, Iowa **BE REINSTATED** as amended at Section VII, Question 3 to specify "west longitude". Further, Plus Charities urges that the construction permit granted to New Bohemia Group, Inc. **BE RESCINDED** and that said application, at the very least, **BE RETURNED TO PENDING STATUS**, unless it is first dismissed or denied for violation of 47 C.F.R. §73.3513(c) and/or the application certification policy stated in *WMOZ, Inc., supra*.

Respectfully submitted,

PLUS CHARITIES

By


Dennis J. Kelly
Its Attorney

LAW OFFICE OF DENNIS J. KELLY
Post Office Box 41177
Washington, DC 20018
Telephone: 202-293-2300

DATED AND FILED: November 10, 2010



Federal Communications Commission
Washington, D.C. 20554

October 13, 2010

DA 10-1958
In Reply Refer To:
1800B3-MM
Released October 13, 2010

Dennis J. Kelly, Esq.
Law Office of Dennis J. Kelly
P.O. Box 41177
Washington, D.C. 20018

Richard S. Myers, Esq.
Myers Lazrus
1220 19th St. N.W.
Suite 500
Washington, D.C. 20036

In re: Plus Charities
NEW(FM), Coggon, Iowa
Facility ID No. 171762

File No. BNPED-20071022BMC

New Bohemia Group, Inc.
NEW(FM), Coggon, Iowa
Facility ID No. 174923

File No. BNPED-20071019BBN

Petitions for Reconsideration

I. INTRODUCTION

1. We have before us the "Petition for Reconsideration" ("First Petition")¹ and the "Petition for Reconsideration, or, in the Alternative, Application for Review" ("Second Petition")² of Plus Charities ("Plus"), asking us to reconsider our actions of February 10 and 25, 2009, respectively, regarding the

¹ Filed Mar. 12, 2009.

² Filed Mar. 25, 2009. Because Plus raises arguments in the Second Petition not yet considered by the Media Bureau ("Bureau"), we will treat this pleading as a Petition for Reconsideration pursuant to Section 1.106 of the Commission's Rules ("Rules"). 47 C.F.R. § 1.106.

captioned applications of New Bohemia Group, Inc. (“New Bohemia”) and Plus.³ For the reasons set forth below, we deny both Petitions.

II. BACKGROUND

2. Plus and New Bohemia each applied⁴ to construct a new noncommercial educational (“NCE”) station to serve Coggon, Iowa, during a filing window for NCE FM applications in October 2007. On November 8, 2007, the staff dismissed the Plus Application (“Dismissal Letter”)⁵ pursuant to Section 73.3566(a) of the Rules,⁶ because Plus’ proposed facility failed to provide adequate community coverage as required by Section 73.515 of the Rules.⁷

3. On December 7, 2007, Plus petitioned for reconsideration of the dismissal and requested leave to amend its application and have it reinstated *nunc pro tunc* (“December 2007 Petition”). Specifically, Plus asserted that it inadvertently checked the box “east longitude” rather than “west longitude” in Section VII, question 3 of its application.⁸ It maintained that a review of the Plus Application “as a whole” would have shown that it had actually specified a tower located in Masonville, Iowa, as its proposed transmitter site.⁹ Plus argued that the Commission should accept as a minor change its amended application reflecting the correct coordinates.¹⁰ The Bureau’s order (“February 25th Order”)¹¹ rejected these arguments, finding that staff correctly dismissed the Plus Application based on data in the Tech Box. The Bureau stated that correct geographic coordinates are essential to determining an application’s completeness.¹² Thus, the Plus Application was patently nonconforming and properly dismissed without opportunity to file a curative amendment.¹³

4. On March 7, 2008, the Bureau issued a public notice that identified the New Bohemia Application and an application filed by Calvary Iowa City as mutually exclusive (“MX”) and grouped

³ On March 25, 2009, New Bohemia filed an “Opposition to Petition for Reconsideration,” and on April 3, 2009, Plus filed a “Reply to Opposition to Petition for Reconsideration” (“Reply”). New Bohemia also filed an “Opposition to Petition for Reconsideration/Application for Review” on April 8, 2009.

⁴ File Nos. BNPED-20071022BMC and BNPED-20071019BBN (respectively, “Plus Application” and “New Bohemia Application”).

⁵ *Letter from Rodolfo Bonacci, Assistant Chief, Audio Division to Plus Charities*, Ref. No. 1800-B3 (MB Nov. 8, 2007). Specifically, the Dismissal Letter found that the “proposed 60 dBu contour fails to cover at least 50 percent of the community of license of Coggon, Iowa.”

⁶ Section 73.3566(a) of the Rules provides for dismissal of nonconforming applications without an opportunity for a corrective amendment. It reads: “Applications which are determined to be patently not in accordance with the FCC rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective and will not be accepted for filing or if inadvertently accepted for filing will be dismissed.” 47 C.F.R. § 73.3566(a).

⁷ 47 C.F.R. § 73.515 (signal must cover “at least 50 percent of its community of license or reach 50 percent of the population within the community”).

⁸ See Form 340, Section VII, question 3, <http://www.fcc.gov/Forms/Form340/340.pdf>.

⁹ See December 2007 Petition at 3.

¹⁰ *Id.*

¹¹ *Plus Charities*, Letter, 24 FCC Rcd 2410 (MB 2009).

¹² *Plus Charities*, 24 FCC Rcd at 2411-12.

¹³ See n.6, *supra* (incomplete applications will be dismissed without opportunity to refile). See also 47 C.F.R. § 73.3564 (applications found not to meet minimum filing requirements will be returned).

them into NCE MX Group 78.¹⁴ Pursuant to established procedures,¹⁵ the Bureau determined that the New Bohemia Application was entitled to a dispositive preference under Section 307(b) of the Communications Act of 1934, as amended,¹⁶ and identified New Bohemia as the tentative selectee.¹⁷

5. Plus filed a Petition to Deny¹⁸ the tentative selection of the New Bohemia Application on the grounds that: (1) it was signed by a corporate director, rather than a corporate officer; (2) the date of the certification of the technical section of the New Bohemia Application postdated the applicant's certification; and (3) at the time the New Bohemia Application was certified, the Iowa Secretary of State had dissolved New Bohemia as a corporation.¹⁹ Plus also contended that the New Bohemia Application should not have been given a "fair distribution preference" because the technical certification postdated the applicant's certification.²⁰ Finally, Plus argued that the New Bohemia Application should be designated for hearing to determine the accuracy and truthfulness of New Bohemia's certifications.²¹ Again, the Bureau rejected Plus' arguments, finding that (1) the director was qualified to certify the New Bohemia Application; and (2) Plus did not meet its burden to establish that the different certification dates or the corporate dissolution reflected an intent to deceive the Commission.²² Accordingly, it denied the Petition to Deny ("*February 10th Order*").²³

6. Plus filed the First and Second Petitions on March 12 and 25, 2009, respectively, asking us to reconsider the *February 10th Order* and the *February 25th Order*. Each petition restated the allegations in the Petition to Deny and the December 2007 Petition. The Second Petition added new arguments that (1) the decision to deny the Plus Application and grant the New Bohemia Application raised questions of disparate treatment of similarly situated applicants in violation of the precedent set in *Melody Music, Inc. v. FCC*²⁴ and (2) Plus lacked notice of the Commission's acceptability standards.

¹⁴ See *Media Bureau Identifies Groups of Mutually Exclusive Applications*, Public Notice, 23 FCC Rcd 3914 (MB 2008).

¹⁵ See 47 C.F.R. § 73.7002 (procedures for selecting among mutually exclusive applicants for stations proposing to serve different communities); see also *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000) ("*NCE Comparative Order*"); Memorandum Opinion and Order, 16 FCC Rcd 5074, 5105 (2001), *reversed in part on other grounds*, *NPR v. FCC*, 254 F.3d 226 (D.C. Cir. 2001).

¹⁶ 47 U.S.C. § 307(b). A Section 307(b) analysis is ordinarily conducted at the staff level because the Bureau has delegated authority to make Section 307(b) determinations in NCE cases. See *NCE Comparative Order*, 15 FCC Rcd at 7397.

¹⁷ See *Threshold Fair Distribution Analysis of 26 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in October 2007 Window*, Memorandum Opinion and Order, 23 FCC Rcd 9934 (MB 2008).

¹⁸ Filed on Feb. 10, 2009.

¹⁹ Petition to Deny at 3-5.

²⁰ Petition to Deny at 7.

²¹ Petition to Deny at 6.

²² *New Bohemia Group, Inc.*, Letter, 24 FCC Rcd 1357 (MB 2009).

²³ *New Bohemia Group, Inc.*, 24 FCC Rcd at 1359-60.

²⁴ *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965) (holding that the Commission must explain its disparate treatment of contemporaneous cases with similar underlying facts). Plus also argues that *Community Television, Inc.*, Hearing Designation Order, MM Docket No. 86-45, FR Doc. 86-3253, (MMB Feb. 7, 1986) ("*Community Television*"), supports its argument that the New Bohemia Application should be designated for hearing for compliance with Section 73.3513 of the Rules (47 C.F.R. § 73.3513).

III. DISCUSSION

7. As an initial matter, we note that it is settled Commission precedent that petitions for reconsideration are not to be used for the mere reargument of points previously advanced and rejected.²⁵ To the extent that the First and Second Petitions pose arguments previously advanced and rejected, we dismiss them.²⁶ We address Plus' remaining arguments below.

8. Plus first argues that the dismissal of its application in the *February 25th Order* and the grant of the New Bohemia Application in the *February 10th Order* amounts to disparate treatment of similarly situated applicants in violation of *Melody Music*.²⁷ Specifically, Plus asserts that "New Bohemia received one standard of treatment for two clear and unambiguous violations of filing, tenderability and acceptability criteria, while Plus received a different standard of treatment when its application was dismissed and a corrective amendment refused"²⁸

9. We disagree with Plus' premise that Plus and New Bohemia are similarly situated applicants. *Melody Music* applies to factually similar cases that give rise to similar applicable Rules. Here, the Plus and New Bohemia Applications contained fundamentally different defects. Correction of the Plus Application to reflect the proper geographic coordinates would have constituted an impermissible "major change."²⁹ Conversely, the defects contained the New Bohemia Application – namely, that it was signed by a corporate director (rather than officer), and that the date of the certification of the technical

²⁵ *Regents of the University of California*, Order, 17 FCC Rcd 12891, 12892 (WTB 2002) (dismissing petition for reconsideration as repetitious) citing *Mandeville Broadcasting Corp. and Infinity Broadcasting of Los Angeles*, Order, 3 FCC Rcd 1667, 1667 (1988); *M&M Communications, Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 5100, 5100 (1987) (dismissing petition for reconsideration as repetitious).

²⁶ See paras. 3 and 5, *supra*. Plus cites to a new case in support of its argument that the New Bohemia Application should be designated for hearing because it did not contain the signature of a corporate officer, as required by Section 73.3513 of the Rules. See *Community Television*, *supra* n.24. However, this case not only fails to support Plus' argument, but in fact works against it. In *Community Television*, the application at issue contained the signature of the applicant's technical officer. A Petition to Deny the application claimed that Section 73.3513 of the Rules (47 C.F.R. § 73.3513) prohibited a signature from anyone but a director. In response, the applicant revealed that the technical officer also served as the applicant's executive director and *ex-officio* member of the board. The Bureau found that it was "clear" that the signer possessed the requisite authority to satisfy the Rule (*Community Television*, MM Docket No. 86-45, FR Doc. 86-3253 at ¶ 2), denied the petition, and asked the applicant to amend its application to show that the signor was an officer of the applicant and was authorized to execute the application on behalf of the applicant. The issue designated for hearing involved the *completeness* of the application (47 C.F.R. § 73.3514, requiring applicants to provide all information requested in a form), not the authority of the signer (47 C.F.R. § 73.3513).

The new cases cited by Plus in support of its argument that the Commission staff should have looked to the application as a whole to determine the correct site coordinates are also inapposite. See Second Petition at 5, citing *Special Markets Media, Inc.*, Hearing Designation Order, 5 FCC Rcd 80 (MMB, 1989); *Major-Keene Partnership*, Hearing Designation Order, 4 FCC Rcd 8713 (MMB 1989); *Burnett Broadcasting, Ltd.*, Hearing Designation Order, 4 FCC Rcd 8497 (MMB 1989), *et. seq.*, see Second Petition at 5. These cases were decided before 1998, when the Commission stated that the Tech Box controls in the event of a discrepancy. See n.33, *infra*.

²⁷ *Melody Music*, 345 F.2d 730 (D.C. Cir. 1965).

²⁸ Reply at 4.

²⁹ See 47 C.F.R. § 73.3564 (applications must meet minimum filing requirements in order to be accepted for filing. Transmitter site coordinates is a minimum requirement. Thus, an amendment would constitute a major change).

Plus again asserts that the Commission staff could have gleaned that the coordinates in the Tech Box were incorrect had it reviewed the application in its entirety. However, the Commission has explicitly rejected this sort of temporizing approach to rectifying erroneous Tech Box submissions. See n.33, *infra*.

section postdated the applicant's certification – were minor.³⁰

10. We further reject Plus' assertion that the Commission's acceptability criteria are unclear.³¹ Section 73.3564 of the Rules clearly sets forth the Commission's acceptability criteria.³² Moreover, it is well-settled that information in the Tech Box supersedes inconsistent data elsewhere in an application.³³

IV. CONCLUSION.

11. Accordingly, IT IS ORDERED that the March 12, 2009, Petition for Reconsideration and the March 25, 2009, Petition for Reconsideration, or, in the Alternative, Application for Review, filed by Plus Charities, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau

³⁰ *RKO General, Inc. et. al.*, Memorandum Opinion and Order, 49 FR 50449, 50451-52 (1984) (when signature on engineering portion of application postdated the certification date, Commission ruled that the discrepancy could have been corrected by a minor amendment); *David T. Murray*, Memorandum Opinion and Order, 5 FCC Rcd 5770 (1990) and *Bloomfield Hills School District*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 14055, 14058-59 (MB 2007) ("*Bloomfield*") (alleged violation of Section 73.3513(a)(5) of the Rules is overcome by the fact that signer had the authority to sign).

Plus also argues that the Bureau lacked delegated authority to conclude that the signature of a corporate director (as opposed to an officer) satisfied the requirements of Section 73.3513 of the Rules. We disagree. The Bureau has the authority to act on matters that are minor or routine and that do not present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines. See 47 C.F.R. § 0.283(c). The Bureau previously has addressed signature requirements. See *Union County Broadcasting Co.*, Letter, 22 FCC Rcd. 10285, 10288-89 (MB 2007) and *R B Schools, Decatur, Illinois*, Letter, 22 FCC Rcd. 8409, 8411 (MB 2007) (finding that applications were "substantially complete" despite bearing general manager's signature instead of an officer of the corporation); *Bloomfield*, 22 FCC Rcd at 14058-59. Accordingly, because it was not addressing a new or novel matter, the Bureau was acting within the scope of its delegated authority.

³¹ Second Petition at 4, arguing that *Glazer v. FCC* requires more explicit notice regarding acceptability criteria. See *Glazer v. FCC*, 20 F.3d 1184, 1186 (D.C. Cir. 1994), citing *Salzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985).


³² 47 C.F.R. § 73.3564 (describing minimum filing requirements: Applications that do not meet the minimum criteria, including transmitter site coordinates, will be returned to the applicant, whereas those that are "substantially complete" and "are in accordance with the Commission's core legal and technical requirements" will be accepted for filing).

³³ See 1998 Biennial Regulatory Review, *Streamlining of Mass Media Applications, Rules, and Processes*, Report and Order, 13 FCC Rcd 23056, 23081 (1998), recon. granted in part by Memorandum Opinion and Order, 14 FCC Rcd 17525 (1999) (finding that "use of the tech box would eliminate the need for repeated staff amendment requests and attendant processing delays, necessitated by errors and discrepancies within the application.") See also FCC Form 340, Instructions for Section VII, at 9 (Dec. 2008), <http://www.fcc.gov/Forms/Form340/340.pdf> (noting that "[i]n the event that there are any discrepancies between data in the Tech Box and data submitted elsewhere in the application, the data in the Tech Box will be controlling").

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing "Application for Review" was served by first-class mail, postage prepaid, on this 10th day of November, 2010 upon the following:

Richard S. Myers, Esquire
Myers Lazrus
1220 Nineteenth Street, NW
Suite 500
Washington, DC 20036
Counsel for New Bohemia Group, Inc.



Dennis J. Kelly

