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BEFORE THE
Federal Communications Commission

WASHINGTON, D. C. 20554

2010 DEC 1 54
FEDERAL COMMUNICATIONS COMMISSION

In re Applications of)	NCE FM MX Group # 78
)	
NEW BOHEMIA GROUP, INC.)	File No. BNPED-20071019BBN
Coggon, Iowa)	Facility ID No. 174923
)	
CALVARY IOWA CITY)	File No. BNPED-20071022BPL
Winthrop, Iowa)	Facility ID No. 176935
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)	
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

TO: Honorable Marlene H. Dortch, Secretary

ATTN: The Commission

DEC - 1 2010

Federal Communications Commission
Office of the Secretary

REPLY TO
OPPOSITION TO APPLICATION FOR REVIEW

Plus Charities (Plus), by its attorney, and pursuant to Section 1.115(d) of the Commission's Rules, hereby respectfully submits this Reply to the "Opposition to Application for Review" filed by New Bohemia Group, Inc. (New Bohemia) on November 24, 2010. In so doing, the following is shown:

1. At the outset, it needs to be stated once again that an applicant such as New Bohemia has no vested interest in the disqualification or dismissal of a

competing applicant. **Crosthwait v. FCC**, 584 F.2d 550 (D. C. Cir. 1978)..

2. Going back to the beginning of this dispute, the Audio Division dismissed the Plus application on the grounds that it failed to provide adequate community coverage as required by Section 73.515 of the Rules. **Letter of Rodolfo F. Bonacci, Assistant Chief, Audio Division, to Plus Charities**, November 8, 2007. Plus had proposed to locate its transmitting antenna on a tower assigned the antenna structure registration number 1225767 (Plus application, Section VII, Tech Box, question 5). The engineering exhibits aggregated at Attachment 17 all relate to tower ASR #1225767. Figure 1 of Attachment 17, at the top left, clearly indicates the coordinates 42-27-20 N by 91-34-38 W.

3. So far as we can tell, the FCC has never overruled **Special Markets Media, Inc.**, 5 FCC Rcd 80 (Bureau, December 27, 1989). The rationale of that case is on all fours with the Plus situation:

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.

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 Enterprises, Ltd.**, 4 FCC Rcd 2409, ¶3 (Bureau, 1989); **Mexican American Communications Entertainment Group**, 4 FCC Rcd 528 (Bureau, 1989).

4. The appellate court has ruled that, when the sanction for an application defect is dismissal, the FCC is obligated to give applicants such as Plus precise notice as to what is expected. **Glaser v. FCC**, 20 F.3d 1184, 1186 (D. C. Cir. 1994). The notice was not precise, and the Plus application must be reinstated.

5. Turning to the New Bohemia application, the defects in its application raised by Plus which were overlooked by the Bureau highlight the fundamental unfairness doled out by the Bureau in this case. Plus' application was rejected on a mistake which the Commission staff could have confidently resolved in favor of Plus by looking at the response to question 5 of the tech box and the accompanying exhibits. By contrast, the Bureau accepted the New Bohemia application in spite of a defective certification which violated both Section

73.3513(a)(3) of the Rules (requiring an application filed by a corporation to be signed by an officer) and a clear violation of its almost half-century old precedent of **WMOZ, Inc.**, 36 FCC 201, 218 (1964), which 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.

6. New Bohemia cites a number of precedents which appear to be staff actions resolving certification issues in favor of the applicants. However, staff decisions are not the definitive word on rule compliance. It is to be pointed out that when a legacy of non-enforcement of the 47 C.F.R. §73.1150(a) prohibition against "reversionary interests" was brought to the attention of the appellate court, a reversal ensued, since the Commission had failed to adequately explain the deviation from its stated rule. **Kidd Communications v. FCC**, 427 F.3d 1 (D. C. Cir. 2005). Plus points out that the Audio Division staff has never adequately explained how it let New Bohemia get away with two blatant violations of its application certification rule and case law. This is a fundamental unfairness which brings the "arbitrary and capricious" standard of 5 U.S.C. §706(2)(A) into play. Plus calls on the Commission to

correct this obvious unfairness, and reinstate the Plus application.

7. Therefore, the Audio Division violated Section 0.283(c) of the Commission's Rules by creating new law by overlooking a patently defective application certification, in the process throwing out Section 73.3513(a)(3) of the Rules and the **WMOZ** line of cases. Furthermore, the Audio Division created 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 **Melody Music, Inc. v. FCC**, 345 F.2d 730 (D. C. Cir. 1965), it could reject 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 at the same time grant the New Bohemia application, which contained a far more serious and, in fact, unfixable problem—a defective certification as of the cut-off date.

Conclusion

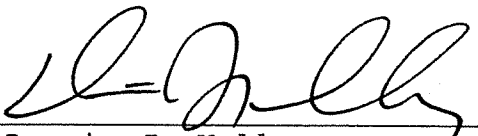
8. Plus restates its request that the Commission *en banc* reverse or vacate DA 10-1958, and reinstate the Plus application *nunc pro tunc*, permitting an amendment by Plus of the engineering portion of its application to specify "west longitude" in lieu of "east longitude", which is

consistent with the antenna structure registration number and engineering exhibits electronically filed with the application prior to the close of the NCE FM filing window on October 22, 2007. Further, Plus calls upon the Commission *en banc* to reverse the Audio Division and to grant Plus' petition to deny against the New Bohemia application based upon the defective certification contained therein.

WHEREFORE, Plus Charities urges that its 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
dkellyfcclaw1@verizon.net

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing "Reply to Opposition to Petition for Reconsideration" was served by first-class mail, postage prepaid, on this 1st day of December, 2010 upon the following:

Richard S. Myers, Esq.
Myers Lazrus
1220 19th St. N.W.
Suite 500
Washington, D.C. 20036
Counsel for New Bohemia Group, Inc.



Dennis J. Kelly