

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

In the Matter of )
Comparative Consideration of Seven Groups of )
Mutually Exclusive Applications for Permits to ) NCE Reserved Allotment Group Numbers 8,
Construct New Noncommercial Educational FM ) 12, 14, 24, 39, 40, and 48
Stations filed in the February 2010 Window )
)

MEMORANDUM OPINION AND ORDER

Adopted: May 8, 2015

Released: May 13, 2015

By the Commission: Commissioner Clyburn issuing a statement; Commissioner O’Rielly approving in part, dissenting in part, and issuing a statement.

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I. INTRODUCTION

1. By this Memorandum Opinion and Order (“Order”), the Commission considers five Petitions to Deny, two Petitions for Reconsideration, and two Informal Objections that challenge actions taken by the Commission regarding seven groups of mutually exclusive applications for new noncommercial educational (“NCE”)<sup>1</sup> FM station construction permits. In each of these groups, the

<sup>1</sup> Channels 201-220 are reserved for noncommercial educational FM broadcasting. See 47 C.F.R. § 73.501. Non-reserved FM band channels (Channels 221-300) reserved exclusively for NCE use appear with an asterisk designation in the Table of FM Allotments, Section 73.202 of the Commission’s Rules. See 47 C.F.R. § 73.202. All (continued....)

Commission previously resolved the conflicting NCE proposals by applying comparative procedures codified in Part 73, Subpart K, of the Commission's Rules (the "Rules")<sup>2</sup> and tentatively selected applications for grant, followed by filings or events which now require additional analysis.

## II. BACKGROUND

2. The applications addressed in this Order were filed in February 2010, during a filing window for non-reserved FM band allotments that had been reserved for NCE use.<sup>3</sup> Each application addressed herein was mutually exclusive ("MX") with at least one other application. Accordingly, the Commission resolved the seven MX groups herein, along with 54 other MX groups comprising over 300 NCE FM applications,<sup>4</sup> by comparing the applications under an NCE point system,<sup>5</sup> which is a simplified, "paper hearing" process for selecting among mutually exclusive NCE applications.<sup>6</sup> The Commission's comparative review of MX applications is based on applicant-provided information.<sup>7</sup> To expedite the licensing of new NCE FM stations, the Commission relies on applicant certifications and documentation and does not independently confirm their accuracy during the review process. Rather, the Media Bureau ("Bureau") and the Commission rely on the subsequent petition to deny process and random audits to verify the accuracy of the points claimed and certifications.<sup>8</sup>

3. After applying the comparative procedures, the Commission tentatively selected applications for grant from each MX group and initiated a 30-day period for filing petitions to deny against the applicants tentatively selected.<sup>9</sup> The pleadings addressed herein include the remaining

(Continued from previous page) \_\_\_\_\_  
of the applications considered in this Order propose to use spectrum that has been reserved for NCE use through the allotment process.

<sup>2</sup> 47 C.F.R. §§ 73.7000 – 73.7005.

<sup>3</sup> Each application in Groups 5 through 48 herein was filed during a filing window that was open from February 19, 2010, through February 26, 2010, for 67 existing, vacant FM allotments on Channels 221 through 300 that had been reserved for NCE use. See *Media Bureau Announces Filing Window for Vacant FM Allotments Reserved for Noncommercial Educational Use*, Public Notice, 24 FCC Rcd 12621 (MB 2009) ("Reserved Allotment Notice"); *Filing Window for Vacant FM Allotments Reserved for Noncommercial Educational Use Rescheduled to February 19-26, 2010*, Public Notice, 24 FCC Rcd 12952 (MB 2009).

<sup>4</sup> See *Comparative Consideration of 37 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations filed in the February 2010 and October 2007 Filing Window*, Memorandum Opinion and Order, 26 FCC Rcd 7008 (2011) ("37 Group Comparative Order"); *Comparative Consideration of 33 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 26 FCC Rcd 9058 (2011) ("33 Group Comparative Order").

<sup>5</sup> See 47 C.F.R. § 73.7003 (point system selection procedures). The NCE point system awards a maximum of seven merit points, based on four distinct criteria: (1) established local applicant; (2) diversity of ownership; (3) state-wide networks; and (4) technical parameters. See ¶¶ 6-11, *infra*.

<sup>6</sup> 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 (D.C. Cir. 2001), *clarified*, Memorandum Opinion and Order, 16 FCC Rcd 5074 ("NCE MO&O"), *Erratum*, 16 FCC Rcd 10549, *recon. denied*, Memorandum Opinion and Second Order on Reconsideration, 17 FCC Rcd 13132 (2002), *aff'd sub nom. American Family Ass'n v. FCC*, 365 F.3d 1156 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 1000 (2004).

<sup>7</sup> See Section IV of FCC Form 340 "Application for Construction Permit for Reserved Channel Noncommercial Educational Broadcast Station."

<sup>8</sup> See *NCE MO&O*, 16 FCC Rcd at 5104.

<sup>9</sup> See 47 C.F.R. § 73.7004(b).

unresolved petitions to deny<sup>10</sup> the tentative selectee applications from the February 2010 NCE FM reserved allotment MX groups.<sup>11</sup> In many of the petitions to deny, a petitioner has challenged the exclusion or inclusion of challenged or claimed points, thus potentially altering the outcome of the particular NCE MX group. Accordingly, the Bureau has referred the disposition of the applications in these groups to the Commission.<sup>12</sup> Although the groups we resolve in this Order involve a broad range of factual patterns, they also involve many common issues arising from our NCE comparative process. We therefore believe that organizing this Order primarily by topic and by consolidating these decisions as a single order will provide guidance on the application of many of the NCE comparative criteria.

4. Section III of this Order provides an introductory overview of each NCE comparative criterion. Section IV is devoted to a challenge to our prior award of established local applicant points in one MX group. Section V addresses whether the documentation submitted by the tentative selectees from four separate MX groups was sufficient to receive established local applicant and/or diversity of ownership points. In Section VI we address a challenge regarding our tie-breaker criterion and provide clarification regarding the applications and authorizations that must be counted for purposes of the first tie-breaker in one separate MX group and conduct a tie-breaker analysis in another.

### III. NCE COMPARATIVE PROCESS

5. The Commission's analysis of mutually exclusive groups of applications for vacant FM allotments in the non-reserved portion of the FM band that have been reserved for NCE use generally consists of three main components. First, applicants must show that they satisfy the "third reserved allotment showing" justifying the use of the non-reserved channel proposed by making a required population showing.<sup>13</sup> Second, applications are compared under an NCE point system.<sup>14</sup> The

<sup>10</sup> In cases involving a petition to deny, the Commission applies a two-step analysis under the public interest standard. The Commission must first determine whether the petition contains specific allegations of fact sufficient to show that granting the application would be *prima facie* inconsistent with the public interest. 47 U.S.C. § 309(d)(1); *Astroline Communications Co., Ltd. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) ("*Astroline*"). If the petition meets this first step, the Commission must determine whether "on the basis of the application, the pleadings filed, or other matters which [the Commission] may officially notice," the petitioner has raised a substantial and material question of fact as to whether the application would serve the public interest. *Astroline*, 857 F.2d at 1561; 47 U.S.C. § 309(e). We also dismiss a Petition for Reconsideration herein. See ¶41, *infra*. Petitions for reconsideration do not lie against interlocutory point decisions, which take no final action on an application. See 47 C.F.R. § 1.106(a)(1).

<sup>11</sup> Twenty of the 29 challenges received were previously resolved by the Bureau.

<sup>12</sup> The Commission directed the Bureau to refer only those issues where the exclusion or inclusion of challenged or claimed points could alter the outcome of a particular NCE group, or where a new or novel question exists. See *Comparative Consideration of 76 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 22 FCC Rcd 6101, 6162 n. 230 (2007) ("*NCE Omnibus*").

<sup>13</sup> The third reserved allotment showing is a basic qualifying test, not a comparative standard. Under the third reserved allotment showing, a reservation proponent must demonstrate that (1) it is technically precluded from using a reserved band channel (*i.e.*, one in Channels 201-220), and (2) it would provide a first and/or second NCE radio service to at least ten percent of the population within the 60 dBu (1 mV/m) contour of its proposed station, and that such population is at least 2,000 people. The Commission specifically advised prospective NCE applicants that the first or second NCE service requirement remains applicable at the application stage. Therefore, if the third reserved allotment showing served as the basis for reservation of an allotment, applicants for that allotment must provide a first or second NCE service to at least ten percent of the population within the proposed station's service area and that population must be at least 2,000 people. Applications which failed to satisfy this requirement were eliminated and did not proceed to the point system analysis. See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Second Report and Order, 18 FCC Rcd 6691, 6703-05 (2003); see also 47 C.F.R. § 73.202(a)(1)(ii).

<sup>14</sup> See 47 C.F.R. § 73.7003 (point system selection procedures).

Commission generally has awarded the number of points claimed by each applicant in Section IV of its FCC Form 340 application.<sup>15</sup> Third, if necessary, the Commission makes a tie-breaker determination, based on applicant-provided data and certifications contained in Section V of each application. The point system selection process is described in greater detail below.

**A. Point System Selection Process**

6. **Four Distinct Criteria.** The Commission compares mutually exclusive groups of NCE FM applications under the point system set forth in Section 73.7003 of the Rules.<sup>16</sup> The NCE point system awards a maximum of seven merit points, based on four distinct criteria.<sup>17</sup>

7. **Established Local Applicant.** First, three points are awarded to applicants that certify that they have been local and established for at least two years immediately prior to the filing of their application. Applicants with a headquarters, campus, or 75 percent of their board members residing within 25 miles of the reference coordinates of the community of license are considered local. A governmental unit is considered local within its area of jurisdiction. To qualify for localism points based on board composition, the applicant must certify that its governing documents require that such board composition be maintained. The applicant also must certify that it has placed documentation supporting its certification in a local public inspection file, and that it has submitted that documentation to the Commission.<sup>18</sup>

8. **Diversity of Ownership.** Second, two points are awarded for local diversity of ownership if the principal community contours of the applicant's proposed station do not overlap with those of any other station in which any party to the application holds an attributable interest.<sup>19</sup> To be awarded such points, an applicant's governing documents must include a provision requiring that such diversity of ownership be maintained in the future. Applicants that are organized pursuant to state charters that cannot be amended without legislative action are permitted to base the governing document component of their local diversity certifications on other safeguards that reasonably assure that board characteristics supporting any points claimed by the applicant will be maintained.<sup>20</sup> An applicant awarded diversity of ownership points must submit copies of pertinent governing documents to support its certification or, for applicants such as state universities that are governed by laws which cannot be amended without legislative action, an appropriate alternative showing. The applicant also must certify that it has placed documentation supporting its certification in a local public inspection file, and that it has submitted that documentation to the Commission.<sup>21</sup> An applicant that proposes a full service NCE station that would replace an attributable FM translator may exclude the translator for calculating ownership diversity points if it has pledged to request cancellation of the translator authorization upon the new station's commencement of operations.<sup>22</sup> The Commission has stated that it will, on a waiver basis, similarly allow applicants to exclude Class D (10 watt) FM stations that will be replaced by the proposed full service

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<sup>15</sup> See Section IV of FCC Form 340.

<sup>16</sup> See 47 C.F.R. § 73.7003.

<sup>17</sup> See 47 C.F.R. § 73.7003(b).

<sup>18</sup> See 47 C.F.R. § 73.7003(b)(1); FCC Form 340, Section IV, Question 1, Instructions at 9 (requiring governing documents to ensure that applicant maintains "local" characteristics of governing board); Worksheet 4 (same); *NCE Order*, 15 FCC Rcd at 7419.

<sup>19</sup> See 47 C.F.R. § 73.7003(b)(2). Parties with attributable interests are defined as the applicant, its parent, subsidiaries, their officers, and members of their governing boards. See 47 C.F.R. § 73.7000. Interests of certain entities providing more than 33 percent of the applicant's equity and/or debt are also attributable. *Id.*

<sup>20</sup> See *NCE MO&O*, 16 FCC Rcd at 5095.

<sup>21</sup> See FCC Form 340, Section IV, Question 2(a), Instructions at 9.

<sup>22</sup> See *NCE MO&O*, 16 FCC Rcd at 5102-03.

NCE station.<sup>23</sup> The Bureau has also extended this waiver treatment to low power FM (“LPFM”) stations.<sup>24</sup>

9. **State-wide Network.** Third, two points are awarded for certain state-wide networks providing programming to accredited schools. These points are available only to applicants that cannot claim a credit for local diversity of ownership.<sup>25</sup>

10. **Technical Parameters.** Fourth, an applicant that proposes the best technical proposal in the group (i.e., proposes service to the largest population and area, excluding substantial areas of water) may receive up to two points. The applicant receives one point if its proposed service area and population are ten percent greater than those of the next best area and population proposals, or two points if both are 25 percent greater than those of the next best area and population proposals as measured by each proposed station’s predicted 60 dBu signal strength contour.<sup>26</sup> If the best technical proposal does not meet the 10 percent threshold, no applicant is awarded points under this criterion. In considering this criterion, we generally accept applicants’ coverage and population claims.

11. Finally, the Commission tallies the total number of points awarded to each applicant. Each of the applicants with the highest score in a group is designated a “tentative selectee.” All other applicants are eliminated.

12. **Tie-Breakers.** Applicants tied with the highest number of points awarded in a particular group proceed to a tie-breaker round, in accordance with Section 73.7003(c) of the Rules.<sup>27</sup> The first tie-breaker for NCE FM applicants is the number of radio station authorizations attributable to each applicant.<sup>28</sup> The applicant with the fewest attributable authorizations prevails. If the tie is not broken by this first factor, we apply a second tie-breaker: the number of pending radio station applications attributable to each applicant. Applicants are required to include new and major change radio applications, the current application, as well as all other applications filed within the window.<sup>29</sup> If that second factor fails to break the tie, we use mandatory time-sharing as the tie-breaker of last resort.

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<sup>23</sup> See *NCE Omnibus*, 22 FCC Rcd at 6120.

<sup>24</sup> See, e.g., *Comparative Consideration of 59 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Education FM Stations*, Memorandum Opinion and Order, 25 FCC Rcd 1681, 1686 (2010) (“*59 Group Comparative Order*”). See also *Reserved Allotment Notice*, 24 FCC Rcd at 12624. An applicant seeking to avoid attribution of an LPFM interest must, as part of its window-filed application, submit a request for waiver of the Rule that would otherwise result in the attribution of the LPFM interest in the applicant’s point system determination and propose to surrender the LPFM interest. The Commission will waive the LPFM cross-ownership rule so that an NCE FM construction permit may issue to an LPFM licensee, provided that the LPFM licensee divests its interest in the LPFM station prior to commencement of program tests by the new NCE FM station. See 47 C.F.R. § 73.860(a).

<sup>25</sup> See 47 C.F.R. § 73.7003(b)(3). The state-wide network credit is an alternative for applicants that use multiple stations to serve large numbers of schools and, therefore, do not qualify for the local diversity of ownership credit.

<sup>26</sup> *Id.* § 73.7003(b)(4). See *NCE Omnibus*, 22 FCC Rcd at 6121-22 (If there is one top applicant in terms of area and population, but no single next best applicant for both factors, the Commission will compare the top applicant’s proposed area to the next best area of one applicant and the top applicant’s population to the next best population of another applicant. Point(s) are awarded only if the top applicant prevails against the next best area and population proposals.)

<sup>27</sup> 47 C.F.R. § 73.7003(c).

<sup>28</sup> *Id.* § 73.7003(c)(1). Applicants are required to count all attributable full service commercial and NCE radio stations and certain FM translator stations. An applicant may exclude fill-in translators and any translator which the applicant seeks to replace with its full service proposal filed in this window. Applicants requesting and receiving a rule waiver may similarly exclude an LPFM or Class D FM station.

<sup>29</sup> See *NCE Omnibus*, 22 FCC Rcd at 6123.



13. **Timely Documentation of Comparative Qualifications.** The NCE new station application, FCC Form 340, is certification-based, but requires applicants to document certain of their claims by submitting supporting information both to the Commission and to a local public file.<sup>30</sup> Applicant point claims must be readily ascertainable from timely-filed application exhibits.<sup>31</sup> Certifications which require the applicant to submit documentation, but which are not supported with any such timely submitted documentation, are not credited. For example, the Commission rejects claims where the applicant certifies that it qualifies for points for diversity of ownership or as an established local applicant but fails to supply supporting information referred to in the certification. As noted above, every applicant claiming points for diversity of ownership must certify that the proposed station's service area would not overlap that of an attributable existing station, that its governing documents require that such diversity be maintained, and "that it has placed documentation of its diversity qualifications in a local public file and has submitted to the Commission copies of that documentation."<sup>32</sup> Similar certifications and documents are required of applicants claiming points as established local applicants.<sup>33</sup> While there is some flexibility in the type of documentation an applicant may provide, an applicant submitting no timely documentation at all cannot be found to have made a valid certification.

#### IV. ESTABLISH LOCAL APPLICANT CHALLENGE

14. As discussed previously, applicants with a headquarters, campus, or 75 percent of their board members residing within 25 miles of the reference coordinates of the proposed community of license, and government entities within their jurisdiction, are considered "local."<sup>34</sup> To qualify for the three established local applicant points, applicants must demonstrate that they been local and established for at least two years immediately prior to the filing of their application. The failure to timely submit the requisite documentation is fatal to a point claim. The Commission purposefully adopted a narrow definition of "established local" entities to increase the likelihood that organizations most knowledgeable, responsive, and accountable to their local community would be awarded licenses, to keep localism points meaningful, and to avoid possible abuses.<sup>35</sup> In the group discussed in this Section, the petitioner alleges that the tentative selectee did not satisfy our stringent localism standard and was therefore improperly awarded established local applicant points. We agree and adjust the points accordingly.

##### A. NCE Reserved Allotment Group 40

15. This group originally consisted of five applicants for a new NCE FM station on reserved Channel 237A at Dillsboro, North Carolina, an allotment reserved by means of the third reserved allotment showing. The Commission found that all five applicants demonstrated compliance with the third reserved allotment criteria and proceeded to a point hearing. The Commission awarded Canary

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<sup>30</sup> See *NCE Order*, 15 FCC Rcd at 7423.

<sup>31</sup> To be considered timely-filed, such exhibits must be filed by the close of the filing window. See, e.g., *33 Group Comparative Order*, 26 FCC Rcd at 9063 (2011) (comparative qualification claims not supported with documentation on file by close of window cannot be credited); *59 Group Comparative Order*, 25 FCC Rcd at 1694 (rejecting documentation filed after close of window as prohibited attempt to enhance comparative qualifications).

<sup>32</sup> See *FCC Form 340*, Instructions at 9, Section IV, Question 2(a). With respect to documenting current diversity, the preferred information is a map showing no overlap or a statement that none of the parties to the application holds an attributable interest in any other radio station. To document future diversity, the applicant would generally submit a copy of the governing documents referenced in the certification.

<sup>33</sup> See *FCC Form 340*, Instructions at 9, Section IV, Question 1. Examples of acceptable documentation include corporate materials from the secretary of state, lists of names, addresses, and length of residence of board members, copies of governing documents requiring a 75 percent local governing board, and course brochures indicating that classes have been offered at a local campus for the preceding two years.

<sup>34</sup> See *supra* ¶ 7; 47 C.F.R. § 73.7000.

<sup>35</sup> See *NCE MO&O*, 16 FCC Rcd at 5091.

Coalition, Inc. (“Canary”) and Western Carolina University (“Western Carolina”) three points each as an established local applicant. Canary was also awarded two points for diversity of ownership.<sup>36</sup> Thus, Canary was awarded the most points and identified as the tentative selectee.<sup>37</sup>

16. Western Carolina filed an Informal Objection and a Petition to Deny the Canary Application (“Petition”), on April 30, 2010, and July 21, 2011, respectively.<sup>38</sup> In the Petition and Informal Objection, Western Carolina asserts that Canary does not qualify for points as an established local applicant because it listed a post office box as its address in its application.<sup>39</sup> In response, Canary claims that the Commission properly credited it with points because the exhibit supporting its local established applicant points claim was on letterhead that included the URL address for its website, on which Canary’s physical address could be found. It also claims that the Commission has been “flexible” with information submitted in support of the local applicant certification.<sup>40</sup> Finally, it claims that the public notice, in which it notified the community of the application’s filing, included the organization’s local physical address.<sup>41</sup>

17. A local headquarters must be “a primary place of business or primary residence and not, for example, a post office box... which would not provide sufficient contact between the station’s decision and policy makers and the area to be served.”<sup>42</sup> Here, the address Canary provided falls short of our requirements. Such information must be readily ascertainable from timely filed exhibits, as required in the *33 Group Comparative Order*.<sup>43</sup> We do not look beyond the four corners of the application.<sup>44</sup> Canary’s application provided nothing more than a post office box for its physical headquarters. We do not credit the physical address included on its website or in the public notice because this information was not in its application. We thus find that Canary is not entitled to any points under the established local

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<sup>36</sup> The remaining three applicants were not credited with any points.

<sup>37</sup> *33 Group Comparative Order*, 26 FCC Rcd at 9069-70, 9097-98. The remaining applications in this group were dismissed by Public Notice on August 3, 2011. See *Broadcast Actions*, Public Notice, Report No. 47542 (MB rel. Aug. 3, 2011). Those dismissals are now final.

<sup>38</sup> Also before us are the following pleadings: (1) Canary’s Consent Motion for the Extension of Time, filed August 4, 2011; (2) Canary’s Opposition to Petition to Deny, filed August 12, 2011 (“Opposition”); (3) Western Carolina’s Reply to Opposition (“Reply”), filed August 24, 2011; (4) a “Supplement to Western Carolina University’s Reply to Opposition of the Canary Coalition, Inc.,” filed August 24, 2011; and (5) Canary’s Motion to Strike “Supplement,” filed September 7, 2011.

<sup>39</sup> Informal Objection at 2; Petition at 2. Western Carolina also argues that Canary’s application should be dismissed because: (1) it does not qualify for the diversity credit; (2) its financial and main studio certifications “lack credibility”; and (3) Canary violated Section 73.3580(c) of the Commission’s Rules by incorrectly and untimely issuing public notice of its application’s filing. In light of our disposition in this case, we do not reach these arguments.

<sup>40</sup> Opposition at 2, citing *33 Group Comparative Order* at 9083-84 (crediting applicant Northland with local status although board of trustees was unable to meet in time to secure a bylaws amendment). We find this precedent inapposite. As noted by Western Carolina, Northland’s application contained at least four references to the applicant’s physical location and included a waiver request explaining its situation. In contrast, the Canary application did not contain the applicant’s claimed physical address.

<sup>41</sup> Opposition at 3.

<sup>42</sup> *NCE Order*, 15 FCC Rcd at 7410.

<sup>43</sup> *33 Group Comparative Order*, 26 FCC Rcd at 9063 (“Applicant point claims must be readily ascertainable from timely filed application exhibits”).

<sup>44</sup> 47 C.F.R. § 73.7003(b) (“based on information provided in each application, each applicant will be awarded a predetermined number of points under the criteria listed....”).

applicant criterion.<sup>45</sup> This finding alters the outcome of the point hearing for this MX Group. Specifically, without the points awarded to it under the established local applicant criterion, Canary falls from five to two points. Western Carolina therefore prevails with three points as an established local applicant and is the new tentative selectee in Group 40.

## V. ESTABLISHED LOCAL APPLICATION AND/OR DIVERSITY DOCUMENTATION CHALLENGES

18. As noted earlier, applicants are required to timely document their point claims and certify that they have placed documentation supporting their certifications in a local public inspection file and submitted copies to the Commission.<sup>46</sup> Every applicant claiming points for diversity of ownership must certify and document that the proposed station's service area would not overlap that of an attributable existing radio station and that its governing documents require that such diversity be maintained. Similarly, every applicant claiming points as an established local applicant must certify and document that it has been local and established for at least two years.<sup>47</sup> The failure to timely submit the requisite documentation is fatal to a point claim. In the four groups discussed in this Section, we find that a tentative selectee did not timely or sufficiently document its localism and/or diversity claims in accordance with our Rules, and we adjust the points accordingly in each group.

### A. NCE Reserved Allotment Group 14

19. **Background.** This group originally consisted of three applications proposing service on vacant Channel 240A at Otter Creek, Florida. After determining that each applicant satisfied the third reserved allotment showing, the Commission conducted a point hearing. The Commission awarded five points to Florida Community Radio, Inc. ("FCR") – three under the established local applicant criterion and two under the diversity of ownership criterion. It awarded two points to Citrus County Association for Retarded Citizens, Inc. ("CCARC") under the best technical proposal criterion and no points to the other applicant. Accordingly, the Commission designated FCR the tentative selectee in Group 14.<sup>48</sup>

20. CCARC filed a Petition to Deny ("Petition") the FCR Application on June 2, 2011, asserting that the Commission erred in awarding FCR points under the established local applicant and diversity of ownership criteria. CCARC also implies that FCR made misrepresentations to the Commission in certifying that it was eligible for points under the established local applicant criterion.<sup>49</sup> FCR filed an Opposition to Petition to Deny ("Opposition") on June 14, 2011.<sup>50</sup> FCR argues that the

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<sup>45</sup> See *La Dov Educational Outreach, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 12457, 12459 (2008) (declining to credit established local applicant claim where applicant used a post office box address).

<sup>46</sup> See *supra* ¶ 13.

<sup>47</sup> See 47 C.F.R. § 73.7003(b)(1),(2); FCC Form 340, Instructions at 9, Section IV, Questions 1 and 2(a).

<sup>48</sup> *37 Group Comparative Order*, 26 FCC Rcd at 7052 (2011).

<sup>49</sup> CCARC additionally alleges that FCR failed to make the local public notice required by Section 73.3580 of the rules. Petition at 8-9; 47 C.F.R. § 73.3580. Given our rescission of FCR's designation as the tentative selectee in Group 14, we need not reach this issue.

<sup>50</sup> CCARC filed a Reply to Opposition to Petition to Deny ("Reply") on June 27, 2011, after the time for filing a reply had elapsed. We dismiss the Reply as late-filed. We note, however, that, had we considered the Reply, it would not have affected our findings. We also dismiss the following: (1) Supplemental Motion filed by FCR on September 9, 2011; (2) the Amended Supplemental Motion filed by FCR on August 21, 2012; (3) the Opposition to Amended Supplemental Motion filed by CCARC on September 6, 2012; (4) the Reply to Opposition filed by FCR on September 14, 2012; and (5) Motion to Dismiss filed by FCR on December 19, 2012. Section 73.7004 of the rules, 47 C.F.R. § 73.7004, allows for the filing of a petition, any oppositions, and a reply by the petitioner. See also 47 C.F.R. § 1.45(c) (explaining that replies "shall be set forth in single pleading."). Any other pleadings are unauthorized and subject to dismissal without consideration. See, e.g., *Living Way Ministries, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 15070, 15070 n.1 (2008) (dismissing comments filed after the deadline for

(continued....)



Petition is procedurally defective. FCR also maintains it was eligible for both the local and diversity points awarded to it and denies that it made misrepresentations to the Commission. Finally, FCR argues that the Commission erred in awarding CCARC points under the best technical proposal criterion.

21. **Procedural Issues.** At the outset, we address whether the Petition is procedurally defective because CCARC did not include an affidavit supporting its allegations of fact.<sup>51</sup> Section 309(d)(1) of the Act requires that a petition to deny contain specific allegations of fact sufficient to show that grant of the application would be prima facie inconsistent with public interest.<sup>52</sup> It also requires that such allegations of fact, except for those of which official notice may be taken, be supported by the affidavit of a person or persons with personal knowledge thereof. It is undisputed that the Petition lacked a supporting affidavit.<sup>53</sup> We find, however, that the facts set forth in the Petition and discussed herein are those of which the Commission may take official notice. The key facts alleged in the Petition relate to (1) the timing of FCR's submission of certain materials to the Commission; and (2) the addresses set forth in the FCR Application.<sup>54</sup> Because this information is included in the FCR Application and publicly available through the Commission's Consolidated Database System,<sup>55</sup> we can and do take official notice of these matters. Accordingly, the absence of a supporting affidavit is not a procedural defect in this instance.<sup>56</sup>

22. **Established Local Applicant and Diversity Documentation.** Next, we turn to CCARC's allegation that FCR failed to timely document its eligibility for and, therefore, was not entitled to any of its awarded points. We find FCR did not timely document its claims for established local applicant or diversity points.<sup>57</sup> While FCR submitted documentation of its claims, it did not do so until after the close of the filing window.<sup>58</sup> The FCC Form 340 instructions provide, in pertinent part:

The applicant's qualification for points is determined as of the closing of the filing window assuming the applicant continues to qualify for all points claimed at the time of selection.<sup>59</sup>

(Continued from previous page) \_\_\_\_\_  
petitions for reconsideration as unauthorized pleadings). Accordingly, we dismiss the Supplemental Motion without consideration.

<sup>51</sup> Opposition at 1-2.

<sup>52</sup> 47 U.S.C. § 309(d)(1).

<sup>53</sup> *Id.*

<sup>54</sup> Petition at 3-7.

<sup>55</sup> See File No. BNPED-20100226AGX (as originally filed on February 26, 2010, and as amended on March 8, 2010).

<sup>56</sup> While FCR argues that Section 73.7004 of the Commission's Rules, 47 C.F.R. § 73.7004, precludes us from accepting CCARC's Petition to Deny without an affidavit, we do not believe that Section 73.7004 was intended to eliminate the statutory exception to the affidavit requirement contained in Section 309(d)(1). However, even if we were to agree with FCR's contention, we would still consider CCARC's pleading as an informal objection pursuant to Section 73.3587 of the Rules, 47 C.F.R. § 73.3587, and reach the same substantive result as is reached herein.

<sup>57</sup> Given our finding that FCR failed to timely document its claim for established local applicant points, we need not reach CCARC's allegation that, even if FCR had submitted supporting documentation prior to the close of the filing window, it does not qualify as an established local applicant. Petition at 6-8.

<sup>58</sup> The filing window opened on February 19, 2010, and closed on February 26, 2010. *Filing Window for Vacant FM Allotments Reserved for Noncommercial Educational Use Rescheduled to February 19-26, 2010*, Public Notice, 24 FCC Rcd 12952 (MB 2009). FCR did not amend the FCR Application to include documentation supporting its points claims until March 8, 2010. See File No. BNPED-20100226AGX (as originally filed on February 26, 2010, and as amended on March 8, 2010).

<sup>59</sup> See FCC Form 340, "Instructions for Section IV – Point System Factors."

Indeed, Questions 1 and 2(a) of Section IV of the FCC Form 340 require applicants to certify that such documentation has been submitted to the Commission.<sup>60</sup> We reject FCR's contention that it could support its points claims in a post-filing window amendment.<sup>61</sup> It is well established that an NCE applicant's qualifications for points are established at the close of the filing window and cannot be enhanced after that time.<sup>62</sup> FCR had until the close of the filing window to provide any documentation to support the point certifications in its application. It did not. Accordingly, we conclude that FCR was not entitled to points under the established local applicant or the diversity of ownership criteria.

23. This finding alters the outcome of the point hearing for this group. Without the established local applicant and diversity points awarded to it, FCR is awarded no points, and CCARC prevails with the two points awarded to it under the best technical proposal criterion. Although we establish a deadline for filing petitions to deny the CCARC Application herein, we will consider herein FCR's argument that the Commission should not have awarded CCARC points under the best technical proposal criterion now.<sup>63</sup> We find the data submitted by FCR unconvincing because it was inaccurate and did not provide an accurate assessment of population served or area covered by CCARC's proposed facility. FCR's submission includes areas which CCARC's proposed facility would not cover and fails to include areas that it would cover. We conclude that CCARC continues to satisfy the third reserved allotment showing requirement and remains eligible for two points under the best technical proposal criterion.<sup>64</sup> Accordingly, we affirm our award of two points to CCARC under the best technical proposal criterion and designate CCARC the new tentative selectee in Group 14.<sup>65</sup>

#### **B. NCE Reserved Allotment Group 24**

24. This group consists of two applications proposing service on vacant Channel 282A at Pinckneyville, Illinois, an allotment reserved by means of the third reserved allotment showing. In the 37 Group Comparative Order, after determining that each applicant satisfied the third reserved allotment criteria, the Commission conducted a points hearing.<sup>66</sup> The two applicants, Pinckneyville Community Radio ("PCR") and Heterodyne Broadcasting Company ("HBC"),<sup>67</sup> each claimed and were credited with three points as established local applicants and two points for diversity of ownership. The Commission thus proceeded to the first tie-breaker under which the applicant with the fewest number of attributable radio station interests prevails. We found that HBC had an attributable interest in one radio authorization;

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<sup>60</sup> See FCC Form 340, Section IV, Question 1 and Question 2(a).

<sup>61</sup> Opposition at 2-3.

<sup>62</sup> See Instructions for FCC Form 340, Section IV; 47 C.F.R. § 73.7003(e) ("For applications filed after April 21, 2000, an applicant's maximum qualifications are established at the time of application"); *NCE Order*, 15 FCC Rcd at 7423 (noting that point system documentation filed at the Commission should be submitted "concurrently with filing").

<sup>63</sup> Opposition at 4. FCR asserts that, while CCARC claims its proposed 60 dBu contour will encompass 2,216 square kilometers, it actually will encompass only 1,085 square kilometers. FCR bases its assertion on the U.S. Census data for Levy County, Florida. FCR also challenges whether, in the event of a points tie, CCARC should receive the benefit of an amendment made to the CCARC Application, which altered the number of existing radio station authorizations reported as attributable to CCARC from one to zero. Opposition at 3-4. Because we find below that CCARC prevails on points, we need not reach this issue.

<sup>64</sup> CCARC amended its application on August 9, 2012, in part, to indicate its proposed station will serve the same area (2,216 square kilometers), but a smaller population that originally predicted (14,614 people versus 14,638 people). CCARC still qualifies for two points for best technical proposal.

<sup>65</sup> In light of our action here on the FCR application, we need not consider CCARC's misrepresentation allegations.

<sup>66</sup> *37 Group Comparative Order*, 26 FCC Rcd at 7030.

<sup>67</sup> See FCC File No. BNPED-20100226AJF.

PCR did not have an attributable interest in any radio authorization.<sup>68</sup> Accordingly, based on the first tie-breaker, PCR prevailed and was designated the tentative selectee in NCE MX Group 24.

25. HBC timely filed a Petition to Deny on June 1, 2011. HBC asserts that the Commission improperly awarded points to PCR under the established local applicant and diversity of ownership criteria because PCR failed to provide adequate documentation to support its points claims.<sup>69</sup> As such, HBC claims it should have prevailed in the point determination. On June 7, 2011, the Commission dismissed HBC's application, per the *37 Group Comparative Order*.<sup>70</sup> That same day, HBC filed a Petition for Reconsideration, claiming that its application should be reinstated based on the arguments in its Petition to Deny.<sup>71</sup> Both petitions are unopposed.

26. As noted earlier, an applicant claiming points as an established local applicant must have supporting documentation in its local public inspection file and submit electronic copies of the documentation to the Commission as part of its application filing prior to the close of the window.<sup>72</sup> Acceptable documentation includes corporate material from the secretary of state, lists of names, addresses, and length of residence of board members, copies of governing documents requiring a 75 percent local governing board, or course brochures indicating that classes have been offered at a local campus for the preceding two years.<sup>73</sup>

27. We find that PCR was improperly awarded points as an established local applicant. In support of its claim, PCR provided an excerpt of its bylaws, stating, "In order to comply with the localism requirements of the FCC, Hubbardston Community Radio, Inc. [sic],<sup>74</sup> shall be physically headquartered or have a campus or have the residences of 75% of its board members within 25 miles of the reference coordinates of the community to be served by the full power FM station to be operated by Pinckneyville Community Radio Inc."<sup>75</sup> However, it failed to submit any documentation demonstrating that it maintained a community presence or that at least 75 percent of its board members were local for the two years preceding its application filing. Moreover, based on the information contained in the application, it appears that neither PCR's headquarters nor 75 percent of its listed board members are located within 25 miles of Pinckneyville.<sup>76</sup> Specifically, PCR's physical headquarters is located in Oshgosh, Wisconsin, approximately 410 miles from the community to be served, and 50 percent of its board members reside

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<sup>68</sup> *37 Group Comparative Order*, 26 FCC Rcd at 7030-31.

<sup>69</sup> Petition to Deny at 2-4.

<sup>70</sup> *Broadcast Actions*, Public Notice, Report No. 47505 (Jun. 10, 2011).

<sup>71</sup> Petition for Reconsideration at 1-2. Because we had not ruled on HBC's Petition to Deny – and therefore had not made a finding that there was "no substantial and material question concerning the grantability of the tentative selectee's application" – dismissal of HBC's application was premature. Therefore, we will grant HBC's Petition for Reconsideration and reinstate its application.

<sup>72</sup> See FCC Form 340 Instructions, Section IV- Point System Factors, Question 1 – Established Local Applicant. See also *37 Group Comparative Order*, 26 FCC Rcd at 7014 n.32. See *supra*, n.31.

<sup>73</sup> *37 Group Comparative Order*, 26 FCC Rcd at 7014 n.32.

<sup>74</sup> The reference to Hubbardston Community Radio, Inc. ("HCR") appears to be an error. The author may have used material from HCR's application, FCC File No. BNPED-20100226AGV, submitted in the same filing window, in completing the PCR application.

<sup>75</sup> File No. BNPED-20100226AIB, Exhibit 3.

<sup>76</sup> PCR lists four directors. Director Ed London lives 25.67 miles from Pinckneyville, IL, and President James Miller lives 412.58 miles from Pinckneyville, IL.

more than 25 miles outside Pinckneyville. Accordingly, we find that PCR was not entitled to points as an established local applicant.<sup>77</sup>

28. Our finding that PCR is not entitled to points as an established local applicant alters the outcome of the points hearing for this MX Group. Specifically, without such points, PCR is no longer tied with HBC and does not proceed to the tie-breaker round. HBC thus prevails because it has five points for being an established local applicant and diversity of ownership, and therefore, becomes the new tentative selectee in Group 24.

### C. NCE Reserved Allotment Group 39

29. **Background.** This group consists of applications filed by Gallatin Valley Community Radio (“GVCR” or “GVCR Application”) and Mount Ellis Academy (“MEA” or “MEA Application”) for a new NCE FM station on reserved Channel 240C3 at Bozeman, Montana, an allotment reserved by the third reserved allotment showing.<sup>78</sup> The MEA and GVCR Applications, as well as four other applications, were mutually exclusive and designated as Reserved Allotment Group 39.<sup>79</sup> After determining that each applicant satisfied the third reserved allotment criteria, the Commission conducted a points hearing.<sup>80</sup> In Group 39, the Commission found that GVCR, MEA, and Guild of St. Peter Educational Association (“Guild”) were entitled to five points each under the point system – three points for being an established local applicant and two points for diversity of ownership. Accordingly, GVCR, MEA, and Guild proceeded to a tie-breaker. Guild incorrectly certified the number of pending radio applications attributable to it, and when counted correctly, it was eliminated.<sup>81</sup> Accordingly, GVCR and MEA were designated the tentative selectees in Group 39 on a time-sharing basis.

30. In its September 9, 2011, Petition for Reconsideration (“Petition”),<sup>82</sup> GVCR alleges that MEA is not entitled to the two points it received for diversity of ownership, primarily because its governing documents do not comport with Section 73.7003 of the Commission’s Rules.<sup>83</sup> Specifically, GVCR claims that MEA does not satisfy the diversity documentation requirement because the exhibit certifying that MEA holds no attributable interest in any station is not binding.<sup>84</sup> GVCR contends that MEA’s submission is not an official governing document, as it cannot be ratified until a general meeting

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<sup>77</sup> In light of our action here, we need not reach HBC’s additional claim that PCR was improperly awarded points for diversity of ownership.

<sup>78</sup> See *33 Group Comparative Order*, 26 FCC Rcd at 9068.

<sup>79</sup> The four other applications were dismissed by the staff on July 29, 2011. See *Broadcast Actions*, Public Notice, Report No. 47542 (rel. Aug. 3, 2011).

<sup>80</sup> *33 Group Comparative Order*, 26 FCC Rcd at 9068.

<sup>81</sup> See *33 Group Comparative Order*, 26 FCC Rcd at 9069 n.48.

<sup>82</sup> GVCR acknowledges that the Petition was filed more than 30 days after the release of the *33 Group Comparative Order*, but indicates that the Bureau recently released a decision directly bearing on this case. Petition at 2, citing the unpublished Bureau decision in *Northwest Communities Education Center*, Letter, Ref. 1800B3-ATS at 2 (MB rel. Aug. 26, 2011), *recon. granted in part on other grounds*, 27 FCC Rcd 6081 (MB 2012) (“*Northwest*”). It therefore seeks leave to file the Petition under 47 C.F.R. § 1.106(c), arguing that the release of the *Northwest* case was an event occurring since its last opportunity to present such matters to the Commission. See Motion, referencing 47 C.F.R. § 1.106(f).

<sup>83</sup> Petition at 3, citing *Northwest*. Additionally before us are: (1) a Motion for Leave to File Petition for Reconsideration (“Motion”), filed by GVCR on September 9, 2011; (2) an Opposition to Petition for Reconsideration (“Opposition”), filed by MEA on October 6, 2011; and (3) a Reply to Opposition to Petition for Reconsideration (“Reply”), filed by GVCR on October 18, 2011.

<sup>84</sup> Petition at 3.

of the MEA board members is held in 2013, “[a]nd it is unclear whether it is a pledge of the entity, or its current board members, or just whom.”<sup>85</sup>

31. In its Opposition, MEA asserts that the Petition is procedurally defective and should be dismissed without consideration<sup>86</sup> because: (1) the *33 Group Comparative Order* is an interlocutory order not subject to petitions for reconsideration pursuant to Section 1.106(a)(1) of the Rules; (2) the Petition is barred as untimely pursuant to Section 1.106 of the Commission’s Rules;<sup>87</sup> and (3) GVCR’s claim that its late-filed Petition is justified because there is a “new development in the law,” fails because the new law, i.e., *Northwest*, “merely purport[s] to follow a prior decision by the full Commission.”<sup>88</sup>

32. In Reply, GVCR reiterates its contention that MEA should not be awarded diversity points and argues that MEA’s procedural arguments – which it characterizes as contending that the Petition is both premature (as it seeks review of an interlocutory determination) and untimely (as not filed within 30 days of the Comparative Consideration Order) - “cannot possibly be correct.”<sup>89</sup> It also states that the Bureau’s decision in *Northwest* did not merely follow existing Commission precedent but held, for the first time, “that an applicant may not claim diversity credit based on an undocumented claim of action by the governing body.”<sup>90</sup> GVCR states that “the flaws identified in the Northwest application’s showing are present here identically,” and the opposition makes no attempt to distinguish that case.<sup>91</sup>

33. **Procedural Issues.** We find that GVCR’s Petition is procedurally defective and dismiss it on this basis. The *33 Group Comparative Order* explicitly states that “[p]arties should not raise [arguments that the tentatively selected applicant should not be granted] as petitions for reconsideration of the instant Order because the point hearings herein take no final action on any application, and petitions for reconsideration do not lie against such interlocutory decisions.”<sup>92</sup> GVCR attempts to do exactly that here. The Motion must therefore be denied and the Petition dismissed. Accordingly, we need not consider issues related to the alleged untimely filing of the GVCR Petition. Nevertheless, on our own motion, in order to further clarify our rules and policies on the diversity of ownership issue, we shall discuss the Statement in the MEA Application regarding its diversity claim.

34. **Diversity Points.** In support of its diversity of ownership claim, MEA submitted a “Statement,” which declares, in pertinent part:

The Applicant has no attributable interest in any other radio station . . . . The Applicant is therefore entitled to comparative points for diversity of local media ownership. The Applicant has taken formal corporate action to commit to maintain the qualities that earn these comparative points. The Bylaws of the Montana Conference of Seventh-Day Adventists, Inc. d/b/a Mount Ellis Academy can be amended only by a vote of the

<sup>85</sup> *Id.*; see also File No. BNPED-20100226AGK at Exhibit 1 (“Statement”).

<sup>86</sup> Opposition at 1.

<sup>87</sup> MEA further argues that the Petition is untimely because Section 405(a) of the Communications Act only permits “petitions for reconsideration within 30 days of the public notice of the action for which reconsideration is requested.” 47 U.S.C. § 405(a); see also *Reuters, Ltd. v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986); *Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976) (“*Gardner*”).

<sup>88</sup> Opposition at 1. MEA also argues that GVCR’s motion for leave to file a petition for reconsideration fails because “the pleading for which the request is made is not a supplement or addition to a previous pleading . . . [i]t is the original Petition.” *Id.*

<sup>89</sup> Reply at 1, 3-4.

<sup>90</sup> *Id.* at 4.

<sup>91</sup> *Id.* at 3.

<sup>92</sup> *33 Group Comparative Order*, 26 FCC Rcd at 9094. Based on our finding that the GVCR Petition is procedurally defective, we need not address any of MEA’s other procedural arguments.



constituency. The constituency only meets once every four years. The next meeting is scheduled for the Summer of 2013. Consequently the Applicant is unable to amend its Bylaws immediately to incorporate those commitments. However, the Board . . . has adopted the following policies concerning the application . . . :

1. It is our policy to always maintain the campus of Mount Ellis Academy within 25 miles of the referenced coordinates for the Community of Bozeman, Montana.

2. At no time shall Mount Ellis Academy hold an attributable interest in another radio station, if the principal community contour of such station would overlap . . . the principal community contour of the radio station that results from an application filed by the Academy for a new station in which comparative points are claimed for diversity of media ownership if the application is granted because the academy has earned such points . . . .

[I]t also sent a recommendation . . . that the constituency amend the corporation's Bylaws at its next meeting in 2013 so as to incorporate these commitments into the Bylaws.<sup>93</sup>

35. During the rulemaking proceeding leading to the adoption of Section 73.7003 of the Rules, the Commission considered how an organization without traditional governing documents, such as MEA, would be able to meet the governing documents requirement.<sup>94</sup> The Commission determined that in the limited case of state entities whose governing documents cannot be amended without legislative action, it would permit such applicants to certify their commitment to maintain the board characteristics on which it bases its diversity claim.<sup>95</sup> Although we did not make a similar accommodation for applicant entities that do not use traditional corporate governance documents, we recognize the fairly rare circumstance in this case where board members only have the opportunity to review and adopt governing documents once every four years. We are concerned that an unreasonably strict approach would have the effect of penalizing applicant entities, such as MEA here, who have non-traditional corporate governance documents, but clearly are attempting to satisfy our concerns for maintaining board characteristics for which an applicant receives comparative credits. Accordingly, we will consider alternate safeguards from such organizations if they reasonably assure that board characteristics will be maintained during the four-year holding period.

36. Nonetheless, on the specific facts of this case, we find that even if we were to accept the proposed policies of MEA's board, the representations in MEA's Statement are insufficient to satisfy the requirements of Section 73.7003 because the Statement does not provide any safeguards that reasonably ensure that diversity will be maintained by current or future board members.<sup>96</sup> We therefore find that MEA should not have received two points for diversity of ownership.

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<sup>93</sup> See Statement at 1.

<sup>94</sup> See *NCE MO&O*, 16 FCC Rcd at 5094-5095.

<sup>95</sup> *Id.* at 5095 (“We specifically limit the availability of this option to entities whose governing documents cannot be amended without legislative action.”).

<sup>96</sup> See, e.g., *NCE MO&O*, 16 FCC Rcd at 5095 (commenter's proposal to certify that “it will not apply for any additional stations” is insufficient because such a proposal “does not address the potential that future members of its governing board may hold or acquire attributable interests in broadcast stations licensed to others”); compare *Talking Information Center*, Letter, 22 FCC Rcd 11120 (MB 2007) (finding that the University of Massachusetts adequately demonstrated, through an alternative showing, that it would maintain diversity where: (1) its President stated that no member of its governing board held an attributable interest in an overlapping radio station; and (2) its Board of Trustees had adopted a policy requiring that the President notify present board members and members of the board appointing authority of the need to maintain diversity; ask all board members to advise the president of

(continued....)

37. As MEA is not entitled to any points for diversity, the outcome for Reserved Allotment Group 39 is altered. Without the two diversity points, MEA is not tied with GVCR and does not proceed to a tie-breaker. Thus, we will dismiss the MEA Application. The GVCR Application is the point winner and sole tentative selectee in Group 39, and we will grant the GVCR Application as ordered herein.

**D. NCE Reserved Allotment Group 48**

38. This group consists of applications filed by Calvary Chapel of McMinnville, Inc. (“CCM”), Dallas Seventh-Day Adventist Church (“DSDA”), Mano a Mano Family Center (“Mano”), and Capital Community Television, Inc. (“CCT”) for a new NCE FM station on reserved Channel 252C3 at Dallas, Oregon, an allotment reserved by the third reserved allotment showing.<sup>97</sup> The CCM, DSDA, Mano, and CCT Applications, as well as three other applications, were mutually exclusive and designated as NCE Reserved Allotment Group 48.<sup>98</sup> After determining that each applicant satisfied the third reserved allotment criteria, the Commission conducted a points hearing.<sup>99</sup> The Commission found that CCM, DSDA, Mano, and CCT were each entitled to five points each under the point system – three points for being an established local applicant and two points for diversity of ownership. CCM, DSDA, Mano, and CCT therefore proceeded to a tie-breaker, and the Commission declared each to be tentative selectees in Group 48 on a time-sharing basis.

39. **Background.** In a July 21, 2011, Petition to Deny (“Petition”),<sup>100</sup> Mano alleges that DSDA is not entitled to the two points it received for diversity of ownership because the “bare narrative” DSDA filed as an exhibit to its application to support its claim failed to satisfy the documentation requirements of Section 73.7003 of the Commission’s Rules.<sup>101</sup> In support of this argument, Mano states that without actual governing documents, “it is impossible for the Commission or the public to determine when this resolution was adopted, what its precise language might be, whether it was conditional or bounded in time, and whether it is effective as a statement of present condition or future effect.”<sup>102</sup> Mano further argues that the “exhibit fails to show that its summarized pledge language ... has binding effect on some future board.”<sup>103</sup>

40. In its Opposition, DSDA states that Mano is “attempting to manufacture a problem where none exists,”<sup>104</sup> and notes that the Commission has accepted similar documentation in the past.<sup>105</sup> It maintains that the policy statements were the “precise language that was adopted by the Church Board”

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changes in their radio interests; screen all new appointments to the board; and revise new member orientation materials to advise new members of diversity requirements).

<sup>97</sup> See *33 Group Comparative Order*, 26 FCC Rcd at 9075.

<sup>98</sup> The three other applications were dismissed by the staff on July 29, 2011. See *Broadcast Actions*, Public Notice, Report No. 47542 (rel. Aug. 3, 2011).

<sup>99</sup> *33 Group Comparative Order*, 26 FCC Rcd at 9075.

<sup>100</sup> On July 29, 2011, DSDA filed a Consent Motion for Extension of Time to file its Opposition by August 19, 2011. We grant this unopposed Motion. DSDA filed an Opposition to the Petition on August 19, 2011. Mano filed a Reply on August 31, 2011.

<sup>101</sup> 47 C.F.R. § 73.7003. Mano Petition at 3-4. Mano also alleges that DSDA failed to establish its qualifications as a noncommercial educational licensee (Petition at 1), and that DSDA failed to support its claim as an established local entity in its points showing (Petition at 4-5). We will not address these issues, as they are moot in light of the outcome herein.

<sup>102</sup> Petition at 4.

<sup>103</sup> *Id.* at 5.

<sup>104</sup> Opposition at 5.

<sup>105</sup> *Id.* at 6-7.

and submits a declaration of the church's pastor, Doug Clayville ("Clayville") in support of this contention.<sup>106</sup> Finally, it argues that Mano's question regarding the binding effect of the diversity language on future boards amounts to no more than "unauthenticated speculation."<sup>107</sup>

41. In its Reply, Mano points out that the Opposition fails to produce any corroborative document -- not a "board resolution, not minutes of a meeting, not a letter, not a memorandum, not anything" -- to demonstrate that the policies were adopted.<sup>108</sup> Mano claims that Clayville's declaration is deficient because it lacks specificity.<sup>109</sup> Finally, Mano argues that the nine applications to which DSDA cites all involved applicants that submitted and properly filed documentation (i.e., copies of corporate resolutions or amended bylaws) in support of their diversity/localism claims, unlike DSDA.<sup>110</sup>

42. **Discussion.** DSDA's application contains an exhibit explaining that the Church has no governing documents, such as articles of incorporation or bylaws, and that the actions of the church board serve as its governing documents.<sup>111</sup> The exhibit states that the church board adopted a policy in support of its claim for comparative points for diversity of ownership, which states in pertinent part:

The local Seventh-Day Adventist Church has no governing documents similar to articles of incorporation, a constitution or bylaws. Consequently, local policy and governance are implemented by the church board. Actions of the church board serve as governing documents for the church. In support of the church's claim to comparative points, the church board has adopted the following policies concerning the application for a new noncommercial FM Station that the church is filing in the February, 2010 filing window:

2) At no times shall the church hold an attributable interest in another radio station, or construction permit for a radio station, if the principal community contour of such station would overlap, in whole or in part, the principal community contour of the radio station that will result from the application.

These policies are adopted for the purpose of complying with the FCC's comparative selection procedures for noncommercial broadcast applications as set forth in Sections 73.7000 and 73.7003 of the FCC's Rules (47 CFR 73.7000 and 73.7003).<sup>112</sup>

43. As noted in the discussion of NCE Reserved Allotment Group 39, *supra*, during the rulemaking proceeding leading to the adoption of Section 73.7003 of the Rules, the Commission considered how an organization without traditional governing documents, such as DSDA, would be able to meet the governing documents requirement.<sup>113</sup> We recognize that not all organizations have traditional governing documents, and we will consider alternate safeguards from such organizations if they reasonably assure that board characteristics will be maintained during the four-year holding period.

44. Nonetheless, on the specific facts of this case, even if we were to accept DSDA's board policy as its "governing document," the statement's declaration that "[a]t no time shall the church hold an

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<sup>106</sup> Mr. Clayville's declaration states: "I have reviewed the forgoing Opposition to Petition to Deny. I have personal knowledge as to the facts stated therein. All of the factual statements made in that pleading concerning the Dallas Seventh-day Adventist Church and its Church Board are true and correct to the best of my knowledge and belief."

<sup>107</sup> Opposition at 6.

<sup>108</sup> Reply at 6.

<sup>109</sup> Reply at 2-3.

<sup>110</sup> Reply at 7.

<sup>111</sup> DSDA Application at Exhibit 1.

<sup>112</sup> *Id.*

<sup>113</sup> See *NCE MO&O*, 16 FCC Rcd at 5094.

attributable interest in another radio station” falls short of the requirements of Section 73.7003. As Mano correctly argues, DSDA’s statement does not specifically prohibit the parties to the application - the church board members – from having attributable interests in other broadcast stations and therefore does not provide any safeguards that reasonably assure that diversity will be maintained by future board members.<sup>114</sup> We therefore find that DSDA should not have received points for diversity of ownership.<sup>115</sup>

45. As DSDA is not entitled to any points for diversity, the outcome for Reserved Allotment Group 48 is altered. Without the two diversity points, DSDA is no longer tied with CCM, Mano, and CCT. Thus, we will dismiss the DSDA Application; CCM, Mano, and CCT remain tentative selectees in Group 48 on a time-sharing basis.<sup>116</sup>

## VI. TIE-BREAK CHALLENGES

46. As noted earlier, our rules provide for a system of tie-breakers if more than one application receives the same number of points.<sup>117</sup> With regard to applications for NCE radio facilities, the applicant with the fewest existing radio authorizations (licenses and construction permits, commercial and NCE) prevails on the first tie-breaker. The applicant with the fewest pending new and major change radio applications prevails on the second tie-breaker.<sup>118</sup> We have noticed some confusion amongst applicants regarding the applications and authorizations that must be counted for purposes of the tie-breaker criterion. In NCE Reserved Allotment Group 12, we address the question of whether the contemporaneous grant of an NCE authorization should be considered for purposes of the first tie-breaker. In the final group discussed in this Order, we conduct a tiebreaker analysis to resolve NCE Reserved Allotment Group 8.

### A. NCE Reserved Allotment Group 12

47. This group consists of applications filed by Help Save the Apalachicola River Group, Inc. (“HSARG” or “HSARG Application”) and Florida Community Radio, Inc. (“FCR-HB” or “FCR-HB Application”) for a new NCE FM station on Channel 234C3 at Horseshoe Beach, Florida, an allotment reserved by the third reserved allotment showing. After determining that each applicant satisfied the third reserved allotment criteria, the Commission conducted a points hearing.<sup>119</sup> The HSARG and FCR-HB Applications, as well as five other applications, were mutually exclusive and designated as Reserved Allotment Group 12.<sup>120</sup> Following a point system analysis, HSARG, FCR-HB, and three other applicants were tied with two points each and proceeded to the tie-breaker analysis. Under the first tie-breaker, the number of radio station authorizations attributable to each applicant, only HSARG and FCR-HB each

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<sup>114</sup> See, e.g., *Talking Information Center*, *supra*, note 100.

<sup>115</sup> We find the Commission or Bureau’s disposition of the applications cited by DSDA to be inapposite. The Commission awarded diversity points in those cases because all of the applicants had traditional governing documents and provided copies of their resolutions and amended bylaws to support their diversity claims. All but one of these points claims went unchallenged. Had questions regarding the sufficiency of the supporting documentation been raised, the Commission would have considered them, as it has done in this case. In the case of the application of Southwest Georgia Project for Community Education, Inc. (File No. BNPED-20071015ABU), the one challenged application, the Bureau upheld the award of points for diversity because the applicant submitted with its application a corporate resolution requiring current and future officers and directors to maintain diversity. See *NCE MX Group 337A*, Letter, 26 FCC Rcd 6020 (MB 2011).

<sup>116</sup> See *33 Group Comparative Order*, 26 FCC Rcd at 9075-76.

<sup>117</sup> See *supra* ¶ 12.

<sup>118</sup> See 47 C.F.R. § 73.7003(c)(1),(2).

<sup>119</sup> *37 Group Comparative Order*, 26 FCC Rcd at 7022.

<sup>120</sup> The other five applications were dismissed by the staff on June 7, 2011. See *Broadcast Actions*, Public Notice, Report No. 47505 (rel. June 10, 2011).

certified that it had no attributable interest in any radio authorizations. Accordingly, the other three applicants were eliminated, and HSARG and FCR-HB proceeded to the second tie-breaker, the number of pending radio applications attributable to each applicant. HSARG and FCR-HB each certified to having attributable interests in three radio applications. Because HSARG and FCR-HB remained tied, the Commission declared both HSARG and FCR-HB to be tentative selectees in NCE Reserved Allotment Group 12 on a time-sharing basis.

48. **FCR-HB Petition.** Although no timely petitions were filed, FCR-HB filed an “Objection” on June 6, 2011,<sup>121</sup> arguing that HSARG should be eliminated under the first tie-breaker because HSARG was contemporaneously granted an NCE authorization for Port St. Joe, Florida<sup>122</sup> in NCE MX Group 328 in the same *37 Group Comparative Order*.<sup>123</sup> FCR-HB asserts that, at the time of the *37 Group Comparative Order*’s release, it therefore should have prevailed under the first tiebreaker because it held zero authorizations. Additionally, in its Motion, FCR-HB contends that HSARG violated Section 1.65<sup>124</sup> of the Rules by failing to update the HSARG Application to reflect the grant of the HSARG Port St. Joe Application. FCR-HB claims that, for these reasons, its application should be the sole tentative selectee for Group 12. Finally, in a December 15, 2011 Request, FCR-HB seeks a conditional grant of its application pending the outcome of the Objection because “the public interest requires the prompt establishment of broadcast service to the community of Horseshoe Beach, Florida due to the fact, that no radio station is licensed to the community . . . .”<sup>125</sup> FCR-HB states that should its Objection be denied it will enter into a time-share agreement within 30 days of the Commission’s determination.<sup>126</sup>

49. **Discussion.** At issue is whether our comparative analysis in this group should take into account the contemporaneous grant of the HSARG Port St. Joe Application in NCE MX Group 328. Under the “Existing Authorizations,” Section V, Question 1, FCC Form 340, an applicant is required to certify the number of attributable interests held in broadcast station authorizations “as of the date of filing.” At the time HSARG filed its application, HSARG correctly certified that it had no attributable interests in existing broadcast authorizations, which prevented it from being eliminated in the first tie-breaker. HSARG’s status under the first tie-breaker, however, changed when its Port St. Joe Application was granted in the *37 Group Comparative Order*.

50. With respect to post-filing window changes, for the point system analysis and tie-breakers, the Commission has stipulated that an applicant’s maximum point eligibility and tie-breaker

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<sup>121</sup> Before us are the following pleadings: (1) a “Petition to Deny Based Upon Clarification of the Tentative Selectee Tie-Breaker Rule When an Applicant is Granted an Authorization on the Same Day of Being Selected a Tentative Selectee on Another NCE Application After a Final Tie-Breaker that Resulted in Mandatory-Time Sharing Based Upon the Applicant’s Having Zero Full Power Radio Station Authorizations as of the May 3, 2011 Point Hearing” (“Objection”) filed by FCR on June 6, 2011; (2) a “Supplemental Motion to Rescind the Selection of Help Save the Apalachicola River Group, Inc. as a Tentative Selectee in NCE Reserved Allotment Group 12 and Supplemental Motion to Dismiss Help Save the Apalachicola River Group, Inc.’s Instant 340 NCE Application with Prejudice” (“Motion”) filed by FCR on September 28, 2011; and (3) a “Request for Conditional Grant of the Tentative-Selectee Florida Community Radio, Inc.’s Application for a Construction Permit to Construct a New NCE-FM Radio Station at Horseshoe Beach, Florida” (“Request”) filed by FCR-HB on December 15, 2011. HSARG did not respond to any of FCR-HB’s filings.

<sup>122</sup> File No. BNPED-20071018AQD (the “HSARG Port St. Joe Application”).

<sup>123</sup> *37 Group Comparative Order*, 26 FCC Rcd at 7039, 7060.

<sup>124</sup> 47 C.F.R. § 1.65.

<sup>125</sup> Request at 1.

<sup>126</sup> *Id.* at 2. Petitions to deny the HSARG Application were due by June 2, 2011. See 47 C.F.R. § 73.7004(b). FCR’s pleading was not filed until June 6, 2011, and is therefore untimely. We will, however, consider the pleading as an informal objection pursuant to Section 73.3587 of the Rules. 47 C.F.R. § 73.3587.



standing is established as of the close of the filing window, but can be reduced due to subsequent events.<sup>127</sup> In the context of the tie-breaker process, the Commission stated specifically that:

Similarly, for tie breakers, the applicant's best position is established at the time of application, but can be reduced. For example, in our primary tie breaker, which selects the applicant with the fewest number of broadcast authorizations at the time of filing, an applicant cannot enhance its position by selling one of its existing stations, but can diminish its position by acquiring an additional station. Thus, an applicant with no existing stations at the time of application will benefit from its "zero" stations in tie breakers *only until such time as it receives a first authorization*. It will be required, pursuant to 47 C.F.R. § 1.65, to update its pending applications and so will not be able to continue claiming zero authorizations, when it has, in fact, already had applications granted in several proceedings, perhaps now surpassing a tied competing applicant in terms of stations authorized.<sup>128</sup>

51. It is clear, therefore, that an applicant's claim that it has no authorizations is accurate only until it is granted a first authorization or otherwise acquires a station. The *NCE MO&O* clearly establishes that the Port St. Joe authorization should be included in our comparative analysis. Accordingly, FCR-HB prevails under the first tie-breaker, and we will dismiss the HSARG Application.<sup>129</sup> The FCR-HB Application is therefore the sole tentative selectee in Group 12, and we will grant the FCR-HB Application as ordered herein.

#### **B. NCE Reserved Allotment Group 8**

52. This group consists of applications filed by Modesto Peace/Life Center ("MPLC") and Calvary Chapel of Turlock, Inc. ("CC-Turlock") for a new NCE FM station on Channel 238A at Westley, California ("Channel 238A"), a channel reserved by the third reserved allotment showing (the "Reservation Standard").<sup>130</sup> In the *37 Group Comparative Order*,<sup>131</sup> the MPLC and CC-Turlock applications, along with six others, were mutually exclusive and designated as Reserved Allotment Group 8.<sup>132</sup> After determining that each applicant satisfied the third reserved allotment criteria, the Commission conducted a points hearing.<sup>133</sup> Based on a point system analysis, Sacred Heart Roman Catholic Parish ("SHRCP") was credited with a total of seven points, the highest number of points in this group. MPLC and CC-Turlock were credited with a total of five points each. SHRCP was therefore chosen as the tentative selectee in Group 8.

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<sup>127</sup> *NCE MO&O*, 16 FCC Rcd at 5082-5083 ("Our rules require applicants to inform us of material changes in their applications after the time of filing, which, in the context of a point system, will include all changes that negatively affect its claimed points and tie breaker position. 47 C.F.R. § 1.65. A future applicant's maximum points and its standing in a tie breaker can thus go down, but not up, as a result of changes made after filing"). *See also* 47 C.F.R. § 73.7003(e) and (f) and *Section 1.65 Amendment Deadline Established for Noncommercial Educational FM and FM Translator Applicants*, Public Notice, 19 FCC Rcd 24740, 24740-41 (MB 2004).

<sup>128</sup> *NCE MO&O*, 16 FCC Rcd at 5083 (emphasis added).

<sup>129</sup> Because we are dismissing the HSARG Application, we find the Section 1.65 issue to be moot. To the extent, however, that HSARG has any additional pending NCE applications it will need to amend its first tie-breaker certification to reflect at least the grant of the HSARG Port St. Joe Application.

<sup>130</sup> *See 37 Group Comparative Order*, 26 FCC Rcd at 7009.

<sup>131</sup> *Id.* at 7009-10.

<sup>132</sup> The other six applications were dismissed by the staff on June 7, 2011, and those actions have become final. *See Broadcast Actions*, Public Notice, Report No. 47505 (Jun. 10, 2011). SHRCP's application was dismissed by the staff on July 27, 2012. *See Sacred Heart Roman Catholic Parish*, Letter, 27 FCC Rcd 8375 (MB 2012) ("*Staff Decision*").

<sup>133</sup> *37 Group Comparative Order*, 26 FCC Rcd at 7020.

53. MPLC and CC-Turlock timely filed petitions to deny the SHRCP application, alleging that it did not satisfy the Reservation Standard, and should therefore be dismissed. The Bureau reviewed SHRCP's application and confirmed that it did not satisfy the Reservation Standard. Accordingly, the Bureau granted the petitions to deny, rescinded SHRCP's tentative selection, and dismissed its application.<sup>134</sup> The Bureau then reviewed the MPLC and CC-Turlock applications (each with the next highest tally of five points) and concluded that they also failed to satisfy the Reservation Standard. Both applications were dismissed, and Channel 238A was unreserved by operation of law.<sup>135</sup> MPLC and CC-Turlock timely filed Petitions for Reconsideration,<sup>136</sup> each arguing that its application should be reinstated. The Bureau concluded that both applications (MPLC's, as originally filed, and CC-Turlock's, as amended)<sup>137</sup> satisfied the Reservation Standard, granted reconsideration, reinstated the applications, and referred them to the Commission to conduct the tiebreaker analysis.<sup>138</sup> The Bureau also re-reserved Channel 238A for NCE use. Accordingly, we must now apply the tie-breaker analysis to the MPLC and CC-Turlock applications.

54. As discussed above, the first issue considered in a tie-breaker is the number of radio station authorizations attributable to each applicant. MPLC and CC-Turlock each certify that it has no attributable interest in any radio authorizations; thus, they remain tied. The second issue in a tie-breaker is the number of radio station applications attributable to each applicant. The only attributable applications for MPLC and CC-Turlock are each's subject application for Channel 238A; MPLC and CC-Turlock remain tied. Accordingly, MPLC and CC-Turlock are each tentative selectees in Group 8 on a time-sharing basis.

## VII. NEXT STEPS

55. **Acceptability Studies and Filing of Petitions.** The staff has examined the applications of each successor tentative selectee for application defects.<sup>139</sup> Each new tentative selectee identified in this Order appears to be fully qualified to become the licensee of the new NCE FM station it has proposed. We tentatively conclude that the grant of these applications would serve the public interest, convenience, and necessity. Accordingly, the applications of the tentative selectees are accepted for filing. This triggers a 30-day period from release of the Order for the filing of petitions to deny.

56. Any argument that the newly tentatively selected application should not be granted must be raised in such a petition, even if the objection relates only indirectly to the tentative selectee's comparative points. For example, an applicant that concedes that the tentative selectee is qualified for the points received but believes its own proposal should have received a greater number of points than the

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<sup>134</sup> *Id.* See 47 C.F.R. § 73.3566(a) ("Applications which are determined to be patently not in accordance with the FCC rules, regulations, or other requirements . . . will be considered defective and will not be accepted for filing or if inadvertently accepted for filing will be dismissed."). SHRCP's dismissal is now final. See 47 C.F.R. § 1.106(f).

<sup>135</sup> *Staff Decision*, 27 FCC Rcd at 8378-79.

<sup>136</sup> Both Petitions for Reconsideration were filed on August 27, 2012. MPLC filed an Opposition to Petition for Reconsideration on September 10, 2012. CCT filed an Opposition to Petition for Reconsideration on September 11, 2012. MPLC filed a Reply to Opposition re: Petition for Reconsideration on September 20, 2012. CCT filed a Reply to Opposition to Petition for Reconsideration on September 21, 2012.

<sup>137</sup> MPLC simply resubmitted its original application, without any amendments. CC-Turlock filed an amendment to its application along with its Petition. CC-Turlock's amended application satisfied the third reserved allotment showing, and its application was reinstated *nunc pro tunc*.

<sup>138</sup> See *Michael Couzens, Esq.*, Letter, 27 FCC Rcd 15208 (2012).

<sup>139</sup> If a tentative selectee's application is found unacceptable for filing, it is returned. The applicant is then given one opportunity to submit a curative amendment. See 47 C.F.R. § 73.3522(b)(2). A tentative selectee that is unable to cure the defect with a minor amendment is disqualified, and the applicant with the next highest point tally becomes the new tentative selectee. See 47 C.F.R. § 73.7004(d).

tentative selectee's should make its argument in a petition to deny. In cases where we have declared a new tentative selectee, parties may not raise such matters as petitions for reconsideration of the instant Order because the point hearings herein take no final action on the application, and petitions for reconsideration do not lie against such interlocutory decisions.<sup>140</sup> Any such petition to deny must contain allegations of fact supported by an affidavit of a person or persons with personal knowledge thereof.<sup>141</sup> Responsive pleadings, if any, should be submitted as provided for in Section 73.7004(c) of the Rules.<sup>142</sup>

57. **Forthcoming Staff Action.** We direct the staff, once the petition to period has run, to conduct a final study of each new tentatively selected application in accordance with the Bureau's routine processing procedures. The staff studies should consider any petitions, comments, and objections to determine whether there is any substantial and material question of fact concerning whether grant of the tentatively selected application would serve the public interest. If no such question exists, we direct the staff to grant the applications on the basis of the point system determinations made herein and dismiss all competing applications.

58. With the exception of issues that are new or novel or require Commission or Administrative Law Judge consideration by statute or Rules, the staff shall act on the tentatively selected applications pursuant to delegated authority. We delegate to the staff authority to act on any routine matter that may be raised, including whether the applicant is eligible, as certified, for the points awarded herein, and whether the application complies with all relevant Rules and policies.<sup>143</sup> The staff need not refer such matters to the Commission or designate such matters for hearing before an Administrative Law Judge unless the issues are new or novel, or raise a substantial and material question of fact regarding the award of points. Generally, the staff should refer only those issues to the Commission where the exclusion or inclusion of challenged or claimed points could alter the outcome in the particular NCE group, or where there is a new or novel issue.<sup>144</sup> In such cases, the staff would refer the mutually exclusive group to the Commission for resolution of the new or novel issue and/or the determination of a successor tentative selectee. In cases where there is a substantial and material question of fact, the staff should designate the issue for hearing before an Administrative Law Judge.

59. **Severance for Purposes of Petitions, Appeals and Finality.** We are including a provision in the ordering clauses herein that each decision involving a mutually exclusive group is to be considered distinct and separate for purposes of petitions to deny, petitions for reconsideration, review on the Commission's own motion, and appeals. The timing of any action disposing of a petition or appeal affecting a particular group will not delay the finality of our decision with respect to any other group discussed herein.

## VIII. ORDERING CLAUSES

60. Accordingly, IT IS ORDERED, that each decision involving a mutually exclusive group in this Memorandum Opinion and Order shall be deemed a distinct and separate decision for purposes of petitions to deny, petitions for reconsideration, review on the Commission's own motion, and appeals.<sup>145</sup>

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<sup>140</sup> See *id.* § 1.106 (a) (1). See also *Patrick J. Vaughn, Esq.*, Letter, 22 FCC Rcd 11165 (MB 2007).

<sup>141</sup> See 47 C.F.R. § 73.7004(b).

<sup>142</sup> See 47 C.F.R. § 73.7004(c).

<sup>143</sup> See, e.g., *Central Florida Educational Foundation, Inc.*, Letter, 23 FCC Rcd 1695 (MB 2008) (staff dismissal of defective application tentatively selected in a point hearing, and staff award of permit on a non-comparative basis to only remaining acceptable applicant).

<sup>144</sup> See generally *NCE Omnibus*, 22 FCC Rcd at 6162 n.230 (2007) (standards for staff evaluation of petitions).

<sup>145</sup> See 5 U.S.C. §§ 702, 704, 706; 47 U.S.C. §§ 309(d), 402(b), 405; 47 C.F.R. §§ 1.106-08, 73.7004. In cases that involve separate mutually exclusive groups but present common issues, the petitions or appeals may be filed jointly or may be consolidated at the discretion of the Commission or a reviewing court. See, e.g., FED. R. APP. P. 3(b).

If any decision in this Memorandum Opinion and Order is declared invalid for any reason, the remaining portions shall be severable from the invalid part and SHALL REMAIN in full force and effect to the fullest extent permitted by law.

61. **NCE Reserved Allotment Group 8.** Accordingly, IT IS ORDERED, that Modesto Peace/Life Center and Calvary Chapel of Turlock, Inc. are TENTATIVELY SELECTED to be awarded construction permits ON A TIME-SHARING BASIS for a new NCE FM station in Westley, California, and the applications of Modesto Peace/Life Center (File No. BNPED-20100224ABX) and Calvary Chapel of Turlock, Inc. (File No. BNPED-20100226AGO) ARE ACCEPTED FOR FILING, establishing a deadline thirty (30) days from the date of release of this Order for the filing of petitions to deny. We direct the staff to provide the tentatively selected applicants a ninety (90)-day period from the date of release of this Order in which to reach a time-sharing agreement among themselves and, pursuant to an acceptable agreement, TO GRANT the applications of Modesto Peace/Life Center and Calvary Chapel of Turlock, Inc. CONDITIONED UPON each selectee's compliance with Section 73.7005 of the Commission's Rules, 47 C.F.R. § 73.7005, which sets forth a four-year holding period for applicants that are awarded permits by use of a point system, and Section 73.202(a)(1)(ii) of the Commission's Rules, 47 C.F.R. § 73.202(a)(1)(ii), which requires that the NCE station provide the requisite level of first and second NCE service. If the applicants are unable to reach a voluntary time-sharing agreement, the staff shall designate the applications for hearing on the sole issue of an appropriate time-sharing arrangement.

62. **NCE Reserved Allotment Group 12.** Accordingly, IT IS ORDERED, that the June 6, 2011 "Petition to Deny Based Upon Clarification of the Tentative Selectee Tie-Breaker Rule When an Applicant is Granted an Authorization on the Same Day of Being Selected a Tentative Selectee on Another NCE Application After a Final Tie-Breaker that Resulted in Mandatory-Time Sharing Based Upon the Applicant's Having Zero Full Power Radio Station Authorizations as of the May 3, 2011 Point Hearing," filed by Florida Community Radio, IS considered as an informal objection and GRANTED. IT IS FURTHER ORDERED, that the tentative selection of the application of Help Save the Apalachicola River Group, Inc. (File No. BNPED-20100226ACU) for a permit to construct a new NCE FM station at Horseshoe Beach, Florida, IS RESCINDED, and the application IS DISMISSED. IT IS FURTHER ORDERED, that the September 28, 2011, "Supplemental Motion to Rescind the Selection of Help Save the Apalachicola River Group, Inc. as a Tentative Selectee in NCE Reserved Allotment Group 12" and the "Supplemental Motion to Dismiss Help Save the Apalachicola River Group, Inc.'s Instant 340 NCE Application with Prejudice," filed by Florida Community Radio, IS DISMISSED AS MOOT. IT IS FURTHER ORDERED, that the "Request for Conditional Grant of the Tentative-Selectee Florida Community Radio, Inc.'s Application for a Construction Permit to Construct a New NCE-FM Radio Station at Horseshoe Beach, Florida," filed by Florida Community Radio, IS DISMISSED AS MOOT. IT IS FURTHER ORDERED, that the application of Florida Community Radio (File No. BNPED-2010022AIK) for a construction permit for a new NCE FM station at Horseshoe Beach, Florida, IS GRANTED CONDITIONED UPON that selectee's compliance with Section 73.7005 of the Rules, 47 C.F.R. § 73.7005, which sets forth a four-year holding period for applicants that are awarded permits by use of a point system, and Section 73.202(a)(1)(ii) of the Commission's Rules, 47 C.F.R. § 73.202(a)(1)(ii), which requires that the NCE station provide the requisite level of first and second NCE service.

63. **NCE Reserved Allotment Group 14.** Accordingly, IT IS ORDERED, that the tentative selection of Florida Community Radio, Inc., for a construction permit for a new NCE FM station at Otter Creek, Florida, IS RESCINDED. IT IS FURTHER ORDERED, that the June 2, 2011, Petition to Deny filed by the Citrus County Association for Retarded Citizens, Inc., IS GRANTED to the extent indicated herein. IT IS FURTHER ORDERED, that the application filed by Citrus County Association for Retarded Citizens, Inc. (File No. BNPED-20100226AGR) IS TENTATIVELY SELECTED to be awarded a construction permit for a new NCE FM station in Otter Creek, Florida, and its application IS ACCEPTED FOR FILING, establishing a deadline thirty (30) days from the date of release of this Order for the filing of petitions to deny. If, after the petition to deny period has run, there is no substantial and material question concerning the grantability of the tentative selectee's application, we direct the staff, by



public notice, TO DISMISS the mutually exclusive application of Florida Community Radio, Inc. (File No. BNPED-20100226AGX), and TO GRANT the application of Citrus County Association for Retarded Citizens, Inc. CONDITIONED UPON that selectee's compliance with Section 73.7005 of the Commission's rules, 47 C.F.R. § 73.7005, which sets forth a four-year holding period for applicants that are awarded permits by use of a point system, and Section 73.202(a)(1)(ii) of the Commission's rules, 47 C.F.R. § 73.202(a)(1)(ii), which requires that the NCE station provide the requisite level of first and second NCE service.

64. **NCE Reserved Allotment Group 24.** Accordingly, IT IS ORDERED, that the July 7, 2011, Petition for Reconsideration filed by Heterodyne Broadcasting Company is GRANTED, and its application (File No. BNPED-20100226AJF) IS REINSTATED. IT IS FURTHER ORDERED, that the tentative selection of the application of Pinckneyville Community Radio for a new NCE FM station at Pinckneyville, Illinois (File No. BNPED-20100226AIB) IS RESCINDED. IT IS FURTHER ORDERED, that the June 1, 2011, Petition to Deny filed by Heterodyne Broadcasting Company, IS GRANTED. IT IS FURTHER ORDERED, that Heterodyne Broadcasting Company is TENTATIVELY SELECTED to be awarded a construction permit for a new NCE FM station at Pinckneyville, Illinois and its application (File No. BNPED-20100226AJF) IS ACCEPTED FOR FILING, establishing a deadline thirty (30) days from the release of this Order for the filing of petitions to deny. If, after the petition to deny period has run, there is no substantial and material question concerning the grantability of the tentative selectee's application, we direct the staff, by public notice, TO DISMISS the mutually exclusive application of Pinckneyville Community Radio and TO GRANT the application of Heterodyne Broadcasting Company, CONDITIONED UPON that selectee's compliance with Section 73.7005 of the Commission's Rules, 47 C.F.R. § 73.7005, which sets forth a four-year holding period for applicants that are awarded permits by use of a point system and Section 73.202(a)(1)(ii) of the Commission's Rules, 47 C.F.R. § 73.202(a)(1)(ii), which requires that the NCE station provide the requisite level of first and second NCE service.

65. **NCE Reserved Allotment Group 39.** Accordingly, IT IS ORDERED, that the tentative selection of the application of Mount Ellis Academy (File No. BNPED-20100226AGK) for a permit to construct a new NCE FM station at Bozeman, Montana, IS RESCINDED, and the application IS DISMISSED. IT IS FURTHER ORDERED, that the September 9, 2011, Motion for Leave to File Petition for Reconsideration filed by Gallatin Valley Community Radio, IS DENIED, and that the September 9, 2011, Petition for Reconsideration filed by Gallatin Valley Community Radio, IS DISMISSED. IT IS FURTHER ORDERED, that the application of Gallatin Valley Community Radio (File No. BNPED-20100225ADQ) for a construction permit for a new NCE FM station at Bozeman, Montana, is GRANTED, CONDITIONED UPON that selectee's compliance with Section 73.7005 of the Rules, 47 C.F.R. § 73.7005, which sets forth a four-year holding period for applicants that are awarded permits by use of a point system, and Section 73.202(a)(1)(ii) of the Commission's Rules, 47 C.F.R. § 73.202(a)(1)(ii), which requires that the NCE station provide the requisite level of first and second NCE service.

66. **NCE Reserved Allotment Group 40.** Accordingly, IT IS ORDERED, that the tentative selection of the the application of Canary Coalition, Inc. for a new NCE FM station at Dillsboro, North Carolina (File No. BNPED-20100226AIG) IS RESCINDED. IT IS FURTHER ORDERED, that the petition to deny and the informal objection filed by Western Carolina University on July 21, 2011, and April 30, 2010, respectively, ARE GRANTED to the extent discussed herein. IT IS FURTHER ORDERED, that Western Carolina University is TENTATIVELY SELECTED to be awarded a construction permit for a new NCE FM station at Dillsboro, North Carolina, and its application (File No. BNPED-20100226ABN) IS ACCEPTED FOR FILING, establishing a deadline thirty (30) days from the date of release of this Order for the filing of petitions to deny. If, after the petition to deny period has run, there is no substantial and material question concerning the grantability of the tentative selectee's application, we direct the staff, by public notice, TO DISMISS the mutually exclusive application of The Canary Coalition, Inc. and TO GRANT the application of Western Carolina University, CONDITIONED UPON that selectee's compliance with Section 73.7005 of the Commission's Rules, 47 C.F.R. § 73.7005,



which sets forth a four-year holding period for applicants that are awarded permits by use of a point system, and Section 73.202(a)(1)(ii) of the Commission's Rules, 47 C.F.R. § 73.202(a)(1)(ii), which requires that the NCE station provide the requisite level of first and second NCE service.

67. **NCE Reserved Allotment Group 48.** Accordingly, IT IS ORDERED, that the tentative selection of the application of Dallas Seventh-Day Adventist Church (File No. BNPED-20100223AAB) for a permit to construct a new NCE FM station at Dallas, Oregon, IS RESCINDED, and its application IS DISMISSED. IT IS FURTHER ORDERED, that the July 21, 2011, Petition to Deny filed by Mano a Mano Family Christian Network, Inc., IS GRANTED. We further direct the staff to provide the tentatively selected applicants a ninety (90)-day period from the date of release of this Order in which to reach a time-sharing agreement among themselves and, pursuant to an acceptable agreement, TO GRANT the applications of Calvary Chapel of McMinnville, Inc. (File No. BNPED-20100222ACK), Mano a Mano Family Center (File No. BNPED-20100225ADD), and Capital Community Television, Inc. (File No. BNPED-20100226AEJ) CONDITIONED UPON each selectee's compliance with Section 73.7005 of the Commission's Rules, 47 C.F.R. § 73.7005, which sets forth a four-year holding period for applicants that are awarded permits by use of a point system, and Section 73.202(a)(1)(ii) of the Commission's Rules, 47 C.F.R. § 73.202(a)(1)(ii), which requires that the NCE stations provide the requisite level of first and second NCE service, and PROVIDED THAT, Calvary Chapel of McMinnville, Inc. must surrender its license for low power FM station KKJC-LP, McMinnville, Oregon, prior to commencement of program tests of the full service NCE FM station. If the applicants are unable to reach a voluntary time-sharing agreement, the staff shall designate the applications for hearing on the sole issue of an appropriate time-sharing arrangement.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

**STATEMENT OF  
COMMISSIONER MIGNON L. CLYBURN**

Re: *Comparative Consideration of Seven Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations Filed in the February 2010 Window*,  
Memorandum Opinion and Order, FCC 15-54.

While I vote to approve this Order in the interest of resolving these longstanding applications, I do so with some hesitation. I am concerned about situations in which applicants seeking to provide their communities with local, noncommercial radio service are ultimately rejected based on technicalities that, in some cases, might have been easily resolved through improved outreach to help smaller applicants better understand the nuances of our orders and regulations. For example, one application is rejected in this Order because it lists only a post office box, and not a physical address. This applicant is denied credit under our comparative process as an established “local” entity, notwithstanding evidence submitted by the applicant suggesting that it, in fact, may be located in the area in question. Several other applications similarly are rejected for reasons that conceivably could have been resolved through relatively simple clarifications of factual issues.

I hope that, in the future, we are able to conduct more effective outreach in this area. My office is always willing to listen to those who have ideas for how to improve our processes and make them more accessible, especially to smaller organizations that have limited resources and are less likely to be familiar with our rules and application requirements.

**STATEMENT OF  
COMMISSIONER MICHAEL O'RIELLY  
APPROVING IN PART AND DISSENTING IN PART**

*Re: Comparative Consideration of Seven Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations filed in the February 2010 Window, Memorandum Opinion and Order, FCC 15-54.*

I am pleased to support this Order, which takes important steps toward resolution of several applications filed five years ago for new noncommercial educational FM station construction permits. While I would prefer an overall licensing approach not based on a convoluted and subjective point system, we are finally disposing of open petitions and providers can get on with providing service to their communities. Nonetheless, I cannot assent to the Commission's decision to consider the merits of the defective Petition for Reconsideration regarding NCE Reserved Allotment Group 39, which was correctly dismissed.

While the *33 Group Comparative Order* designating the tentative selectees in Group 39 stated that it was an interlocutory decision and thus arguments against the selection of the tentatively selected applicant should not be raised as petitions for reconsideration,<sup>1</sup> petitioner Gallatin Valley Community Radio ("GVCR") proceeded to do so anyway. But while the Commission properly dismisses the petition on this ground, it then proceeds to consider the underlying substantive issue on its own motion,<sup>2</sup> reversing its previous selection in favor of the petitioner.<sup>3</sup> I believe this is a step too far. Short-circuiting the prescribed appeals procedure based on the argument that we would presumably get to a similar outcome in the future is a faulty and misguided approach.

For some of the other applicants addressed in this Order, such leniency on the part of the Commission will remain an unfulfilled wish. For example, Canary Coalition, Inc.'s initial local applicant point determination is overturned here because it provided a post office box address instead of the location of its physical headquarters on its application.<sup>4</sup> And a diversity point determination for Dallas Seventh-Day Adventist Church is reversed because, in the absence of traditional governing documents, the policy adopted by the church board prohibiting the church, but not the individual board members, from holding an attributable interest in another radio station is insufficient to meet our requirement.<sup>5</sup>

If we are to apply the Commission's rules strictly with regard to these permits – a reasonable and logical assumption – we should do so across the board. Adjudications before the Commission are costly and, at five years into the process, certainly time-consuming for all of these parties. At the very least, they should have certainty that our approach will be consistent and fair. By second-guessing its dismissal of the GVCR petition, the Commission may very well have changed this station's fate and set us on a questionable path for the next applicant.

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<sup>1</sup> See *33 Group Comparative Order*, 26 FCC Rcd at 9094.

<sup>2</sup> *Supra* para. 33.

<sup>3</sup> *Supra* para. 36.

<sup>4</sup> *Supra* para. 17.

<sup>5</sup> *Supra* para. 44.