Before the

Federal Communications Commission

Washington, D.C. 20554

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

To: Office of the Secretary
Attention:
Chief, Audio Division Media Bureau

OPPOSITION TO PETITION FOR RECONSIDERATION

Bible Broadcasting Network, Inc. ("BBN"), by its attorneys, pursuant to Title 47 C.F.R. § 1.106, hereby opposes the "Petition for Reconsideration" ("Petition") filed December 21, 2010, by Berks Radio Association ("BRA"). BRA seeks reconsideration of the Commission's grant on November 18, 2010, of BBN's above-captioned construction permit for a new noncommercial educational FM station at Leesport, Pennsylvania. Because BRA's Petition relies on cases that interpret a policy struck down by the court as arbitrary and capricious, the cases do not support reconsideration. The Petition must, therefore, be denied.[1]

[1] This Opposition is timely filed. Normally, a response would be due by January 5, 2011; however, on January 3, 2011, BBN filed a Motion for Extension of Time to file its response up to and including **January 19, 2011**.

Background

On October 19, 2007, BBN filed its captioned application for construction permit for a new noncommercial educational FM station at Leesport, Pennsylvania. BRA filed a mutually-exclusive application (File No. BNPED-20071019BFI) seeking a permit to serve Frackville, Pennsylvania. The BBN and BRA applications were consolidated for processing in MX Group 403 with two other applications that have since been dismissed and for which reconsideration was not sought. In *Comparative Consideration of 26 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations filed in the October 2007 Filing Window*, Memorandum Opinion and Order ("MO&O"), 25 FCC Rcd 11108 (2010), the Media Bureau tentatively selected BBN's application as comparatively superior and accepted it for filing. BRA timely filed a Petition to Deny following the release of the MO&O. By unreported *Letter Decision*, dated November 18, 2010, the Chief, Audio Division, denied BRA's Petition to Deny and granted BBN's application. As a result, BBN now holds a construction permit for the Leesport station which has been assigned call letters "WYBQ."

BRA claimed that it qualified for three points as an established local applicant and two points for maintaining "diversity of ownership." However, because BRA did not timely submit documentation to support its claim, the Bureau did not credit BRA with any points under these criteria. BBN claimed two points for diversity which it supported with documents that the Bureau accepted. Accordingly, the Commission awarded two points to BBN but refused to award any points to BRA under the diversity criterion. The MO&O found that BRA qualified for one point under the best technical proposal

criterion because BRA would serve at least 10 percent more area and population than would BBN. In sum, BBN was credited with a total of two points, BRA was credited with one point; thus, BBN was awarded the permit. The Bureau MO&O was fully consistent with precedent and should be affirmed.

The BRA Petition for Reconsideration

BBN's application included an exhibit stating that "...neither the Network nor any parent or subsidiary of the Network shall seek...to acquire any interest in any radio station whose principal community contour overlaps the principal community contour of such [application]." BRA claims this language does not bind the principals of BBN. The BBN application also prohibits any person from becoming a director or officer of the Network unless that person shall "first verify in writing" that he or she will not acquire an interest that would invalidate the pledge to maintain diversity. BRA argues that the restriction is applicable only to new members of the board yet to join, that the statement does not cover current members' ownership interests and is defective. BRA argues that additional documents should have been signed and filed to comply with the "diversity of ownership rules." BRA's argument is incorrect. BRA hopes it will prevail under the technical proposal criterion by eliminating BBN's diversity points. Thus, BRA devotes its Petition for Reconsideration to an attack on the documents supporting BBN's diversity points. Over BRA's protests, the Bureau found BBN's supporting exhibits to be adequate and said:

> Although BBN may have inartfully neglected to mention specifically its current members, directors and officers in its supporting exhibits, we note that Section IV, Question 2 of FCC Form 340's "Diversity of Ownership" certification binds "any party to the application [that] has an attributable interest," which Sections 73.7000 and 73.3555 of the Rules define as current "officers and members of the governing board."

BBN made that certification in the application and the Letter Decision (copy attached to BRA's Petition), quite correctly, found this certification to be sufficient. The Letter Decision rejected BRA's argument as "misguided," and that characterization is correct.

Under the provisions of *Reexamination of the Comparative Standards for Noncommercial Educational Applicants,* Memorandum Opinion and Order, 16 FCC Rcd 5074 (2001) ("NCE MO&O")[2], 125 S.Ct. 634 (2004), if no party to an NCE application has an attributable interest in another authorized station with an overlapping principal community contour, the applicant can claim 2 points. BBN's application reflects that no party to BBN's application has such an attributable interest.

BBN is required to maintain the *status quo* now and in the future with respect to the proposed Leesport station. While BRA nit-picks the verbiage of BBN's diversity documentation, claiming that the document "does not bind the principals of BBN," BRA has not shown that BBN's directors and officers listed in Section II, Question 6, of Form 340, have any undisclosed attributable interests or plans to obtain an attributable interest in another authorized station with a principal community contour overlapping the proposed Leesport principal community contour. Further, BRA claims that the documentation only binds "*future*" directors or officers, and that the instant application "did not address the status of BBN's then-current directors and officers." There is nothing in the Instructions to Form 340 that specifies the form of the documentation that

[2] See also, *Reexamination of the Comparative Standards for Noncommercial Educational Applicants, Erratum,* 16 FCC Rcd 10549 (2001), *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, 361 U.S. App. D.C. 231 (D.C. Cir. 2004), *cert. denied,* 125 S.Ct. 634 (2004).

BBN was required to submit, and the Bureau has inspected and found BBN's documentation to be adequate (See *Letter Decision* pp. 5-6).

In the NCE MO&O, the Commission discussed its new NCE comparative evaluation process in light of prior cases and a landmark U. S. Court of Appeals case that invalidated the prior comparative selection process:[3]

> [S]everal events in the 1990's led to our eventual change of the comparative selection process both for NCE and commercial stations, and for both reserved and non-reserved channels. These events included the conclusion of the Commission's Review Board that the NCE criteria had, over time, become "meaningless" in distinguishing between applicants, and a federal court's finding that the **core integration criterion used to evaluate non-reserved channel applications was "arbitrary and capricious, and therefore unlawful**." *FCC v. Bechtel*, 10 F.3d 875, 878 (D.C. Cir. 1993) *(Bechtel); Real Life Educational Foundation of Baton Rouge, Inc.*, 6 FCC Rcd 2577, 2580, n.8 (Rev. Bd. 1991) [emphasis added].

Paragraphs 55 and 58 of the NCE MO&O addressed the issue of documents and the maintenance of diversity in the future:

> A pending applicant can claim points for diversity if...it has no stations with overlapping principal community contours, and it has included in its governing documents a provision to maintain that diversity in the future.
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> ***
>
> The governing document safeguard aims to maintain governing board characteristics for which the applicant received credit, even if the composition of that board and its attributable broadcast interests change due to resignation and replacement of board members. We do not believe that the requirement is overbroad. **Applicants may word the language as they deem best for their organization**. [emphasis added.].

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

It is clear from the foregoing that the Commission allows flexibility in the wording of the documents. The Commission was right to grant BBN points for diversity based on its showing.

BRA makes the bold claim that "The Bureau should reexamine its position in light of binding precedent." None of the cases cited by BRA are binding precedent. All the cases cited deal with how the now-defunct Review Board parsed damaging testimony elicited on cross-examination during comparative hearings to determine the permittee of a new **commercial** radio station. The instant matter concerns a noncommercial station and involves no live testimony. Nevertheless, BRA cites eleven "integration proposal" cases,[4] and proposes that "The distinction between an integration proposal and a diversification proposal is a distinction without a difference." BBN disagrees strongly with BRA that any of the cited cases are binding.[5] Comparative hearing wars were waged before FCC administrative law judges from 1965 to 1993. It has been 18 years since the

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[4] *Margaret Garza,* 1 FCC Rcd 1294 (1986) [vague statement of integration proposal]; *Blancett Broadcasting Co.*, 17 FCC 2d 227 (Rev. Bd. 1968) [integration proposals were "too nebulous and indefinite" to entitle either applicant to a preference]; *Metro Broadcasting, Inc.*, 99 FCC 2d 688 (Rev. Bd. 1984); *Stanly Group Broadcasting, Limited,* 65 RR 2d 341 (1988); *Leininger-Geddes Partnership*, 2 FCC Rcd 3199 (Rev. Bd. 1987); *Washoe Shoshone Broadcasting*, FCC 88 R-30, released June 20, 1988; *Ft. Collins Telecasters*, 60 RR 2d 1401 (Rev. Bd. 1986); *Jarad Broadcasting Company, Inc.*, 61 RR 2d 389 (Rev. Bd. 1986); *Kennelwood Broadcasting Company, Inc.*, 5 FCC Rcd 6657 (1990); *Kennebec Valley Television, Inc.*, 2 FCC Rcd 1240 (Rev. Bd. 1987); and *Cuban-American Limited*, 5 FCC Rcd 3781 (1990) [but, See fn 5].

[5] However, even BRA's inapposite "integration" cases do not support BRA's argument. Historically, the Commission took a rather relaxed view of documents supporting integration credit. For example, in a case cited by BRA, *Cuban-American Limited,* the full Commission observed: "Commission applicants are not required to establish their integration proposals as a legal certainty. We will credit an integration proposal whenever an applicant provides reasonable assurance that the integration proposal can be effectuated. *Bradley, Hand and Triplett,* 89 FCC 2d 657, 662 P8 (Rev. Bd. 1982). In *High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 433-34 (Rev. Bd. 1983), *review denied*, FCC 84-434 (Sept. 19, 1984), *reconsideration denied*, 57 RR 2d 1483 (1985), the integration proposal of a partnership was credited even though the partnership agreement was not executed until after the cut-off date for amending the application. Therefore, the failure of Minority's shareholders to execute documents restructuring its corporate ownership, standing alone, is not a sufficient basis for denying integration credit to Minority for its restructured ownership interests [fn omitted]."

landmark decision in *Bechtel*, cited *supra*, which invalidated the Commission's comparative hearing system. In *Bechtel*, the court held that the integration preference applied in comparative hearings was arbitrary and capricious. *Bechtel*, at 878-87. But that whole system is now merely mildly interesting history, because in 1997 Congress expanded the Commission's auction authority, amending the Communications Act to require the Commission, in cases of mutual exclusivity, to grant the license or permit to a qualified applicant through a system of competitive bidding. See 47 U.S.C. § 309(j)(1). The *Bechtel* court rejected the Commission's argument that the integration credit was a structural factor that it applied consistently and objectively ("every step [of the integration analysis] towards the magic number is packed with subjective judgments, some generic, some ad hoc.") Accordingly, the court found the use of integration credit to be arbitrary and capricious. Therefore, all the cases cited by BRA are a nullity because they interpret a void policy. There is a huge distinction between an integration proposal and a diversification proposal. They are not remotely similar.[6]

The Commission's process for deciding among mutually-exclusive applicants for new **noncommercial educational** construction permits follows an entirely different procedure. 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

[6] The procedures that were employed in litigating comparative hearing cases and the "paper hearings" conducted in the NCE context, as here, are distinctly different. For example, under the cases BRA has cited, applicants for commercial broadcast construction permits filed applications that described the ownership of their applicants, but it was only at the trial stage, after the applications were designated for a trial-type hearing, that the administrative law judge typically ordered the litigants to file, by a set date, their "integration proposals" in the form of sworn affidavits. Litigants then engaged in discovery efforts whereby applicants produced documents and underwent oral cross-examination in an attempt to support those proposals. Sharp-eyed lawyers (like honorable opposing counsel) then attempted to rebut the evidence on cross-examination. That process culminated in the kinds of cases BRA has cited, but those

(1998), *rules adopted,* Report and Order, 15 FCC Rcd 7386 (2000) ("NCE Order"), vacated in part on other grounds *sub nom., National Public Radio v. FCC,* 254 F.3d 226, 349 U.S. App. D.C. 149 (D.C. Cir. 2001) *clarified,* Memorandum Opinion and Order, 16 FCC Rcd 5074 (2001) ("*NCE MO&O*"), *Erratum,* 16 FCC Rcd 10549 (2001), *recon. denied,* Memorandum Opinion and Second Order on Reconsideration, 17 FCC Rcd 13132 (2002) ("*NCE Reconsideration Order*"), *aff'd sub nom. American Family Ass'n v. FCC,* 365 F.3d 1156, 361 U.S. App. D.C. 231 (D.C. Cir. 2004), *cert. denied,* 125 S.Ct. 634 (2004). The Commission's rules pertaining to the "point system" and how it is administered have been fully reviewed by the same court that found the commercial comparative hearing procedures arbitrary and capricious. And the U. S. Supreme Court denied *certiorari.* In short, BRA has failed to cite even one case interpreting the NCE Order, the NCE MO&O or the NCE Reconsideration Order that might support its argument. The 11 cases BRA cites interpret a void policy. Thus, the notion that an applicant's underlying supporting documents must contain special provisions, as argued by BRA, is erroneous.

Thus, the integration proposals used in commercial comparative hearing cases have no bearing or precedential value with respect to NCE cases, such as this one. Because the integration credit factor was vitiated, along with the rest of the comparative hearing system, by the court, BRA's citation of integration cases is not by any stretch "binding precedent."

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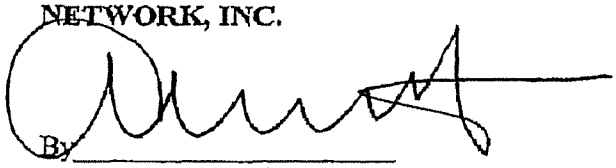
cases are NOT binding precedent.

Conclusion

Based upon the foregoing, BBN respectfully requests the Commission to deny BRA's Petition for Reconsideration and affirm the grant of BBN's application for a new noncommercial FM station at Leesport, PA.

Respectfully submitted,

BIBLE BROADCASTING NETWORK, INC.



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January 19, 2011

CERTIFICATE OF SERVICE

I, Sherry L. Schunemann, do hereby certify that a copy of the foregoing "Opposition to Petition for Reconsideration" was mailed, by First Class U.S. Mail, postage prepaid, this 19th day of January 2011, to the following:

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