

ORIGINAL

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

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AUG 20 2015

In re Applications of NCE)
Reserved Allotment Group 43)
)
Calvary Chapel of the Niagara Frontier)
)
Medaille College)
)
)
For New NCE FM Stations)
At Amherst, New York)
)

Federal Communications Commission
Bureau / Office

File No. BNPED-20100226AGW

File No. BNPED-20100224AAO

To: Chief, Audio Division, Media Bureau

**JOINT REQUEST FOR APPROVAL OF
SETTLEMENT AGREEMENT**

Calvary Chapel of the Niagara Frontier ("CCNF") and Medaille College ("Medaille"), mutually exclusive applicants for authority to construct a new noncommercial ("NCE") FM Station to serve Amherst, New York, (each an "Applicant" and collectively, the "Applicants"), hereby jointly request that the Commission:

1. Approve the attached Settlement Agreement that resolves the mutual exclusivities among the applications through the voluntary withdrawal of Medaille's application, as further detailed below; and
2. Grant the above-referenced application filed by CCNF, as the sole remaining applicant, subject to the terms and conditions specified in the Settlement Agreement.

In support of this request, the following is shown:

The Applicants constitute the tentatively selected applicants in NCE Reserved Allotment Group 43.¹

¹ See *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, 9070 (June 21, 2011), ("Memorandum Opinion and Order"). Group 43 initially consisted of nine applications. Six applications were dismissed by the Memorandum Opinion and Order, based upon the point system used to compare mutually exclusive applicants for NCE stations. The application of a seventh applicant, Lockport

The Applicants have entered into a Settlement Agreement that would resolve the mutual exclusivities among their applications by granting CCNF a construction permit and dismissing the Medaille application. A copy of the Settlement Agreement is attached hereto as Exhibit A.

The proposed settlement complies with the Commission's Rules, including Section 73.3525. Attached to the Settlement Agreement are declarations whereby each Applicant affirms that it did not file its application for purposes of achieving a settlement or for any other improper purpose and that, other than as disclosed in the Settlement Agreement, no consideration has been or will be paid, received or promised. The declarations also demonstrate that approval of the Settlement Agreement, and grant of the CCNF application pursuant to the Settlement Agreement, would serve the public interest by providing new noncommercial FM service to Amherst, New York and by conserving Commission resources by terminating this proceeding without the need for further litigation.

Accordingly, the parties respectfully request that: 1) this Joint Request be granted; 2) the attached Settlement Agreement be approved; 3) the above-captioned application of CCNF be granted; and 4) the Medaille application be dismissed with prejudice, subject to the terms and conditions of the Settlement Agreement.

[SIGNATURE PAGE FOLLOWS]

Seventh-Day Adventist Church (BNPED-20100226AFZ), was subsequently dismissed on technical grounds. See Media Bureau letter, 1800B3-ERC, dated September 4, 2012. The dismissals of the seven applicants are now final. Medaille and CCNF are thus the only remaining applicants in Group 43.

[SIGNATURE PAGE TO JOINT REQUEST
FOR APPROVAL OF SETTLEMENT AGREEMENT]

Respectfully Submitted,

CALVARY CHAPEL OF THE NIAGARA
FRONTIER

By: Mark Siena
Name: MARK Siena
Title: president

MEDAILLE COLLEGE

By: [Signature]
Name: Dr. Kenneth M. Macur
Title: President

Dated: 8/20/15

EXHIBIT A

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is made as of this 12th day of August, 2015, by and among Calvary Chapel of the Niagara Frontier ("CCNF") and Medaille College ("Medaille") (each an "Applicant" or "Party," and collectively, the "Applicants" or the "Parties").

WHEREAS, each of the Applicants tendered to the Federal Communications Commission ("FCC" or "Commission") an application ("Application") for a construction permit to build new a new noncommercial ("NCE") FM broadcast station on FM Channel 221A at Amherst, New York (each a "Station" and collectively, the "Stations"); and

WHEREAS, each of the Applicants filed its application with the intention of obtaining a grant of its Application and not for purposes of settlement; and

WHEREAS, the Applications are mutually exclusive; and

WHEREAS, the Applications constitute the only remaining applications identified by the Commission as NCE Reserved Allotment Group 43; and

WHEREAS, the public interest will be served by grant of the Agreement because such grant will conserve the resources of the Commission and of the Applicants and hasten commencement of a new radio broadcast service to Amherst, New York.

NOW THEREFORE, in consideration of the foregoing and of the terms and conditions set forth herein, and with the intent of being legally bound hereby, the Applicants agree as follows:

1. FCC Consent. This Agreement is entered into subject to approval by the FCC and shall be void unless approved by the FCC. Should the FCC object to any part of this Agreement, the Applicants will immediately make good faith efforts to resolve each FCC objection in order to obtain FCC approval.

2. Joint Request for Approval of Agreement. Within five (5) days from the date of this Agreement, the Applicants will file with the FCC a Joint Request for Approval of Settlement Agreement. The Joint Request shall be accompanied by a copy of the executed Agreement, and a Declaration of No Consideration, in the form attached hereto as Exhibit B-1 and B-2, signed by the respective Applicants. The Joint Request shall ask the FCC to: a) grant the CCNF Application; and b) dismiss the Medaille Application with prejudice, subject to the terms and conditions of this Agreement. In the event the Agreement is not approved by the FCC, the Applicants shall return to their status as though this Agreement had not been entered into, and no Applicant shall have any further obligations hereunder.

3. Settlement. In exchange for the voluntary dismissal of the Medaille Application, CCNF hereby agrees to reimburse Medaille for a portion of its legitimate and prudent expenses

associated with its Application ("Expenses"). The Parties hereby agree that Medaille's Expenses are Twenty Thousand Dollars (\$20,000.00). Payment of the Expenses shall be made by CCNF within five (5) business days of the CCNF Application having been granted and such grant having become a Final Order as defined below.

4. Finality. This Agreement is subject to the condition that the Commission's order approving the Agreement becomes a Final Order. A Final Order shall be an order or decision of the FCC which is no longer subject to administrative or judicial review, reconsideration, or stay.

5. No Partnership or Joint Venture. Nothing in this Agreement shall be construed as creating a partnership or joint venture among the Applicants.

6. Valid Organization and Warranty. Each Applicant represents that (a) it is duly organized, validly existing and in good standing in its state of formation, and that (b) the execution, delivery, and performance of this Agreement has been duly and effectively authorized by its governing body.

7. Amendment. This Agreement may be amended or modified by the Applicants only by a written instrument executed by all of the Applicants and submitted to the Commission.

8. Expenses. Except as otherwise provided herein, each Applicant shall bear its own expenses in relation to the preparation, filing, prosecution, and performance of the duties contemplated by this Agreement.

9. Conduct of Applicants. Each Applicant shall use its best efforts to cooperate in good faith with the other Applicants and with the FCC by expeditiously providing any additional information which reasonably may be required, and by doing all other acts reasonably necessary to effectuate the objectives of this Agreement.

10. Confidentiality. The Applicants shall maintain the confidentiality of any information received from the other Applicant in connection with the transactions contemplated by this Agreement.

11. Remedies on Default; Attorneys' Fees. In the event of a default on the part of any Applicant, the Applicant not in default shall have available to it all remedies, at law or equity, to which it is entitled under the laws of the State of New York, including the right to obtain specific performance of the terms of this Agreement. The prevailing Party in any lawsuit to enforce this Agreement or to be compensated for the default of the other Party shall be entitled to reasonable attorneys' fees.

12. Benefit and Assignment. The Agreement shall be binding upon and inure to the benefit of the Parties and their respective heirs, legal representatives and successors. No Party may assign its interest under this Agreement without the prior written consent of the other Parties hereto.

13. Termination. This Agreement may be terminated at any time by the mutual written consent of the Parties.

14. Paragraph and Section Headings. All paragraph and section headings in the Agreement are for convenience of reference only and are not intended to qualify the meaning of any section or paragraph.

15. Counterparts; Facsimile. This Agreement may be executed in counterparts, which, when executed, shall constitute one Agreement, binding upon the Parties hereto. The Parties agree that any signatures conveyed to one or more of the other Parties electronically or by facsimile shall be deemed to have full force and effect.

16. Entire Agreement. This Agreement contains the entire understanding among the Parties and supersedes all prior written or oral agreements between them irrespective of the subject matter. There are no representations, agreements, arrangements or understandings, oral or written, among the Parties relating to the subject matter of this Agreement that are not fully expressed herein. By signing below, the Parties acknowledge that they have read this Agreement and fully understand each provision of this Agreement.

17. Interpretation; Venue. This Agreement shall be construed and enforced in accordance with the laws of the State of New York. Any action under or pertaining to this Agreement shall be brought in the State of New York.

18. Notices. Any notice required hereunder shall be in writing, and any notice or other communication shall be deemed given when delivered by: (i) certified mail, return receipt requested; (ii) electronic mail (email) with notice by telephone of same by the sender to the recipient; or (iii) a nationally-recognized overnight delivery service, to the following addresses, or such other addresses as may hereafter be specified in writing:

If to CCNF:

Mark Siena
Calvary Chapel of the Niagara Frontier
2090 Bowen Road
Elma NY 14059
Tel: 716-684-9065
Email: mark.siena@roadrunner.com

With a copy (which shall not constitute notice) to:

David A. O'Connor
Wilkinson Barker Knauer, LLP
2300 N Street, NW, Suite 700
Washington, DC 20037
Tel: 202-783-4141
Email: doconnor@wbklaw.com

If to Medaille:

Dr. Kenneth M. Macur
18 Agassiz Circle
Buffalo, NY 14214
Tel: 716-880-2202
Email: macur@medaille.edu

19. Waiver. Failure of any Party to complain of any act or omission on the part of any other Party in breach of this Agreement, no matter how long the same may continue, shall not be deemed a waiver of any rights hereunder. No waiver of any provision of this Agreement shall be deemed a waiver of any other provision, or a consent to any subsequent breach of the same or other provisions.

20. Severability. If any term or provision of this Agreement be invalid or unenforceable as to any Party, the remainder of this Agreement shall not be affected thereby, and each remaining term or provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

[SIGNATURE PAGE FOLLOWS]

[SIGNATURE PAGE TO SETTLEMENT AGREEMENT]

In Witness Whereof, this Agreement is hereby executed as of the date first above written.

CALVARY CHAPEL OF THE NIAGARA FRONTIER

By: Mark Sierra
Name: MARK Sierra
Title: president

MEDAILLE COLLEGE
By: [Signature]
Name: Dr. Kenneth M. Macur
Title: President

Declaration

I, Dr. Kenneth M. Macur, do hereby declare, under penalty of perjury, as follows:

I am President for Medaille College ("Medaille"), an applicant for a construction permit for a new noncommercial FM radio station to operate on Channel 221A at Amherst, New York (the "Medaille Application").

Applicant has entered into a Settlement Agreement with mutually exclusive applicant Calvary Chapel of the Niagara Frontier whereby in part Medaille has agreed to voluntarily withdraw the Medaille Application, thus allowing CCNF's Application to be granted.

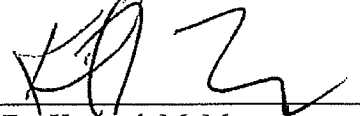
The Settlement Agreement constitutes the entire understanding between Medaille and CCNF for settlement of this proceeding. Other than as stated in the Settlement Agreement, neither Medaille nor any of its principals has been paid, received or been promised any consideration of any kind. The Expenses set forth in the Settlement Agreement constitute a portion of Medaille's legitimate and prudent expenses associated with the Medaille Application.

Medaille did not file the Medaille Application for the purpose of reaching or carrying out a settlement.

Approval of the Settlement Agreement is in the public interest. It will conserve the resources of the parties and the Commission and will speed the delivery of new noncommercial FM radio service to the public.

I am authorized to sign this Declaration and the Settlement Agreement on behalf of Medaille.

MEDAILLE COLLEGE

By: 

Name: Dr. Kenneth M. Macur

Title: President

EXHIBIT B-2**Declaration**

I, Mark Siena, do hereby declare, under penalty of perjury, as follows:

I am President of Calvary Chapel of the Niagara Frontier, an applicant for a construction permit for a new noncommercial FM radio station to operate on Channel 221A at Amherst, New York (the "CCNF Application").

Applicant has entered into a Settlement Agreement with mutually exclusive applicant Medaille College ("Medaille") whereby CCNF has agreed to pay a portion of the legitimate and prudent expenses of Medaille in exchange for the dismissal of the Medaille application, thus allowing the CCNF Application to be granted.

The Settlement Agreement constitutes the entire understanding between CCNF and Medaille for settlement of this proceeding. Other than as stated in the Settlement Agreement, neither CCNF nor Medaille, nor any of their respective principals, has been paid, received or been promised any consideration of any kind.

CCNF did not file the CCNF Application for the purpose of reaching or carrying out a settlement.

Approval of the Settlement Agreement is in the public interest. It will conserve the resources of the parties and the Commission and will speed the delivery of new noncommercial FM radio service to the public.

I am authorized to sign this Declaration and the Settlement Agreement on behalf of CCNF.

CALVARY CHAPEL OF THE NIAGARA
FRONTIER

By: Mark Siena
Name: MARK Siena
Title: president