

FILED/ACCEPTED

NOV 24 2010

Federal Communications Commission  
Office of the Secretary

Before The  
Federal Communications Commission  
Washington, DC 20554

In re Applications of	)	NCE FM MX Group #78
	)	
NEW BOHEMIA GROUP, INC.	)	File No. BNPED-20071019BBN
Coggon, Iowa	)	Facility ID No. 174923
	)	
CALVARY IOWA CITY	)	File No. BNPED-20071022BPL
Winthrop, Iowa	)	Facility ID No. 176935
_____	)	
	)	
PLUS CHARITIES	)	File No. BNPED-20071022BMC
Coggon, Iowa	)	Facility ID No. 171762
	)	
For Construction Permit for	)	
New NCE FM Station on Channel 204	)	

To: The Commission

**OPPOSITION TO  
APPLICATION FOR REVIEW**

New Bohemia Group, Inc. ("NBG"), by its attorney and pursuant to Section 1.115(d) of the Commission's Rules, hereby opposes the Application for Review filed by Plus Charities ("Plus") on November 10, 2010 in the captioned proceeding. Plus challenges the Media Bureau's October 13, 2010 letter decision<sup>1</sup> that denied Plus' March 12, 2009 Petition for Reconsideration and March 25, 2009 Petition for Reconsideration, or, in the Alternative, Application for Review. As shown below, the *Decision Letter* is consistent with statute, regulation, case precedent, and established Commission policy, makes no erroneous finding as to an important or material question of fact, and commits no prejudicial procedural error. The Commission therefore should affirm the *Decision Letter* and deny Plus' Application for Review.

<sup>1</sup> DA-1958 [hereinafter "*Decision Letter*"].

The Media Bureau dismissed Plus' captioned application on November 8, 2007 because its proposed 60 dBu contour failed to cover at least 50 percent of the community of license of Coggon, Iowa as required by Section 73.515 of the Commission's rules.<sup>2</sup> On December 7, 2007, Plus filed a petition for reconsideration with an amendment supplying new engineering that: (1) changed areas and populations; (2) specified new geographic coordinates that changed the number of seconds of latitude and changed "west longitude" to "east longitude;" (3) specified a new tower height, height of center of radiation, and antenna height above average terrain; (4) provided a new exhibit to demonstrate 60 dbu contour coverage of the proposed community of license; and (5) provided a new "Fair Distribution" exhibit even though the Plus application does not claim a fair distribution preference.<sup>3</sup> The Bureau's February 25, 2009 order denied Plus' petition and rejected its argument that the amendment was "minor" since it described a fundamentally different location than that specified in the Tech Box of its application, holding that "geographic coordinates of a proposed site are essential for the staff to determine whether an applicant's proposal complies with the rules."<sup>4</sup>

In its numerous filings in this proceeding Plus never disputes that its application was unacceptable for filing because it violated Section 73.515 and that the staff properly dismissed

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<sup>2</sup> *Letter from Rodolfo Bonacci, Assistant Chief, Audio Division to Plus Charities*, Ref. No. 1800-B3 (MB Nov. 8, 2007).

<sup>3</sup> See Exhibit C to Plus' November 7, 2010 Petition For Reconsideration and To Petition For Leave To Amend and Reinstatement of Application Nunc Pro Tunc. Plus did not claim a Fair Distribution of Service preference in response to Items 1 and 2 of Section III of the FCC Form 340 application, either in Plus' originally filed application or in its November 7, 2010 application. *Id.* (responses to Items 1 and 2 of Section III both marked "No"). Plus' November 7, 2010 petition did not describe all of the changes made by its amendment but reads as if the amendment were only changing "west longitude" to "east longitude."

<sup>4</sup> *Plus Charities*, Letter, 24 FCC Rcd 2410 (MB 2009). The Bureau cited *Aerco Broadcasting Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 24417, 24419 (2003), where an application that listed geographic coordinates and site elevation data that did not match the tower registration was dismissed as patently defective.

that application in accordance with Section 73.3566(a) of the rules. That rule does not give a party which filed an application for a new noncommercial educational (NCE) FM station during a filing window the opportunity to amend its application as a matter of right after dismissal for an acceptability defect.<sup>5</sup> Plus has not challenged the *Aerco Broadcasting* precedent where the applicant was not permitted to file a curative amendment as a matter of right.<sup>6</sup> The *Decision Letter* is consistent with Section 73.3566(a) and case precedent and therefore should be affirmed.<sup>7</sup>

Indeed, Plus can identify no Commission rule or precedent that affords a NCE window applicant with the opportunity to amend a dismissed application as a matter of right under the circumstances present in this case. The amendment rights described in Section 73.3522(b) apply to NCE window application tentative selectees, a status that Plus never achieved. Furthermore, Plus has made no showing of good cause for waiving the rules or for accepting an amendment that is not “minor,” but rather one that submits new coordinates, new engineering parameters, and new 60 dbu coverage and fair distribution exhibits, which constitute major changes.<sup>8</sup> The

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<sup>5</sup> 47 C.F.R. §73.3566(a).

<sup>6</sup> *Aerco Broadcasting Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 24417, 24419 (2003)(*Aerco Broadcasting*). The Bureau cited this precedent in its February 25, 2009 decision that denied Plus’ December 7, 2007 petition. See *Plus Charities*, Letter, 24 FCC Rcd 2410 (MB 2009) at n. 10.

<sup>7</sup> Given that Section 73.3566(a) clearly permits the Bureau to dismiss patently defective applications that are unacceptable filing and to do so without giving the applicant an opportunity to amend, *Glaser v. FCC*, 20 F.3d 1184 (D.C. Cir 1994) and *Salzer v. FCC*, 778 F.2d 869 (D.C. Cir 1985) are inapposite in this case. Nor is there is a *Melody Music* issue present in this case, since NBG and Plus are not “similarly-situated” applicants: despite a signature issue raised by Plus, NBG’s application was acceptable for filing and no amendment was necessary, while Plus’ application was patently defective and dismissed as unacceptable for filing.

<sup>8</sup> See 47 C.F.R. § 73.3564 (transmitter site coordinates among minimum requirements an application must meet to be acceptable for filing).

Bureau was well within the rules and precedent to reject such an amendment and the Commission should affirm the *Decision Letter*.

At page 8 of its Application for Review, Plus suggests that the *Decision Letter* “never mentions” a line of cases beginning with *Special Markets Media, Inc.*, Hearing Designation Order, 5 FCC Rcd 80 (MMB, 1989). Plus is mistaken, because in footnote 26 of the *Decision Letter* the Bureau specifically addressed those cases, stating that they “were decided before 1998, when the Commission stated that the Tech Box controls in the event of a discrepancy.” The same footnote also referenced footnote 33 of the *Decision Letter*, which in turn cited the 1998 *Biennial Regulatory Review, Streamlining of Mass Media Applications, Rules, and Processes* order, where the Commission found that “use of the tech box would eliminate the need for repeated staff amendment requests and attendant processing delays, necessitated by errors and discrepancies within the application.” The Bureau also cited the Form 340 Instructions which state that “[i]n the event that there are any discrepancies between data in the Tech Box and data submitted elsewhere in the application, the data in the Tech Box will be controlling.”<sup>9</sup> The Form 340 instructions and Section 73.3566(a) clearly permitted, and indeed required, the Bureau to dismiss Plus’ application as unacceptable for filing.<sup>10</sup>

Plus has not shown that the Commission, after having to first expend the time and resources to review an NCE applicant’s defective application “as a whole,” has ever relied on the “*Special Market* line of cases” to accept a curative amendment to a patently defective application filed under new NCE window filing procedures. Plus bases its argument on one sentence in a

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<sup>9</sup> *Decision Letter*, n. 33.

<sup>10</sup> Plus simply brushes off the FCC Form 340 Instructions as “not helpful in answering this inquiry.” Application for Review, p. 9. However, given the FCC Form 340 instructions and Section 73.3566(a), which provides for the dismissal of applications with acceptability defects, that the 1998 order did not state what happens when there is an error in the Tech Box information has no significance.

2007 letter ruling in which the Bureau stated that “[t]he Commission will grant reconsideration and will reinstate a dismissed application nunc pro tunc where a relatively minor curative amendment is filed within 30 days of the date of the dismissal.”<sup>11</sup> However, the preceding sentence in *Czelada* states: “The Commission generally will reconsider a prior action only when a petition shows either a material error in the Commission’s original order, identifies changed circumstances, or discloses unknown additional facts not known or existing at the time of petitioner’s last opportunity to present such matters.”<sup>12</sup>

In the instant case, Plus has not shown that it was material error for the Bureau to dismiss its application in the first place, nor that its amendment which provided new engineering and fair distribution exhibits was “relatively minor,” nor that good cause exists to waive the rules or to otherwise accept such an amendment. Indeed, in *Czelada*, the Bureau found that the amendment violated the rules and dismissed it.<sup>13</sup> Thus neither the “*Special Markets* line of cases” nor *Czelada* support Plus’ argument.

The Bureau’s treatment of the certification issues with respect to NBG’s application also was consistent with rules and precedent and should be affirmed. The Bureau previously addressed those issues in detail when it affirmed the grant of NBG’s application.<sup>14</sup> But throughout this proceeding, in arguing that NBG’s application had certification defects, Plus

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<sup>11</sup> Application for Review, p. 7, citing *Edward T. Czelada*, Letter, 22 FCC Rcd 16634 (MB 2007)(“*Czelada*”).

<sup>12</sup> *Id.* at 16635.

<sup>13</sup> *Id.* at 16636.

<sup>14</sup> See *New Bohemia Group*, Letter, 24 FCC Rcd 1357 (MB 2009).

simply ignores the Bureau's analysis and the precedent that proves Plus wrong.<sup>15</sup> In rejecting Plus' argument that the Bureau lacks authority to determine that a director of the applicant, to whom the board delegated the authority of an officer to sign the application, may do so, the Bureau cited no less than four cases to support that determination.<sup>16</sup> Yet again Plus simply brushes off precedent with the observation that those cases "deviated from the letter of Section 73.3513." It makes no attempt to demonstrate how a director, who as a matter of law has the same power of an officer to sign the application, somehow violates Section 73.3513 by doing so.<sup>17</sup> Indeed, Plus' Application for Review did not even challenge the Bureau's observation that one of Plus' cited cases "not only fails to support Plus' argument, but in fact works against it."<sup>18</sup>

WHEREFORE, for all the foregoing reasons, the Commission should deny the Plus Application for Review.

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<sup>15</sup> NBG also made this point at page 2 of its March 25, 2009 opposition to Plus' March 12, 2009 petition for reconsideration.

<sup>16</sup> See *Decision Letter* at footnote 30, discussing *David T. Murray*, Memorandum Opinion and Order, 5 FCC Rcd 5770 (1990); *Bloomfield Hills School District*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 14055, 14058-59 (MB 2007); *Union County Broadcasting Co.*, Letter, 22 FCC Rcd. 10285, 10288-89 (MB 2007); and *R B Schools, Decatur, Illinois*, Letter, 22 FCC Rcd. 8409, 8411 (MB 2007).

<sup>17</sup> See Application for Review at p. 13. Under Iowa State law, the NBG director was considered a *de facto* officer of NBG based on the board's actions that delegated to him the authority to prepare and file NBG's application. See NBG's August 29, 2008 Opposition to Petition to Deny and/or, in the Alternative, Petition for Reconsideration, Exhibit 2, Letter from David J. Bright, Esquire. Plus has never challenged that legal conclusion. Nor has Plus questioned Commission precedent which follows state laws under which a dissolved corporation continues to have a *de facto* existence and may take steps, as NBG did, to regain *de jure* existence retroactively as if the dissolution had never occurred. Instead, Plus merely repeats its baseless assertion that yet another "line of cases" supports designating NBG's application for hearing on character issues. Application for Review at p. 12-13. Moreover, Plus offers absolutely nothing to challenge the Bureau's conclusion that the date discrepancy in the NBG certifications was anything but inadvertent. See *New Bohemia Group, supra*, 24 FCC Rcd 1357 at 1359-1360 (MB 2009).

<sup>18</sup> *Decision Letter* at n. 26 (discussing *Community Television, Inc.*, Hearing Designation Order, MM Docket No. 86-45, FR Doc. 86-3253, (MMB Feb. 7, 1986)).

Respectfully submitted,  
NEW BOHEMIA GROUP, INC.

By   
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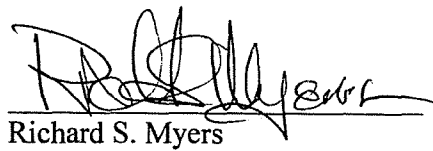
November 24, 2010

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of November, 2010, a copy of the foregoing OPPOSITION TO APPLICATION FOR REVIEW was sent by first class U.S. mail, postage prepaid, to:

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