

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

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In re Applications of: }
ANNISTON SEVENTH-DAY }
ADVENTIST CHURCH }
Application for a New NCE FM }
Station at Anniston, Alabama }
BOARD OF TRUSTEES OF }
JACKSONVILLE STATE UNIVERSITY }
Application for a New NCE FM }
Station at Anniston, Alabama }
NCE Reserved Allotment Group #1 }

File No.: BNPED-20100226ABT
Facility Id.: 184996

File No.: BNPED-20100226AFB
Facility Id.: 184885

FILED/ACCEPTED

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Federal Communications Commission
Office of the Secretary

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

PETITION FOR RECONSIDERATION

The Board of Trustees of Jacksonville State University (“JSU”), by and through its attorneys, hereby submits its Petition for Reconsideration of the Media Bureau’s letter decision reinstating and granting the application of the Anniston Seventh-Day Adventist Church (“ASDA”), and dismissing the JSU application, *Anniston Seventh-Day Adventist Church*, DA 12-1588, released October 4, 2012 (the “Letter Decision”). With respect thereto, the following is submitted:

In a prior decision (*Anniston Seventh-Day Adventist Church*, DA 12-809, released May 23, 2012), the Media Bureau properly dismissed ASDA’s application based on its failure to meet the threshold requirement of providing for first and/or second NCE service to at least ten percent of the population within its proposed 60 dBu contour. This level of service is required

because the channel in question is located within the non-reserved FM band but has been reserved for noncommercial educational (“NCE”) use through a rule making proceeding. *See* 47 C.F.R. § 73.202(a)(1). Moreover, the Commission has specifically advised prospective applicants for such channels that the threshold first and second NCE requirements apply at the application stage as well as at the allotment stage. *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 18 FCC Rcd 6691, 6705 (2003). Nevertheless, ASDA failed to make any attempt meet this basic qualifying requirement until after its application had been dismissed pursuant to the prior decision. Instead, in response to JSU’s Petition to Deny, which pointed out ASDA’s shortfall, ASDA chose to stick with its original, non-compliant proposal and to argue against the wisdom of the Commission’s settled policy instead. Indeed, despite the fact that ASDA took an opportunity to amend its application to correct another error by reversing its previously designated site co-ordinates with the prior reference co-ordinates, it made no effort to correct its first and/or second service shortfall. It was not until after the Commission’s adverse decision dismissing its application following its first amendment that ASDA decided belatedly to seek to amend its application to come into compliance with the Commission’s basic qualification standards.

The fundamental, threshold nature of the first and/or second NCE service requirement had previously been made quite clear by the Commission. Indeed, the Commission specifically stated that “[r]eserved allotments will be conditioned on the construction and licensing of an NCE station that provides the requisite level of first and second NCE service.” *Id.* Nevertheless, the *Letter Decision* determined that ASDA should be allowed one chance to amend its application pursuant to Section 73.3522 of the Commission’s rules, accepted its allegedly

curative amendment, and granted its application. *Letter Decision* at 4-5. This decision was erroneous on a number of different counts.

First, read in its most generous manner, Section 73.3522 provides one and only one opportunity for the submission of a curative amendment. Here, when the selfsame issue that led to its initial dismissal, namely, that of ASDA's failure to provide sufficient first or second NCE coverage, was raised in JSU's Petition to Deny, filed June 11, 2011, along with the issue of the incorrect geographic co-ordinates specified as ASDA's transmitter site location, ASDA chose not to even attempt to bolster its qualifications in its amendment accepted for filing on January 24, 2012. Instead ASDA's amendment undertook only to correct the transmitter site location. Thus, before ASDA's application was dismissed after consideration of JSU's Petition to Deny, it had already had one bite at the apple of filing a corrective amendment, but had instead chosen to argue against the Commission's settled policy. Given the minimal nature of the changes in its eventual amendment, and the fact that they could have been adopted at any time, ASDA easily could have submitted its amendment earlier. Indeed, ASDA's conduct smacks of that of the dilatory and routinely rejected party that holds onto certain information pending an FCC decision, and then, when it doesn't like the decision, offers more evidence. Likewise, ASDA's belated amendment should be rejected.

Furthermore, despite the *Letter Decision's* somewhat free application of Section 73.3522 to ASDA's application, the fact remains that Section 73.35522(b) (2), as cited by ASDA, is specifically entitled "Tentative Selectee." In addition, the language of that rule section refers specifically to tentative selectees and thus applies only to applicants in that posture. At the time of the *Letter Decision*, however, ASDA was not a tentative selectee but a dismissed applicant, and thus, Section 73.3533(b)(2) was inapplicable. While it could be argued that ASDA should

have been given an opportunity to amend as a tentative selectee instead of being dismissed, and thus should still be treated as if it were a tentative selectee, that argument is unavailing. Taking that argument one step further, ASDA never should have been chosen as a tentative selectee in the first place due to its application's failure to possess the required basic qualifications. The Commission made it quite from the inception of such NCE allotments in the otherwise non-reserved band that the threshold nature of the first and/or second NCE service requirement was a matter of basic qualifications, without which an applicant would be basically unqualified. *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 18 FCC Rcd 6691, 6705. Even the *Letter Decision* noted that the issue of NCE first and second service was question of basic qualifications. *Letter Decision* at 3.

The Commission has pointed to Section 73.3564(a)(3) of its rules as nonetheless providing for an opportunity for ASDA to amend its defective application. That rule section provides that “[a]pplications found to meet minimum filing requirements, but that contain deficiencies in tender and/or acceptance information, shall be given an opportunity for corrective amendment pursuant to 73.3522 of this part.” 47 C.F.R. §73.3564(a)(3). This rule provision is unavailing, however. Given that the application specified a facility that was basically unqualified, it failed to meet minimum filing requirements. It would have been as if the applicant had specified a commercial rather than a noncommercial entity and then had sought to amend to correct this defect.

Indeed, the full Commission has found that failure to satisfy this threshold standard is a defect which requires dismissal of an application. In examining the groups of mutually exclusive noncommercial applicants for specially reserved channels in non-reserved band, the Commission found that Mutually Exclusive Group 11 was comprised of three applicants for such a channel,

reserved by means of the third channel reservation standard, at Big Pine Key, Florida. *Comparative Consideration of 37 Groups of Mutually Exclusive Applications for Permits to Construct New and Modified Noncommercial Educational Stations File in the February 2010 and October 2007 Filing Windows*, FCC 11-67, released May 3, 2011, at Paragraph 34 [footnotes omitted.]

The Commission found that two of the applicants proposed sufficient coverage of NCE underserved area to satisfy the third channel reservation criteria and that they, therefore would “proceed to the point system analysis. Serendipity[, the third applicant,] does not, and, accordingly, is eliminated.” *Id.* This elimination was done as a threshold matter, before the consideration of any points. Thus, the Commission again made it clear that an applicant’s failure to satisfy the third channel reservation requirements is a failure in basic qualifications which leads to dismissal of the application, and not a chance to amend. Indeed, in this instance, Serendipity had attempted to amend its application nine months after the filing window closed to increase the amount of second NCE service that it would provide, and the Commission specifically rejected this attempt. It reasoned that the applicant’s amendment was a belated attempt to upgrade its comparative position and would not be considered. It further noted that “[t]he Commission has repeatedly disallowed the late submission of requested information in comparative cases, finding that such an allowance would ‘inevitably lead to abuse of the Commission’s processes, applicant gamesmanship, and unfair advantage’ *Silver Springs Communications*, 3 FCC Rcd 5049, 5050 (1988), rev. denied, 4 FCC Rcd 4917 (1989);... *see also, LRB Broadcasting*, 8 FCC Rcd 3076 (1993).” *Id.* at Note 59. Here ASDA attempted to submit its amendment not only well after the filing window had closed, but after its application had actually been dismissed. Following the same rationale adopted by the Commission in

dismissing the Serendipity application without regard to its less-tardy amendment, ASDA's application also must be dismissed.

Moreover, the Commission's treatment of applications which fail to meet the basic, threshold qualification of compliance with the third channel reservation standard has been quite consistent. In the same 2011 decision with regard to noncommercial applicants, NCE Reserved Allotment Group 21 was found to include three applicants which satisfied the reservation criteria and proceeded to a point analysis, and one which did not and, "accordingly" was eliminated without further consideration. *Id.* at Paragraph 59. Likewise, in NCE Reserved Allotment Group 31, two out of three of the applicants were found to comply with the third channel reservation criteria and went on to a points comparison, while the third applicant did not and was "therefore eliminated." *Id.* at Paragraph 79.

The fact that in each instance in which the Commission was aware that an applicant failed to comply with the third channel reservation standard, it dealt with that failure as an initial matter in its first paragraph of discussion of a group of applicants demonstrates that the Commission views this failure as disqualifying and not as a relatively minor tenderability or acceptability defect which may be corrected. In addition, the Commission's use of the words "accordingly" and "therefore" demonstrates the Commission's view of the necessary cause and effect relationship between failure to meet the third channel reservation standard and dismissal of the application; if an application does not satisfy the third channel reservation requirement, then it must be dismissed. Thus, the full Commission has made it quite clear, both when it first adopted its policies related to reserving otherwise non-reserved channels, and when it implemented those policies in connection with mutually exclusive applicant groups, that proposing sufficient first and/or second NCE coverage is a necessary threshold matter which

must be set forth in an initial application. The fact that the Commission's staff may have initially overlooked a failure in compliance does not change the consequence of that failure once it is brought to the Commission's attention. Just as the Media Bureau has often remarked that it is not obliged to repeat a past error when it has refused to follow a questionable earlier decision, it also is not obliged to continue in an overlooked error once the correct facts are made known. Nor does the existence of any staff oversight confer upon the Media Bureau the authority to overrule the Commission's settled determination that compliance with the third channel reservation requirement is a prerequisite for any points evaluation; rather, the Media Bureau is still necessarily obligated to follow the full Commission's direction..

Therefore, it is clear that the decision to allow ASDA to modify its proposed facilities to be able to meet the third channel reservation criteria was in error. Furthermore, a review of ASDA's application and subsequent amendment reveals the sort of attempted gaming of the systems which the Commission's prohibition on post-window comparative upgrades is designed to prevent. An examination of ASDA's amendment shows that the facility change which enabled it to come into compliance with the third channel reservation standard was nothing more than the addition of a directional antenna to reduce the total population within the service area. The smaller the total population served, the greater the percentage receiving first or second NCE service, even as the total number of first or second NCE recipients remains the same. Thus, ASDA was able initially to claim comparative credit for having an overall larger population served and then to reduce that population only after it was called on its failure to comply with the third channel reservation criteria. It should also be noted that an amendment, the sole purpose of which is to reduce the total population covered without any change in transmitter location, is not generally thought to serve the public interest.


Taking all of these factors into consideration, it is apparent that the ASDA application should again be dismissed. The Commission has made it plain that satisfaction of the third channel reservation requirement is a prerequisite for any further consideration of an application. Given that ASDA failed to meet the threshold NCE service requirements, it should have been immediately eliminated and not have proceeded to a point system analysis. It remains undisputed that ASDA did not meet the minimum technical standards on the date of filing its application. Therefore, since ASDA could not be a tentative selectee pursuant to Section 73.7003, then the provisions of Section 73.3522(b)(2) cannot apply. Furthermore, since ASDA failed to meet the minimum filing requirements established by the full Commission, which make compliance with the third channel reservation criteria mandatory, ASDA was not entitled to amend its application pursuant to either Section 73.3522(b)(2) or Section 73.3564(a)(3). Therefore ASDA's application must be dismissed, and JSU's must be reinstated.

Finally, the Media Bureau has remarked that the Commission is likelier to accept amendments when no other party's interests are harmed. Here, however, it is quite clear that another party, namely JSU, does have its interests harmed if ASDA's amendment. JSU properly met the Commission's threshold requirements from the beginning, while ASDA did not; nonetheless, it is JSU's application that has now been dismissed. In effect, JSU has been punished for meeting basic qualifications requirements, while ASDA is being rewarded for its failure to be basically qualified by the close of the filing window. Thus, it is quite clear that JSU's interests have been harmed and its rights as a fully qualified applicant prejudiced by acceptance of ASDA's belated "fix" to its defective application.

WHEREFORE, the premises considered, JSU respectfully requests that the Media Bureau's Letter Decision be overruled, that ASDA's application be reinstated, and that JSU's application be reinstated and granted.

Respectfully submitted,

**BOARD OF TRUSTEES OF
JACKSONVILLE STATE UNIVERSITY**

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November 5, 2012

Certificate of Service

I, Michelle Brown Johnson, hereby certify that on this 5th day of November, 2012, I caused a copy of the foregoing "Petition for Reconsideration" to be served via U.S. mail, postage prepaid, upon the following:

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