

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

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

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

FILED/ACCEPTED

DEC 5 2012

Federal Communications Commission
Office of the Secretary

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

The Board of Trustees of Jacksonville State University ("JSU"), by and through its attorneys, hereby submits its Reply to the Opposition for Petition for Reconsideration filed by Anniston Seventh-Day Adventist Church ("ASDA") with regard to the Media Bureau's letter decision reinstating and granting the ASDA application, 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:

JSU's Petition for Reconsideration demonstrated that the Media Bureau's prior decision (*Anniston Seventh-Day Adventist Church*, DA 12-809, released May 23, 2012), which 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 was correct and should have been affirmed without regard to ASDA's belated attempt to cure this qualifying defect. In its Opposition, ASDA has argued, in effect, that Section 73.3522(b)(2) trumps all and allows any applicant who has ever, rightly or wrongly, held the status of a Tentative Selectee to amend and change any or all portions of its application, even basic, qualifying matters, which would otherwise preclude its application from being considered. ASDA has apparently missed the point of JSU's argument, however, and is espousing a dangerous policy by which any defect of any sort could be corrected by any applicant following dismissal, so long as a corrective amendment would not be considered to be a major amendment. By this argument, even an applicant which had filed for a noncommercial license as a for-profit entity could amend its application following dismissal to specify a not-for-profit entity with the same principals, and the Commission would be constrained to accept that application. After all, a change in corporate form, without an accompanying change in control, is not defined as a major amendment. Such a policy of allowing wholesale substitutions would encourage sloppy applications and substantial gaming of the application system and cannot reflect the intent of the Commission.

As an initial matter, ASDA argues that the fact that its application had been dismissed rather than returned did not affect its status as a Tentative Selectee because Section 73.3522(b) anticipates that a petition for reconsideration will be filed with a curative amendment. In making this argument, ASDA overlooks an important, if fine, detail. Section 73.3522(b)(2) states that if a Tentative Selectee's application is found to be defective "the application will be returned...." While it is true that this rule contemplates the submission of a petition for reconsideration seeking reinstatement, it applies to applications that have been "returned." The ASDA

application was not returned, but dismissed. The words “returned” and “dismissed” are terms of art which do not mean the same thing.

Furthermore, the case cited by ASDA as supporting the notion that a dismissed former Tentative Selectee may amend its application pursuant to Section 73.3522(b)(2), *Hampton Roads Educational Telecommunications Association, Inc.*¹, does not support ASDA’s contention. There, the Media Bureau noted that it had been error not to dismiss an application due to a Channel 6 interference problem, but noted that if it had done so, the applicant could have sought reinstatement pursuant to the Commission’s policies with regard to correcting an application’s acceptability defects and made no reference to Section 75.3522(b) in this regard. *Id.* at 6, n. 34. Thus, this case does not stand for the proposition that dismissed former Tentative Selectees may use Section 73.3522(b) as a free pass for reinstatement, but rather that other Commission policies may allow applicants to correct acceptability defects. The problem for ASDA is that the defect in its application was a matter of basic, threshold qualifications, not an acceptability defect. The Commission made it quite clear from the very origin of NCE allotments on generally non-reserved channels that the first and/or second NCE service requirement was a matter of basic qualifications, without which an applicant would be unqualified. *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 18 FCC Rcd 6691, 6705. Therefore, as a dismissed former Tentative Selectee with a problem with its basic qualifications, ASDA did not have Section 73.3522(b) available to resurrect its application, nor were the Commission policies with regard to acceptability defects applicable.

Furthermore, if a different policy were to be adopted, the necessary outcome would be the abuse of the Commission’s processes and gamesmanship that the Commission has identified

¹ While ASDA cited the case as appearing at 23 FCC Rcd 7376, 7381 (MB 2010), JSU did not find it there, most likely due to a typographical error or the like. Rather, JSU found what appears to be the relevant letter decision, *Hampton Roads Educational Telecommunications Association, Inc.*, DA 10-1046, released June 9, 2010.

as problems leading it to disallow late submission of certain information. *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 Note 59, citing, *Silver Springs Communications*, 3 FCC Rcd 5049, 5050 (1988), rev. denied, 4 FCC Rcd 4917 (1989), *LRB Broadcasting*, 8 FCC Rcd 3076 (1993). Indeed, the ASDA application itself provides an example of such gamesmanship. Here ASDA's application first initially claimed to serve a wide area and sought comparative credit for proposing to serve an overall larger population than other applicants. Then, only after its failure to provide first or second NCE service to a sufficient percentage was caught, it backpedalled and attempted to amend its application to reduce its coverage area and meet the threshold third channel standard. Similarly, if ASDA's rule interpretation is allowed to stand, basically unqualified applicants would be able to file defective applications claiming credits to which they are not entitled, then, should they be caught, simply amend their applications to pull back their claims and move forward. The prospects for abuse under such a system are simply mind-boggling.

ASDA objected in its Opposition to JSU's pointing to the fact three other NCE Allotment groups had included applicants that failed to meet the third channel reservation standard and were summarily dismissed without comparative consideration. *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. ASDA attempts to argue that the situations of those applicants is somehow different, as they were never named Tentative Selectees. Opposition at 5. While that fact is true, it does not assist ASDA but rather only confirms that its

initial designation as a Tentative Selectee was in error, and the proper treatment of ASDA's application would have been to dismiss its application without further consideration. The case of Serendipity Educational Broadcasting, Inc. is especially illustrative and must be contrasted with the outcome in *Hampton Roads Educational Telecommunications, Inc.*, DA 10-1046. Serendipity, an applicant in Mutually Exclusive Group 11 initially admitted that its application did not meet the third channel reservation standard. It then attempted to amend 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 and dismissed the Serendipity application. *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 at Paragraph 34 [footnotes omitted.] ASDA is now arguing that because the Commission overlooked the glaring defects in its own application and erroneously did not dismiss its similarly situated application, ASDA is entitled to different, and superior, treatment. Somehow, it claims, ASDA acquired more rights based solely on the Commission's oversight and therefore should be entitled to remedy its qualifying defect. It should be noted, however, that the Commission has long stated that once it discovers an error, it is not obliged to persist in the erroneous course of action.

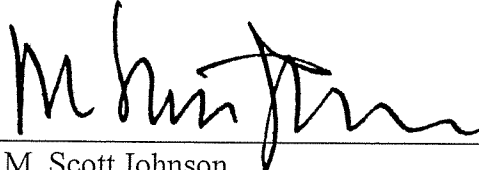
Leaving aside for the moment the lack of logic that a more belated amendment should be accepted more readily than an earlier amendment solely because of an intervening Commission error, the contrast with *Hampton Roads Educational Telecommunications, Inc.* reveals the different treatment afforded to acceptability defects as opposed to qualifying defects, and that failure to satisfy the third channel reservation requirement falls into the latter character. In the *Hampton Roads* case, the issue was an applicant's failure to provide proper protection to a

Channel 6 facility. The Media Bureau there found that it had, indeed, been an error not to dismiss the application prior to its selection as Tentative Selectee, but that the application nonetheless would not be denied on those grounds because the applicant would have been allowed prior to such selection to correct this acceptability defect. *Id.* at note 34. In contrast, Serendipity attempted to correct its application before any tentative selection was made; if the failure to meet the their channel reservation standard were an acceptability defect, this amendment would have been accepted pursuant to Commission policy as stated in *Hampton Roads*. In point of fact, the amendment was rejected and the application dismissed. The same fate should meet the ASDA application, which suffered from the same qualifying defect that Serendipity's did.

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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December 5, 2012

Certificate of Service

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

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