

POSTED
7/1/13

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

2013 JUN 18 A 5:59

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

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

JUN 14 2013

Federal Communications Commission
Office of the Secretary

APPLICATION FOR REVIEW

BOARD OF TRUSTEES OF
JACKSONVILLE STATE UNIVERSITY

M. Scott Johnson
Anne Goodwin Crump

FLETCHER, HEALD & HILDRETH, PLC
1300 North 17th Street, 11th Floor
Arlington, Virginia 22209
703-812-0400

June 14, 2013

SUMMARY

The Board of Trustees of Jacksonville State University (“JSU”), by and through its attorneys, herein submits its Application for Review of the Media Bureau’s letter decision denying reconsideration of its decision to reinstate and grant the above-referenced application of Anniston Seventh-Day Adventist Church (“ASDA”) for a new noncommercial educational (“NCE”) station at Anniston, Alabama, and to dismiss the JSU application, *NCE Reserved Allotment Group 1, New NCE-FM, Anniston, Alabama*, DA 13-1104, released May 15, 2013 (the “*Reconsideration Decision*”).

The *Reconsideration Decision* mistakenly denies reconsideration of the Bureau’s prior reversal of course to reinstate and grant the ASDA application in its decision in *NCE Reserved Allotment Group No. 1, New NCE-FM, Anniston, Alabama*, 27 FCC Rcd 12149 (MB 2012). That decision had, in turn, reversed a prior decision, *NCE Reserved Allotment Group No. 1, New NCE-FM, Anniston, Alabama*, 27 FCC Rcd 5710 (MB 2012) which had properly dismissed the ASDA applications as ineligible for its failure to meet the “third channel reservation standard,” which requires that applicants must propose to provide a first or second NCE service to at least ten percent of the population within the proposed station’s service area, and that this first or second NCE service must reach at least 2,000 people.

The Commission has made it entirely clear, with ample prior notice, that satisfaction of the third channel reservation standard is a matter of basic eligibility which must be met initially in order for an applicant to be basically qualified. The full Commission has acted consistently in dismissing applicants that failed to meet that standard. The Media Bureau simply does not have the authority to effectively negate these decisions in the guise of applying other processing rules

to allow corrective amendments. Further, if the Commission were to change its policies to allow such amendments, it would be encouraging careless practices and increased gamesmanship among applicants in a manner contrary to the public interest.

TABLE OF CONTENTS

	Page
Summary	i
Background	2
Questions Presented	2
Argument	3
I. Ample Notice Given of Third Channel Reservation Standard as Eligibility Requirement	3
II. Reconsideration Letter Impermissibly Reverses a Full Commission Decision	9
III. Section 73.3522(b)(2) Inapplicable	9
IV. Acceptance of Late Third Channel Reservation Showing Amendments Leads to Abuses	11
Conclusion	12

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

In re Applications of:		
ANNISTON SEVENTH-DAY		
ADVENTIST CHURCH		File No.: BNPED-20100226ABT
		Facility Id.: 184996
Application for a New NCE FM		
Station at Anniston, Alabama		
BOARD OF TRUSTEES OF		
JACKSONVILLE STATE UNIVERSITY		File No.: BNPED-20100226AFB
		Facility Id.: 184885
Application for a New NCE FM		
Station at Anniston, Alabama		
NCE Reserved Allotment Group #1		

To: Office of the Secretary
Attn: The Commission

APPLICATION FOR REVIEW

The Board of Trustees of Jacksonville State University ("JSU"), by and through its attorneys, hereby submits its Application for Review of the Media Bureau's letter decision denying reconsideration of its decision to reinstate and grant the above-referenced application of Anniston Seventh-Day Adventist Church ("ASDA") for a new noncommercial educational ("NCE") station at Anniston, Alabama, and to dismiss the JSU application, *NCE Reserved Allotment Group 1, New NCE-FM, Anniston, Alabama*, DA 13-1104, released May 15, 2013 (the "*Reconsideration Decision*"). With respect thereto, the following is submitted:

Background

The *Reconsideration Decision* mistakenly denies reconsideration of the Bureau's prior reversal of course to reinstate and grant the ASDA application in its decision in *NCE Reserved Allotment Group No. 1, New NCE-FM, Anniston, Alabama*, 27 FCC Rcd 12149 (MB 2012).

That decision had, in turn, reversed a prior decision, *NCE Reserved Allotment Group No. 1, New NCE-FM, Anniston, Alabama*, 27 FCC Rcd 5710 (MB 2012) (the "*Letter Decision*") which had properly dismissed the ASDA applications as ineligible for its failure to meet the "third channel reservation standard," which requires that applicants must propose to provide a first or second NCE service to at least ten percent of the population within the proposed station's service area, and that this first or second NCE service must reach at least 2,000 people. The *Letter Decision* had itself corrected an apparent oversight when the Commission initially chose the ASDA application as the tentative selectee on a points evaluation, after erroneously concluding that all applicants satisfied the third reservation standard as required.

JSU is now seeking restoration of the outcome of the *Letter Decision*, reinstatement and grant of the JSU application, and dismissal of the ASDA application for its failure to satisfy basic eligibility requirements.

Questions Presented

1. When the Commission has clearly set forth basic, mandatory eligibility requirements for applicants, may the Commission dismiss applicants which fail to meet those requirements?

2. May the Media Bureau effectively overturn a decision of the full Commission that an applicant failing to meet the third reservation requirement should not be allowed to amend its

application to correct that defect by allowing other, similarly situated applicants to be reinstated based on such amendments?

3. Do the Commission's rules necessarily allow for curative amendment of an application by applicant which has had a previous opportunity to amend its application and has failed to cure a fatal defect until after the applicant has been rejected as a tentative selectee, and its application has been dismissed?

4. Should the Commission adopt a permissive amendment policy which will encourage lack of sufficient care in original application and attempts to game the comparative system in the hope that application defects will be overlooked?

Argument

I. Ample Notice Given of Third Channel Reservation Standard As Eligibility Requirement.

In rejecting JSU's argument that ASDA's failure to meet the third channel reservation standard is a basic qualifying defect which may not be cured by amendment, the *Reconsideration Decision* notes that, in order to dismiss applicants on this basis, the Commission must first have given applicants adequate notice of the consequences of such a failure. JSU submits that such notice has been amply given, particularly in light of the need to meet the third channel reservation standard in order to be eligible to submit any application. Clearly, ASDA knew that it was applying for a channel which had been specially reserved but was in the otherwise non-reserved band. The Public Notice announcing the filing window made that fact exceedingly clear, and specifically noted that the Anniston allotment was such a channel. *Media Bureau Announces Filing Window for Vacant FM Allotments Reserved for Noncommercial Educational Use*, Public Notice, 24 FCC Rcd 12621 (MB 2009).

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. Furthermore, the Public Notice announcing the filing window also made it quite clear that compliance with the third reservation standard was an absolute requirement and stated in mandatory language that applicants for channels that has been reserved on the basis of the third channel reservation standard “must provide a first or second NCE service to at least ten percent of the population within the proposed station’s service areas and that population must be at least 2000 persons.” *Media Bureau Announces Filing Window for Vacant FM Allotments Reserved for Noncommercial Educational Use*, Public Notice, 24 FCC Rcd at 12623.

At this point, it is important to consider the context in which the Commission decided it would allow non-reserved channels previously available for commercial use to be reserved specifically for noncommercial educational stations. At that time, the Commission had put in place its auction regime for deciding among mutually exclusive commercial applicants, and it was in the process of determining a method by which it would similarly judge among competing NCE applicants. One of the decisions made was that noncommercial applicants would not be eligible to compete with commercial applicants for non-reserved channels. *Re-examination of the Comparative Standards for Noncommercial Educational Applicants*, 18 FCC Rcd 6691, 6699-6700 (2003). As some measure of benefit, having taken away the prior ability of NCE applicants to apply for unreserved frequencies, the Commission made it somewhat easier to reserve a non-reserved frequency, provided that a showing pursuant to the third channel

reservation standard was made. If that showing were not satisfactorily made, then the channel in question would remain non-reserved, and, as a practical matter would be available for application only by commercial entities.¹ The third channel reservation standard was carried over to the application stage, so that only those applicants that met the standard such that the allotment could continue to be reserved were eligible to apply. *Id.* at 6705. An applicant that did not meet that standard would simply be ineligible.

Thus, the exceedingly basic nature of this requirement is analogous to the question of whether an applicant is a for-profit or a not-for-profit organization. The requirement that NCE licenses be issued only to non-profit organizations is spelled out in the Commission's Rules (*see* 47 C.F.R. Section 73.315(a); Section 73.621(a)), but there was no statement in the Public Notice announcing the filing window that NCE applications submitted by for-profit, i.e. commercial, entities would be dismissed. *See, Media Bureau Announces Filing Window for Vacant FM Allotments Reserved for Noncommercial Educational Use*, Public Notice, 24 FCC Rcd 12621. Counsel for JSU is unaware, however, of any case in which a plainly for-profit commercial entity has been allowed to apply for a reserved channel and then has been permitted to amend its application to discard for-profit commercial status and specify a non-profit entity. Likewise, while the Public Notice announcing the filing window specified that "applicants must specify the exact community of license, channel and class as designated in the Table of Allotments and specified in Attachment A," (*id.* at 12623), it did not specify the penalty for failure to heed this application. Nonetheless, there is little doubt that had an applicant specified a different community, the Commission would have had no trouble in dismissing the errant application in

¹ While the Commission did provide for the ability of NCE applicants to continue to apply for those allotments for which no commercial applicants applied, as a practical matter, with the ability of applicants to select all allotments in a commercial window, there have been no such opportunities.

light of the Public Notice's clear warning. Hence, an explicit statement that applications filed by an ineligible entity will be subject to dismissal does not appear to be the *sine qua non* for actual dismissal of ineligible applicants.

Moreover, the Court of Appeals case cited in the *Reconsideration Letter*, *JEM Broadcasting Co., Inc. v FCC*, 22 F.3d 320, 75 R.R.2d 273 (D.C. Cir. 1994), does not stand for the proposition that a particular form of notice is required to inform basically ineligible applicants that their application may be subject to dismissal. That case involved an applicant which had specified one set of co-ordinates for its proposed transmitter site in its application, exhibits, and request for FAA approval and another set of co-ordinates, with one digit different, on its map of the proposed site. Despite this rather minute difference, the Commission dismissed the application pursuant to its "hard look" policy, and the Court upheld that dismissal. The Court required only that the Commission have given notice of the rules to be applied, not that the notice take a particular form. Thus, the Court stated that, "where the FCC had issued clear rules prescribing the requisites of a complete license application, it was not obliged to hold a hearing before dismissing applications that failed to comply with those rules." *JEM Broadcasting Co., Inc.*, 75 R.R.2d 278, *citing*, *Ranger v. FCC*, 294 F.2d 240 (D.C. Cir. 1961). Here, the Commission had given explicit notice of the third channel reservation standard, not only in the order adopting the standard, but also in its Public Notice announcing the filing window, and in its allotment table rules. *See*, 47 C.F.R. Section 73.202(a)(1).

Furthermore, the Public Notice announcing the availability of the filing window for, *inter alia*, the Anniston allotment specified that "[t]he Commission staff will return applications and amendments not submitted in accordance with the procedures described in this Public Notice." *Media Bureau Announces Filing Window for Vacant FM Allotments Reserved for*

Noncommercial Educational Use, Public Notice, 24 FCC Rcd at 12623. Clearly, the requirement to meet the third channel reservation standard is one of the procedures set forth in the Public Notice.

Moreover, the full Commission has made it quite clear that it views failure to satisfy the third channel reservation threshold standard as a disqualifying defect requiring 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*, 26 FCC Rcd. at 7021 [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 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 7021 Note 59. Thus, it is quite clear that the full Commission has determined that the failure to meet the third channel reservation standard is an incurable defect which may not be overcome by amendment.

Moreover, the full Commission's treatment of applications which it was aware failed to meet the basic, threshold qualification of compliance with the third channel reservation standard has been entirely consistent with finding this failure to be an incurable defect. In the same 2011 order 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 7028. 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 7036.

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 and may not be corrected by an amendment after dismissal.

II. Reconsideration Letter Impermissibly Reverses a Full Commission Decision.

Furthermore, the *Reconsideration Letter's* determination that ASDA might revive its application by filing a corrective amendment after dismissal of its application flies squarely in the face of the considered decision of the Commission noted above that an applicant was not entitled to amend its application to correct a third channel reservation standard deficiency. The Commission's ruling was unequivocal in that regard and did *not* state that a contrary decision might be appropriate in other circumstances. *Id.* at 7021. It was quite straightforward in finding that a deficiency in first and second NCE coverage may not be removed by amendment, and that allowing such amendments would be contrary to public policy. *Id.* Likewise, the Commission was quite clear that compliance with the third channel reservation requirement is a prerequisite for any points evaluation. It is not for the Media Bureau staff to decide that a decision made by the full Commission is too harsh or might not be warranted in certain circumstances; rather, it is only for the full Commission to make adjustments to its otherwise clear determinations. Nor does the Media Bureau have the authority to negate a Commission ruling as to a required prerequisite and simply move on to a points resolution.

III. Section 73.3522(b)(2) Inapplicable

Similarly, the *Reconsideration Letter's* attempt to resort to Section 73.3522(b)(2) of the Commission's Rules is unavailing. The fact is that Section 73.3522(b) (2) 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 it filed its amendment, however, ASDA was not a tentative selectee but a dismissed applicant, which had filed a prior amendment on December 27, 2011, and elected not to further amend its application when its third channel reservation standard deficiency was pointed out. Thus, Section 73.3533(b)(2) was inapplicable. The *Reconsideration Letter* points out that ASDA was not a tentative selectee when it filed its first amendment, and thus has not already used its one opportunity to amend. *Reconsideration Letter* at 3. It also notes that a tentative selectee would not need to seek reinstatement of an application if it had not been dismissed and attempts to gloss over the difference between an application which has been “returned,” as opposed to “dismissed.” Of course, an application which has been either “returned” or “dismissed” would have to be reinstated if it were to be considered. Furthermore, it must be noted that here, ASDA had been removed as a tentative selectee, and another tentative selectee was chosen. If the failure to qualify as a tentative selectee is of significance in one context relating to amendments, it must be equally so in another. Further, ASDA should not have still been treated as if it were a tentative selectee because 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.²

Likewise, Section 73.3564(a)(3) provides no 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

² While the *Reconsideration Letter* notes that it has allowed another dismissed tentative selectee to amend its applications in similar circumstances, a citation to a decision which involves virtually the same set of circumstances, also involves a belated amendment to address third channel reservation standard issues, and is contrary to the language of the rule in question is unavailing.

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.

Moreover, the equities do not in this case favor ASDA. It must be recalled that, 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. 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 must be rejected.

IV. Acceptance of Late Third Channel Reservation Showing Amendments Leads to Abuses.

Moreover, for the Commission to reach any other conclusion would be to adopt a policy which encourages carelessly filed applications and gamesmanship. First of all, potential applicants would be provided with the knowledge that even if they fail to meet the most basic eligibility requirements, they will nonetheless be able to make corrections anyway, and could do so having had the benefit of seeing details of opposing competitors’ applications . Furthermore, it must be remembered that there can be a comparative advantage for the applicant which proposes the largest facility. With the instant ruling, an applicant may feel free to do so, without

regard to the third channel reservation standard. It may hope that this deficiency will be overlooked, as was initially the case with ASDA's application, and in the meantime it can see its competitors' proposals. In any event, such an applicant will rest assured that it may later tailor an amendment to come into compliance with the eligibility requirements in the most advantageous way possible.

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 a change to 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. While the reduced coverage might have been entirely acceptable if it were filed as an initial proposal, that fact does not alter the glaring nature of ASDA's attempt to have it both ways.

Conclusion

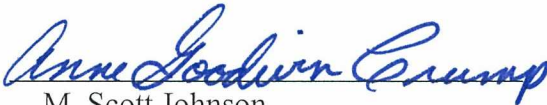
In sum, the Commission has made it entirely clear, with ample prior notice, that satisfaction of the third channel reservation standard is a matter of basic eligibility which must be met initially in order for an applicant to be basically qualified. The full Commission has acted consistently in dismissing applicants that failed to meet that standard. The Media Bureau simply does not have the authority to effectively negate these decisions in the guise of applying other processing rules to allow corrective amendments. Further, if the Commission were to change its

policies to allow such amendments, it would be encouraging slip-shop practices and increased gamesmanship among applicants.

WHEREFORE, the premises considered, JSU respectfully requests that the ASDA application be dismissed, and that the JSU application be reinstated and granted.

Respectfully submitted,

**BOARD OF TRUSTEES OF
JACKSONVILLE STATE UNIVERSITY**

By: 
M. Scott Johnson
Anne Goodwin Crump

FLETCHER, HEALD & HILDRETH, PLC
1300 North 17th Street, 11th Floor
Arlington, Virginia 22209
703-812-0400

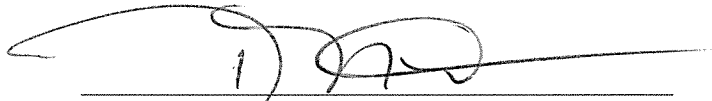
Its Attorneys

June 14, 2013

Certificate of Service

I, Deborah N. Lunt, hereby certify that on this 14th day of June, 2013, I caused a copy of the foregoing "Petition for Reconsideration" to be served via U.S. mail, postage prepaid, upon the following:

Donald E. Martin, P.C.
P.O. Box 8433
Falls Church, VA 22041
Counsel for Anniston Seventh-Day Adventist Church



Deborah N. Lunt