



Federal Communications Commission
Washington, D.C. 20554

October 12, 2007

DA 07-4233

In Reply Refer To:

1800B3-IB/DEB

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The University of Massachusetts, Boston
c/o Peter W. Gutmann, Esq.
Womble Carlyle Sandridge and Rice, PLLC
1401 I Street NW, Suite 700
Washington, DC 20005

Re: NEW(FM), Orleans, MA
Facility ID No. 93704
BPED-19990618MA
MX Group No. 990607
Petition to Deny

Dear Counsel:

We have before us a Petition to Deny (“Petition”)¹ filed by the University of Massachusetts, Boston (“UMASS”) and related pleadings. UMASS contests the Commission’s tentative decision to grant a permit to construct a new noncommercial educational (“NCE”) FM station to Lower Cape Communications, Inc. (“Lower Cape”), as proposed in the Commission’s *Omnibus Order*.² For the reasons set forth below, we deny the Petition and grant the referenced Lower Cape application (the “Application”).

Background. The *Omnibus Order* applied the Commission’s NCE comparative selection criteria³ to seventy-six groups of mutually exclusive NCE FM applications. Group 990607 consisted of UMASS’ and Lower Cape’s conflicting applications for new NCE FM stations at Orleans, Massachusetts. Because UMASS and the Lower Cape proposed to serve the same community, the Commission did not perform a fair distribution analysis⁴ and proceeded directly to a point system analysis. The Commission found the applications to be equal under the point system, and tentatively selected Lower Cape’s application for grant based on a tie-breaker that favors the applicant with the fewer authorizations.⁵

¹ Petition to Deny (May 2, 2007).

² See *Comparative Consideration of 76 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 22 FCC Rcd 6101 (2007) (“*Omnibus Order*”).

³ See 47 C.F.R. §§ 73.7000 – 05.

⁴ See 47 U.S.C. § 307(b); 47 C.F.R. § 73.7002.

⁵ See *Omnibus Order*, 22 FCC Rcd at 6159; 47 C.F.R. § 73.7003(c)(1). Specifically, Lower Cape and UMASS had attributable interests in one and 11 radio interests, respectively.

Petition to Deny. UMASS' petition to deny focuses on the issue of site availability for Lower Cape's proposal. UMASS contends that the installation of another FM station's antenna (WZAI, Brewster, MA) at the approximate height proposed by Lower Cape precludes that applicant from installing an antenna as proposed. UMASS includes a letter from Shively Labs to support this contention. UMASS faults Lower Cape for not reporting the apparent conflict earlier and for not amending its application to resolve the conflict. UMASS argues that such an amendment could not satisfy the "good cause" filing requirement for acceptance. UMASS further complains that Lower Cape declined to modify its proposed antenna height notwithstanding an April 19, 2006, inquiry letter from Commission staff. In light of this situation, UMASS concludes that it has been prejudiced by the continued processing of Lower Cape's application, and that a hearing into the character qualifications of Lower Cape is warranted.

In response, Lower Cape provides a letter from the tower owner stating that WZAI has no exclusive lease for a particular location on the tower, and that Lower Cape could enter into a lease at the proposed antenna location. Lower Cape points out that there may be no conflict with WZAI's operation if it mounts its antenna on a different tower leg than WZAI. Lower Cape argues that the petitioner has not shown that the proposed antenna mounting violates any FCC rule or requirement, and that Shively Labs has not quantified in any measurable way the alleged pattern distortion to WZAI. Lower Cape also states that it will coordinate its initiation of operations with WZAI. Lower Cape concludes that it has always been able to construct the specified facilities, and that UMASS petition must be rejected.

Discussion. We find that the UMASS arguments are without merit. As Lower Cape points out, UMASS has provided no information that would demonstrate that Lower Cape could not mount its antenna as proposed. Indeed, UMASS' own exhibit from Shively Labs supports Lower Cape ("it is physically possible for LCC to mount their antenna exactly as proposed"). As the "newcomer," Lower Cape is responsible for taking steps to ensure that its operation does not disrupt other licensees, but the mere question as to whether it may be required to undertake remedial measures does not bar grant of the construction permit application. Moreover, Lower Cape has amply documented that it has the tower owner's consent to mount its antenna on that tower structure.

The Commission's own rules provide some flexibility in mounting antennas on towers. Section 73.1690(c)(1) permits a permittee to mount an FM antenna up to two meters above or four meters below the authorized value for the height of antenna radiation center, without requiring prior approval from the FCC. UMASS has not shown that Lower Cape's antenna mounting could not fall in this range. Importantly, requests involving greater changes in antenna height are routinely processed as simple minor change applications, without penalty to the permittee.

Lastly, Lower Cape did not receive a fair distribution preference or points for superior technical parameters. UMASS has not alleged or shown that an alternative mounting of the antenna would alter the comparative positions of either applicant with respect to points or tiebreakers.

Ordering Clauses. Accordingly, IT IS ORDERED, That the Petition to Deny filed on May 2, 2007, by the University of Massachusetts, Boston, IS DENIED.

IT IS FURTHER ORDERED, That the application IS GRANTED CONDITIONED UPON its compliance with Section 73.7005 of the Commission's Rules, 47 C.F.R. § 73.7005, which sets forth a four-year holding period for applicants that are awarded permits by use of a point system.

IT IS FURTHER ORDERED, That the mutually exclusive application of the University of Massachusetts, Boston (File No. BNPED-20000118ABS) IS DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Lower Cape Communications, Inc.