



Federal Communications Commission  
Washington, D.C. 20554

January 25, 2008

**DA 08-162**

*In Reply Refer to:*

1800B3-ALV

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Eagle's Nest Fellowship Church  
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In Re: Eagle's Nest Fellowship Church  
NEW NCE FM, Harrington, DE  
Facility ID No. 90270  
BPED-19980320MD

Application for NCE FM Construction Permit  
MX Group No. 970929

Dear Applicants:

We have before us the above-captioned application of Eagle's Nest Fellowship Church ("ENFC") for a new noncommercial educational ("NCE") FM station to serve Harrington, Delaware (the "Application"). We also have before us a Petition to Deny (the "Petition") filed by Positive Alternative Radio, Inc. ("PAR") and a one-page letter opposing the Application (the "Informal Objection") filed by WXXY Broadcasting, Inc. ("WXXY").<sup>1</sup> For the reasons set forth below, we deny the Petition and the Informal Objection and grant the Application.

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<sup>1</sup> See July 25, 2005, PAR Petition to Deny and October 12, 2005, WXXY Informal Objection. We also have before us the following: (1) ENFC's August 8, 2005, Consent Motion of Extension of Time; (2) ENFC's August 22, 2005, Opposition to Petition to Deny; (3) PAR's August 24, 2005, Reply to Opposition to Petition to Deny; (4) ENFC's September 14, 2005, Motion for Leave to File Response and Response to Reply; (5) PAR's September 20, 2005, Petition to Deny Amended Application; (6) ENFC's October 3, 2005, Consent Motion for Extension of Time to File Opposition; (7) ENFC's October 11, 2005, Opposition to Petition to Deny Amended Application; (8) ENFC's November 2, 2005, Opposition to WXXY Objection; and (9) ENFC's February 3, 2006, Supplement to Opposition to Petition to Deny.

**Background.** ENFC and PAR were among four mutually exclusive applicants for a new NCE FM station construction permit.<sup>2</sup> Pursuant to established procedures,<sup>3</sup> the Media Bureau (the “Bureau”) determined that ENFC was entitled to a decisive preference under Section 307(b) of the Communications Act of 1934, as amended,<sup>4</sup> and identified ENFC as the tentative selectee in NCE MX Group 970929.<sup>5</sup> ENFC subsequently filed a minor amendment to its Application, proposing to lower the center of radiation of the station’s antenna and increase the effective radiated power (“ERP”).<sup>6</sup> PAR objects to the grant of the Application, averring that: (1) ENFC has undergone a major change in ownership since its application was filed in 1998, and (2) ENFC’s proposed transmitter site is unavailable. WXXY asserts that the Application must be dismissed because it will cause “catastrophic interference” to its co-channel NCE Station WXXY-FM, Port Republic, New Jersey.

**Discussion. *Major Change in Ownership.*** PAR asserts that: (1) ENFC has undergone an impermissible major change of ownership, requiring the “immediate and irrevocable” dismissal of the Application, and (2) ENFC violated Section 1.65 of the Commission’s Rules (the “Rules”)<sup>7</sup> by failing to apprise the Commission of its ownership changes.<sup>8</sup> PAR bases its allegation on the fact that ENFC disclosed three officers and directors in its initial application, filed March 20, 1998, whereas in ENFC’s 2003 and 2004 annual Franchise Tax Reports only one of the original officers is listed.<sup>9</sup> Accordingly, PAR concludes that two of ENFC’s three original officers have left the organization, which constitutes a 66 percent major change in ownership. ENFC, however, explains that the annual Franchise Tax Reports, upon which PAR bases its accusation, only have space to list two of its three officers, and declares under penalty of perjury that only one of its three original officers has been replaced since 1998.<sup>10</sup> Accordingly, we find that PAR’s allegation of a major change in ownership is erroneous.

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<sup>2</sup> Group 970929 consisted of the applications filed by ENFC, PAR, Mary V. Harris Foundation (“MVHF”), and American Family Association (“AFA”). ENFC, MVHF, and AFA proposed service to Harrington, Delaware; PAR proposed service to Denton, Maryland.

<sup>3</sup> See 47 C.F.R. § 73.7002; see also *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000), *partially reversed on other grounds*, *NPR v. FCC*, 254 F.3d 226 (D.C. Cir. 2001) (delegating authority to the Bureau to make 307(b) determinations in NCE cases) (the “NCE Order”).

<sup>4</sup> 47 U.S.C. § 307(b).

<sup>5</sup> See Letter to Patrick J. Vaughn, Esq., et al., 20 FCC Rcd 11131 (MB 2007). The Bureau concluded that ENFC’s proposal would provide a first or second local service to 184,859 people, and none of the other applicants could make an equivalent or better showing.

<sup>6</sup> See Amendment to FCC File No. BPED-19980320MD, filed September 7, 2005. Specifically, ENFC proposes to lower the center of radiation of its antenna from 97.5 meters above ground level to 90.7 meters and increase the ERP from 22 kW to 25 kW.

<sup>7</sup> See 47 C.F.R. § 1.65.

<sup>8</sup> PAR Petition at 2.

<sup>9</sup> ENFC listed three officers in its Application: William T. Sammons, Jr., Mary Jane Sammons, and Patrick A. Betts. ENFC listed two officers in its 2003 and 2004 annual Franchise Tax Reports: William Sammons and Hall Reed, Jr.

<sup>10</sup> ENFC submitted 2002 letters from its Secretary confirming the resignation of just one officer, Patrick Betts, and the appointment of Hall D. Reed, Jr. ENFC states that its current officers are: William T. Sammons, Jr., Mary Jane Sammons, and Hall D. Reed, Jr.

Moreover, even assuming ENFC had undergone a major change in its ownership structure, such a change would not necessarily be fatal to the Application, as PAR asserts. Pursuant to Section 73.3573 of the Rules, a fifty percent change in the governing board of an NCE applicant is generally considered a “major change” and not permissible outside a filing window.<sup>11</sup> In the *Omnibus Order*, however, the Commission waived Section 73.3573, and directed the staff to grant waivers, for NCE applicants that experienced gradual ownership changes where those changes were not an outgrowth of a party’s desire to gain control over the NCE station application.<sup>12</sup>

Finally, pursuant to Section 1.65 of the Rules, all Commission applicants are responsible for the continuing accuracy of their applications and, therefore, must amend pending applications whenever the information furnished is no longer substantially accurate and complete.<sup>13</sup> While ENFC concedes that it inadvertently neglected to amend its Application to report its ownership change, we find that this minor omission is not material to its basic qualifications.<sup>14</sup> Specifically, Section 1.65 violations are potentially disqualifying only if an applicant has an intent to conceal information or if omissions of reportable information are so numerous and serious as to undermine the applicant’s basic qualifications.<sup>15</sup> PAR has submitted no evidence that ENFC intentionally concealed its ownership change or had any motive to do so. Moreover, as discussed above, ENFC has retained no fewer than two of its original officers, *i.e.*, over fifty percent, and thus there was no potential “major” change in ownership to report. Further, we note that on August 29, 2005, ENFC filed a minor amendment to its Application to update its ownership information and thus, has remedied any deficiencies.

*Reasonable Site Assurance.* In its Application ENFC proposes to install an antenna with a center of radiation of 97.5 meters above ground at a tower site owned by Delmarva Power & Light. PAR asserts that ENFC never obtained reasonable assurance of the availability of the site specified in the Application, and accordingly, the Application must be denied. In support of its allegation, PAR states that its President inquired about the availability of space at 97.5 meters on the tower and received an email from one of the site managers indicating that, although space was available at other heights, no tower space was available at that particular height.<sup>16</sup>

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<sup>11</sup> See 47 C.F.R. § 73.3573.

<sup>12</sup> 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*”).

<sup>13</sup> 47 C.F.R. § 1.65.

<sup>14</sup> NCE applicants must report “substantial and significant” changes, including changes with the potential to reduce their comparative positions under the point system, and information generally must be reported within 30 days of the change. *Id.* However, because action on NCE applications was delayed for a considerable period due to litigation, the Bureau anticipated by late 2004 that many NCE applications were no longer up-to-date. The Bureau reminded NCE applicants of their Section 1.65 obligations, and set a deadline of January 21, 2005, for NCE applicants to update their applications electronically. *Section 1.65 Amendment Deadline Established for Noncommercial Educational FM and FM Translator Station Applicants*, Public Notice, 19 FCC Rcd 24740 (2004). ENFC did not update the Application.

<sup>15</sup> See *David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253 (D.C. Cir. 1991) (citing *Valley Broadcasting Co.*, Decision, 4 FCC Rcd 2611, 2618 (Rev. Bd. 1989)). Intentional deceit reflects upon an applicant’s basic qualifications, and “the fact of concealment may be more significant than the facts concealed.” See *Character Qualifications*, Report, Order, and Policy Statement, 102 FCC 2d 1179, 1210, n.77 (1986) (quoting *FCC v. WOKO, Inc.*, 329 U.S. 223, 227 (1946)). Intention can be inferred from motive. See, e.g., *RKO General, Inc.*, Decision, 4 FCC Rcd 4679, 4684 (Rev. Bd. 1989).

<sup>16</sup> See Exhibit 4 to PAR Petition.

An applicant seeking a new broadcast facility must, in good faith, possess “reasonable assurance” of a transmitter site at the time it files its application.<sup>17</sup> The specification of a transmitter site in an application is an implied representation that the applicant has obtained reasonable assurance that the site will be available.<sup>18</sup> While some latitude is afforded such “reasonable assurance,” there must be, at a minimum, a “meeting of the minds resulting in some firm understanding as to the site’s availability.”<sup>19</sup> We find that ENFC has satisfied this requirement.

Specifically, ENFC declares under penalty of perjury that it contacted the owner of its proposed tower site and confirmed the site’s availability prior to filing its Application.<sup>20</sup> In support of its affirmation, ENFC has submitted a letter from the tower site’s project coordinator verifying that the site is available.<sup>21</sup> Moreover, although not a prerequisite to site assurance, ENFC also submitted a draft tower lease agreement it received from the site owner, further confirming the site’s availability.<sup>22</sup>

Finally, PAR asserts that ENFC’s September 8, 2005, minor amendment proposing to operate at a lower tower height at its original transmitting site must be denied because ENFC never had a legitimate site.<sup>23</sup> It is true, as PAR emphasizes, that “an applicant will not be permitted to amend where it did not

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<sup>17</sup> See, e.g., *Port Huron Family Radio, Inc.*, Decision, 66 RR 2d 545(1989); *Radio Delaware, Inc.*, Memorandum Opinion and Order, 67 RR 2d 358 (1989).

<sup>18</sup> See, e.g., *William F. Wallace and Anne K. Wallace*, Memorandum Opinion and Order, 49 FCC 2d 1424, 1427 (1974); *South Florida Broadcasting Co.*, Memorandum Opinion and Order, 99 FCC 2d 840, 842 (1984) (“*South Florida*”).

<sup>19</sup> *Genesee Communications, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 3595 (1988). The applicant need not own the proposed site and may even work out the final details for a lease sometime in the future. The “reasonable assurance” standard is satisfied by “[s]ome clear indication from the landowner that he is amenable to entering into a future arrangement with the applicant for use of the property as its transmitter site, on terms to be negotiated....” *Elijah Broadcasting Corp.*, Memorandum Opinion and Order, 5 FCC Rcd 5350, 5351 (1990).

<sup>20</sup> ENFC surmises that PAR may have been told that space was not available on the tower because it had been previously reserved for ENFC.

<sup>21</sup> See ENFC Opposition at Exhibit 2.

<sup>22</sup> Although ENFC explains that it obtained reasonable site assurance prior to filing its Application, it also argues that PAR’s Petition is moot because it is “no longer a requirement that an applicant have reasonable assurance of an available site.” ENFC “Motion for Leave to File Response and Response to Reply” at 2. ENFC’s supposition is erroneous. The Commission has consistently held that it is “elementary that a prospective construction permittee must have, if little else, an antenna site, a technical keystone of the broadcasting operation ... just as elementary in FCC law is the proposition that, when an application is filed, the specification of a site is an implied representation that an applicant has obtained reasonable assurance that the site will be available.” *South Florida*, *supra* n. 18, 99 FCC 2d at 842. No exception to this requirement has been carved out for NCE applicants. Moreover, although the Commission repealed the requirement that commercial broadcast applicants certify the availability of the transmitter site when it adopted its competitive bidding procedures, the Commission’s basic “reasonable assurance” standard remains unaltered. See *Implementation of Section 309(j) of the Communications Act*, First Report and Order, 13 FCC Rcd 15920 (1998); see also Instructions to FCC Form 301 at 2 (“the Commission’s substantive site availability requirements are unchanged”).

<sup>23</sup> See Amendment to FCC File No. BPED-19980320MD. ENFC proposes to lower the center of radiation of its antenna from 97.5 meters above ground level to 90.7 meters.

have the requisite reasonable assurance to begin with....”<sup>24</sup> However, because we find that ENFC, in good faith, secured site assurance prior to filing its Application, there is no impediment to its subsequent minor amendment. Accordingly, we find that PAR’s argument is without merit.<sup>25</sup>

*Interference.* Finally, WXXY alleges that ENFC’s Application, as amended, will cause “catastrophic interference” to co-channel Station WXXY-FM. WXXY, however, submits no technical evidence to support its claim. ENFC, in contrast, has adequately rebutted WXXY’s conclusory charge by demonstrating in its Application that its proposal is compliant with the FCC’s technical rules, including the contour overlap restrictions.<sup>26</sup> Moreover, the staff has evaluated the ENFC Application and found it to be fully compliant with the Commission’s technical rules. Accordingly, we reject WXXY’s unsupported interference allegation.

Accordingly, IT IS ORDERED, That the Petition to Deny, filed on July 25, 2005, by Positive Alternative Radio, Inc. and the Informal Objection, filed on September 30, 2005, by WXXY Broadcasting, Inc. ARE DENIED.

IT IS FURTHER ORDERED, That the application of Eagle’s Nest Fellowship Church (File No. BPED-19980320MD) IS GRANTED CONDITIONED UPON its compliance with Section 73.7002(c) of the Commission’s Rules, 47 C.F.R. § 73.7002(c), which sets forth a four-year holding period for applicants that are awarded permits based on a dispositive Section 307(b) preference.

IT IS FURTHER ORDERED, That the mutually exclusive applications of Positive Alternative Radio, Inc. (File No. BPED-19980320MP), American Family Association (File No. BPED-19970915MB), and Mary V. Harris Foundation (File No. BPED-19980320MM) ARE DISMISSED.

Sincerely,

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

cc: Vincent Klepac  
Patrick J. Vaughn, Esq.  
Donald E. Martin, Esq.

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<sup>24</sup> See, *Classic Vision, Inc.*, Memorandum Opinion and Order, 104 FCC 2d 1271, 1273 (1986), *review denied*, 2 FCC Rcd 2376 (1987), *citing South Florida, supra* n. 18, 99 FCC 2d at 845 n.12; *see also REM Malloy Broadcasting*, Memorandum Opinion and Order, 6 FCC Rcd 5843 (1991); *Family Broadcasting, Inc.*, Initial Decision, 10 FCC Rcd 3174 (1995).

<sup>25</sup> We note that ENFC has demonstrated that its proposed amendment complies with Section 73.7002(c) of the Rules, which provides that for a period of four years of on-air operations, an applicant receiving a decisive 307(b) preference must “construct and operate technical facilities substantially as proposed and shall not downgrade service to the area on which the preference was based.” 47 C.F.R. § 73.7002(c); *see also NCE Order, supra* n. 3, 15 FCC Rcd at 7397, and Amendment to FCC File No. BPED-19980320MD at Exhibit 1 (ENFC explains that its amendment will not result in any loss of service area or population).

<sup>26</sup> See 47 C.F.R. § 73.509. *See also* Amendment to FCC File No. BPED-19980320MD at Exhibit 15. ENFC demonstrates that its proposal will result in no prohibited overlap with WXXY-FM.