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In Reply Refer to:

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In re: **New NCE-FM, Mount Forest, MI**
Facility ID No. 175350
File No. BNPED-20071019AIK

Petition to Deny

Gentlemen:

We have before us: (1) the referenced application of Smile FM (“Smile”) for a new noncommercial educational (“NCE”) FM station at Mount Forest, Michigan (the “Smile Application”); and (2) a Petition to Deny the Smile Application (the “Petition”),¹ filed on September 22, 2008, by Midland Seventh-day Adventist Church (“Midland”), an applicant for a new NCE FM station at Midland, Michigan (the “Midland Application”).² The Smile and Midland Applications, which were mutually exclusive, were designated as part of the NCE MX Group 125 in the Commission’s August 20, 2008, *Comparative Consideration Order*,³ with the Smile Application chosen as the tentative selectee therein. For the reasons set forth below, we deny the Petition and grant the Smile Application.

Background. In the *Comparative Consideration Order*, the Media Bureau (the “Bureau”), applied NCE comparative selection criteria⁴ to twelve groups of mutually exclusive NCE FM applications and tentatively selected one winner in each group. NCE MX Group No. 125 consisted of four applications, including the Smile and Midland Applications; each application proposed a different

¹ In addition, the parties filed the following pleadings: on September 25, 2008, Midland filed an Erratum to Petition to Deny; on October 7, 2008, Smile filed an Opposition to Petition to Deny (“Opposition”); and on October 20, 2008, Midland filed a Reply to Opposition to Petition to Deny (“Reply”).

² File No. BNPED-20071022AWS.

³ See *Comparative Consideration of 12 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 23 FCC Rcd 12721 (MB 2008) (“*Comparative Consideration Order*”).

⁴ See 47 C.F.R. §§ 73.7000 – 05.

Michigan community.⁵ Of these applications, only Smile claimed that it was eligible for a fair distribution preference.⁶ Accordingly, the other three applications, including the Midland Application, were eliminated,⁷ and Smile was named the tentative selectee in NCE MX Group 125.⁸ We then accepted the Smile Application for filing and announced a 30-day period for filing petitions to deny that application.⁹

Midland timely filed the Petition on September 22, 2008,¹⁰ arguing that: 1) Mount Forest, Michigan, Smile's proposed community of license, is not a licensable community because it does not possess the indicia of a community; and 2) the Smile Application proposed directional antenna exceeds the radiation pattern limits set forth in Section 73.316(b)¹¹ of the Commission's Rules (the "Rules"). Therefore, Midland asserts, the Smile Application should be denied and Commission staff should process the remaining NCE MX Group 125 applicants for possible grant.

In its Opposition, Smile contends that Midland's objections are meritless. In particular, Smile argues that Mount Forest is a community with defined borders, a significant population, and a local government, a fire department and a school. Additionally, Smile asserts that its proposed directional antenna does not violate the Rules as the Section 73.316(b) restriction only applies when short-spaced stations are involved.

Discussion. Pursuant to the Section 309(d) of the Communications Act of 1934, as amended (the "Act"), a petition to deny must provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with Section 309(a).¹²

Licensable Community. Section 307(b) of the Act requires the Commission to "make [the] distribution of licenses . . . among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service."¹³ A locale that is incorporated or listed in the U. S. Census is

⁵ The two other applicants were: Saidnewsfoundation, which proposed to serve Pinconning, Michigan; and Partnership Ministries, Inc. d/b/a Passion Communications, which proposed to serve Shields, Michigan.

⁶ *Id.* See also Smile Application, Questions III(1), III(2), and associated exhibits. Smile's 60 dBu contour encompasses 23,279 people, with first NCE service to 3,237 and second NCE service to 6,762 for an aggregated first and second NCE service of 9,999. Thus, it would provide combined first or second NCE service to at least ten percent of the population within its 60 dBu contour and to more than 2,000 people. See also 47 C.F.R. § 73.7004.

⁷ At each stage of the Section 307(b) analysis, any applicant that is comparatively disfavored in terms of eligibility or service totals is eliminated. The process ends when the Bureau determines that one applicant is entitled to a preference or that none of the remaining applicants can be selected or eliminated based on a Section 307(b) preference. In the latter case, all remaining applicants proceed to a point system analysis.

⁸ *Comparative Consideration Order*, 23 FCC Rcd at 12725.

⁹ *Id.* at 12721, 12725.

¹⁰ The Petition was filed on the first business day after the thirty day period expired as the thirtieth day fell on a non-business day.

¹¹ 47 C.F.R. § 73.316(b).

¹² See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff'd sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *rehearing denied* (Sept. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (petitions to deny must contain adequate and specific factual allegations sufficient to warrant the relief requested).

¹³ 47 U.S.C. § 307(b).

presumptively a licensable community.¹⁴ When a locale meets neither of these criteria, the "key ingredient in determining the existence of a community is the presence of . . . [a geographically] identifiable population grouping."¹⁵ The principal test for this finding is whether the location's "residents function as and conceive of themselves as a community around which their interests coalesce."¹⁶ This may be proven by direct testimony of residents of the locality and by "indicia of community."¹⁷ Such indicia include separate municipal services and institutions, or significant political, commercial, social and religious organizations serving the residents. Mere geographic location is insufficient to establish community status.¹⁸ The Commission will weigh all of these factors in determining whether a particular locale is a licensable community.¹⁹

Midland argues that Mount Forest, Michigan, is not a licensable community because "it is not incorporated, is not identified by the Census Bureau as a Census Designated Place, has no established boundaries, has no post office or other local governmental services and is generally in decline."²⁰ Midland notes that the *Rand McNally Road Atlas*²¹ shows Mount Forest as a small geographic area. In addition, Midland states that Wikipedia identifies Mount Forest as "an unincorporated community in the township [Mount Forest township, Bay County, Michigan] at 43 5314 N 840651 W."²² Furthermore, in a declaration, Midland board member Norman Moll states:

On October 15, 2008, fellow-Church Board member Reid Tait and I visited the unincorporated area known as Mount Forest, Michigan

As shown on [a yahoo] map, Mount Forest lies along a road named Main Street, stretching for about 0.5 mile north from the intersection with West Mt. Forest Road. The area is rural in nature, sparsely populated and has no defined boundaries. I observed not more than approximately 15 residences throughout the Mount Forest are. Upon a thorough review of the entire area, I observed no presently active commercial, religious, social or governmental establishments in Mount Forest²³

Midland acknowledges "that there is a governmental subdivision in Bay County, Michigan, known as Mount Forest Township. [However,] Smile obviously did not intend to designate the Township as its community of license because the word 'Township' is absent from the designation."²⁴

¹⁴ See *Matagorda, Texas*, Report and Order, 21 FCC Rcd 1736 (MB 2006).

¹⁵ *Fortuna Foothills and Wellton, Arizona*, Memorandum Opinion and Order, 19 FCC Rcd 4619, 4620 (MB 2004).

¹⁶ *Id.*

¹⁷ *Central Florida Educational Foundation, Inc.*, Letter, 23 FCC Rcd 1695, 1699 (MB 2008).

¹⁸ See, e.g., *Beacon Broadcasting*, Decision, 104 FCC 2d 808 (Rev. Bd. 1986), *modified*, 2 FCC Rcd 3469, *aff'd sub nom. New South Broadcasting Corp. v. FCC*, 879 F.2d 867 (D.C. Cir. 1989) (specified location must be an identifiable population grouping, separate and apart from all others, and the geographic boundaries of the location must not enclose or contain areas or populations more logically identified or associated with some other location); see also *Hannibal, Ohio*, Report and Order, 6 FCC Rcd 2144 (MMB 1991).

¹⁹ See *Willows and Dunnigan, California*, Report and Order, 10 FCC Rcd 11522, 11523 (MMB 1995).

²⁰ Reply at 4.

²¹ *Id.*, Exhibit 1.

²² *Id.*, Exhibit 2.

²³ *Id.*, Exhibit 3 at 1, Declaration of Norman Moll (dated Oct. 20, 2008).

²⁴ Petition at 2, note 3.

Smile contends that Mount Forest is qualified to be a community of license and that Midland is merely arguing over “semantics.” In particular, Smile notes:

The official census reference map (attached) bears a label of “Mount Forest.” Similarly, the USGS [United States Geological Survey map] (attached) also bears the word “Mount Forest” and not “Mount Forest Township.” The American Factfinder website also does not capitalize the word “township.” This indicates [that] the word “township” is not part of the official name, but rather a supplemental indicator.²⁵

Moreover, Smile contends, Mount Forest possesses significant indicia of a community. Specifically, Smile observes, Mount Forest has defined borders, is recognized by the Census Bureau and, according to the 2000 US Census, has a population of 1405 persons.²⁶ In addition, Smile states, “it has several regulatory boards and inspectors comprised of at least 15 persons, [a] fire hall; . . . [an] operational elementary school that bears the same name with 196 students, and more than 25 businesses.”²⁷

We find that the Smile Application proposes to serve a licensable community. The US Census Bureau identifies Mount Forest as Mount Forest township, Bay County, Michigan.²⁸ We agree with Smile that the US Census Bureau’s identification of the area as “Mount Forest township” indicates that township is a descriptive term for the location. Additionally, a simple search using the terms “Mount Forest” in the Census Bureau’s Factfinder database links to Mount Forest township. We reject Midland’s contention that “there is nothing in Smile’s application to lead the reader to conclude that Smile intended its community of license to be the Township.”²⁹ Our independent engineering review reveals that the service area of Smile’s proposed station covers the whole of Mount Forest township. On these facts, we find that Smile’s proposed community of license, Mount Forest, consists of the entirety of Mount Forest township and therefore, constitutes a licensable community.

Directional Antenna. On October 13, 2009, Smile filed an engineering amendment which modified its directional antenna proposal and eliminated any potential issue involving Section 73.316(b)(2).³⁰ Therefore, Midland’s argument regarding Section 73.316(b)(2) of the Rules is now moot and warrants no further consideration.

Conclusions/Actions. We have evaluated the Smile Application and find that grant of the Application will further the public interest, convenience, and necessity.³¹

²⁵ Opposition at 2, note 2.

²⁶ *Id.* at 2.

²⁷ *Id.*

²⁸ <http://factfinder.census.gov>

²⁹ Reply at 1-2.

³⁰ Smile explained that the amendment “was filed because Station WTWS(FM), [Facility ID No. 15563] has completed its city of license change to Houghton Lake, MI and [Smile] no longer needs to protect the old facility.” Exhibit 1, Smile Application.

³¹ Midland also alleged that Smile made false certifications and/or engaged in an unauthorized transfer of control regarding Superior Communications, Inc., licensee of Station WLGH, Leroy Township, Michigan, Facility ID 78460, and Station WTAC, Burton, Michigan, Facility ID. 88040. Smile responded that it was the same entity as Superior Communications, Inc., but that it merely changed its corporate name without changing its underlying corporate structure and ownership. Midland did not refute Smile’s explanation in its Reply. Moreover, the

Accordingly, for the reasons set forth above, IT IS ORDERED, that the September 22, 2008, Petition to Deny filed by Midland Seventh-day Adventist Church IS DENIED.

IT IS FURTHER ORDERED, that the Application filed by Smile-FM (File No. BNPED-20071019AIK) for a construction permit for a new NCE FM station in Mount Forest, Michigan IS HEREBY GRANTED.³²

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

Commission's database lists both stations as licensed to Smile. Therefore, we find Midland's accusations without merit.

³² We remind Smile of the importance of maintaining complete, accurate and current ownership information with the Commission. Accordingly, Smile is directed to promptly take all necessary and appropriate steps to update the Commission's records to reflect the actual name of the entities through which it holds or files applications for broadcast authorizations.