



**Federal Communications Commission
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**In re: NCE October 2007 Window
NCE MX Group 7**

New NCE(FM), McIntosh, Alabama
Facility ID No. 171610
TBTA Ministries
File No. BNPED-20071015ABX

Petition to Deny

New NCE(FM), Mount Vernon, Alabama
Facility ID No. 175762
Archangel Holy Family Communications
File No. BNPED-20071022BPM

Petition for Reconsideration

Gentlemen:

We have before us an application filed by TBTA Ministries (“TBTA”) for a new noncommercial educational (“NCE”) FM station on Channel 210 at McIntosh, Alabama (“TBTA Application”). We also have before us a Petition to Deny the TBTA Application (“Archangel Petition to Deny”) filed by Archangel Communications (“Archangel”).¹ Finally, we have before us a Petition for Reconsideration filed by Archangel on June 20, 2010 (“Archangel Petition for Reconsideration”), which challenges our dismissal of its application (“Archangel Application”) for a new NCE FM station on Channel 210 at Mount Vernon, Alabama, as unacceptable for filing and seeks reinstatement of the Archangel Application *nunc pro tunc*. For the reasons set forth below, we: (1) grant the Archangel Petition for Reconsideration and reinstate the Archangel Application *nunc pro tunc*, (2) grant in part and deny in part the Archangel Petition to Deny, and (3) after determining that neither Archangel nor TBTA are entitled to a dispositive fair distribution preference pursuant to Section 307(b) of the Communications Act of 1934, as amended (“Act”), refer the Archangel and TBTA Applications to the Commission for a point hearing.

¹ TBTA filed an Opposition (“TBTA Opposition”) to the Archangel Petition to Deny on August 11, 2008.

Background. Archangel and TBTA submitted the above-captioned applications during a filing window for NCE FM applications in October 2007. On March 7, 2008, the Media Bureau issued a public notice that, among other things, identified the Archangel and TBTA Applications as the only two applicants in NCE MX Group 7.² Because Archangel and TBTA propose to serve different communities in Alabama, the Bureau performed a threshold fair distribution analysis pursuant to Section 307(b) of the Act. The Bureau found that TBTA proposed to provide a first NCE service to at least 5,000 people more than Archangel. Accordingly, on June 30, 2008, the Bureau awarded TBTA a dispositive fair distribution preference and designated TBTA the tentative selectee for NCE MX Group 7.³ The Bureau's tentative selection of TBTA over Archangel triggered a 30-day period for filing of petitions to deny the TBTA Application.

Archangel filed a Petition to Deny the TBTA Application on July 30, 2008. In its Petition, Archangel alleges that the Bureau should not have awarded TBTA a dispositive fair distribution preference because "the numbers are close enough that differences in software and databases employed by [TBTA's and Archangel's] consulting engineers can easily account for the gap."⁴ According to Archangel, "[w]here a facial examination of applications produces a difference that only barely exceeds the 5,000 threshold, additional scrutiny is required to be certain that the comparison is 'apples to apples, and oranges to oranges.'"⁵ Archangel submits an engineering exhibit that analyzes both its and TBTA's proposed facilities "using identical software and relying on identical population databases" and purports to show that the difference in first NCE service populations is not sufficient to justify the fair distribution preference awarded to TBTA.⁶ Based on these service totals, Archangel argues that the Bureau should have found that neither Archangel nor TBTA was entitled to a dispositive fair distribution preference and should have proceeded with a point hearing on the two applications.⁷ According to Archangel, it would have prevailed in the point hearing.⁸

TBTA filed an Opposition to the Archangel Petition on August 11, 2008. TBTA asserts that it is entitled to a dispositive fair distribution preference and submits an engineering exhibit that "was completed using the same software and the same population database" to support its claim.⁹

Prior to the Bureau's designation of TBTA as the tentative selectee, on December 6, 2007, the American Family Association, Inc. ("AFA") filed a Petition to Deny the Archangel Application ("AFA Petition"). The AFA Petition alleged that the Archangel Application violated Section 73.509(a) of the Commission's Rules ("Rules").¹⁰ Specifically, AFA asserted that the Application involved a prohibited overlap with the signal of one of its NCE stations, WZKM-FM, Waynesboro, Alabama. We confirmed the existence of this prohibited contour overlap through an independent review. Accordingly, on May 20,

² See *Media Bureau Identifies Groups of Mutually Exclusive Applications*, Public Notice, 23 FCC Red 3914 (MB 2008).

³ *Threshold Fair Distribution Analysis of 32 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 23 FCC Red 10213, 10215-16 (MB 2008) ("*Fair Distribution Order*").

⁴ Archangel Petition to Deny at 3.

⁵ *Id.*

⁶ *Id.* at 4.

⁷ *Id.* at 1, 5.

⁸ *Id.*

⁹ TBTA Opposition at 3.

¹⁰ 47 C.F.R. § 73.509(a).

2010, we granted the unopposed AFA Petition and dismissed the Archangel Application as unacceptable for filing.¹¹

Archangel timely sought reconsideration, arguing that its Application in fact complies with Section 73.509(a), submitting additional technical information to support this argument and seeking reinstatement of its Application *nunc pro tunc*.

Discussion. Archangel Petition for Reconsideration. We previously dismissed the Archangel Application as unacceptable for filing, finding it failed to comply with Section 73.509(a) of the Rules. Archangel seeks reconsideration of this action and submits technical information that it asserts demonstrates that its application complies with the provisions of Section 73.509(a). Upon review of the 3 second terrain data submitted by Archangel in its Petition for Reconsideration,¹² we find that Archangel has demonstrated that its Application complies with Section 73.509(a). Accordingly, we grant the Archangel Petition for Reconsideration and reinstate its Application *nunc pro tunc*.

Archangel Petition to Deny. Archangel contests the Bureau's finding that TBTA is entitled to a dispositive fair distribution preference.¹³ Archangel argues that the Bureau should have found that neither it nor TBTA were entitled to a dispositive fair distribution preference given that the first service population totals "are close enough that differences in software and databases employed by the consulting engineers can easily account for the gap."¹⁴ As Archangel notes, the Commission awards a dispositive fair distribution preference to an applicant only if, among other things, that applicant proposes to provide new first (or first and second) service to at least 5,000 more persons than any other applicant.¹⁵

The service totals calculated by Archangel for its and the TBTA Application varied from those calculated by TBTA for its and the Archangel Application. The totals differ sufficiently that the results of our fair distribution analysis also would vary depending upon whether we accepted Archangel's or TBTA's numbers. If we accepted TBTA's numbers,¹⁶ we would find TBTA entitled to a dispositive fair

¹¹ *Letter to Stuart W. Nolan, Jr., Esq. and Patrick J. Vaughn, Esq. from James Bradshaw, Deputy Chief, Audio Division, Media Bureau* (dated May 20, 2010); see 47 C.F.R. § 73.3566.

¹² The 3 second terrain data submitted by Archangel is more granular than the 30 second terrain data that we originally reviewed.

¹³ Archangel also asserts that TBTA misrepresented the number of pending applications for broadcast authorizations in its submissions to the Commission. Archangel Petition to Deny at 3. According to Archangel, TBTA improperly certified in its Application that it had no other pending applications for broadcast authorizations, when in fact it had filed "no fewer than eight" applications during the October 2007 filing window. *Id.* TBTA disputes this, stating that its failure to report the other applications it filed during the October 2007 was a "clerical error," not a misrepresentation. TBTA Opposition at 2-3. We do not find credible the claim that TBTA engaged in misrepresentation regarding a matter which could be easily and definitively resolved on the basis of public Commission records. As we have in similar situations regarding other applicants in this window, we conclude that TBTA made an error rather than an intentional misrepresentation regarding its pending application certification. See *KM Radio of St. Johns, L.L.C.*, Memorandum Opinion and Order, 19 FCC Rcd 5847, 5850 (2004) (misrepresentation not inferred from error); *Michael Scott Clem*, Letter, 22 FCC Rcd 12986 (MB 2007).

¹⁴ Archangel Petition at 3.

¹⁵ Archangel Petition at 3. See also *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386, 7397-98 (2000) ("*2000 NCE Comparative Standards Order*").

¹⁶ TBTA calculated that it would provide first NCE service to 8,788 people and combined first and second NCE service to 11,657 people; and Archangel would provide first NCE service to 3,005 people and combined first and second NCE service to 11,463 people. TBTA Opposition, Engineer Declaration.

distribution preference. However, if we used Archangel's numbers,¹⁷ we would find neither Archangel nor TBTA entitled to a dispositive fair distribution preference and would proceed to a point hearing.

In these circumstances, where we are presented with two sets of calculations both of which appear to comply with our requirements but would result in two different outcomes, we believe the best course of action is to perform our own independent calculations and to rely upon those in determining whether either Archangel or TBTA is entitled to a dispositive fair distribution preference.¹⁸ We calculate that TBTA will provide a first NCE service to 7,495 people and Archangel will provide a first NCE service to 3,026 people. The first service totals for the TBTA and Archangel Applications are comparable because they involve a difference of fewer than 5,000 people.¹⁹ Accordingly, we calculate the aggregated first and second NCE service totals for the TBTA and Archangel Applications – 10,357 and 7,137 people, respectively.²⁰ Because these totals also are comparable,²¹ TBTA and Archangel must proceed to a point hearing. However, the Commission, not the Bureau, must conduct the point hearing.²² Thus, we are referring the Archangel and TBTA Applications to the Commission for such hearing.

Conclusion/Actions. ACCORDINGLY, IT IS ORDERED that the Petition for Reconsideration filed by Archangel Communications on June 21, 2010, IS GRANTED and the application for a new noncommercial educational FM station on Channel 210 at Mount Vernon, Alabama (File No. BNPED-20071022BPM) filed by Archangel Communications IS REINSTATED *NUNC PRO TUNC*.

IT IS ORDERED that the Petition to Deny filed by Archangel Communications on July 30, 2008 IS GRANTED IN PART AND DENIED IN PART.

IT IS FURTHER ORDERED that the application for a new noncommercial educational FM station on Channel 210 at Mount Vernon Alabama (File No. BNPED-20071022BPM) filed by Archangel Communications and the application for a new noncommercial educational FM station on Channel 210 at

¹⁷ Archangel calculated that it would provide first NCE service to 2,777 people and combined first and second NCE service to 11,201 people; and TBTA would provide first NCE service to 7,231 people and combined first and second NCE service to 10,045 people. Archangel Petition to Deny, Figures 1 and 2.

¹⁸ We previously determined that Archangel and TBTA each would provide combined first and second NCE service to ten percent of the population within its 60 dBu contour and to more than 2,000 people. *Fair Distribution Order*, 23 FCC Rcd at 10216, n. 17. *See also*, 47 C.F.R. § 73.7002(b).

¹⁹ 47 C.F.R. § 73.7002(b).

²⁰ Both Archangel and TBTA failed to include WMAH-FM, Biloxi, Mississippi, when they calculated the combined first and second NCE service total for the Archangel proposal. We have included WMAH-FM in our calculation. Thus, we calculated a combined service total for the Archangel proposal that is significantly lower than that calculated by either Archangel or TBTA.

²¹ 47 C.F.R. § 73.7002(b).

²² *2000 NCE Comparative Standards Order*, 15 FCC Rcd at 7388.

McIntosh, Alabama (BNPED 2007-1015ABX) filed by TBTA Ministries ARE REFERRED to the Commission for a point hearing.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Archangel Communications
TBTA Ministries
American Family Association, Inc.