



Federal Communications Commission
Washington, D.C. 20554

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DA 10-2065

In Reply Refer to:

1800B3-ATS

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Dr. Jon A. Gerbracht
Edinboro Early School
380 Jumpers Hole Road
Severna Park, MD 21146

Mr. Richard Snyder
Allied Communications Network Two
23 Harbor Road Box 976
Rehoboth, DE 19971

In re: **NCE MX Group 113**

New NCE (FM), Ocean City, Maryland
Edinboro Early School
Facility ID No. 173444
File No. BNPED-20071012AJU

Petition to Deny

Dear Dr. Gerbracht and Mr. Snyder:

We have before us: (1) the referenced application of Edinboro Early School ("Edinboro") for a new noncommercial educational ("NCE") FM station in Ocean City, Maryland ("Application"); and (2) a Petition to Deny ("Petition") the Application filed on March 8, 2010, by Allied Communications Network Two ("Allied").¹ For the reasons stated below, we grant the Petition and dismiss Edinboro's Application.

Background. Edinboro, Allied, Allegheny East Conference Corp of Seventh-Day Adventists ("AECC"), and Priority Radio, Inc. ("PRI"), filed mutually exclusive applications for NCE FM station construction permits. The applications proposed service to various communities in Maryland or Delaware, and were designated NCE MX Group 113.² Pursuant to established procedures,³ on February 16, 2010, the Media Bureau ("Bureau") determined that no applicant in NCE MX Group 113 was entitled to a dispositive fair distribution preference under Section 307(b) of the Communications Act of 1934, as

¹ Allied filed an Informal Objection on January 25, 2010. Because Allied has referenced its Informal Objection in its Petition, we will consider its merits in our discussion of the latter-filed pleading.

² *Media Bureau Identifies Groups of Mutually Exclusive Applications Submitted in the October 2007 Filing Window for Noncommercial Educational FM Stations*, Public Notice, 23 FCC Rcd 3914, 3922 (MB 2008).

³ See 47 C.F.R. § 73.7002 (procedures for selecting among mutually exclusive applicants for stations proposing to serve different communities); see also *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000) ("*NCE Comparative Order*"); Memorandum Opinion and Order, 16 FCC Rcd 5074, 5105 (2001) ("*NCE Comparative MO&O*"), reversed in part on other grounds, *NPR v. FCC*, 254 F.3d 226 (D.C. Cir. 2001).

amended (“Act”),⁴ and consequently, the Commission engaged in a point system selection process.⁵

The Commission awarded both Edinboro and Allied⁶ three points each for being an established local applicant, and awarded AECC two points for having the best technical proposal. PRI was not awarded any points.⁷ AECC and PRI were thus eliminated, and Edinboro and Allied proceeded to a tie-breaker.⁸ The first tie-breaker - the number of radio station authorizations attributable to each applicant - was not determinative because neither applicant was found to have any attributable interest in any radio authorization.⁹ Edinboro prevailed on the second tie-breaker – the number of pending radio applications attributable to each applicant, because the staff found that it had one pending application, while Allied had seven pending applications.¹⁰ Thus, the *Tentative Selectee Order* identified Edinboro as the tentative selectee in NCE MX Group 113, accepted for filing the Application, set a 30-day period for filing petitions to deny that application, and indicated that, if, after that 30-day petition period had run, there was no substantial and material question concerning the Edinboro Application, it would, by *Public Notice*, dismiss the other mutually exclusive applications and grant the Edinboro Application.¹¹

Allied argues in the Petition that the Application is defective and must be dismissed without opportunity to amend under Section 73.3566 of the Commission’s Rules (“Rules”). Specifically, Allied asserts that Edinboro: (1) is not a non-profit corporation; (2) failed to disclose its ownership of Station WEES-LP; (3) improperly claimed points for diversity of ownership; (4) did not fully disclose its existing authorizations and pending NCE applications; and (5) improperly claimed points as an established local applicant.¹² Edinboro did not respond to Allied’s Petition to Deny.

⁴ 47 U.S.C. § 307(b). A Section 307(b) analysis is ordinarily conducted at the staff level because the Bureau has delegated authority to make Section 307(b) determinations in NCE cases.

⁵ See 47 U.S.C. § 307(b); 47 C.F.R. § 73.7002(a); *Threshold Fair Distribution Analysis of 26 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 25 FCC Rcd 1681, 1707-1708 (MB 2010) (“*Tentative Selectee Order*”).

⁶ On February 5, 2010, the staff dismissed Allied’s application for its violation of Section 73.509(a) of the Rules. See *Letter to Marion Snyder and Richard Snyder* (Arthur E. Doak, Senior Engineer, Audio Division, Media Bureau, Feb. 5, 2010). The *Tentative Selectee Order* thus inadvertently considered Allied’s application. The dismissal of Allied’s application was not appealed and is now final.

⁷ *Tentative Selectee Order* at 1708.

⁸ *Id.*

⁹ *Id.* Edinboro was credited with no attributable interest based on its commitment in the Application to divest itself of Low Power FM (“LPFM”) Station WEES-LP, Ocean City, Maryland. *Id.*; see also Application, Section II, Question 7; Section V, Question 1; and Exhibits 4 and 12.

¹⁰ *Id.*

¹¹ *Id.* at 1727. The applications of AECC and PRI were subsequently dismissed. See *Broadcast Actions*, Public Notice, Report No. 47202 (rel. Mar. 29, 2010). These dismissals were not appealed and are now final.

¹² Allied further alleges that Edinboro made a misrepresentation in the Application when it stated that the frequency change of Station WKHI(FM), Fruitland, Maryland, would force Station WEES-LP off the air, noting that the LPFM station has continued operations even though Station WKHI’s switch has been completed. Allied’s suggestion that this is a misrepresentation is incorrect, as the staff has in fact notified Edinboro that Station WEES-LP will be required to switch to a different channel. Allied also raises numerous allegations regarding the operation of Station WEES-LP.

Discussion. Section 309(d)(1) of the Act¹³ provides that any party in interest may file a petition to deny an application. In order to assess the merits of a petition to deny, a two-step analysis is required.¹⁴ First, the petition must make specific allegations of fact sufficient to demonstrate that the petitioner is a party in interest and that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity.¹⁵ This threshold determination is made by evaluating the petition and the supporting affidavits. If the petition meets this threshold requirement, the Commission must then examine all of the material before it to determine whether there is a substantial and material question of fact calling for further inquiry and requiring resolution in a hearing.¹⁶ If no such question is raised, the Commission will deny the petition and grant the application if it concludes that such grant otherwise serves the public interest, convenience, and necessity.

Pursuant to Section 73.503(a) of the Rules, “a noncommercial educational FM broadcast station will be licensed only to a *nonprofit educational organization* upon showing that the station will be used for the advancement of an educational program.”¹⁷ An applicant for an NCE FM station must certify its eligibility to own and operate such station at the time it files its application.¹⁸ Allied states the State of Maryland identifies Edinboro as a “general business” and a “stock corporation,” and that there is no filing on record with the State of Maryland indicating that Edinboro is a non-profit corporation.¹⁹ The Application states that Suellen L. Gerbracht and Dr. Jon A. Gerbracht (“Gerbrachts”) each own 49.2% of Edinboro. Allied argues that the Gerbrachts improperly identified themselves as “owners” of the corporation, and instead should have listed their interests under “voting stock.”

The information contained in the Application and Allied’s allegations raised in the Petition are sufficient to make a *prima facie* showing that Edinboro’s application should be dismissed. Our review of the State of Maryland’s Department of Assessments and Taxation database confirms that Edinboro is a for-profit stock corporation. Because Edinboro’s profits may lawfully inure to its private shareholders, namely the Gerbrachts, it is not a “nonprofit” as defined by the Act.²⁰ Accordingly, we find that Edinboro

These claims are unsupported and/or are immaterial to our consideration of the Application and we will not consider them further.

¹³ 47 U.S.C. § 309(d)(1).

¹⁴ See, e.g., *Artistic Media Partners, Inc.*, Letter, 22 FCC Rcd 18676, 18676 (MB 2007).

¹⁵ See *id.*; *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

¹⁶ 47 U.S.C. § 309(d)(2).

¹⁷ 47 C.F.R. § 73.503(a) (emphasis added). In contrast, the commercial broadcast service contains no such stipulation, and businesses in any form (*i.e.*, corporation, sole proprietorship, or individual) may use commercial broadcast channels.

¹⁸ See FCC Form 340, Section II, Question 2, and corresponding instructions.

¹⁹ Petition at 1-2.

²⁰ See 47 U.S.C. § 397(8) (defining a “nonprofit” as “a foundation, corporation, or association, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual”).

is ineligible to hold an NCE FM license and will dismiss the Application.²¹ In light of this finding, we need not address the remaining allegations that Allied raised in the Petition.²²

Conclusion/Actions. Accordingly, IT IS ORDERED that the Petition to Deny filed by Allied Communications Network Two IS GRANTED.

IT IS FURTHER ORDERED that the application of Edinboro Early School (File No. BNPED-20071012AJU) for a construction permit for a new noncommercial educational FM station in Ocean City, Maryland, IS HEREBY DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Allegheny East Conference Corp of Seventh-Day Adventists
Priority Radio, Inc.

²¹ See, e.g., *Blue Lake Academy, Inc.*, Letter, 20 FCC Rcd 12066, 12068-69 (MB 2005) (holding that failure to properly incorporate as a nonprofit corporation prior to filing a noncommercial broadcast application is a defect that cannot be cured). See also 47 C.F.R. §73.3566(a) (“Applications which are determined to be patently not in accordance with the FCC rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective and will not be accepted for filing or if inadvertently accepted for filing will be dismissed.”); 47 C.F.R. § 73.3564(b) (“Acceptance of an application for filing merely means that it has been the subject of a preliminary review by the FCC’s administrative staff as to completeness. Such acceptance will not preclude the subsequent dismissal of the application if it is found to be patently not in accordance with the FCC’s rules.”).

²² We believe that Allied also has made a *prima facie* showing that Edinboro (1) was incorrectly awarded points under the established local applicant criterion, and (2) failed to amend the Application to reflect that it had filed an application for a new NCE station in Erie, Pennsylvania (File No. BNPED- 20071015AGY). However, in light of our dismissal of the Application, we need not reach a decision on the merits of these allegations.