



Federal Communications Commission  
Washington, D.C. 20554

May 5, 2010

**DA 10-776**

*In Reply Refer to:*

1800B3-VMM

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Stuart W. Nolan, Jr., Esq.  
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4121 Wilson Boulevard, Suite 101  
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In Re: St. Francis Xavier Gift Shop  
New NCE (FM), Wenatchee, Washington  
Facility ID No. 174357  
File No. BNPED-20071022ARM

**Petition for Reconsideration**

Dear Mr. Nolan:

We have before us a Petition for Reconsideration ("Petition") filed on June 12, 2009, by St. Francis Xavier Gift Shop ("SFX"), seeking reconsideration of the staff's dismissal of its application for a new noncommercial educational ("NCE") FM facility in Wenatchee, Washington ("Wenatchee Application").<sup>1</sup> For the reasons set forth below, we deny the Petition.

**Background.** SFX was among four mutually exclusive applicants for an NCE FM station construction permit.<sup>2</sup> These applications, which propose to serve three different communities in Washington, were designated NCE MX Group 258. Pursuant to established procedures,<sup>3</sup> on March 31, 2009, the Media Bureau ("Bureau") determined that the Spokane Public Radio ("SPR") application<sup>4</sup> for a new NCE FM station in Brewster, Washington, was entitled to a decisive preference under Section 307(b)

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<sup>1</sup> See *Broadcast Actions*, Public Notice Report No. 46984, at 16 (May 13, 2009).

<sup>2</sup> See *Threshold Fair Distribution Analysis of 21 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in October 2007 Window*, Memorandum Opinion and Order, 24 FCC Rcd 3873, 3882 (MB 2009) ("2009 Fair Distribution MO&O").

<sup>3</sup> 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).

<sup>4</sup> File No. BNPED-20071019AEH.

of the Communications Act of 1934, as amended (“Act”),<sup>5</sup> and identified SPR as the tentative selectee in NCE MX Group 258.<sup>6</sup>

On May 8, 2009, the Bureau dismissed the Wenatchee Application. The *Public Notice* announcing this action was released on May 13, 2009.<sup>7</sup> In response to that *Public Notice*, SFX filed a timely petition for reconsideration of the dismissal of its application.

**Discussion.** In its Petition, SFX states that it is not challenging the Bureau’s tentative selection of SPR’s application. Rather, SFX argues that its Wenatchee Application is also grantable because its proposal is not mutually exclusive with SPR’s Brewster proposal.<sup>8</sup> In support of this argument, SFX cites to an unpublished staff action (“*North Fork*”) in which a dismissed application that was part of an MX group was reinstated and granted because it was “not precluded by the issuance of a permit to the tentative selectee.”<sup>9</sup> SFX further argues that grant of its application would promote the public interest.<sup>10</sup>

As an initial matter, we note that *North Fork* is an unpublished staff action that pre-dates the *NCE Comparative MO&O* and is therefore without any precedential weight.<sup>11</sup> Moreover, in the *NCE Comparative MO&O*, the Commission considered a geographic-based processing proposal that would have sanctioned the tentative selection of more than one applicant in a mutually exclusive application group.<sup>12</sup> The Commission rejected this proposal, noting that although it might be beneficial to select more than one applicant, doing so could potentially result in the selection of an inferior applicant as a secondary selectee.<sup>13</sup> Instead, the Commission determined that the better approach would be to dismiss all non-selected applicants in a group, even if a particular application is not mutually exclusive with the primary selectee of the group.<sup>14</sup> Therefore, in keeping with the Commission’s processing guidelines, we

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<sup>5</sup> 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. See *NCE Comparative Order*, 15 FCC Rcd at 7397.

<sup>6</sup> See *2009 Fair Distribution MO&O*, 24 FCC Rcd at 3891.

<sup>7</sup> See Note 1, *supra*.

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

<sup>9</sup> Petition at 4, citing, *Broadcast Actions*, Public Notice Report No. 46586, at 13 (October 5, 2007) (referencing North Fork Valley Public Radio, Inc).

<sup>10</sup> Specifically, SFX asserts that grant of its application will (1) further the goal of spectrum efficiency, and (2) facilitate “the availability of more diverse programming in the greater Wenatchee area.” See Petition at 3, 4.

<sup>11</sup> See 47 C.F.R. § 0.445(e).

<sup>12</sup> *NCE Comparative MO&O*, 16 FCC Rcd at 5104.

<sup>13</sup> *Id.* at 5105 (“... after the best qualified applicant is selected, it is possible that remaining applicants that are not mutually exclusive with this primary selectee and thus potentially secondary selectees, may also be significantly inferior to other applicants that are eliminated because they *are* mutually exclusive with the primary selectee. Rather than issue authorizations to applicants whose potential for selection stems primarily from their position in the mutually exclusive chain, we believe it is appropriate to dismiss all of the remaining applicants and permit them to file again in the next filing window.”) (emphasis in original).

<sup>14</sup> *Id.* The Commission recently reiterated that only one application from each mutually exclusive group would be granted and that the remaining applications, even if not mutually exclusive with the tentative selectee, should be dismissed. See *Comparative Consideration of 59 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in the October 2007 Filing Window*, Memorandum Opinion and Order, 25 FCC Rcd 1681, 1716 (2010) (“Finally, we note that we previously concluded that only one application should be granted out of each mutually exclusive group, while providing the competing applicants the opportunity to file again in the next filing window. Accordingly we direct the staff to deny petitions

reject SFX's contention that its application should also be granted based solely on its position in the mutually exclusive chain and the absence of any direct conflict with the tentative selectee, SPR.

**Conclusion/Actions.** Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed on April 30, 2009, by St Francis Xavier Gift Shop IS DENIED.

Sincerely,

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

cc: St. Francis Xavier Gift Shop  
Todd Gray, Esq. (counsel to Washington State University)  
Ernest Sanchez, Esq. (counsel to Spokane Public Radio)  
Fire Media Corp.

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for reconsideration based on the theory that the dismissed application is not mutually exclusive with the granted application." (internal citations omitted)).