



**Federal Communications Commission
Washington, D.C. 20554**

April 4, 2011

DA 11-600

In Reply Refer to:

1800B3-AJR

Released: April 4, 2011

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In re: **MX Group No. 419**
New NCE-FM, Cookeville, Tennessee
Catholic Social Club of Putnam County
Tennessee, Inc.
Facility ID No. 176039
File No. BNPED-20071022BSO

Petition To Deny

New NCE-FM, Cookeville, Tennessee
Cookeville Christian Broadcasting
Facility ID No. 173671
File No. BNPED-20071018AHZ

Petition for Reconsideration

Dear Counsel:

We have before us the referenced applications of the Catholic Social Club of Putnam County, Tennessee, Inc. ("CSC") and Cookeville Christian Broadcasting ("CCB") for a new, noncommercial educational ("NCE") FM station at Cookeville, Tennessee (the "CSC Application" and "CCB Application," respectively). We also have before us: (1) a Petition to Deny the CSC Application, filed by Roane State

Community College (“Roane”)¹ on January 16, 2009 (“Roane Petition”); (2) a Petition for Reconsideration of the dismissal of the CCB Application” filed by CCB on February 27, 2009 (“CCB Petition”);² and (3) various related pleadings.³ For the reasons set forth below, we deny the Roane Petition, grant in part the CCB Petition, and grant the CSC Application.

Background. CSC, CCB, and four other parties filed mutually exclusive applications for NCE FM stations at three different communities during the October, 2007 filing window. These applications were subsequently designated MX Group No. 419.⁴ The staff tentatively selected the CSC Application because it would provide a combined first or second NCE service to at least 5,000 people more than the only other applicant in this MX Group that claimed eligibility for a fair distribution preference.⁵ The CSC Application was also accepted for filing, which triggered a 30-day period for parties to file petitions to deny against the tentative selectee.⁶

The timely filed Roane Petition contends that the CSC Application should be denied because: (1) CSC has not submitted any evidence of its incorporation; (2) the William Morris Council #6645 of the Knights of Columbus (“Morris Council”), as opposed to CSC, is the real party in interest in the CSC Application; and (3) CSC made a false statement of a material fact regarding whether it is entitled for credit as an “established local entity.” In its Opposition, CSC claims that it is a corporation in good standing in Tennessee, that CSC is the real party in interest, and that there has not been a misrepresentation of a material fact.

Subsequent to the filing of the Roane Petition, the staff released a *Public Notice* announcing that the CCB Application had been dismissed on January 23, 2009.⁷ The CCB Petition contends that the CCB Application was prematurely dismissed and requests that it be reinstated *nunc pro tunc*.

Discussion. *Preliminary Issue: Dismissal/Reinstatement of CSC Application.* On November 19, 2010, the staff dismissed the CSC Application because the proposal would cause prohibited overlap with the protected service contours of Stations WYZZ(FM), Spencer, Tennessee, and WDVX(FM), Clinton, Tennessee.⁸ On December 7, 2010, CSC filed a petition for reconsideration of the dismissal of its application and an amendment to the technical portion of its application purporting to eliminate the

¹ Roane is a competing applicant in MX Group 419 for a new NCE FM station at Crossville, Tennessee. See File No. BNPED-20071022AEL.

² See *Broadcast Actions*, Public Notice, Report No. 46910 (Jan. 28, 2009) (“*Public Notice*”).

³ These pleadings include an Opposition to Petition to Deny filed by CSC on January 29, 2009 (“CSC Opposition”) and a Reply to Opposition filed by Roane on February 6, 2009 (“Roane Reply”).

⁴ See *Media Bureau Identifies Groups of Mutually Exclusive Applications*, Public Notice, 23 FCC Rcd 3914 (MB 2008).

⁵ See *Threshold Fair Distribution Analysis of 26 Groups of Mutually Exclusive Applications for Permits to Construct New Or Modified Noncommercial Educational FM Stations Filed in October 2007 Window*, 23 FCC Rcd 17983, 17995 ¶ 50 (MB 2008) (“*Fair Distribution Order*”). Specifically, the CSC Application would provide a new first or second NCE service to 23,413 people whereas the application of Way-FM Media Group, Inc. for a new NCE FM station at Algood, Tennessee (File No. BNPED-20071018DEH) would provide a combined first or second NCE service to 18,297 people.

⁶ See 47 C.F.R. § 73.7004. See also *Fair Distribution Order*, 23 FCC Rcd at 18003 ¶ 84.

⁷ *Public Notice* at 10.

⁸ *Letter to Catholic Social Club of Putnam County, Tennessee, Inc.*, Reference 1800B3 (MB Nov. 19, 2010).

overlaps to WZYX(FM) and WDVX(FM). The staff reviewed the amendment and determined that it cured the defect and did not diminish CSC's fair distribution preference.⁹ The staff therefore granted the petition for reconsideration and reinstated the CSC Application *nunc pro tunc* on January 6, 2011.¹⁰ We therefore consider the merits of the Roane Petition.

Roane Petition. Pursuant to Section 309(d) of the Communications Act of 1934, as amended ("the Act"),¹¹ 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

Incorporation. The Roane Petition claims that CSC has not demonstrated that it is eligible to be a Commission licensee because it has not submitted its articles of incorporation, date, or other evidence of incorporation. In its Opposition, CSC contends that incorporation is not a requirement for NCE applicants but submits a printout from the Tennessee Secretary of State, showing that CSC was incorporated in Tennessee on September 25, 2000 and has a nonprofit status.¹³

We find that no substantial and material question of fact has been raised regarding CSC's organizational eligibility to be a licensee of an NCE FM station. Roane has provided no basis for questioning CSC's corporate status other than a general allegation that CSC has not submitted its articles of incorporation.¹⁴ Applicants for NCE FM stations are not required to submit evidence of incorporation. Rather, they simply certify whether or not they are a "nonprofit educational organization."¹⁵ CSC certified as to its nonprofit educational status and, moreover, provided evidence that it was incorporated in September 2000 in Tennessee and has a nonprofit status. Accordingly, we reject Roane's argument concerning CSC's eligibility.

⁹ See 47 C.F.R. § 73.3522(b)(1) (if any fair distribution selectee's application is determined to be unacceptable, "the application will be returned and the Selectee will be provided one opportunity for curative amendment by filing a petition for reconsideration requesting reinstatement of the application. All amendments filed in accordance with this paragraph must be minor and must not alter the [fair distribution] preference.") The amended CSC Application would provide a combined first or second NCE service to 25,424 persons, an increase of 2,011 persons over its original proposal. We will not, of course credit CSC with this post-filing window improvement in its comparative position. See *Media Bureau Announces NCE FM New Station and Major Change Filing Procedures for October 12 – October 19, 2007 Window; Limited Application Filing Freeze to Commence on September 8, 2007*, Public Notice, 22 FCC Rcd 15050, 15052 (MB 2007) ("the Commission will not take into account any enhancement in an applicant's comparative position after the close of the window"). Nevertheless, CSC continues to provide a combined first of second SCE service to at least 5,000 more persons than the only other applicant claiming eligibility for a fair distribution preference. See n.5, *supra*.

¹⁰ See *Broadcast Actions*, Public Notice, Report No. 27400 at 10 (Jan. 11, 2011).

¹¹ 47 U.S.C. § 309(d).

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), *reh'g 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 CSC Opposition, Exhibit B.

¹⁴ See, e.g., *Way of Life Radio*, Memorandum Opinion and Order, 23 FCC Rcd 2453, 2454-55 (2008) (determining that a mere allegation by an informal objector that an applicant for a new LPFM station had failed to provide its articles of incorporation is insufficient to rebut a certification by applicant that it was incorporated).

¹⁵ See FCC Form 340, Section II, Question 2. See also Instructions for FCC 340 at 4.

Real Party in Interest. Next, Roane contends that the real party in interest¹⁶ to the CSC application is the Morris Council, the local chapter of the Knights of Columbus in Putnam County, and that insufficient information was provided to determine whether the Morris Council and its members are eligible to be a Commission licensee. In support of this position, Roane refers to several sections of the CSC by-laws, providing that (1) CSC is an “adjunct” of the Morris Council; (2) members of CSC shall be members of the Morris Council and shall have one vote; (3) the CSC Board of Directors shall include the Grand Knight, Deputy Grand Knight, and Trustees of the Morris Council by reason of their offices in the Morris Council; and (4) the CSC Board of Directors is under the general supervision of the officers of the Morris Council and these officers may remove any CSC director.¹⁷ Roane contends that these by-laws establish the Morris Council as the real party in interest to the CSC application and that information must be provided regarding the citizenship, other broadcasting interests, and character-related misconduct of the Morris Council and its members to determine its qualifications to hold the Cookeville permit.

CSC argues in its Opposition that the relationship between CSC and the Morris Council was previously disclosed in the CSC Application¹⁸ and does not raise a real party in interest issue. Specifically, CSC states that the Knights of Columbus is an international, Catholic fraternal organization comprised of local, unincorporated associations, known as councils, and that the internal rules of the international association prevent any of these local councils from owning real property or operating a business such as a radio station unless the members incorporate and own such assets through a corporation established for this purpose. As a result, CSC explains that it was created by the Morris Council to act as its “home corporation” and that the members of the Morris Council simultaneously elect officers and directors to manage both the unincorporated Morris Council and the CSC corporation. Under these circumstances, CSC believes that there are no other parties to disclose because the officers and directors in question are identical and hold their roles in the corporation by virtue of their corresponding role in the unincorporated council. In addition, CSC disagrees with Roane’s contention that it should be required to list every member of the Morris Council, as opposed to the officers and directors that those members elect. CSC states that memberships in Knights of Columbus Councils frequently number in the hundreds and asserts that such a level of inquiry would be too burdensome.

We find that Roane has not raised a substantial and material question of fact regarding whether the Morris Council is a real party in interest in the CSC Application. The Commission has held that “it is an abuse of process to specify a surrogate to apply for a station so as to deny the Commission and the public the opportunity to review and pass on the qualifications of that party.”¹⁹ “The test for determining whether a third person is a real party in interest is whether that person has an ownership interest, or is or will be in a position to actually or potentially control the operation of the station.”²⁰ Questions of *de facto*

¹⁶ A real party in interest is a third party that “has an ownership interest or is or will be in a position to actually or potentially control the operation of the station.” See *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1564 (D.C. Cir. 1988), quoting *KOWL, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 962, 964 (Rev. Bd. 1974) (“*KOWL*”).

¹⁷ Roane Petition at 1-2.

¹⁸ CSC Application, Exhibit 2.

¹⁹ *Ronald Brasher*, Decision, 19 FCC Rcd 18463, 18477 (2004), quoting *Arnold L. Chase*, Decision, 5 FCC Rcd 1642, 1643 ¶ 9 (1990).

²⁰ *KOWL*, 49 FCC 2d at 964.

control are examined on a case-by-case basis to determine who has operational control over an applicant's or licensee's basic policies on programming, personnel, and finances.²¹

In this proceeding, we find that Roane has not established that Morris Council is a real party in interest with regard to the CSC Application. First, the relationship between the Morris Council and CSC was disclosed in the CSC Application.²² Therein, CSC explained that “[t]he Applicant is an independent corporation with a governing Board elected by members of the Knights of Columbus residing in the community.”²³ Second, CSC provides a legitimate reason for creating another entity to apply for an NCE FM station at Cookeville. As explained by CSC, the unincorporated Morris Council is not permitted to own real property or businesses and must create a “home corporation” to engage in such activities. An affiliated applicant such as CSC may hold an NCE license provided that it is otherwise qualified, and we have granted similar applications for new NCE stations where the applicant is affiliated with a university or other nonprofit entity that is not the actual applicant.²⁴ Third, Roane has submitted no evidence of *de facto* control by a third party. On the contrary, our review of CSC's by-laws indicates that the authority for management of CSC and control of its financial affairs rests with the Board of Directors,²⁵ and these directors, as well as the officers, were identified in the CSC Application.²⁶ While the CSC directors are under the general supervision of the Morris Council officers, these are the same officers for both entities, thereby negating any concerns that the CSC Board of Directors is being controlled by an undisclosed, third party.²⁷ Likewise, although the ability of one entity to appoint or remove directors of another has been a factor considered in examining control,²⁸ we do not believe that it is meaningful in this case, where it is undisputed that the principals are the same for both entities. Fourth, Roane has not cited any authority for the attribution of the individual members of the Morris Council to the CSC Application. Rather, under the Commission's attribution policy for non-stock corporations such as CSC, the officers

²¹ See *A. Wray Fitch III, Esq.*, Letter, 23 FCC Rcd 12665, 12671 (MB 2008) (“*Fitch Letter*”).

²² See, e.g., *State of Oregon*, Letter, 22 FCC Rcd 17634, 17644-45 (MB 2007) (finding that a real party in interest issue against an NCE applicant was not warranted because the relationship between the applicant and a university had been disclosed) (“*Oregon Letter*”); and *KOWL*, 49 FCC 2d at 968 ¶ 22 (denying motion to add a real party in interest issue against a mutually exclusive applicant because all pertinent information regarding present and future principals of applicant had been revealed).

²³ CSC Application, Exhibit 2, at 3.

²⁴ See, e.g., *Oregon Letter*, 22 FCC Rcd at 17644-45 (granting the NCE application of a foundation affiliated with a university for a new NCE FM station and finding that such a relationship, as well as a short-form change of ownership for the foundation, did not raise a real party in interest issue).

²⁵ CSC Application, Attachment 12, Article VI, Section 5.

²⁶ CSC Application, Section II, Question 6, at 2-5 (listing parties to the application and demonstrating their U.S. citizenship).

²⁷ Although Roane points out that CSC has only identified five out of nine possible members of the CSC Board of Directors, we do not believe that this omission raises any concerns. First, CSC has explained that these remaining directors were not identified because these vacancies on the Board of Directors had not been filled at the time of the filing of the CSC Application. See CSC Opposition at 2. Second, the eventual reporting of the remaining four members of the Board of Directors would not constitute a “major amendment” to the CSC application because it constitutes less than a 50 percent change to the Board of Directors. Cf. *Moody Bible Institute of Chicago*, Letter, 22 FCC Rcd 11116, 11117 (MB 2007) (“a fifty percent change in the governing board of an NCE applicant would generally be considered a “major change” and would not be permissible outside of a filing window”) (“*Moody Bible*”).

²⁸ See *Fitch Letter*, 23 FCC Rcd at 12671.

and directors, as opposed to the individual members, have attributable interests that must be reported.²⁹ Accordingly, we conclude that Roane has not demonstrated that the Morris Council is a real party in interest.³⁰

Misrepresentation. Finally, Roane contends that the CSC application must be denied because it contains a false statement of a material fact regarding CSC's entitlement to a comparative credit as a "local entity." Specifically, Roane notes that CSC certified that it was an established local entity because it was formed 24 months prior to the filing of the application.³¹ However, Roane appears to argue that this certification is inconsistent with the narrative in Exhibit 2 of the CSC Application, which it claims indicates that CSC was created solely for the purpose of filing for the Cookeville NCE frequency due to concern that the Morris Council would not be eligible to be a Commission licensee. In its Opposition, CSC disagrees with Roane's characterization of Exhibit 2 and contends that the certification is correct because "CSC was established much earlier than 24 months prior to the filing window."³²

We believe that this matter does not raise a substantial and material question that would require further inquiry. Misrepresentation involves false statements made with an intent to deceive.³³ Lack of candor involves concealment, evasion or other failure to be fully forthcoming, accompanied by an intent to deceive.³⁴ Our review of the record indicates that the certification was correct and that, therefore, there was no false statement made by CSC. Specifically, CSC has submitted documentation, demonstrating that it was incorporated in September, 2000, approximately seven years before the CSC Application was filed.³⁵ Further, there is no inconsistency between CSC's certification and the statements made in Exhibit 2. Contrary to Roane's allegations, Exhibit 2 of the CSC Application does not state or imply that CSC was created solely to apply for an NCE FM station at Cookeville. Most of Exhibit 2 addresses subjects unrelated to CSC's entitlement to a localism credit,³⁶ and, therefore, that portion of the narrative is not

²⁹ See Instructions for FCC 340, Section II, Question 6(a), at 4 ("Non-stock corporations or other non stock entities: the applicant, the parent and subsidiary entities of the applicant, and the officers, directors, and governing board members of the applicant and its parent and subsidiary entities are considered to be parties to the application). See also *Moody Bible*, 22 FCC Rcd at 11118-19 (finding that members or congregants of a church that elected the same members of the governing boards for both the church and an affiliated NCE applicant did not have attributable interests in the NCE applicant and that this relationship did not raise a real party in interest issue).

³⁰ This conclusion also moots Roane's related argument that CSC has not demonstrated compliance with the alien ownership provisions of the Act, 47 U.S.C. § 310(b)(1) and (2), with respect to the Morris Council, its members, or the International Knights of Columbus.

³¹ CSC Application, Section IV, Question 1, at 7, which asks applicants to certify whether or not "... for at least the 24 months immediately prior to application, and continuing through the present, it qualifies as a local applicant pursuant to 47 C.F.R. Section 73.7000, that its governing documents require that such localism be maintained and that it has placed documentation of its qualifications as an established local applicant in a local public inspection file and has submitted to the Commission copies of the documentation."

³² CSC Opposition at 6.

³³ See *Fox River Broadcasting, Inc.*, Order, 93 FCC 2d 127, 129 (1983).

³⁴ *Id.*

³⁵ CSC Opposition at 6 and Exhibit B.

³⁶ These topics include: (1) the nature and educational purpose of the applicant in order to demonstrate its eligibility as an NCE applicant under Section 73.503(a) of the Commission's Rules; (2) the type of programming that CSC proposes; and (3) CSC's relationship with the Morris Council.

inconsistent with the certification. Moreover, the part of the exhibit that addresses CSC’s basis for claiming eligibility for the localism credit is consistent with the certification in the CSC Application. Although the language used provides a more detailed basis for the localism credit, it reiterates that CSC has been both an established and local entity for at least two years.³⁷ Accordingly, we conclude that CCB made no misrepresentation in its certification that it was entitled to receive a “local entity” credit.³⁸

CCB Petition. Relying upon language in the *Fair Distribution Order*,³⁹ the CCB Petition contends that the dismissal of the CCB Application was premature because it occurred prior to our disposition of Roane’s timely filed petition to deny, which sought to raise issues regarding the tentative selectee’s qualifications. We agree. The CCB Application should not have been dismissed prior to our consideration of the issues raised in the Roane Petition against the tentative selectee. We will, therefore, grant in part the CCB Petition. However, the premature dismissal of the CCB Application amounts to a harmless error in view of our determination herein that the Roane Petition did not raise any substantial and material question of fact regarding CSC’s qualifications.⁴⁰

Conclusion/Actions. Accordingly, IT IS ORDERED, that the Petition to Deny filed by Roane Community College IS DENIED.

IT IS FURTHER ORDERED, that the Petition for Reconsideration filed by Cookeville Christian Broadcasting IS GRANTED TO THE EXTENT INDICATED, AND IS DENIED IN ALL OTHER RESPECTS.

³⁷ Specifically, the exhibit states that “[t]he primary place of business for this applicant, listed on the first page of the application, disclosed under the parties to the application, and evidenced in the attachments hereto, is (and has been for at least the last two years) within 25 miles of the proposed community of license.” CSC Application, Exhibit 2, at 1.

³⁸ As a related matter, we note that Roane raises in its Reply another basis for questioning CSC’s entitlement to a local entity credit – that CSC, as an entity distinct from Morris Council, has not shown any community involvement. See Roane Reply at 3. We will not, however, address this allegation because it constitutes impermissible “new matter” that is not sufficiently related to matters raised in the CSC Opposition. See 47 C.F.R. § 1.45(c) (“[t]he reply shall be limited to matters raised in the opposition”). See also *Industrial Business Corp.*, 26 R.R.2d 1447, 1449 (Rev. Bd. 1973) (“To allow the reply to thus serve the purpose of the original petition would be to . . . effectively render meaningless provisions in the rules for a fair opportunity by another party to respond to allegations . . .”).

³⁹ See *Fair Distribution Order*, 23 FCC Rcd at 18003 ¶ 84 (“[i]f, after a 30-day petition to deny period has run, there is no substantial and material question concerning the grantability of the tentative selectee’s application, we intend by public notice TO DISMISS the mutually exclusive applications . . . [including that of CCB]”).

⁴⁰ See *Hawaii Public Radio, Inc.*, Letter, 25 FCC Rcd 3697 (MB 2010) (finding that dismissal of a competing application before action on a timely petition to deny against the tentative selectee was a harmless error in view of the ultimate denial of the petition to deny).

IT IS FURTHER ORDERED, that the application (File No. BNPED-20071022BSO) of the Catholic Social Club of Putnam County Tennessee, Inc., for a new noncommercial educational FM station in Cookeville, Tennessee, IS GRANTED subject to the condition that it must operate technical facilities substantially as proposed for a period of four years of on-air operations.⁴¹

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Catholic Social Club of Putnam County, Tennessee, Inc.
Cookeville Christian Broadcasting

⁴¹ See 47 C.F.R. § 73.7002(c) (requiring four years of on-air operations as proposed when a tentative selectee receives a fair distribution preference).