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In Reply Refer to:

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In re: New NCE FM, Crownpoint, New Mexico
Facility ID 175965
File Nos. BNPED-20071022BAR
and BNPED-20111031AAG
Petition for Waiver

Dear Mr. Catalano:

We have before us a July 27, 2011, "Petition for Waiver" ("Petition") and four supplements thereto filed on behalf of Navajo Technical College ("NTC"), permittee of a new noncommercial educational ("NCE") FM broadcast station at Crownpoint, New Mexico. Also before us is the referenced application (the "Application") to modify the NTC Crownpoint construction permit. NTC seeks waivers of the Commission Rules (the "Rules") to obtain additional time to construct and for permission to modify its initially authorized facility to downgrade service to the area on which our grant of NTC's original construction permit application was premised.¹ For the reasons set forth below we deny the request for downgrade and dismiss the request for additional construction time.

Background. NTC is a non-profit, educational institution wholly owned by the Navajo Nation and located on tribal lands.² NTC became aware of the opportunity to apply for an NCE FM construction permit when approached by an engineering consultant and relied heavily on that consultant's expertise.³ On October 22, 2007, NTC filed an application to construct a new NCE broadcast station at Crownpoint, New Mexico.⁴ The application specified a transmitter site in a remote mountain location that housed NTC's solar-powered broadband network but which had no electrical service. The Commission identified NTC's application as mutually exclusive with three others, known collectively as Group 182.⁵ Pursuant to comparative "fair distribution" procedures used when applicants propose to serve different

¹ Specifically, NTC seeks waivers of 47 C.F.R. §§ 73.3598(a), 73.3598(c), 73.7002(c) and 73.7005(b).

² Petition at 2-3.

³ Affidavit of Jason K. Arviso, Director of Institutional Development, NTC, Appendix 1 to Petition ("Arviso Declaration").

⁴ File No. BNPED-20071022BAR.

⁵ *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, Attachment A (MB 2008).

communities,⁶ the Media Bureau (“Bureau”) determined the extent to which each proposal would provide a first or second NCE service. NTC documented that it would provide a new first or second NCE service to 16,898 people (4,880 first service plus 12,018 second service) whereas the next best applicant proposed aggregated new NCE service to 4,823 people (4,693 first service plus 130 second service).⁷ The differences between these proposals exceeded the 5,000-person threshold required for the award of a dispositive “fair distribution” preference. Accordingly, NTC prevailed. The Bureau granted NTC’s construction permit application on August 5, 2008,⁸ for a three-year term expiring August 5, 2011. Consistent with rules designed to maintain the integrity of the NCE comparative selection process, all permits awarded on the basis of a decisive fair distribution preference are conditioned.⁹ NTC’s permit bore a condition requiring construction substantially as proposed with no downgrade to “the area” upon which the preference was based for a period of four years of on-air operations.¹⁰

On October 1, 2010, NTC received a \$405,196 grant from the Public Telecommunications Facilities Program (“PTFP”) to be used toward construction costs.¹¹ NTC erroneously believed that its construction deadline coincided with the March 31, 2012, expiration date of the PTFP funding; it discovered its misunderstanding only when it fired its initial consultant and hired a new one in late June 2011.¹² On July 27, 2011, NTC filed the subject Petition seeking waivers of the three-year broadcast construction deadline and of the automatic forfeiture of expired permits.¹³ The request for additional construction time is based upon NTC’s misunderstanding of the FCC/PTFP deadlines and reliance on its original engineer, who NTC says proved unreliable and unable to move the project forward.¹⁴

⁶ See 47 C.F.R. § 73.7002; 47 U.S.C. § 307(b) (requiring “distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.”).

⁷ *Comparative Consideration of 26 Groups of Mutually Exclusive Applications*, Memorandum Opinion and Order, 23 FCC Rcd 9934, 9943 (MB 2008).

⁸ See *Broadcast Actions*, Public Notice, Report No. 46796 (rel. Aug. 8, 2008).

⁹ See generally 47 C.F.R. §§ 73.7002(c) and 73.7005(b).

¹⁰ *Id.* § 73.7005(b). An applicant for a new NCE FM station does not know whether competing applications will be filed and, if so, their comparative merits when submitting its application in a window. However, the filing establishes an applicant’s maximum comparative standing. Thus, applicants must balance competing interests, e.g., construction costs, coverage, etc., against the comparative criteria. Under these procedures it is imperative that applicants fulfill their comparative promises to the public. The downgrade prohibition is phrased in terms of area rather than on shifting populations, service changes by other stations, or proposals of other applicants in order to keep the requirements simple and meaningful. See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386, 7398 (2000), *clarified and aff’d in relevant part*, 16 FCC Rcd 5074, 5082-83, 5089-90 (2001) (subsequent history omitted).

¹¹ Petition at 4. PTFP is administered by the National Telecommunications and Information Administration of the U.S. Department of Commerce. NTC’s application to the FCC was not contingent upon receipt of PTFP funding. File No. BNPED-20071022BAR, Question II(17).

¹² NTC states that it believed in good faith that it had until the PTFP deadline rather than FCC expiration date to construct because neither its original consultant nor PTFP advised it differently and NTC is not a sophisticated, experienced broadcaster knowledgeable about Commission rules. NTC also argues that its understanding was reasonable because it would be inconsistent for one federal agency to award funding for a project past the expiration date set by another agency. Arviso Declaration at 2.

¹³ See 47 C.F.R. §§ 73.3598(a) and (e).

¹⁴ Petition at 12.

On August 2, 2011, NTC filed a Supplement at the request of the staff, providing additional information about its inability to build. Therein, NTC disclosed for the first time that it could not construct at its authorized transmitter site. Although that site houses a broadband communications tower, the existing facilities operate on solar power which is insufficient for FM broadcast operations. NTC states that its original consultant experienced unforeseen difficulties in extending power to the site. After severing its relationship with that consultant, NTC retained a new engineer to locate an alternate site. In its Second and Third Supplements, filed August 31, 2011, and September 30, 2011, respectively, NTC sought additional thirty-day periods to complete engineering studies of potential replacement sites.

On October 28, 2011, NTC filed the Fourth Supplement stating that it determined that the only viable replacement site is located on NTC's campus. NTC determined that it could not, from that site, replicate the coverage on which its fair distribution preference was based. On October 31, 2011, NTC filed the Application. NTC contends that its proposal includes service gains that would partially offset service losses and calculates that its modification would provide a new first plus second NCE service to 13,577 people (2,036 first service and 11,541 second service), a net loss of 3,321 people from its original proposal (2,844 net loss of first service and 477 net loss of second service).¹⁵ NTC thus seeks a waiver of the downgrade prohibition upon which its permit is conditioned. NTC argues that a waiver would serve the public interest by furthering Commission policies to promote telecommunications service to tribal lands.¹⁶

Discussion. An applicant seeking a rule waiver has the burden to plead with particularity the facts and circumstances that warrant such action.¹⁷ The Commission must give waiver requests "a hard look," but an applicant for waiver "faces a high hurdle even at the starting gate"¹⁸ and must support its waiver request with a compelling showing.¹⁹ Waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.²⁰ Generally, the Commission grants a rule waiver only if the relief requested would not undermine the policy objective of the rule in question, and would otherwise serve the public interest.²¹

¹⁵ This data uses the "snap-shot" date of the original application, as required. Alternatively, NTC submits an analysis that takes into account a proposed modification by another NCE FM station, KLGQ, after the snap-shot date. NTC states that a "forward looking analysis" incorporating changes to KLGQ would result in NTC first service to 8,381 people and second service to 2,150 people for a total aggregated new NCE service to 10,531 people. We will not use this alternative data. See *Jeffrey D. Southmayd, Esq., KALD(FM), Caldwell, TX*, Letter, 24 FCC Rcd 5672, 5673 (MB 2009) ("KALD") (declining to consider post-snap-shot date changes by other stations). In any event, our decision would not have been different under those alternative figures, which increase first service but substantially reduce aggregated first plus second service.

¹⁶ Petition at 13; Fourth Supplement at 7.

¹⁷ See *Columbia Communications Corp. v. FCC*, 832 F.2d 189, 192 (D.C. Cir. 1987) (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 644, 666 (D.C. Cir. 1968)).

¹⁸ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (1972), *cert. denied*, 93 S.Ct. 461 (1972) ("WAIT Radio"). See also *Thomas Radio v. FCC*, 716 F.2d 921, 924 (D.C. Cir. 1983).

¹⁹ *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999) (citing *Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974)).

²⁰ See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); see also *WAIT Radio*, 418 F.2d at 1159 (Commission may consider hardship, equity, or more effective implementation of overall policy on an individual basis).

²¹ *WAIT Radio*, 418 F.2d at 1157.

It is rare for the Bureau to permit service downgrades of the type requested here. In this case, NTC proposes a downgrade area of approximately 4,328 square kilometers. This would result in the loss of a first NCE service by 5,062 people and the loss of a second NCE service by 42 people.²² We have, for example, denied downgrade requests where fair-distribution-favored applicants argued simply that they still would have prevailed over other applicants with the modified proposal; that the proposed losses of areas and population are small; and/or that proposed losses would be offset by proposed gains.²³

Two key considerations guide our evaluation of Section 73.7005(c) waivers. A waiver may not undermine the service goals the rule seeks to advance. Secondly, a waiver may not be used to undermine the integrity of our comparative licensing scheme. Thus, in these circumstances, a permittee must show: (a) that the site loss was entirely beyond the permittee's control and not reasonably foreseeable; (b) that the permittee conducted a thorough search for replacement sites and chose a location that would maintain service to as much of the original unserved/underserved areas as possible; and (c) that countervailing public interest benefits support a waiver, e.g., the modification would provide service to unserved/underserved areas which were not included in the existing authorization and that the "snap-shot" date population within this gain area exceeds that lost.

In support of its requested waivers, NTC argues that the power company's inability to bring electricity to the original site was beyond NTC's control. NTC states that it conducted a diligent search for a new location and determined that an existing tower on its campus is "the only viable site." In particular, NTC states that the same rugged terrain which makes it "virtually impossible" to bring electricity to the original site limits potential replacement sites. Moreover, NTC claims that historic preservation issues preclude construction close to the Chaco Canyon archeological monuments, ancient ruins near the original site.²⁴ Replicating service to the area on which the original preference was based is further frustrated, argues NTC, by the propagation characteristics of radio signals because the area of lost first service is at a high elevation above the Chaco Mesa mountain range and cannot receive signals from potential replacement sites at considerably lower heights. In order to mitigate the amount of lost service resulting from the move, NTC proposes to add 50 feet to the existing 149-foot communications tower at the new site. NTC contends that reaching the lost area from the new site would require that it build a new tower approximately 1,000 feet taller than the one currently in place. NTC argues that, even if it could obtain local approvals, such construction could not be accomplished within the necessary time frame prior to expiration of PTFP funding.²⁵

NTC also contends that a waiver is warranted due to the uniqueness of its mission, which is consistent with the Commission's policy initiatives on Tribal broadcast ownership.²⁶ NTC states that the

²² These loss numbers are the result of the Bureau's independent analysis and larger than those provided by NTC because NTC identifies only a net loss after considering gains. We also observe that the Bureau's numbers may not correlate exactly to others presented by NTC because the Bureau does not have access to proprietary software used by NTC's engineering consultant.

²³ See *KALD*, 24 FCC Rcd 5672 (voluntary move with loss of first NCE service to 2,262 people and proposed gain of first NCE service to 2,081 people). The primary case cited by NTC in support of its proposed modification does not involve a downgrade to an area on which an applicant prevailed on fair distribution. See *Radio Free Moscow*, Letter, 25 FCC Rcd 10111(MB 2010) (application held in abeyance so that applicant tentatively selected by NCE point system and who originally had reasonable assurance of site availability could determine whether the site remained available and, if not, specify a new site).

²⁴ Fourth Supplement at 6.

²⁵ *Id.* at 7.

²⁶ Petition at 6.

Commission has long recognized that Indian reservations and tribal lands have limited radio service and has been trying to address that situation.²⁷ NTC contends that a waiver would foster those goals because the station, even as modified, would reach out to remote and isolated residents including many below the poverty line, offering benefits of education and information never available to them before and by broadcasting in the Navajo language to many with a limited command of English.²⁸

Additionally, NTC argues that no other party in Group 182 or potential applicant in a future window would be harmed. With respect to Group 182, NTC states that it would have prevailed even with the lesser facilities in the modified proposal.²⁹ It also argues that it would be “virtually guaranteed” to prevail over other applicants in a future window because NTC would then qualify for a tribal priority that the Commission adopted in 2010, after the comparative consideration of Group 182.³⁰

Finally, NTC contends that the recent elimination of PTFP funding supports its request. NTC states that if the Bureau denies the requested waiver, NTC will simply apply for the desired facilities in the next NCE filing window and is “virtually guaranteed” to prevail under the tribal priority. However, the \$405,196 grant from the PTFP program expires in March 2012, and would be “lost forever” because the PTFP has been defunded and no future applications are being accepted.³¹ NTC thus argues that denial of a waiver would accomplish nothing except to eliminate important funding that would be extremely hard to replace and delay radio service on tribal lands, thereby frustrating the Commission’s goals of promoting Tribal telecommunications services.³²

As NTC notes, the Commission is committed to assisting Indian Nations in establishing radio service meeting the needs of their communities and citizens.³³ Any process leading to deployment of communications services on Tribal lands must recognize Tribal sovereignty and self-determination, the unique needs and priorities of Native Nations and Tribal communities, and the importance of consultation and coordination with Tribal government and Native community leaders.³⁴ We further acknowledge the rights of Native Nations to set their own communications priorities and goals for the welfare of their membership.³⁵ At the same time, the Commission must also be mindful of its fundamental interests in maintaining the integrity of the rules and policies that will promote radio licensing for all Tribal Nations throughout the country.

²⁷ Petition at 14 citing *Statement on Establishing a Government to Government Relationship with Indian Tribes*, 16 FCC Rcd 4078 (2000).

²⁸ Petition at 3, 7.

²⁹ *Id.* at 9.

³⁰ Fourth Supplement at 3. Petition at 10. The priority provides that “a full-service FM applicant that identifies itself as a Tribal Applicant, that proposes Tribal Coverage, and that proposes the first reserved channel NCE service owned by any Tribal Applicant at a community of license located on Tribal lands, will be awarded a construction permit.” 47 C.F.R. 73.7002(b). See *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, First Report and Order and Further Notice of Proposed Rule Making, 25 FCC Rcd 1583, 1584-85 (2010) subsequent history omitted. See also 47 C.F.R. § 73.7000. (defining relevant terms).

³¹ Petition at 16.

³² Fourth Supplement at 2-3.

³³ See *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Third Report and Order, MB Docket No. 09-52, FCC 11-190, __ FCC Rcd __ (rel. Dec. 29, 2011), *slip op.* at 3 (“*Rural Radio*”).

³⁴ *Id.* at 7.

³⁵ *Id.*

With all of these important goals in mind, we find that NTC's waiver showing is insufficient. It has not shown that the loss of the original site was beyond its control or that the technical problems of constructing and operating a radio transmission facility at the site were unforeseeable. Rather, the issue of bringing power to a remote location is both foreseeable and a matter which any diligent party would investigate prior to the filing of a construction permit application. NTC does not indicate to what extent, if any, it coordinated with the local power company prior to application to determine the feasibility of its technical proposal. NTC only states vaguely without further explanation, that it expected power could be brought to the site, which is located on Navajo Tribal lands, "because of conditions adjacent to the proposed location."³⁶ Moreover, NTC has not shown that it would be impossible to replicate coverage to the loss area. NTC implicitly acknowledges the possibility of reaching the loss area from its chosen replacement site by constructing a new taller tower but dismisses that option due to time constraints.³⁷ This impediment, however, is solely the consequence of NTC's inattentiveness and lack of diligence in taking steps to timely construct the Crownpoint station.³⁸ While NTC faults its original consultant, the Commission has always held the licensee/permittee responsible for the actions and omissions of its employees and independent contractors because the permittee/licensee must retain ultimate control over any construction tasks it chooses to delegate to others.³⁹ Third, there would be a net loss in first or second NCE service levels. Approximately 5,062 people would lose a first or second service and, even when factoring in potential gains, there remains a net loss to approximately 3,321 people. We also reject the argument that we should waive the Rules based on NTC's professed high probability of prevailing in a future NCE filing window. The Commission cannot know who might file applications mutually exclusive with NTC's in the next window and whether any other applicants might also qualify for a tribal priority, which will then be available for the first time to NCE applicants. We will neither prejudge a future proceeding nor apply the tribal priority retroactively by using it, as NTC suggests, to negate a condition placed on the permit in 2008.

For these reasons, we conclude that a waiver of the downgrade restriction is unwarranted. It would both undermine the rule's goal and the integrity of our comparative licensing procedures. NTC is solely responsible for proposing a facility that is either unable or unwilling to construct. Accordingly, we need not reach its request for waiver of the three-year construction deadline, which was premised on the need for more time to build the proposed downgraded facilities. Since we are dismissing the Application, NTC's request for waiver of the construction period is moot.⁴⁰ For sake of a complete record, we note that much of NTC's argument for waiver of the construction deadline is based on the same factors

³⁶ Supplement at 2; Fourth Supplement at 8, n.13. NTC indicates "continuing" discussions between its consultant and the power company in January 2011. Supplement at 2.

³⁷ Fourth Supplement at 7.

³⁸ It appears that the time constraints resulted because little planning was done prior to application or during the first two+ years of the permit, at a time when NTC was relying significantly on its former consultant. Receipt of PTFP funding is the only progress that NTC indicates during that timeframe. Arviso Declaration at 1

³⁹ See *Eure Family Limited Partnership*, Memorandum Opinion and Order, 17 FCC Rcd 21861, 21863-64 (2002); *MTD, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 34, 35 (1991); *Wagenvoord Broadcasting Co.*, Memorandum Opinion and Order, 35 FCC 2d 361 (1972).

⁴⁰ Moreover, it would have confronted some of the same problems as the waiver request considered above, given that selections of sites and engineering consultants are considered matters within a permittee's control.

discussed above in the context of the fair distribution waiver and that those factors do not constitute “rare and exceptional circumstances” beyond the permittee’s control, the standard for broadcast construction deadline waivers.⁴¹

We remain available to consult with NTC and other Tribal applicants on any questions that they may have at any stage of our radio application and licensing processes. Please note that we recently revised our rules to provide for “Tribal Allotments” of commercial radio frequencies. The new process allows a qualified Tribal applicant to simultaneously file a Petition for Rule Making and a FCC Form 301 application. If the proposed Tribal Allotment is allocated and no competing application is filed by another Tribal applicant, the original application will be processed without an auction.⁴² Although these new rules have not yet taken effect, a Tribal applicant could submit such a proposal now.

Accordingly, the August 8, 2011 Petition for Waiver by Navajo Technical College as supplemented, IS HEREBY DENIED with respect to a downgrade of facilities and DISMISSED AS MOOT with respect to additional time to construct. Accordingly, the application for modification of permit (File No. BMPED-20111031AAG) IS DISMISSED and the underlying permit (File No. BNPED-20071022BAR) expired on its own terms on August 5, 2011.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

⁴¹ See *Streamlining of Mass Media Applications*, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17541 (1999). We disagree with NTC’s position that its circumstances are similar to those in *Rebecca Duke*, 18 FCC Rcd 5034 (2003) (site loss resulting from governmental taking by eminent domain beyond permittee’s control).

⁴² See *Rural Radio*, slip op. at ¶¶ 8-9.