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In re: **NCE Reserved Allotment Group 1**
New NCE-FM, Anniston, Alabama
Anniston Seventh-Day Adventist Church
Facility ID No. 184996
File No. BNPED-20100226ABT

New NCE-FM, Anniston Alabama
Board of Trustees of Jacksonville State
University
Facility ID No. 184855
File No BNPED-20100226AFB

Petition for Reconsideration

Dear Counsel:

We have before us a Petition for Reconsideration (“Petition”), filed by the Board of Trustees of Jacksonville State University (“JSU”) on November 5, 2012.¹ JSU challenges our dismissal of its application (“JSU Application”) for a new noncommercial educational (“NCE”) FM station at Anniston, Alabama, and our reinstatement *nunc pro tunc* and grant of an application (“ASDA Application”) filed by Anniston Seventh-Day Adventist Church (“ASDA”) for a new NCE FM station at Anniston, Alabama. For the reasons set forth below, we deny the Petition.

Background. NCE Reserved Allotment Group 1 consisted of eight applications – including those filed by ASDA and JSU – to serve Anniston, Alabama, on Channel 261C3. Channel 261C3 is located in the non-reserved portion of the FM band but has been reserved for non-commercial educational use. Thus, in evaluating the applications in NCE Reserved Allotment Group 1, the Commission first considered whether each applicant satisfied the “third channel reservation standard.”² Under that standard, an applicant must

¹ ASDA filed an Opposition to Petition for Reconsideration on November 20, 2012 (“Opposition”). JSU filed a Reply to Opposition to Petition for Reconsideration on December 5, 2012.

² See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Second Report and Order, 18 FCC Rcd 6691 (2003) (“*NCE Second Report and Order*”).

propose to provide a first or second NCE service to at least ten percent of the population within the proposed station's service area and this first or second NCE service must reach at least 2,000 people.³ The Commission concluded that each applicant in NCE Reserved Allotment Group 1 met the reservation standard and, thus, all applicants would proceed to a point hearing.⁴ The Commission ultimately determined that ASDA had the highest point total of all the applicants with five points.⁵ Accordingly, the Commission designated ASDA the tentative selectee for NCE Reserved Allotment Group 1 and accepted its application for filing, which triggered a 30-day period for parties to file petitions to deny.⁶

JSU filed a petition to deny, arguing that the ASDA Application did not satisfy the third channel reservation standard and therefore should be dismissed. Commission staff reviewed the ASDA Application and confirmed that ASDA had failed to meet the standard. In a letter released on May 23, 2012, we granted the petition, rescinded ASDA's tentative selection, and dismissed the ASDA Application. We then designated the applicant with the next highest point total – JSU – as the tentative selectee and accepted the JSU Application for filing, triggering a 30-day period for parties to file petitions to deny that application.⁷

ASDA filed a petition to deny the JSU Application and a petition for reconsideration of our dismissal of its application. ASDA argued that the Commission should dismiss the JSU Application and accept an amendment to the ASDA Application, which ASDA filed on June 22, 2012. It claimed that the amendment remedied its failure to meet the reservation standard, and therefore, that the staff should reinstate its application *nunc pro tunc*. In a letter released October 4, 2012 (“*Letter Decision*”), we granted both ASDA petitions, dismissed the JSU Application, reinstated the ASDA Application *nunc pro tunc*, reviewed the amended ASDA Application, found the amendment remedied ASDA's defective third channel reservation showing, and granted that application. The Bureau did so after explaining that applicants may cure defective third channel reservation showings by filing an amendment that satisfies the criteria set forth in Section 73.3522(b)(2) and concluding that ASDA's amendment satisfied those criteria.

JSU timely filed the Petition, seeking reconsideration of the *Letter Decision*. Therein, JSU asserts that we erred in accepting *nunc pro tunc* the amendment filed by ASDA which cured the reservation standard defect. JSU also criticizes the method ASDA used to bring its application into compliance with the reservation standard.

Discussion. Nature of Application Defect. Under Commission precedent, applicants may cure some but not all defects in their applications via amendment. JSU argues that we erred in allowing ASDA to cure the third channel reservation standard defect in its application because that defect is one which may not be cured.⁸ However, JSU ignores the fact that, in order to treat such a defect as incurable,

³ *Id.* at 6703-05.

⁴ See *Comparative Consideration of 37 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial FM Stations filed in the February 2010 and October 2007 Filing Windows*, Memorandum Opinion and Order, 26 FCC Rcd 7008, 7014 (MB 2011) (“*Comparative Consideration Order*”).

⁵ See *id.* at 7015. JSU received three points; Equality Broadcasting Network, Moody Bible Institute of Chicago, and Smile FM each received two points; and Covenant Communications, Serendipity Educational Broadcasting, and Old Time Gospel Ministries did not receive any points. *Id.*

⁶ *Id.* at 7050.

⁷ See *NCE Reserved Allotment Group No. 1*, Letter, 27 FCC Rcd 5710 (MB 2012).

⁸ Petition at 6.

the Commission must have provided full and explicit notice to applicants of this strict processing policy.⁹ Here, at no time prior to the filing window during which ASDA and JSU submitted their applications, did the Commission indicate that applicants must successfully show compliance with the third channel reservation standard at the time of filing.¹⁰ In contrast, in other instances, where the Commission has made the failure to provide information or satisfy a requirement at the time of filing an incurable defect, it has done so explicitly.¹¹ Because the Commission must give full and explicit notice that the failure to satisfy an application filing requirement will result in dismissal with prejudice but did not do so here, we find the failure to satisfy the third channel reservation standard to be a curable defect.¹² Accordingly, we conclude that ASDA was entitled to submit an amendment which cured the reservation standard defect in its application.¹³

Applicability of Section 73.3522(b)(2). JSU next argues that we erred in finding Section 73.3522(b)(2) applicable to the amendment submitted by ASDA on June 22, 2012, that cured the reservation standard defect in its application.¹⁴ JSU points out that ASDA previously amended its application on December 27, 2011. JSU argues that this was ASDA's "one bite at the apple" and notes that this amendment did not cure the reservation standard defect.¹⁵ JSU asserts that we should have rejected ASDA's later amendment to its application, which did remedy the reservation standard defect.¹⁶ We reject this argument. As ASDA notes, Section 73.3522(b)(2) pertains to amendments by applicants designated tentative selectees whose applications have been found unacceptable for filing. At the time ASDA filed its first amendment, it was not a tentative selectee. Thus, ASDA's prior amendment did not constitute the one opportunity provided by Section 73.3522(b)(2) to cure application defects. Accordingly, JSU's argument is without merit.

⁹ See *JEM Broadcasting Co., Inc. v. FCC*, 22 F.3d 320, 329 (D.C. Cir. 1994) (explaining that "clear and explicit" notice is required if the Commission wishes to treat a defect as incurable). See also *Liberty Productions*, 16 FCC Rcd 12061, 12068-69 (2001) (rejecting argument that, because applicant's short-form application did not contain all necessary information, it should be dismissed with prejudice, and, in so doing, noting that neither the applicable Rules nor the Public Notice announcing the applicable filing requirements provided for dismissal with prejudice of applications omitting some of the required information).

¹⁰ Indeed, in the public notice announcing the filing requirements for this window, the Media Bureau merely stated: "if the third channel reservation standard ... served as the basis for reservation of the allotment, applicants for that allotment must provide a first or second NCE service to at least ten percent of the population within the proposed station's service areas and that population must be at least 2000 persons." *Media Bureau Announces Filing Window for Vacant FM Allotments Reserved for Noncommercial Educational Use*, Public Notice, 24 FCC Rcd 12621, 12623 (MB 2009).

¹¹ See, e.g., *Amendment of Part 73 of the Commission's Rules to Modify Processing Policies for Commercial FM Broadcast Applications*, Report and Order, 7 FCC Rcd 5074, 5077 (1992) (establishing "first tier" minimum filing requirements and barring corrective amendments when such information is omitted); *Low Power FM Filing Window*, Public Notice, 16 FCC Rcd 7915, 7916 (MMB 2001) (providing that LPFM applications filed in 2000-01 windows that did not comply with certain specified interference protection requirements "will be dismissed with no opportunity to correct the deficiency").

¹² The lack of notice is the critical factor here. Thus, we are not persuaded by the evidence submitted by JSU in its attempts to demonstrate that the Commission viewed a failure to satisfy the third channel reservation standard "as disqualifying." Petition at 4-6.

¹³ See 47 C.F.R. § 73.3564(a)(3) (providing an opportunity for corrective amendment pursuant to Section 73.3522 of the Rules where an application meets minimum filing requirements but contains deficiencies in tender and/or acceptance information).

¹⁴ Petition at 3.

¹⁵ *Id.*

¹⁶ *Id.* at 4-5.

JSU further argues that Section 73.3522(b)(2) refers specifically to tentative selectees and thus applies only to applicants in that posture.¹⁷ It states that, at the time we issued the *Letter Decision*, ASDA was not a tentative selectee but a dismissed applicant. Thus, JSU argues that Section 73.3522(b)(2) was inapplicable.¹⁸ We find this argument unpersuasive. Indeed, we previously found that Section 73.3522(b)(2) is available to tentative selectees whose applications are dismissed.¹⁹ This finding is supported by the language of Section 73.3522(b)(2) itself. That section provides for the “return” of an unacceptable application and offers a tentative selectee whose application has been “returned” “one opportunity for curative amendment by filing a petition for reconsideration requesting reinstatement of the application.” We note that the only reason an applicant would need to seek reinstatement is if its application had been dismissed.²⁰

Abuse of Process. JSU criticizes the method ASDA used to bring its application into compliance with the third channel reservation standard.²¹ Specifically, ASDA revised its proposal to specify a directional antenna, which reduced the total population within the station’s proposed service area. While the total number of persons receiving first and/or second NCE service did not change, the reduction in total population served led to an increase in the percentage of the total population receiving first and/or second NCE service. JSU argues that ASDA is “gaming [] the system.” In response, ASDA notes that if its original application had proposed the service area specified in its amended application, there would have been no negative implications.²² We agree and find no evidence of any abuse of process on ASDA’s part.

¹⁷ *Id.* at 3.

¹⁸ JSU notes that “it could be argued that ASDA should have been given the opportunity to amend as a tentative selectee instead of being dismissed” but points out that ASDA should never have been chosen as a tentative selectee in the first place. We find this argument unpersuasive. Had the Commission initially dismissed the ASDA Application for failure to satisfy the third channel reservation criteria, ASDA could have taken the same steps – filing a petition for reconsideration and reinstatement *nunc pro tunc* and an amendment remedying the defect – and achieved the same result. See *Hampton Roads Educational Telecommunications Association, Inc.*, Letter, 25 FCC Rcd 7376, 7380-81 (MB 2010) *app. for review pending, citing Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, Public Notice, 56 RR 2d 776 (1984).

¹⁹ *NCE Reserved Allotment Group No. 8*, Letter, 27 FCC Rcd 15208 (MB 2012) (granting a petition for reconsideration of the dismissal of an application for failure to meet the third channel reservation standard, accepting an amendment which cured the reservation standard defect and reinstating the application *nunc pro tunc*).

²⁰ JSU argues that Section 73.3522(b)(2) uses the specific language “returned.” JSU notes that the ASDA application was dismissed not returned. While the Commission has not addressed whether a dismissed application is a “returned” application for purposes of Section 73.3522(b)(2), it has done so with respect to Section 73.3522(b)(1), which includes identical language. See 47 C.F.R § 73.3522(b)(1) (providing that if an application selected after a fair distribution analysis is unacceptable for filing, “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”). The Commission specifically described Section 73.3522(b)(1) as providing for dismissal of a tentative selectee’s application if it is found unacceptable for filing. See *Threshold Fair Distribution Analysis of 9 Groups of Mutually Exclusive Applications for New or Modified Noncommercial Educational Stations Filed in the October 2007 Window*, 25 FCC Rcd 15134, 15141 n. 36 (2010); *Stuart J. Nolan, Jr., Esq.*, Letter, 26 FCC Rcd 6155, 6162 n. 30 (2011).

²¹ Petition at 7.

²² Opposition at 6-7.

Conclusions/Actions. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by the Board of Trustees of Jacksonville State University on November 5, 2012, IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau