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In re: **NCE MX Group 409**
New NCE(FM), Vieques, Puerto Rico
Facility ID No. 173116
File No. BNPED-20071019AZH

New NCE(FM), Christiansted, Virgin Islands
Facility ID No. 175804
File No. BNPED-20071022AUJ

Petition to Deny
Petition for Reconsideration

Dear Counsel:

We have before us: (1) the above-referenced application filed on October 22, 2007, by Optima Enrichment, Inc. ("Optima") for a construction permit for a new noncommercial educational ("NCE") FM station at Christiansted, Virgin Islands ("Optima Application")[1]; (2) the above-referenced application filed on October 19, 2007, by Vieques Youth Leadership Initiative, Inc. ("Youth") for a construction permit for a new NCE FM station at Vieques, Puerto Rico ("Youth Application")[2]; (3) a Petition to Deny the Optima Application ("Petition to Deny") filed on December 20, 2010, by Youth;[3] and (4) a Petition for Reconsideration also filed on December 20, 2010, by Youth ("Petition for Reconsideration").[4] Youth seeks reconsideration of a November 18, 2010, Audio Division, Media Bureau ("Bureau") letter ("*Staff Decision*"),[5] which set aside the Commission's August 2, 2010, tentative selection of Youth in mutually exclusive ("MX") Group 409.[6] For the reasons stated below, we deny the Petition to Deny and the Petition for Reconsideration, dismiss the Youth Application, and grant the Optima Application, as conditioned.

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[1] File No. BNPED-20071022AUJ.

[2] File No. BNPED-20071019AZH.

[3] Optima filed an Opposition to the Petition to Deny on January 11, 2011 ("Opposition to Petition to Deny").

[4] Optima filed a Motion for Extension of time on January 7, 2011, and an Opposition to the Petition for Reconsideration on January 11, 2011 ("Opposition to Petition for Reconsideration").

[5] *Vieques Youth Leadership Initiative, Inc.*, Letter, Ref. No. 1800B3-BSH (MB Nov. 18, 2010).

[6] *See Comparative Consideration of 26 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 11108, 11117 (2010) ("*Comparative Consideration Order*").

Background. Youth and Optima filed mutually exclusive applications for new NCE FM stations in the October 12-19, 2007, NCE filing window.[7] The Youth Application and Optima Application were designated as part of NCE MX Group 409 in the Commission's August 2, 2010, *Comparative Consideration Order*.[8] Of the 11 applicants in Group 409, five applicants, including Youth and Optima, claimed eligibility for a fair distribution preference and provided supporting documentation thereof. Accordingly, the other six applications were eliminated.[9] None of the remaining five claimed eligibility for a fair distribution preference based on first NCE service. Thus, because first NCE service was not determinative, the Commission considered the aggregated first and second NCE service provided by the remaining applicants. Youth was found to provide aggregated first and second service to the greatest number of people. The Youth Application provided aggregated first and second service to at least 5,000 more people than any of the other remaining applications, except for the Puerto Rico Public Broadcasting Corporation ("PRPB") Application.

The Commission found the fair distribution claims of Youth and PRPB to be comparable, because neither would exceed the other by at least 5,000 people. Therefore these two applicants proceeded to a point hearing. Because Youth was credited with a total of five points and PRPB was credited with a total of three points, Youth was named the tentative selectee.[10] The Commission accepted the Youth Application for filing and announced a 30-day period for filing petitions to deny. The remaining NCE MX Group 409 applicants, other than Youth and Optima, were dismissed on September 10, 2010, with public notice of the dismissals given on September 15, 2010.[11]

On September 2, 2010, Optima filed a Petition to Deny ("Optima Petition"), challenging the tentative selection of Youth on the ground that Youth had "failed to include licensed station WIUJ[FM] in their [fair distribution] calculations, which is on Channel *275A—an allotment in the non-reserved band that is reserved for exclusive noncommercial use."[12] In support of this argument, Optima cited to a 1995 *Report and Order* reserving Channel 275A at Charlotte Amalie, Virgin Islands, for noncommercial educational use.[13] If Station WIUJ(FM) had been properly considered in its analysis, Optima concluded, Youth would not have received a fair distribution preference based on providing a second local service.

On November 18, 2010, in the *Staff Decision*, the Bureau agreed with Optima that Station WIUJ(FM) should have been included in Youth's fair distribution analysis, explaining that "reserved channels in the nonreserved band (Channels 221-300) are considered in an applicant's NCE service calculation."[14] The Bureau also concluded that, taking Station WIUJ(FM) into account, Youth would

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[7] *Comparative Consideration Order*, 25 FCC Rcd at 11117.

[8] *Id.*

[9] At each stage of the Section 307(b) analysis, any applicant that is comparatively disfavored in terms of eligibility or service totals is eliminated. The process ends when the Commission determines that one applicant is entitled to a preference or that none of the remaining applicants can be selected or eliminated based on a Section 307(b) preference. In the latter case, all remaining applicants proceed to a point system analysis.

[10] *Comparative Consideration Order*, 25 FCC Rcd at 11117.

[11] *Broadcast Actions*, Public Notice, Report No. 47321 (MB Sept. 15, 2010). Because these applicants did not appeal the dismissals of their applications, those actions are now final.

[12] *See Staff Decision* at 2. Youth filed an Opposition to the Petition to Deny on September 15, 2010 ("Youth Opposition").

[13] *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Charlotte Amalie, Virgin Islands)*, Report and Order, 10 FCC Rcd 6533 (MMB 1995) ("*Report and Order*") (finding that the public interest would be served by reserving Channel *275A at Charlotte Amalie, Virgin Islands, for noncommercial educational use).

[14] *Staff Decision* at 3, *citing Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Memorandum Opinion and Order, 16 FCC Rcd 5074, 5089 (2001) ("*First Reconsideration Order*") ("In determining whether a significant population receives NCE aural service, *i.e.*, whether it is unserved or underserved

provide no first or second service to any populated area. The Bureau also determined that PRPB, the only applicant which made comparable fair distribution claims, had made the same error and thus would provide no first or second NCE service. Finally, the Bureau found reasonable Optima's claim that it would provide aggregated first and second service to 36,221 people (no first service plus 36,221 second service). Because all other applicants had been dismissed and those dismissals had become now final, the Bureau set aside the prior tentative selection of the Youth application and named Optima as the new tentative selectee.[15]

In the Petition to Deny, Youth argues that the Optima Application is patently defective due to various differences in the technical data included therein and the Commission's Antenna Structure Registration database, namely discrepancies in site coordinates, tower height, antenna height above mean sea level, and antenna height above average terrain.[16] As a result, according to Youth, the Optima Application overstates the predicted population within its proposed 60 dBμ service contour.[17] In its Opposition, Optima counters that, under the Commission's Rules, a tentative selectee is given one opportunity to submit a minor amendment to cure deficiencies in its application and that it intends to do so.[18] Optima filed a curative amendment on January 11, 2011.

In its Petition for Reconsideration of the *Staff Decision* setting aside the tentative selection of the Youth Application, Youth claims that, as a procedural matter, the Optima Petition was defective and should have been dismissed.[19] Specifically, Youth contends that that the Optima Petition did not "contain allegations of fact supported by affidavit of a person or persons with knowledge thereof" as required by Section 309 (d)(1) of the Communications Act of 1934, as amended ("Act").[20] Youth states that the Optima Petition did not identify the technical consultant that prepared exhibit E.1 and contains only the affidavit of Optima's director, John Melchert, which was in turn "based on information provided by our technical consultant and information found in the FCC's records."[21] Furthermore, Youth claims that the Optima Petition should have been dismissed because it did not contain Optima's address, as required by in Section 1.52 of the Rules.[22]

Substantively, Youth repeats its argument that Station WIUJ(FM) was correctly excluded from its fair distribution calculations.[23] Specifically, Youth argues that the reservation of Channel *275A for

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by existing NCE stations, we will count as first and second signals only *reserved channel* NCE-FM stations. Historically, the Commission has only considered stations operating on reserved channels to determine the level of NCE service already received, and we see no reason to change that practice in context.") (emphasis in original); 47 C.F.R. § 73.7000 (definition of "reserved channels" includes channels that are "reserved" by allotment decision).

[15] *Staff Decision* at 3-4.

[16] Petition to Deny at 2-3.

[17] *Id*. at 3.

[18] Opposition to Petition to Deny at 2-3 (citing, *inter alia*, the *Comparative Consideration Order*, 25 FCC Rcd at 11131, n.60 "If a tentative selectee's application is found unacceptable for filing, it is returned. The applicant is then given one opportunity to submit a curative amendment. *See* 47 C.F.R. § 73.3522(b)(2). A tentative selectee that is unable to cure the defect with a minor amendment is disqualified, and the applicant with the next highest point tally becomes the new tentative selectee. *See* 47 C.F.R. § 73.7004(d).").

[19] Petition for Reconsideration at 3.

[20] Youth Opposition at 2 (incorporated by reference into the Petition for Reconsideration), *citing* 47 C.F.R. § 73.7004(b); 47 U.S.C. § 309(d)(1).

[21] Youth Opposition at 2 (quoting Optima Petition at 2).

[22] Youth Opposition at 2; 47 C.F.R. § 1.52 ("A party who is not represented by an attorney shall sign and verify the document and state his address.").

[23] Petition for Reconsideration at 3-5.

NCE use in the nonreserved band is not "sufficiently fixed" for it to be counted as a first or second NCE aural service in a fair distribution analysis, because this reservation "may be changed by the Audio Division upon the request of interested parties."[24] Only reserved band stations, according to Youth, should be counted in a fair distribution analysis.[25]

In its Opposition to the Petition for Reconsideration, Optima notes that the controlling legal authority on this matter specifically refers to "reserved *channels*" rather than the "reserved *band*."[26] "Reserved channels" are defined in Section 73.7000 of the Commission's rules, Optima observes, as "[c]hannels reserved exclusively for noncommercial educational use, whether by the portion of the spectrum in which they are located (i.e. FM channels 200 to 220) or by a case-by-case Commission allotments decision (channels that appear with an asterisk designation in the FM Table of Allotments (§73.202) or TV Table of Allotments (§ 73.606))."[27] Lastly, Optima argues that, unlike NCE operations on non-reserved channels, which can be converted to commercial operation upon application (FCC Form 302-FM), reserved channels in the commercial band cannot be "simply or easily 'converted' to commercial operation."[28] To the extent that Youth is arguing for a change in this rule, Optima contends, it should file a petition for rulemaking.[29]

Discussion. *Petition for Reconsideration.* Procedurally, we disagree with Youth that the Optima Petition was not acceptable because it lacked an affidavit or address for Optima. Section 309 of the Act provides that a petition to deny "shall contain specific allegations of fact . . . Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof."[30] In this case, the *Staff Decision* relied not upon the personal knowledge of Optima's director but upon Commission records establishing the allocation of Channel *275A at Charlotte Amelia for NCE purposes. Because this is a fact of which the Commission may take official notice, no affidavit was necessary.[31] Moreover, we note that in this case no party was prejudiced by the omission of Optima's address, since Youth was able to obtain Optima's address from Commission records for service of its Opposition to the Optima Petition. Therefore, we find that Youth fails to justify dismissal of the Optima Application on procedural grounds.

Substantively, we find that Youth fails to refute the controlling legal authority cited in the *Staff Decision*.[32] The Commission has stated that "[i]n determining whether a significant population receives NCE aural service, *i.e.*, whether it is unserved or underserved by existing NCE stations, we will count as first and second signals only *reserved channel* NCE-FM stations."[33] As noted in the *Staff Decision* and

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[24] Petition for Reconsideration at 4-5.

[25] Petition for Reconsideration at 4.

[26] Opposition to Petition for Reconsideration at 1-3 (quoting the *First Reconsideration Order*, 16 FCC Rcd at 5089 and *Second Reconsideration Order*, 17 FCC Rcd at 13133) (emphasis added).

[27] Opposition to Petition for Reconsideration at 3; 47 C.F.R. § 73.7000.

[28] Opposition to Petition for Reconsideration at 3; *see also* 47 C.F.R. § 73.1690(c)(9).

[29] Opposition to Petition for Reconsideration at 4.

[30] 47 U.S.C. § 309(d)(1) ("Section 309(d)(1)").

[31] *See Comparative Consideration of Seven Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations Filed in the February 2010 Window*, Memorandum Opinion and Order, FCC 15-54 (rel. May 13, 2015), at 9 (holding that under Section 309(d)(1) of the Act and Section 73.7004 of the Rules, 47 C.F.R. § 73.7004, the absence of a supporting affidavit is not a procedural defect where official notice may be taken of the facts alleged).

[32] *See supra* note 14.

[33] *First Reconsideration Order*, 16 FCC Rcd at 5089 (emphasis added).

Optima's Opposition to the Petition for Reconsideration, Section 73.7000 of the Rules defines "reserved channels" to include both the reserved band as well as stations, like Station WIUJ(FM), that are reserved for noncommercial educational use "by a case-by-case Commission allotment decision."[34] Thus, we affirm the staff's finding that Station WIUJ(FM) should have been included in Youth's fair distribution analysis, because the 1995 *Report and Order* specifically reserved Channel *275A at Charlotte Amalie, Virgin Islands, for exclusive noncommercial use.[35] Taking the WIUJ(FM) authorization into account, the *Staff Decision* correctly found that the Youth proposal would provide no first or second service to any populated area. The Petition for Reconsideration thus fails to show any error in the actions taken in the *Staff Decision*.

Petition to Deny. In its Petition to Deny, Youth argues that the Optima Application should be dismissed as patently defective under Section 73.3566(a) of the Rules.[36] Youth alleges three defects in the Optima Application: (1) a discrepancy between the Antenna Structure Registration ("ASR") coordinates and the coordinates listed in the Optima Application; (2) a discrepancy between the tower height listed in the ASR and that listed in the Optima Application; and (3) an error in the listed height above mean sea level, which results in an incorrect listing of the antenna's height above average terrain ("HAAT").[37]

We disagree with Youth's assertion that these initial defects, which have since been corrected, warranted dismissal of the Optima Application in the *Staff Decision*. As stated in the *Comparative Consideration Order*, "[I]f a tentative selectee's application is found unacceptable for filing, it is returned. The applicant is then given one opportunity to submit a curative amendment. *See* 47 C.F.R. § 73.3522(b)(2). A tentative selectee that is unable to cure the defect with a minor amendment is disqualified . . . ."[38] Prior to return of the Optima Application, on January 11, 2011, Optima submitted a minor curative amendment. We have reviewed this amendment and determined that the Optima Application is acceptable for filing. We have also determined that the Optima Application, as amended, is in the public interest, as it will provide aggregated first and second service to 28,632 people (no first service plus 28,632 second service). Therefore, we deny the Youth Petition and grant the Optima Application, as conditioned below.

Conclusion/Actions. We find that Youth has not shown a material error in the Bureau's tentative selection of Optima in NCE group 409. We also find that grant of the Optima Application will further the public interest, convenience, and necessity.

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[34] 47 C.F.R § 73.7000.

[35] Contrary to Youth's assertions, NCE operation on reserved channels is "mandatory and permanent" and may not be changed upon minor change application. *First Reconsideration Order*, 16 FCC Rcd at 5089; *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Memorandum Opinion and Second Order on Reconsideration, 17 FCC Rcd 13132, 13133-34 (2002) ("Stations operating with noncommercial formats on commercially available channels do so at the discretion of the licensee and can easily convert to commercial operations by filing a minor change application. In contrast, noncommercial educational operations are mandatory on the channels reserved for that purpose.") (internal citation omitted); *see also* 47 C.F.R. § 73.1690(c)(9) (". . .an FM licensee on Channels 221 to 300 (except Class D FM) on a channel *not reserved for noncommercial educational use*, may apply to change from educational to commercial via a modification of license application . . .") (emphasis added).

[36] Petition to Deny at 2-3; 47 C.F.R § 73.3566(a).

[37] Petition to Deny at 2-3.

[38] *Comparative Consideration Order*, 25 FCC Rcd at 11131, n.60.

Accordingly, IT IS ORDERED that the Petition for Reconsideration and Petition to Deny filed by Vieques Youth Leadership Initiative, Inc. on December 20, 2010, ARE DENIED.

IT IS FURTHER ORDERED, that the application filed by Optima Enrichment, Inc. (File No. BNPED-20071022AUJ), for a construction permit for a new NCE FM station at Christiansted, Virgin Islands, IS GRANTED subject to the condition that Optima Enrichment, Inc. must operate technical facilities substantially as proposed for a period of four years of on-air operations.[39]

IT IS FURTHER ORDERED, that the application filed by Vieques Youth Leadership Initiative, Inc. (File No. BNPED-20071019AZH), for a construction permit for a new NCE FM station at Vieques, Puerto Rico, IS DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

[39] *See* 47 C.F.R. § 73.7002(c).