Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Anniston Seventh-Day Adventist Church	)	File No. BNPED-20100226ABT
	)	Facility ID No. 184996
For a New Noncommercial Educational FM Station at Anniston, Alabama	)	
	)	
and	)	
	)	File No. BNPED-20100226AFB
Board of Trustees of Jacksonville State University	)	Facility ID No. 184855
	)	
For a New Noncommercial Educational FM Station at Anniston, Alabama	)	

MEMORANDUM OPINION AND ORDER

Adopted: December 22, 2014 **Released: December 23, 2014**

By the Commission:

1. The Commission has before it an Application for Review ("AFR") filed by the Board of Trustees of Jacksonville State University ("JSU") on June 14, 2013. JSU seeks review of a Media Bureau ("Bureau") decision that denied reconsideration and affirmed a prior Bureau decision.[1] In that earlier decision,[2] the Bureau reinstated nunc pro tunc and granted an application filed by Anniston Seventh-Day Adventist Church ("ASDA") for a new NCE FM station serving Anniston, Alabama ("ASDA Application"). The Bureau also dismissed JSU's competing application for a new noncommercial educational ("NCE") FM station serving the same community ("JSU Application").

2. In this proceeding ASDA and JSU were two of eight applicants for a new station in the FM band which was reserved for NCE use under the third test for channel reservation ("third channel reservation standard").[3] An application for such a reserved allotment must demonstrate that it satisfies this licensing standard. The ASDA Application was dismissed because it did not do so. However, the staff subsequently granted reconsideration, reinstated the ASDA Application and accepted a curative technical amendment.[4] In the AFR, JSU disputes the Bureau's finding that an applicant's failure to satisfy the third channel reservation standard could be cured and therefore claims that the staff improperly applied the general nunc pro tunc processing policy to the ASDA amendment. The Bureau based this finding on the fact that, at no time prior to the filing window during which ASDA and JSU

[1] *NCE Reserved Allotment Group 1*, Letter, 28 FCC Rcd 7094 (MB 2013) ("*Letter Decision*").

[2] *NCE Reserved Allotment Group No. 1*, Letter, 27 FCC Rcd 12149 (MB 2012).

[3] *See Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Second Report and Order, 18 FCC Rcd 6691 (2003) ("*NCE Second Report and Order"*). Under that standard, an applicant must 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. *Id.* at 6703-05 ¶¶ 30-38.

[4] ASDA adjusted the coverage area of its proposed facility. This resulted in a smaller total population served, which, in turn, increased the percentage of the total population receiving first or second NCE service.

submitted their applications, did the Commission provide full and explicit notice that it would treat a third channel reservation standard defect as incurable.[5] In the AFR, JSU argues that the Commission did provide adequate notice. To support this argument, JSU cites the Commission order adopting the third channel reservation standard.[6] It also cites the Public Notice that announced the filing window in which ASDA and JSU filed their applications and set forth the filing procedures for that window.[7] Both the order and the notice discuss the third channel reservation standard. However, neither addresses whether the Commission would treat the third channel reservation standard as a minimum filing requirement, as opposed to "tender and/or acceptance information," for purposes of Section 73.3564(a)(3) of the Rules, which provides 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.[8] The Commission must give full and explicit notice that an application filing requirement is a minimum filing requirement. Otherwise, it cannot treat the failure to satisfy such a requirement as an incurable defect. As the Bureau stated, the lack of notice is the critical factor here.[9] Thus, we find the Bureau properly decided this issue, and we uphold its finding for the reasons stated here and in the Bureau's decision.[10]

3. JSU further argues that, in concluding that a third channel reservation standard defect is curable, the Bureau "impermissibly reverse[d] a full Commission decision."[11] It points to the Commission's treatment of an applicant, Serendipity Educational Broadcasting, Inc. ("Serendipity"), in a different group of mutually exclusive applications for a different reserved NCE allotment in the non-reserved FM band.[12] There, the Commission refused to consider an amendment submitted by Serendipity certifying for the first time that its proposal satisfied the third channel reservation standard. The Commission found that the amendment "constituted a prohibited attempt to enhance the applicant's comparative position."[13]

4. As an initial matter, the Commission decision cited by JSU was issued after the ASDA Application was filed. Therefore, it could not have possibly provided ASDA with notice that the Commission would treat a third channel reservation standard defect as incurable. Moreover, we have

[5] *Letter Decision*, 28 FCC Rcd at 7095-96.

[6] AFR at 4, *citing NCE Second Report and Order,* 18 FCC Rcd at 6705.

[7] AFR at 3-4, *citing Public Notice*, 24 FCC Rcd at 12623-25.

[8] *See* 47 C.F.R. §§ 73.3522(b), 73.3564(a)(3). Specifically, in the order adopting the third channel reservation standard, the Commission discussed the methodology it would use "to evaluate allotment reservation requests" but did not discuss how it planned to process applications for reserved channels that did not demonstrate that they met the third channel reservation standard at the time of filing. *NCE Second Report and Order*, 18 FCC Rcd at 6704-5 ¶¶ 34-38. Similarly, while at one point the notice did state that the Commission "will return applications and amendments not submitted in accordance with the procedures described in this Public Notice," that particular portion of the notice offered no insight into whether a defect causing an application's return is curable or not. *Public Notice,* 24 FCC Rcd at 12623.

[9] *Letter Decision*, 28 FCC Rcd at 7096 n. 10.

[10] *See id.* at 7095-96.

[11] AFR at 9.

[12] *See* AFR at 9, *citing 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, 7021 n.59 (2011) ("*Comparative Consideration Order*").

[13] *See Comparative Consideration Order*, 26 FCC Rcd at 7021 n.59.

reviewed the Commission's treatment of Serendipity and find it erred.[14] The Commission uses population data in a number of contexts. In some contexts, an amendment altering the population served by a proposed facility – or changing an applicant's certification with respect to such population – could enhance an applicant's comparative position.[15] In others, population and service certifications and computations may relate only to a non-comparative acceptability issue. This is the case with the third channel reservation standard. In its original application, Serendipity certified that its proposed facility did not satisfy the third channel reservation standard. In its amendment, Serendipity sought to change its certification from "no" to "yes."[16] In these circumstances the amendment merely sought to cure an acceptability defect. However, the Commission mischaracterized it as a comparative amendment and erroneously rejected it on this basis.[17] Given our conclusion that the Commission erred in failing to consider Serendipity's amendment, we find JSU's argument that the Bureau contravened this precedent moot.

5. We reject JSU's claim that, if the Commission reaches the conclusion that failure to satisfy the third channel reservation standard is a curable defect, it will encourage "carelessly filed applications and gamesmanship."[18] As we explained above, satisfaction of the third channel reservation standard does not offer an applicant a comparative advantage. As the precedents cited by JSU indicate,[19] we will dismiss any application for a channel reserved under this standard which does not demonstrate that it meets this acceptability standard. To have its application reinstated, an applicant dismissed for this reason must amend its application to propose a facility that does satisfy the standard. If the applicant must decrease the population and/or area it proposes to serve to accomplish this, those changes would be taken into account during any point hearing.[20]

6. We are unpersuaded by JSU's argument that Section 73.3522(b) "refers specifically to tentative selectees and thus applies only to applicants in that posture."[21] Upon review of the AFR and

[14] We note that this error was harmless. Even if the Commission had accepted Serendipity's amendment, as it noted, it would not have changed the outcome of the point hearing. *Id.*

[15] For instance, when mutually exclusive NCE FM applications propose to serve different communities, the Commission uses the population receiving a first or second NCE service from an applicant's proposed facility in conducting the fair distribution analysis required by Section 307(b) of the Communications Act of 1934, as amended. 47 U.S.C. § 307(b). *See also* 47 C.F.R. § 73.7002. In addition, the Commission looks at the total population an applicant proposes to serve as part of the point system selection process. *See* 47 C.F.R. § 73.7003(b)(4) (setting forth the best technical proposal criterion under which an applicant is awarded one point if its proposed service area and population are 10 percent greater than those of the next best area and population proposals or two points if both are 25 percent greater than those of the next best area and population proposals).

[16] *See* File No. BNPED-20100225ADK. Serendipity indicated that it had initially included a commercial station in its calculations and sought to correct this error through the amendment.

[17] We note that, if an applicant amends its application in order to satisfy the third channel reservation standard and, in so doing, alters its population numbers in a manner that enhances its comparative position, we will allow the applicant to remedy the third channel reservation standard defect but will not permit the applicant to improve its comparative position. In other words, we will take these numbers into account for purposes of determining whether the applicant satisfied the reservation standard but will not take them into account for purposes of determining whether the applicant qualifies for a point or points under the best technical proposal criterion.

[18] AFR at 11.

[19] AFR at 7-8, *citing Comparative Consideration Order*, 26 FCC Rcd at 7028 ¶ 59, 7036 ¶ 79.

[20] *See* 47 C.F.R. § 73.7003(e) ("an applicant's maximum qualifications are established at the time of application and will be reduced for any post-application changes that negatively affect any evaluation criteria"); *Public Notice*, 24 FCC Rcd at 12623 ("The Commission will take into account any negative change in an applicant's comparative position after the close of the window.").

[21] AFR at 9-10.

the entire record, we find the Bureau properly decided this issue, and we uphold its finding for the reasons stated in its decision.

7. Finally, unlike JSU,[22] we conclude that ASDA properly amended its application pursuant to Section 73.3564(a)(3) of the Rules. That section provides 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. JSU claims that, due to the third channel reservation standard defect, the ASDA Application failed to meet the Commission's minimum filing requirements. We disagree. As discussed, the Commission did not indicate that an applicant must show that it satisfies the third channel reservation standard at the time of filing. Accordingly, Section 73.3564(a)(3) does apply and the failure to make such a showing is curable via amendment.

8. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended,[23] and Section 1.115(g) of the Commission's Rules,[24] the Application for Review filed by the Board of Trustees of Jacksonville State University IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[22] AFR at 10-11.

[23] 47 U.S.C. § 155(c)(5).

[24] 47 C.F.R. § 1.115(g).