



Federal Communications Commission
Washington, D.C. 20554

October 6, 2005

DA 05-2385
In Reply Refer to:
1800B3-ALV

Positive Alternative Radio, Inc.
c/o Cary S. Tepper, Esq.
Booth, Freret, Imlay & Tepper, P.C.
14356 Cape May Road
Silver Spring, MD 20904

Shofar Broadcasting Corporation
c/o Dean R. Brenner, Esq.
Crispin & Brenner, PLLC
1156 15th Street, N.W.
Washington, D.C. 20005

In Re: NEW (NCE FM), Blennerhassett, WV
Facility ID No. 91837
BPED-19981006MK

NEW (NCE FM), Eden, OH
Facility ID No. 90455
BPED-19980406MC

Applications for NCE FM Construction Permits

Group No. 980120

Dear Counsel:

We have before us Group 980120 – two mutually exclusive applications for permits to construct new noncommercial educational (“NCE”) FM stations serving different communities. In such situations, the rules require the Commission to make a threshold determination as to whether grant of any of the applications would further the fair, efficient, and equitable distribution of radio service among communities.¹ For the reasons below, we determine that Positive Alternative Radio, Inc. (“PAR”) is entitled to a decisive Section 307(b) preference.

An NCE FM applicant is eligible to receive a Section 307(b) preference if it would provide a first or second reserved channel NCE aural service (in the aggregate) to at least ten percent of the population,

¹ See 47 U.S.C. § 307(b); 47 C.F.R. § 73.7002(a).

provided that this constitutes at least 2,000 people, within the proposed station's 60 dBu contour.² If more than one applicant in a mutually exclusive group qualifies for a preference, we compare first service population coverage totals.³ An applicant will receive a dispositive fair distribution preference by proposing to serve at least 5,000 more potential listeners than the next highest applicant's first service total.⁴ If no applicant is entitled to a first service preference, we will consider combined first and second service population totals and apply the same 5,000 listener threshold.

In the present group, PAR would serve Blennerhassett, West Virginia, and Shofar Broadcasting Corporation ("Shofar") would serve Eden, Ohio. PAR is the only applicant to claim that it would provide a new first or second NCE service to 10 percent of the population, and to at least 2,000 people, within its service area, and therefore, that it is eligible for a fair distribution preference.⁵ Based on PAR's submissions and calculations, it appears that PAR qualifies for a preference. Accordingly, pursuant to Section 73.7004 of the Commission's rules, we identify PAR as the tentative selectee. Group 980120 thus will not proceed to a point hearing.⁶

Accordingly, it is ordered that the application of Positive Alternative Radio, Inc. is accepted for filing. It is also ordered that Positive Alternative Radio, Inc. is TENTATIVELY SELECTED to be awarded a construction permit for a new NCE FM station in Blennerhassett, West Virginia. Petitions to deny the tentative selectee are due within thirty (30) days following the issuance of a subsequently issued public notice announcing the acceptance and tentative selection of this application.⁷ If, after the petition to deny period has run, there is no substantial and material question concerning the grantability of the

² See 47 C.F.R. § 73.7002(b). With respect to population information, applicants were to use the 2000 Census data, if available by June 4, 2001. See "Supplements and Settlements to Pending Closed Groups of Noncommercial Educational Broadcast Applications Due by June 4, 2001," *Public Notice*, 16 FCC Rcd 6893 (MB Mar. 22, 2001). Applicants were also to base their "fair distribution" analysis on the "snap shot" date of June 4, 2001, which is applicable unless the applicant subsequently makes engineering changes that would diminish its comparative position. *Id.* In this case, neither of the applicants has made such engineering changes. In addition, each applicant timely supplemented its application with a Section 307(b) showing; each purports to be based on 2000 Census data and a "snap shot" date of June 4, 2001.

³ See 47 C.F.R. § 73.7002(b). See also "Deadline for NCE Settlements and Supplements Extended to July 19, 2001; Date for Calculating Comparative Qualifications Remains June 4, 2001," *Public Notice*, 16 FCC Rcd 10892, 10893 (MB May 24, 2001).

⁴ *Id.*

⁵ PAR's 60 dBu contour encompasses 152,391 people. PAR's claimed aggregated first and second service is 52,175 people.

⁶ See 47 C.F.R. § 73.7002(b). The Media Bureau has delegated authority to make 307(b) determinations in NCE cases. See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 15 FCC Rcd 7386 (2000), *partially reversed on other grounds*, *NPR v. FCC*, 254 F.3d 226 (DC Cir. 2001) ("NCE Order"). See also 47 C.F.R. § 0.283. In the *NCE Order*, the Commission concluded that "[i]n examining the fair distribution issues, we will use the general process set forth in the Section of our Competitive Bidding proceeding that addressed Section 307(b) considerations for AM stations." See *NCE Order*, 15 FCC Rcd at 7397 (citing *Comparative Bidding for Commercial Broadcasting and Instructional Television Fixed Services*, 13 FCC Rcd 15920 (1998) (delegating authority to the staff to conduct Section 307(b) analyses with respect to AM applications prior to conducting auctions of competing applications)). In contrast, the *NCE Order* noted that the point system analysis conducted when Section 307(b) is not determinative is considered a simplified "hearing" for purposes of 47 U.S.C. § 155(c)(1). See *NCE Order*, 15 FCC Rcd at 7420.

⁷ See 47 C.F.R. § 73.7004. If any applicant previously raised issues against the tentative selectee, it must refile its objections within this thirty (30) day period.

tentative selectee's application, we will, by public notice, dismiss the mutually exclusive application of Shofar Broadcasting Corporation (File No. BPED-19980406MC) and grant the application of Positive Alternative Radio, Inc. (File No. BPED-19981006MK).

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau