



Federal Communications Commission
Washington, D.C. 20554

June 19, 2007

DA 07-2680

In Reply Refer To:

1800B3-IB

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Moody Bible Institute of Chicago
c/o Jeffrey D. Southmayd, Esq.
Southmayd & Millar
1220 19 Street, N.W.
Washington, D.C. 20036

Re: NEW(FM), Crown Point, IN
Facility ID No. 28188
BPED-19891019MA
MX Group No. 89101E

Petition to Deny
Petition for Reconsideration

Dear Counsel:

We have before us a Petition to Deny ("Petition") filed on May 1, 2007, by Moody Bible Institute of Chicago ("Moody") and related pleadings. Moody contests the Commission's tentative decision to grant the application of Hyles-Anderson College ("HAC") for a permit to construct a new noncommercial educational ("NCE") FM station, as proposed in the Commission's March 27, 2007, *Omnibus Order*.¹ For the reasons set forth below, we deny the Petition.²

¹ See *Comparative Consideration of 76 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, FCC 07-40 (rel. Mar. 27, 2007) ("*Omnibus Order*").

² On April 26, 2007, Moody also sought reconsideration of the underlying *Omnibus Order* ("April Submission"). However, Section 1.106(a)(1) of the Commission's Rules (the "Rules") specifically prohibits petitions for reconsideration of interlocutory actions. See 47 C.F.R. § 1.106(a)(1). The *Omnibus Order* was not a final action with regard to any of the tentatively selected applications. See *Bennet v. Spear*, 520 U.S. 154, 177 (1997) (for agency action to be final, it "must mark the 'consummation' of the agency's decisionmaking process-it must not be of a merely tentative or interlocutory nature.") (internal quotes and cites omitted). Confirming the interlocutory nature of the *Omnibus Order*, the Commission emphasized that "[o]ur selection is 'tentative' because petitions to deny may be filed against the applicant tentatively selected pursuant to these point system determinations." See *Omnibus Order*, __ FCC Rcd at __ (¶ 1). The April Submission is therefore dismissed. The only argument unique to the April Submission is Moody's claim that it should have received a fair distribution preference over HAC although both proposed to serve the same community. The Commission's Rules (the "Rules") are clear that a fair distribution analysis for NCE applications is appropriate only when mutually exclusive applicants will serve different communities. See 47 C.F.R. § 73.7002(a). The April Submission, even if treated as an informal objection to the grant of HAC's application, fails to raise a *prima facie* case that the tentative selection of HAC is in error or that grant of HAC's application would be contrary to the public interest.

The *Omnibus Order* applied the Commission’s NCE comparative selection criteria³ to seventy-six groups of mutually exclusive NCE FM applications. Moody and HAC comprised MX Group 89101E, a group of two mutually exclusive applicants competing for a single permit to build a new NCE FM station at Crown Point, Indiana. Because both applicants proposed to serve the same community, the Commission did not perform a fair distribution analysis⁴ and proceeded directly to a point system analysis. The Commission tentatively selected HAC’s application for grant because HAC qualified for 5 points and Moody qualified for 4 points under the point system.⁵ The Commission observed that HAC’s governing board, which is elected by the membership of the First Baptist Church of Hammond (the “Church”), had undergone a gradual change in ownership such that the original parties to the application no longer retained more than a fifty percent interest in the application as originally filed. The Commission waived the Rules to avoid the assignment of a new file number, an action that would have resulted in the dismissal of the HAC application for this “major” ownership change.⁶

The Commission’s *Omnibus Order* delegated authority to the Media Bureau (“Bureau”) to consider petitions to deny the tentative selectees, and to grant and dismiss applications in accordance with the Commission’s tentative determinations in cases where no substantial and material question of fact is raised through the petition to deny process.⁷ Each of Moody’s arguments is related to the change in HAC’s governing board. Moody maintains that HAC’s governing board change is an impermissible major change requiring dismissal of HAC’s application.⁸ It further alleges that HAC’s failure to report those changes contemporaneously is grounds for denial of the application because HAC either intentionally misrepresented the composition of its board to prevent dismissal of its application or demonstrated such “clear ineptness” and negligence as to raise a question concerning HAC’s basic qualifications.⁹ Finally, Moody alleges that HAC failed to disclose the real party in interest to HAC’s application, which Moody contends is the First Baptist Church of Hammond. HAC responds that the Commission appropriately waived the Rules with respect to gradual changes in HAC’s governing board; that any failure to file timely amendments reflecting the gradual change was due to inadvertence and not to any intention to deceive; and that the relationship between HAC and the Church does not present any real party in interest question.

Pursuant to Section 73.3573 of the Rules, a fifty percent change in the governing board of an NCE applicant would generally be considered a “major change” and would not be permissible outside of a filing window.¹⁰ Moody, however, ignores the fact that the Commission waived Section 73.3573 for HAC and other similarly situated NCE applicants that experienced gradual ownership changes where those changes were not an outgrowth of the party’s desire to gain control over the NCE station

³ See 47 C.F.R. §§ 73.7000 – 05.

⁴ See 47 U.S.C. § 307(b); 47 C.F.R. § 73.7002.

⁵ See *Omnibus Order*, __ FCC Rcd at __ (¶ 73); 47 C.F.R. § 73.7003(c)(1).

⁶ See 47 C.F.R. § 73.3573(b)(3).

⁷ See *Omnibus Order*, __ FCC Rcd at __ (¶¶ 202-03); 47 C.F.R. §§ 0.61(h), 0.283.

⁸ Moody argues that had HAC filed a timely amendment reflecting a major change in ownership it would have been a “suicide amendment” resulting in dismissal of the application. See Petition at 8 citing *C. Ray Helton*, Hearing Designation Order, 4 FCC Rcd 1205 (MMB 1989); *Maricopa County Community College District*, Hearing Designation Order, 3 FCC Rcd 5637 (MMB 1988); *St. Croix Wireless Co.*, Hearing Designation Order, 2 FCC Rcd 4447 (MMB 1987).

⁹ See Petition to Deny at 8-9, n.13; 47 C.F.R. § 1.65(a).

¹⁰ 47 C.F.R. §§ 73.3573(a)(1), (b)(2), and (b)(3).

application.¹¹ The *Omnibus Order* determined that it would be unreasonable to penalize such NCE applicants for routine and inevitable changes over the substantial period – in this case, over sixteen years – during which the Commission was unable to act on their applications due to rulemaking proceedings to fashion new NCE comparative procedures and judicial challenges to those procedures.¹² Moody maintains that the waiver was inconsistent with the *Ocean Pines* decision¹³ in which an administrative law judge dismissed an NCE application following a major change in governing board composition.¹⁴ We find, however, that *Ocean Pines*, which involved a sudden majority change in board membership, is inapposite.

HAC reported changes to its governing board in amendments filed in 2001 and 2005. HAC acknowledges that it did not file amendments between 1990 and 2001, which it attributes to lack of communications counsel during a period when the Commission had essentially ceased processing NCE applications. The cases cited by Moody for the proposition that a failure to report changed information raises a basic qualifications issue, are distinguishable because they all involve failures to report potentially decisional information or reflected a possible intent to deceive the Commission.¹⁵ While it is true that HAC should have notified the Commission contemporaneously of changes in its board, its delayed reporting of that information is neither disqualifying nor comparatively decisional. It is clear that the facts of this case fall within the scope of the relief the Commission has fashioned for these long-pending applications. Moody has not made a *prima facie* case of any intent to deceive or that changes in HAC's governing board would reduce the number of points for which HAC would have qualified. Moody's argument that HAC's reporting failure is potentially disqualifying based on "ineptness" relies on license renewal cases questioning the qualifications of licensees that had violated multiple engineering rules during the prior license term.¹⁶ HAC's failure to update its board in a pending application at a time when the Commission was not processing such applications is not comparable.

With respect to allegations concerning real party in interest, Moody argues that we should apply the test of whether a third party has an ownership interest in, or is or will be in a position to actually or potentially control the station.¹⁷ At the time of HAC's initial application in 1989, however, the Rules contained no definition of attributable interests for NCE stations because attribution was generally immaterial to NCE stations prior to the advent of the point system. The application that HAC completed in 1989 asked simply for all "parties" to the application *e.g.*, officers, directors, members of the governing board, and members with a right to vote one percent or more of stock, membership, or ownership interests.¹⁸ HAC identified its six officers. It also included a list of 98 voting members of HAC's Board of Directors, which included the previously identified officers. HAC identified each member as having a less than one percent voting interest. It did not identify the Church as a party.

¹¹ See *Omnibus Order*, __ FCC Rcd at __ (¶ 59).

¹² *Id.*

¹³ See *Ocean Pines LPB Broadcast Corp.*, Initial Decision, 4 FCC Rcd 7767 (ALJ 1989) ("*Ocean Pines*").

¹⁴ *Id.* at 7770.

¹⁵ See *Fidelity Radio, Inc.*, Memorandum Opinion and Order, 1 FCC 2d 1145 (Rev. Bd. 1965); *Edgefield-Saluda Radio Co.*, Memorandum Opinion and Order, 5 FCC 2d 148 (Rev. Bd. 1966); *Cleveland Broadcasting, Inc.*, Decision, 7 FCC 2d 680 (Rev. Bd. 1967), *decision set aside and settlement approved*, 12 FCC 2d 1008 (1968).

¹⁶ See *Heart of Black Hills*, Decision, 32 FCC 2d 196 (1971); *Nick J. Chaconas*, Decision, 28 FCC 2d 231 (1971); *Marvin C. Hanz*, Memorandum Opinion and Order, 22 FCC 2d 147 (Rev. Bd. 1970).

¹⁷ See *KOWL, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 962, 964 (Rev. Bd. 1974).

¹⁸ See FCC Form 340, Section II (May 1989 ed.).

The Commission did not address attribution standards for NCE stations until April 2000 when it established the current NCE comparative procedures.¹⁹ In 2001, and again in 2005, HAC amended the parties to its application, and disclosed the relationship between HAC and the Church. The 2001 amendment stated that “[e]ach Member of the governing board of Hyles-Anderson College is also a member of the Board of Deacons of the First Baptist Church of Hammond, Indiana. The Board of Deacons is elected by the general membership of the First Baptist Church of Hammond, Indiana.” In response to Moody’s allegations that the Church controls HAC’s governing board, HAC explains that, under a congregational form of governance, there is no controlling Church hierarchy that selects the governing board of HAC, but rather that there is a grassroots process by which the general membership of the Church elects the members of various governing bodies, including that of HAC.²⁰ Assuming *arguendo* that the Church has a reportable attributable interest in the HAC application under the policy announced in 2000, we cannot find that such an interest would have been reportable from the time of initial application in 1989 through the April 2000 date of the policy announcement. Moody has adduced no evidence that could help establish that HAC intended to hide this information from the Commission. To the contrary, HAC forthrightly disclosed the relationship with the Church in July 2001 after the Commission’s clarification and prior to any comparative analysis. Moreover, the Commission was aware of the relationship between HAC and the Church when it tentatively selected HAC’s application for grant.²¹

Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed on April 26, 2007, by Moody Bible Institute of Chicago IS DISMISSED.

IT IS FURTHER ORDERED, That the Petition to Deny filed on May 1, 2007, by Moody Bible Institute of Chicago IS DENIED.

IT IS FURTHER ORDERED, That the application of Hyles-Anderson College (File No. BPED-19891019MA) IS GRANTED CONDITIONED UPON its compliance with Section 73.7005 of the Commission’s Rules, 47 C.F.R. § 73.7005, which sets forth a four-year holding period for applicants that are awarded permits by use of a point system.

IT IS FURTHER ORDERED, That the mutually exclusive application of Moody Bible Institute of Chicago (File No. BPED-19910409MF) IS DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Hyles-Anderson College

¹⁹ See *Reexamination of Comparative Standards for Noncommercial Educational Applications*, Report and Order, 15 FCC Rcd 7386, 7418-19 (2000); 47 C.F.R. § 73.3555, note 2.

²⁰ Moody’s showing that HAC’s Chancellor was also Pastor of the Church and sent Moody a letter on Church stationary concerning settlement negotiations in this proceeding is inconsequential.

²¹ See *Omnibus Order*, ___ FCC Rcd ___ (¶53 and n.148).