



Federal Communications Commission
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DA 07-3969

In Reply Refer To:

1800B3-KD

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Mary V. Harris Foundation
c/o Barry D. Wood
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1827 Jefferson Place, N.W.
Washington, DC 20036

Re: NEW(FM), Strasburg, CO
Facility ID No. 90911
BNPED-19980420MJ
MX Group No. 970726

Petition to Deny
Petition for Reconsideration

Dear Counsel:

We have before us a Petition to Deny ("Petition") filed on May 2, 2007, by JPI Radio, Inc. ("JPI"). JPI is a party to MX Group 970726, a group of three mutually exclusive applicants competing for a permit to build a new noncommercial educational ("NCE") FM station in Strasburg, Colorado. JPI argues that the Commission should deny the application of the Mary V. Harris Foundation ("Harris"), the applicant group's tentative selectee,¹ as proposed in the Commission's *Omnibus Order*.² For the reasons set forth below, we deny JPI's Petition.³

¹ CSN International ("CSN") was the third applicant in this group. See File No. BPED-19980417MI.

² 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*").

³ On April 26, 2007, JPI 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. Moreover, as discussed in n.15, *infra*, the arguments therein would not have changed the outcome of this proceeding.

The *Omnibus Order*⁴ applied the Commission’s NCE comparative selection criteria⁵ to seventy-six groups of mutually exclusive NCE FM applications and tentatively selected one winner in each group. The Commission used a point system selection process, with each applicant’s maximum point qualifications determined as of a “snap shot” date of June 4, 2001.⁶ Any changes made after that snapshot date could potentially reduce, but could not increase, an applicant’s points.⁷ Absent the Commission’s discovery of an error on the face of the application, the Commission generally accepted each applicant’s self-certification that it qualified for the points claimed.⁸ Any party that wished to dispute the points awarded could file a petition to deny the application of the group’s tentative selectee.⁹ The Commission’s *Omnibus Order* delegated authority to the Media Bureau (“Bureau”) to consider such petitions, 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.¹⁰

In this case, all three applications were credited with two points each, so they proceeded to a tie-breaker round. The first issue considered in a tie-breaker is the number of radio authorizations attributable to each applicant; the applicant with the fewest authorizations prevails.¹¹ In this case, Harris, with 3 authorizations, prevailed over CSN and JPI, which had 572 and 8 authorizations, respectively.¹²

Discussion. JPI asserts that Harris has accrued at least two additional broadcast interests since the snapshot date (bringing its tally of attributable authorizations to five) and has failed to notify the Commission of these acquisitions, as required by Section 1.65 of the Commission’s Rules.¹³ JPI, on the other hand, has since divested all of its stations.¹⁴ As such, JPI argues that: (1) Harris is not qualified to be a broadcast licensee because it lacked candor with the Commission by failing to report the changed conditions in its application, and (2) under any choice based on current data, JPI’s qualifications are superior to those of Harris.¹⁵

⁴ See n.1, *supra*.

⁵ See 47 C.F.R. §§ 73.7000 – 05.

⁶ See *Omnibus Order*, __ FCC Rcd at __ (¶ 3).

⁷ *Id.*

⁸ *Id.* at ¶ 5.

⁹ See 47 C.F.R. § 73.7004; *Omnibus Order* at ¶ 202.

¹⁰ See *Omnibus Order* at ¶¶ 202-03; 47 C.F.R. §§ 0.61(h), 0.283.

¹¹ See *Omnibus Order* at ¶ 13.

¹² See *Omnibus Order* at ¶ 249.

¹³ Petition at 3. In its point supplement, filed July 19, 2001, Harris claimed attributable interests in WBAJ(AM), Blythewood, South Carolina, and WSJC(AM), Magee, Mississippi. The Commission subsequently awarded Harris construction permits for NCE Station KFHL(FM), Wasco, California (FCC File No. BPED-19980109MN) in 2002, and NCE Stations WHFG(FM), Broussard, Louisiana (FCC File No. 19961023MG), and WSJL(FM), Northport, Alabama (FCC File No. BPED-19971009MD) in 2005.

¹⁴ *Id.*

¹⁵ Petition at 4. JPI also briefly cross references arguments raised from the dismissed April Submission, filed on April 26, 2007. Those arguments do not make a *prima facie* case that the tentative selection of Harris was erroneous. Specifically, JPI claims that that the Commission’s analysis of applicants’ qualifications as of the June 4, 2001, “snap shot date” was arbitrary and capricious because the data on which it relied was nearly six years old when the *Omnibus Order* was adopted.¹⁵ As such, it asks that we set a new, more recent snapshot date. In response, (footnote continued...)

Failure to Update Application. JPI asserts that Harris did not file any amendments disclosing its additional ownership interests, as required by Section 1.65 of the Rules.¹⁶ JPI argues that Harris's failure to update its application amounts to lack of candor because it failed to disclose "decisionally significant information."¹⁷ Harris claims that its failure to file an amendment was merely "inadvertent oversight."¹⁸

All Commission applicants are responsible for the continuing accuracy of their applications and, therefore, must amend pending applications whenever the information furnished is no longer substantially accurate and complete.¹⁹ Pursuant to this requirement, NCE applications must report changes that would have a potential negative impact on their comparative positions under the point system.²⁰ Information generally must be reported within 30 days of the change.²¹ However, because action on NCE applications was delayed for a considerable period due to litigation, and the applications had been submitted prior to the adoption of electronic filing requirements, the Bureau anticipated by late 2004 that many NCE applications were no longer up-to-date. The Bureau reminded NCE applicants of their Section 1.65 obligations, and set a deadline of January 21, 2005, for NCE applicants to update their applications electronically.²² Harris failed to file such an amendment.

A Section 1.65 violation is disqualifying only if the applicant intended to conceal information from the Commission, or if the reporting violations are so numerous and serious as to undermine the applicant's ability to be a licensee.²³ Intentional deceit reflects upon an applicant's basic qualifications, and "the fact of concealment may be more significant than the facts concealed."²⁴ Intention can be inferred from motive.²⁵ Lack of candor involves concealment, evasion, or other failure to be fully forthcoming, accompanied by an intent to deceive.²⁶

While it is true that Harris should have notified the Commission contemporaneously of changes

Harris asserts that, like application cut-off dates, the snapshot date advances the interests of "administrative finality." See Opposition, Exhibit 1 (citing *City of Angels Broadcasting, Inc. v. FCC*, 745 F.2d 656, 665-66 & n. 12 (D.C.Cir.1984)). We agree. Some of the applications processed in the *Omnibus Order* have been on file with the Commission since the 1980s. As rightly noted by Harris, establishing a new snapshot date would prolong the proceeding for these and all of the applicants in the cases decided in the *Omnibus Order*. *Id.*

¹⁶ See Petition at 2.

¹⁷ See *id.* at 4.

¹⁸ See Opposition at 3. Harris subsequently amended its application to reflect its additional ownership interests on May 16, 2007.

¹⁹ See 47 C.F.R. § 1.65.

²⁰ See *Section 1.65 Amendment Deadline Established for Noncommercial Educational FM and FM Translator Station Applicants*, Public Notice, 19 FCC Rcd 24740 (2004) ("*Section 1.65 Notice*").

²¹ See 47 C.F.R. § 1.65.

²² See *Section 1.65 Notice*, 19 FCC Rcd at 24740.

²³ See *David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253 (D.C. Cir. 1991) (citing *Valley Broadcasting Co.*, Decision, 4 FCC Rcd. 2611, 2618 (Rev. Bd. 1989)).

²⁴ See *Character Qualifications*, Report, Order, and Policy Statement, 102 FCC2d 1179, 1210, n.77 (1986) (quoting *FCC v. WOKO, Inc.* 329 U.S. 223, 227 (1946)).

²⁵ See, e.g., *RKO General, Inc.*, Decision, 4 FCC Rcd 4679, 4684 (Rev. Bd. 1989).

²⁶ *Fox River Broadcasting, Inc.*, Order, 93 FCC 2d 127, 129 (1983).

in its ownership interests, its delayed reporting of that information is neither disqualifying nor comparatively decisional.²⁷ There is no support for JPI's allegation that Harris intentionally concealed this information or had any motive to do so.²⁸ Harris's ownership interests were disclosed in ownership reports on file with the Commission prior to the date of the Petition.²⁹ Such disclosure is at odds with any alleged intent to conceal. In addition, reporting the ownership interests would not have changed the outcome of this proceeding. At the time that Harris should have updated its NCE application, JPI's maximum tie-breaker position would have been well known to Harris. Even with an attributable interest in five stations, Harris would have had a tie-breaker cushion over JPI, which had 8 attributable authorizations.³⁰ JPI has not raised any substantial and material question concerning the Commission's tentative selection of Harris or Harris's basic qualifications. We do, however, admonish Harris for failing to file any amendments disclosing its additional ownership interests, as required by Section 1.65 of the Rules.

JPI's Qualifications. JPI next argues that it would be the winning applicant if the Commission were to evaluate the applicants' comparative qualifications using current data because Harris currently has ownership in five stations, while JPI has none. However, under the procedures adopted in the 2001 *NCE MO&O* and followed in the *Omnibus Order*, the Commission does not award points for post-snapshot date enhancements.³¹ Thus, we cannot consider JPI's post-snapshot date divestitures. Even taking into consideration Harris's subsequent acquisition of two additional ownership interests, Harris remains the winning applicant. JPI has thus failed to make any *prima facie* showing that might alter the Commission's tentative outcome in Group 970726. JPI has also failed to show that the grant of Harris's application would be contrary to the public interest.

Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed on April 26, 2007, by JPI Radio, Inc., IS DISMISSED.

IT IS FURTHER ORDERED, that the Petition to Deny filed on May 2, 2007, by JPI Radio, Inc., IS GRANTED to the extent indicated and IS DENIED in all other respects.

IT IS FURTHER ORDERED, That Mary V. Harris Foundation hereby IS ADMONISHED for its

²⁷ See, e.g., *Moody Bible Institute of Chicago*, Letter, DA 07-2680 (MB June 19, 2007).

²⁸ In its Reply, JPI argues that Harris's claim that its failure to file an amendment showing its ownership interests was "inadvertent" is disingenuous. JPI further argues that the Opposition "provides no support for the factual allegation that Harris did not intent to deceive the Commission..." Reply at 6. However, JPI incorrectly assumes that Harris bears the burden of proof on this issue. The party alleging misrepresentation has the burden of proof to make a *prima facie* showing of an intent to deceive. See, e.g., *Merrimack Valley Broadcasting, Inc.*, Memorandum Opinion and Order, 99 FCC 2d 680, 683 n.9 (1984). As discussed above, JPI has made no such showing in this case.

²⁹ See FCC File No. BON-20051104ADJ. See also Ownership Reports of Family First, FCC File Nos. BOA-20051104ADN and BOA-20060406AAS (disclosing ownership interests in WBAJ(AM) and WSJC(AM)).

³⁰ In its Reply, JPI argues that Harris was on notice that JPI was seeking adoption of a more recent snapshot date, which could have potentially resulted in the selection of a new tentative selectee. Reply at 3. As such, JPI claims that Harris's alleged lack of candor did, in fact, concern decisionally significant facts. *Id.* However, there is no reason for Harris to have believed that the Commission would alter its snapshot date.

³¹ See *Reexamination of Comparative Standards for Noncommercial Educational Applicants*, Memorandum Opinion and Order, 16 FCC Rcd 5074, 5082 (2001).

failure to file timely amendments disclosing its additional ownership interests, as required by Section 1.65 of the Rules.

IT IS FURTHER ORDERED, That the application of Mary V. Harris Foundation (File No. BNPED-19980420MJ) 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 JPI Radio, Inc. (File No. BPED-19970728MA) IS DISMISSED.

IT IS FURTHER ORDERED, That the mutually exclusive application of CSN International (File No. BPED-19980417MI) IS DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Mary V. Harris Foundation