



Federal Communications Commission
Washington, D.C. 20554

October 9, 2007

DA 07-4181

In Reply Refer To:

1800B3-IB

Released: October 9, 2007

Central Florida Educational Foundation, Inc.
c/o Joseph E. Dunne, Esq.
P.O. Box 9203
Durango, CO 81302-9203

Re: NEW(FM), Merritt Island, FL
Facility ID No.
BPED-19990730MD
MX Group No. 9901XP
Petition to Deny

Dear Counsel:

We have before us a Petition to Deny ("Petition")¹ filed by Central Florida Educational Foundation, Inc. ("Central"). Central contests the Commission's tentative decision to grant a permit to construct a new noncommercial educational ("NCE") FM station to Merritt Island Public Radio, Inc. ("MIPR"), as proposed in the Commission's *Omnibus Order*.² For the reasons set forth below, we grant the Petition by referring this matter to the Commission for further consideration.

Background. The *Omnibus Order* applied the Commission's NCE comparative selection criteria³ to seventy-six groups of mutually exclusive NCE FM applications. Group 9901XP consisted of the Central and MIPR applications, along with applications filed by two additional parties, Black Media Works, Inc. ("BMW") and CSN International ("CSN"). Central and MIPR proposed service to Merritt Island, Florida, and the other applicants proposed service to Cocoa Beach, Florida. Because none of the applicants qualified for a fair distribution preference based on proposed new NCE first and/or second service,⁴ the Commission proceeded directly to a point system analysis. MIPR received a total of five points -- three points under the "established local applicant" criterion and two points under the local diversity of ownership criterion. BMW received three points, while Central and CSN received two points

¹ Petition to Deny (May 2, 2007).

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, 22 FCC Rcd 6101 (2007) ("*Omnibus Order*").

³ See 47 C.F.R. §§ 73.7000 – 05. See also *Reexamination of Comparative Standards for Noncommercial Educational Applications*, Report and Order, 15 FCC Rcd 7386 (2000) ("*NCE R&O*"), *affirmed and clarified*, Memorandum Opinion and Order, 16 FCC Rcd 5074, 5106 (2001) ("*NCE MO&O*"), *Erratum*, 16 FCC Rcd 10549, *recon. denied*, Memorandum Opinion and Second Order on Reconsideration, 17 FCC Rcd 13132 (2002) ("*NCE Second Order*"), *aff'd sub nom. American Family Ass'n v. FCC*, 365 F.3d 1156 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 1004 (history concerning non-reserved channels omitted).

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

each. The Commission tentatively selected MIPR's application (the "Application") for grant based on MIPR's receipt of the most points in the group.⁵ Central alleges that MIPR is not an "established local applicant" and that the Commission's award of three points to MIPR for that criterion was erroneous. Central, accordingly, urges the Media Bureau ("Bureau") not to grant the Application.

Discussion. The Rules define a "local applicant" as one "physically headquartered, having a campus, or having 75 percent of board members residing within 25 miles of the reference coordinates for the community to be served, or a governmental entity within its area of jurisdiction."⁶ With respect to the applications in MX Group No. 9901XP, the applicant is considered "established" if it has met the definition of "local" for no fewer than the two years (24 months) immediately preceding the "snap shot" date of June 4, 2001.⁷

MIPR certified "yes" that it was an "established local applicant" and submitted a supporting statement that "[i]n the two years prior to June 4, 2001, at least 75 percent of its members have lived within 25 miles of the reference coordinates of the proposed city of license, Merritt Island, Florida."⁸ MIPR also documented that it had amended its by-laws on June 1, 2001, to require the corporation to maintain such board composition.

Central submits that MIPR cannot be considered "established" because MIPR was formed only about 22 months prior to the snap shot date. Central has submitted a copy of MIPR's Articles of Incorporation dated July 30, 1999, and filed with the Florida Department of State, Division of Corporations ("Florida DOC") on August 2, 1999.⁹ Central states that corporate existence in Florida commences upon the filing of Articles of Incorporation with the Florida DOC.¹⁰ Central thus maintains that MIPR did not exist on June 4, 1999, two years prior to the snap shot date. MIPR did not respond, although Central certified that it mailed the Petition to MIPR's official mailing address.

The Commission purposefully adopted a narrow definition of "established local" entities and has repeatedly declined to expand that definition, thereby increasing the likelihood that organizations most knowledgeable, responsive, and accountable to their local community would be awarded licenses, keeping localism points meaningful, and avoiding possible abuses.¹¹ The Commission has long stated that the *applicant* must be "established," and that a new organization formed by long-term local residents but which has not itself has been in existence for at least two years prior to the snap shot date cannot,

⁵ See *Omnibus Order*, 22 FCC Rcd at 6155 - 56.

⁶ 47 C.F.R. § 73.7000.

⁷ *Id.*; 47 C.F.R. § 73.7300(b)(1). See *Deadline for Settlements and Supplements*, Public Notice, 16 FCC Rcd 19892 (2001).

⁸ See MIPR Point Supplement, Question (IV)(1), Exhibit E1.

⁹ See Articles of Incorporation of MIPR (July 30, 1999) (filed Aug. 2, 1999 with Florida DOC) (Petition, Exhibit 1).

¹⁰ See Petition at 3 (citing Florida Statutes § 607.0201 (2001)). See also Florida Statutes § 607.0203(1) (2007) ("Unless a delayed effective date is specified, the corporate existence begins when the articles of incorporation are filed or on a date specified in the articles of incorporation, if such date is within 5 business days prior to the date of filing.") http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&URL=Ch0607/ch0607.htm (accessed Oct. 3, 2007).

¹¹ See *Omnibus Order*, 22 FCC Rcd at 6114, n.81 (citing *NCE MO&O*, 16 FCC Rcd at 5091).

therefore, meet the “established” prong of the “established local applicant” criterion.¹² At the time that applicants in Group No. 9901XP filed their Point Supplements, however, several petitions for reconsideration of the point system were pending. One such petition, filed by Youngshine Media, Inc. (“Youngshine”), proposed that organizations with boards composed of members who had been local for two or more years should be considered “established” without regard to whether the organization itself was “established” for that same period. In 2002, the Commission rejected the Youngshine proposal:

The long-term residence of board members is not, by itself, a reliable basis on which to award a preference in this context. While having a board with 75 percent local residents is likely to ensure a level of community awareness that may be reflected in future station policies and programming, we cannot say that the mere presence of local residents of the board of an applicant (which may be a new organization or an organization with no previous ties to the community) establishes the track record of serving the community’s educational needs on which this preference relies as a predictor of future performance. Thus, we will not alter the qualifications for the established local applicant credit. Applicants will continue to be able to establish that they are “local” by demonstrating that 75 percent of their board members are local residents, and will continue to have to show that they were a nonprofit educational organization established in the community for two years in order to obtain a preference as an “established” local applicant.¹³

Assuming the truth of all facts presented by Central, we find MIPR’s certification erroneous, and that MIPR has not attempted to rebut Central’s showing.¹⁴ The Commission has rejected applicants’ claims to qualify for “established local applicant” points, when those claims were based on circumstances at variance from those specifically recognized by the Commission.¹⁵

Conclusion. The Commission delegated to the Bureau responsibility to consider petitions to deny and to act on any routine issues that may be raised, including whether the applicant is eligible for the points the Commission awarded in the *Omnibus Order*. The Commission specified that the staff should refer certain matters to the Commission or an Administrative Law Judge, however, if needed to resolve a question of fact, rule on a novel issue, or pick a successor tentative selectee. Such referral is appropriate if the Bureau finds that (1) assuming the truth of the facts alleged, the tentative selectee would be able to claim only the same or fewer points than the Commission awarded to any competing applicant in the same group; (2) the proceeding raises a new or novel question; or (3) there is a substantial and material question of fact.¹⁶ Exclusion of the points MIPR received under the “established local applicant” criterion would alter the outcome of Group No. 9901XP. Accordingly, we will refer this matter to the Commission for further consideration.

¹² See *NCE R&O*, 15 FCC Rcd at 7410, *aff’d NCE MO&O*, 16 FCC Rcd at 5093, *recon. denied, NCE Second Order*, 17 FCC Rcd at 13138. See also *Omnibus Order*, 22 FCC Rcd at 6158, n.223.

¹³ *NCE Second Order*, 17 FCC Rcd at 13138.

¹⁴ We would not, however, accept Central’s position that MIPR’s certification was deliberately false, and therefore, potentially disqualifying. See Petition at 6-9. We find no evidence that MIPR, which filed its “established local applicant” claim without assistance of counsel at a time when the Youngshine Petition was pending, intentionally misrepresented its qualifications. MIPR should, however, have amended its point claim after rejection of the Youngshine Petition. See *Omnibus Order*, 22 FCC Rcd at 6158, n.223.

¹⁵ See, e.g., *Omnibus Order*, 22 FCC Rcd at 6115 – 17.

¹⁶ *Id.* at 6162, n.230.

We hereby provide a period of 30 days from release of this decision for MIPR to produce any documentation that it may wish the Commission to consider concerning MIPR's claim to be an "established local applicant" and to serve that documentation on the mutually exclusive applicants. We further provide an additional 15-day period thereafter for the other parties to file a response.

There is the potential that the Commission will conduct a new point system analysis in this group. Therefore, we remind all applicants in Group No. 9901XP of their obligation under Section 1.65 of the Rules to update their applications to report any significant changes, including any points or tiebreaker factors for which they may no longer qualify due to changed circumstances.¹⁷

Ordering Clause. Accordingly, IT IS ORDERED, That the Petition to Deny filed on May 2, 2007, by Central Florida Educational Foundation, Inc. IS GRANTED to the extent indicated herein and DENIED in all other respects.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Merritt Island Public Radio, Inc.
CSN International
Black Media Works, Inc.

¹⁷ See 47 C.F.R. § 1.65; *Section 1.65 Amendment Deadline Established For Noncommercial Educational FM and FM Translator Applicants*, Public Notice, 19 FCC Rcd 24740 (2004) (describing the Section 1.65 obligation for NCE applicants, especially changes decreasing an applicant's comparative position).