

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

In the Matter of)	
)	
American Family Association)	File No. BPED-19941103MC
)	Facility ID No. 1684
For a Construction Permit for a New)	
Noncommercial Educational FM Station at)	
Bristol, Virginia)	
)	
Emory and Henry College)	File No. BPED-19951023IB
For a Minor Modification to Noncommercial)	Facility ID No. 19527
Educational FM Station WEHC(FM),)	
Emory, Virginia)	
)	
Virginia Tech Foundation, Inc.)	File No. BPED-19951108NC
)	Facility ID No 78467
For a Construction Permit for a New)	
Noncommercial Educational FM Station at)	
Bristol, Virginia)	NCE Group 94114E

MEMORANDUM OPINION AND ORDER

Adopted: December 8, 2006

Released: December 14, 2006

By the Commission:

1. The Commission has before it the captioned, mutually exclusive applications of American Family Association (“AFA”), Emory & Henry College (“EHC”), and Virginia Tech Foundation, Inc. (“VTF”) for a new noncommercial educational (“NCE”) FM station construction permit. AFA and VTF propose to build new stations. EHC applied for a minor change to the licensed facilities of WEHC(FM), Emory, Virginia. The three applications are known collectively as NCE Group 94114E.

I. THRESHOLD FAIR DISTRIBUTION ANALYSIS

2. When mutually exclusive applications for permits to construct new NCE FM stations propose to serve different communities, the rules require the Commission to make a threshold determination pursuant to Section 307(b) of the Communications Act of 1934, as amended of whether grant of any of the applications would best further the fair, efficient, and equitable distribution of radio service among communities.¹ For the reasons below we determine that a fair distribution analysis is not decisive in the present proceeding.²

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

² A Section 307(b) analysis is ordinarily conducted at the staff level, because 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, 7397 (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 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. In the instant proceeding, Section 307(b) factors do not entirely resolve all applications in the group and the Commission must consider the (continued...)

3. 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, provided that this constitutes at least 2,000 people, within the proposed station's 60 dBu contour.³ If more than one applicant in a mutually exclusive group qualifies for a preference, we compare first service population coverage totals.⁴ An applicant will receive a dispositive fair distribution preference by proposing to provide a first NCE aural service to at least 5,000 more potential listeners than the next highest applicant's first service total.⁵ If no applicant is entitled to a first service preference, we will consider combined first and second NCE aural service population totals and apply the same 5,000 listener threshold. AFA, EHC, and VTF each certifies that it would not qualify for a Section 307(b) preference because it would not provide a new first or second service to ten percent of the population within its respective service area. All applicants in this group must, therefore, proceed to a point hearing.

II. POINT SYSTEM SELECTION PROCESS

4. The Commission compares mutually exclusive groups of NCE-FM applications under the point system set forth in Section 73.7003 of the Commission's Rules⁶ if, as a threshold matter, no applicant is entitled to a decisive preference under the fair distribution of service goals enunciated in Section 307(b). The NCE point system awards a maximum of seven merit points based on four distinct criteria.⁷ First, three points are awarded to applicants which have been local and established for at least two years. Applicants with a headquarters, campus, or 75 percent of board member residences within 25 miles of the reference coordinates of the community of license are considered local.⁸ Governmental units are considered local within their area of jurisdiction. Second, two points are awarded for local diversity of ownership if the principal community contours of an applicant's proposed station and any other station in which any party to the application holds an attributable interest do not overlap. The applicant's governing documents also must include a provision to maintain that diversity in the future. Third, two

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remaining applications in a point hearing. The staff therefore has referred the Section 307(b) issue to the Commission for consolidated analysis.

³ 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, none 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.

⁴ 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).

⁵ *Id.*

⁶ 47 C.F.R. § 73.7003.

⁷ *Id.* at § 73.7003(b).

⁸ An applicant relying on local board residence to claim points as an established local applicant must demonstrate that its governing documents, e.g. by-laws, require that such localism be maintained despite board changes. See 47 C.F.R. § 73.7003(b)(1); *NCE Order*, 15 FCC Rcd at 7426.

points will be awarded for certain state-wide networks providing programming to accredited schools, which cannot claim a credit for local diversity of ownership. Fourth, an applicant making the best technical proposal in the group may receive one or two points. An applicant receives one point if its proposed area and population coverage is ten percent greater than the next best proposal, or two points if it is 25 percent greater than the next best proposal. The tentative selectee is the applicant with the highest score.⁹ If there is a tie, the tiebreaker criteria in Section 73.7003(c) are applied.

5. *Established Local Applicant.* AFA certifies that it is not entitled to any points for this criterion. Therefore, AFA receives no points under this criterion.

6. EHC states that it is a college founded in 1836 with a campus in Emory, Virginia. EHC thus certifies that for a period of at least two years prior to the snap shot date, it has existed as an educational institution or organization and has been physically headquartered, has had a campus, or has had 75 percent of its board members residing within 25 miles of the coordinates of Emory, Virginia. It also certifies that it has placed documentation supporting its certification in a local public file and also has submitted that documentation to the Commission. EHC will receive three points as an established local applicant.

7. VTF states that it is a non-profit corporation established as the “support organization” for the Virginia Polytechnic Institute and State University (the “University”). VTF states that the University is operated by the State of Virginia and therefore qualifies for localism points in Bristol, Virginia as a government entity operating within its own jurisdiction. VTF alternatively claims that, since 1998, the University has operated an extended campus at the Southwestern Virginia Higher Education Center in Abingdon, Virginia, within 25 miles of the reference coordinates for the proposed Bristol station. On these two bases, VTF certifies that it is eligible for points as an established local applicant. It also certifies that it has placed documentation supporting its certification in a local public file and also has submitted that documentation to the Commission.

8. VTF recognizes that its certification is based on the qualifications of the University and that VTF would not independently qualify as an established local entity. Nevertheless, VTF maintains that the University’s qualifications should be imputed to VTF due to the unique relationship between the two. Specifically, VTF states that its “sole purpose for existence remains to financially support the University and its educational programs and campuses.”¹⁰ VTF further explains that the U.S. Tax Code treats donations to educational foundations and to universities similarly and that educational foundations are used to ensure that charitable gifts to state universities do not become subject to the direction of state legislatures for purposes unintended by the donors.¹¹ VTF argues the Commission would not dilute the

⁹ The applicants supplemented their applications with point information by July 19, 2001, as required. *See Public Notice, Deadline for NCE Settlements and Supplements Extended to July 19, 2001*, 16 FCC Rcd 10892 (MMB May 24, 2001). All points are considered as of a June 4, 2001 “snap shot” date except for best technical proposal, which is calculated as of the group’s cut-off date or April 21, 2000, whichever is earlier. *See Comparative Standards for Noncommercial Educational Applicants*, 16 FCC Rcd 5074, 5086 (2001) (subsequent history omitted) (“NCE MO&O”).

¹⁰ *See* VTF’s FCC Form 340-Supp., Exhibit B (emphasis in original).

¹¹ *Id.* (citing 26 U.S.C. § 170(b)(1)(A)(iv) and BRUCE R. HOPKINS, *THE LAW OF TAX EXEMPT ORGANIZATIONS*, sixth edition 369 (1992)). VTF states that “In the Commonwealth of Virginia, the Legislature’s Appropriations Act takes precedence over the provisions of the Virginia Code.” *Id.* It further states that it is “important that VTF is organized as an entity separate from the University” so that donations “are beyond the reach of the Commonwealth and its legislature.” *Id.* VTF maintains that its relationship with the University fosters compliance with Commission on-air fundraising policies because on-air fundraising dollars might otherwise flow to the legislature for other purposes. *See Commission Policy Concerning the Noncommercial Nature of* (continued...)

local entity requirement by awarding localism points to VTF because the ruling would apply to a “very narrow” class of corporations, *i.e.*, corporations organized pursuant to Section 170(b)(1)(A)(iv) of the Tax Code to support public colleges and universities that rely on a state legislature for funding.

9. We find that VTF does not qualify for points as an established local applicant, as defined by our rules, and will receive no points for this criterion.¹² VTF is not local in Bristol because it is a corporation with headquarters located in the distant community of Roanoke, Virginia, and 75 percent of its board members have not been shown to reside within 25 miles of the reference coordinates of Bristol. Established local applicants receive the largest percentage of points, reflecting the importance of localism in NCE broadcasting. The Commission purposefully adopted a narrow definition of “local” entities to increase the likelihood that organizations most knowledgeable, responsive, and accountable to the local community would be awarded licenses, to keep localism points meaningful, and to avoid potential abuses.¹³ On reconsideration of the NCE point system rules, the Commission rejected proposals to expand that definition.¹⁴

10. The Commission recognizes the close relationship between VTF and the University, the financial concerns underlying that relationship, and the centrality of the University to VTF’s mission. Even if we assume that the University could have received points in its own right, however, the University is not the applicant in the present proceeding. We decline to impute localism qualifications to a separately organized, non-local corporation. VTF’s taxation and fundraising arguments are not relevant to our localism determination. VTF relies on a tax provision which states that charitable donations to a variety of entities, including universities and corporations like VTF, are deductible. The tax code does not, however, establish that a university and a corporation organized to provide financial support to it are considered one and the same for purposes relevant to our determination here. Many NCE applicants are eligible to receive tax deductible donations, but that fact is immaterial to whether the organization is local. With respect to fundraising, VTF argues that, absent VTF’s services, the University might run afoul of Commission fundraising policies. The scenario that it presents -- that the state legislature could divert monies raised through fundraising activities -- is simply not relevant to the criteria which the Commission has established to promote localism in NCE broadcasting.¹⁵

11. *Diversity of Ownership.* AFA is currently the licensee of FM translator station W213AN, Bristol, Virginia which has a principal community contour which would overlap that of the proposed station. In accordance with policy enunciated when we adopted the point system¹⁶ and reflected as a

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Educational Broadcasting Stations, 97 FCC Rcd 255 (1984) (“noncommercial stations are prohibited from conducting any fundraising activity . . . designed to raise support for any entity other than the station itself.”).

¹² See 47 C.F.R. § 73.7000.

¹³ *Id.* at 5091.

¹⁴ See *NCE MO&O*, 16 FCC Rcd at 5091-93.

¹⁵ Even had we accepted VTF’s position and considered it an established local applicant, VTF would not have been the tentative selectee in this proceeding. Under those circumstances, VTF would have been tied with EHC for 5 points. VTF would have lost the tiebreaker because it has more existing authorizations than EHC. See 47 C.F.R. § 73.7003(c).

¹⁶ See *NCE MO&O*, 16 FCC Rcd at 5102-03 (an FM translator licensee “that, in the particular application involved, is seeking a full service station to replace its existing translator station(s) . . . may exclude, on that application, any existing translator station that will cease operating when the proposed full service station commences operation.”).

choice on FCC Form 340-Supp, AFA seeks to exclude the translator based on a pledge that it will request cancellation of the translator authorization upon the commencement of operation of the proposed full service station.¹⁷ AFA certifies that, with the exception of the translator for which it will seek cancellation, the principal community contour of its proposed station does not overlap the principal community contour of any other radio station in which any party to the application has an attributable interest, that its governing documents require that such diversity be maintained, and that it has placed documentation of this diversity in its local public inspection file and submitted copies to the Commission. Accordingly, AFA will receive two points.

12. EHC and VTF each certifies that the principal community contour of its proposed station does not overlap the principal community contour of any other radio station in which any party to the application has an attributable interest, that its governing documents require that such diversity be maintained, and that it has placed documentation of this diversity in its local public inspection file and submitted copies to the Commission. Accordingly, EMF and VTF will receive two points each.

13. *Statewide Networks.* None of the applicants claim points as a statewide network.

14. *Technical Parameters.* AFA's proposed 60 dBu contour encompasses 323 square kilometers with a population of 61,844. The new area within EHC's modified 60 dBu contour encompasses 190 square kilometers with a population of 4,855.¹⁸ VTF's proposed 60 dBu contour encompasses 360 square kilometers with a population of 65,347. Technical points are awarded only to the applicant with the best technical proposal in the group, which must serve at least ten percent more area and population than the second best proposal. No applicant in the present group qualifies for points under this criterion.

15. *Total.* Accordingly, AFA and VTF are entitled to 2 points, and EHC is entitled to 5 points. EHC is the tentative selectee in group 94114E. A tiebreaker analysis is not necessary.

III. ACCEPTABILITY STUDY

16. Once we select a tentative selectee pursuant to our comparative selection process, we consider whether the tentative selectee's application has defects.¹⁹ If found acceptable, the tentative selectee's application is placed on a Broadcast Applications Public Notice, and petitions to deny may be filed within 30 days following release of the public notice. EHC's application was already accepted for filing on March 1, 1996, pursuant to our former A/B cut-off procedures. EHC has made no subsequent engineering amendments.

17. Based on the record before us, EHC appears to be fully qualified to modify the license of its existing NCE-FM station at Emory, Virginia. We tentatively conclude that the grant of its application would serve the public interest, convenience and necessity.

¹⁷ AFA's FCC Form 340-Supp., Question IV(2)(b) and Exhibit 2.

¹⁸ Modification applications report only the new area proposed. They must exclude any area with the station's existing service area.

¹⁹ If a tentative selectee's application is found unacceptable, it is returned to the applicant. The applicant is then given one opportunity to submit a minor curative amendment, provided that the amendment is minor and that the application, as amended, has the same number of points as originally claimed, or more than the points claimed by the next highest applicant. See 47 C.F.R. § 73.3522(b)(1).

IV. ORDERING CLAUSE

18. Accordingly, IT IS ORDERED, That Emory & Henry College is TENTATIVELY SELECTED to be awarded a construction permit to modify WEHC(FM), Emory, Virginia. We direct the staff to issue a public notice announcing that EHC is the tentative selectee in NCE Group 94114E and establishing a deadline thirty (30) days thereafter for the filing of petitions to deny.²⁰ If, after the petition to deny period has run, there is no substantial and material question concerning the grantability of the tentative selectee's application, we direct the staff TO DISMISS the other mutually exclusive applications and TO GRANT the application of Emory & Henry College (File No. BPED-19951023IB) CONDITIONED UPON its compliance with Section 73.7005 of the Commission's rules, which sets forth a holding period for applicants that are awarded permits by use of a point system.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁰ 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.