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In Reply Refer to:

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In re: **NCE FM Group #78**

New Bohemia Group, Inc.

Coggon, Iowa

Facility ID No. 174923

File No. BNPED-20071019BBN

Calvary Iowa City

Winthrop, Iowa

Facility ID No. 176935

File No. BNPED-20071022BPL

Plus Charities

Coggon, Iowa

Facility ID No. 171762

File No. BNPED-20071022BMC

Applications for New NCE FM Station

**Petition to Deny or in the Alternative Petition
for Reconsideration**

Dear Counsel and Mr. Nullmeyer:

We have before us a Petition to Deny or in the Alternative Petition for Reconsideration (the "Petition") filed by Plus Charities ("Plus"), an Opposition to Petition to Deny or in the Alternative Petition for Reconsideration (the "Opposition") filed by the New Bohemia Group, Inc. ("New Bohemia"), and a Reply to Opposition to Petition to Deny or in the Alternative Petition for Reconsideration (the "Reply") filed by Plus. For the reasons set out below, we deny the Petition.

Background. Plus is a dismissed applicant for a noncommercial educational ("NCE") FM station to serve Coggon, Iowa.¹ Its Petition seeks denial of New Bohemia's application (the

¹ The Plus application was dismissed because it inaccurately listed the geographical coordinates of Plus' proposed FM station. See *Letter from Rodolfo Bonacci, Assistant Chief, Audio Division, Media Bureau, to Dennis Kelly, Esq.*, Nov. 9, 2007.

“Application”), or, in the alternative, reconsideration of the Commission’s designation of New Bohemia as the tentative selectee in NCE FM MX Group #78.

Plus argues that the Application should be denied because: (1) it was signed by a corporate director, rather than a corporate officer, (2) the date of the certification of the technical section of the Application postdated the applicant’s certification, and (3) at the time the Application was certified, the Iowa Secretary of State had dissolved New Bohemia as a corporation. Plus also contends that the Application should not have been given a “fair distribution preference” because the technical certification postdated the applicant’s certification.² Finally, Plus argues that the Application should be designated for hearing to determine the accuracy and truthfulness of New Bohemia’s certifications. In the alternative, Plus seeks reconsideration of the selection of New Bohemia as a tentative selectee, arguing that the selection should be rescinded pending resolution of a Petition for Reconsideration filed by Plus seeking reinstatement of its defective application.³

Discussion. *Certification by Corporate Officer.* Plus is correct that Section 73.3513 of the Rules requires that an application filed by a corporation must be certified by a corporate officer, and that Michael Richards, who certified the Application, is a director of New Bohemia and not an officer.⁴ Plus, however, has cited no case in which the Commission has denied an application because it was certified by a corporate director.

The two cases cited by Plus,⁵ in its Petition, for the proposition that the Application was defective because of improper certification are not controlling here. In *Phillips*, the person signing the application had no relationship to the applicant,⁶ whereas, here, Mr. Richards is a member of the New Bohemia board of directors. In *Snyder*, a Low Power FM application was dismissed because the applicant did not have corporate status before it filed its application.⁷ Here, however, New Bohemia was formed as a corporation before the Application was filed.

The cases cited by Plus in its Reply⁸ are likewise inapposite. In *Lundborg*, a late-filed amendment to an FM broadcast application was rejected under the Commission’s “hard look” policy, in effect at the time, which policy rejected “without recourse to *nunc pro tunc* acceptance, applications submitted without proper signature.”⁹ The hard look policy, however, does not apply to applications for an NCE new station construction permit—the case here. In *Schorsten*, a cellular radio lottery case, the applicant was an individual whose attorney signed on his behalf. The case was decided under Section 1.743 of the Rules¹⁰ governing the circumstances under which attorneys may sign applications.¹¹ It did not, as here, involve a certification by a corporate director. Moreover, Section 1.743 is inapplicable to the type of application at issue here.

In both *Phillips* and *Snyder*, the Commission dismissed the applications because the certifying party was not an “officer, director, or board member” of the applicant, thus reflecting that certification by a director would have sufficed to meet the intent of Section 73.3513 of the Rules.¹² New Bohemia recites that its board of directors voted unanimously to file the Application and, thereafter, formed a committee,

² See Petition at 2.

³ See *id.* at 7.

⁴ See *id.* at 3; 47 C.F.R. § 73.3513(a).

⁵ Petition at 3 (citing *John Phillips*, Letter, 22 FCC Rcd 11562 (MB 2007) (“*Phillips*”) and *Vernon T. Snyder*, Letter, 20 FCC Rcd 12066 (MB 2005) (“*Snyder*”).

⁶ The renewal application was signed by an individual identifying herself as “owner” whereas she was “not an owner, officer, director, or board member” of the licensee. *Phillips*, 22 FCC Rcd at 11562.

⁷ *Snyder*, 20 FCC Rcd at 12069.

⁸ *Susan Lundborg*, Hearing Designation Order, 2 FCC Rcd 3895 (1987) (“*Lundborg*”); *Bruce M. Schorsten*, Letter, 3 FCC Rcd 4409 (1988) (*Schorsten*).

⁹ *Lundborg*, 2 FCC Rcd at 3895.

¹⁰ 47 C.F.R. § 1.743.

¹¹ See *Schorsten*, 3 FCC Rcd at 4409-4410.

¹² *Phillips*, 22 FCC Rcd at 11562 (emphasis supplied); *Snyder*, 20 FCC Rcd at 12069 (emphasis supplied).

with Mr. Michael Richards as chair, to prepare the Application documents and to execute them on New Bohemia's behalf.¹³ In short, the New Bohemia board entrusted the Application filing to one of its own, rather than to a subordinate officer.¹⁴ Given his delegated authority, Mr. Richards, on behalf of the corporation, was as capable as a corporate officer to ensure that "the applicant has personally reviewed the application and can be held responsible for the truthfulness and accuracy of the application."¹⁵ Accordingly, we find Mr. Richards qualified to certify the Application on New Bohemia's behalf and decline to dismiss it, as Plus requests, because it was certified by a director rather than an officer.

Certification Dates. The certification date on the Application predates the certification date on the technical portion by three days.¹⁶ Therefore, Plus argues, Mr. Richards could not have truthfully certified that all statements in the Application were true, complete and correct because—at the time Mr. Richards certified the Application—the technical portion had not yet been completed. In so claiming, Plus relies on the statement in *WMOZ, Inc.* that "no material may be added to an application once it has been signed by the licensee . . . unless the application is thereafter redated, resigned and reverified."¹⁷ Plus, however, has not shown that material was added to the technical portion of the Application after Mr. Richards certified it. Neither has Plus refuted Mr. Richard's declaration that he prepared the non-engineering portion of the Application, dated it October 16, 2007, and thereafter, reviewed the technical portion of the application, but, through inadvertence, neglected to "re-date" his certification after his review of the technical portion.¹⁸

We do not agree with Plus that *WMOZ* is applicable here. As New Bohemia notes, this is not a case of "materials being added to paper applications after signature, or signing a paper application form in blank."¹⁹ Yet, Plus claims that the mere discrepancy in dates between the technical and non-technical portions of the application constituted misrepresentation by New Bohemia. It cites a "line of cases" where certification of an application was at issue.²⁰ These cases are inapposite. None involves an instance in which, as here, an applicant reviewed and approved the entire application but, through inadvertence, did not "re-date" the non-technical portion of the application which the applicant had prepared, and dated, earlier.²¹ In order to sustain its claim of misrepresentation, Plus had the burden to

¹³ See Opposition at 2, 3.

¹⁴ It would be anomalous to conclude that a board of directors—which has plenary authority to appoint officers and delegate particular functions to such officers—itself lacks the authority to perform those functions. See Black's Law Dictionary, 8th Ed.: "Director: "[a] person appointed or elected to sit on a board that manages the affairs of a corporation or other organization by electing and exercising control over its officers."

¹⁵ *1998 Biennial Review – Streamlining of Mass Media Applications, Rules and Procedures*, Memorandum Opinion and Order, 14 FCC Rcd 17525,17544 (1999).

¹⁶ See Application, FCC Form 340, § VI-VII.

¹⁷ Petition at 4 (quoting *WMOZ, Inc.* 36 FCC 201, 218 (1964)).

¹⁸ See Opposition, Ex. 1.

¹⁹ Opposition at 4.

²⁰ Petition at 4.

²¹ In *American International Development*, 75 FCC 2d 67 (ALJ 1979) *aff'd in part and rev'd in part*, Memorandum Opinion and Order, 75 FCC 2d 109 (Rev. Bd. 1979), *modified on other grounds*, Memorandum Opinion and Order, 86 FCC 2d 808 (1981), *aff'd without opinion sub nom. KXIV, Inc. v. FCC*, 704 F.2d 1294 (D.C. Cir. 1983), the applicant certified a blank application form without ever seeing the technical or non-technical portions of the application. In *Badlands Broadcasting Co.*, 60 FCC 2d 353 (Rev. Bd. 1976), there were multiple documents—balance sheets, bylaws, etc.—that bore dates after the date the applicant certified the application, and the applicant had signed an amendment "in blank" without seeing the contents thereof. In *Lansing Community College*, Hearing Designation Order, 3 FCC Rcd 5491 (MMB 1988) ("*Lansing*"), a basic qualifications issue was added on facts similar to those present here. The issue was not resolved, however, in the *Lansing* proceeding, and, in a subsequent proceeding involving the same applicant, the Mass Media Bureau declined to reinstate the issue. See *American Indian Broadcast Group, Inc.*, Hearing Designation Order, 5 FCC Rcd 7087, 7088 (MMB 1990). *Post Newsweek Stations, Florida, Inc. (WJXT)*, 54 FCC 2d 254 (Rev. Bd. 1975), involved backdated exhibits and a "sham" applicant who executed an application with the date left blank and later allegedly "certified" it by telephone. See *Post Newsweek Stations, Florida, Inc. (WJXT)*, Summary Decision, 56 FCC 2d 491 (ALJ 1975). Cf. *Post Newsweek Stations, Florida, Inc. (WJXT)*, Memorandum Opinion and Order, 56 FCC 2d 489 (1975). In *Triangle Broadcasting*

establish, *prima facie*, that the date discrepancy reflected an intent to deceive the Commission.²² It has failed to do so. Mr. Richards has attributed the date discrepancy to inadvertence, and Plus has not shown otherwise. Inadvertence or carelessness does not establish intent to deceive.²³ Plus' claim of misrepresentation is, therefore, rejected.

Corporate Dissolution. The Iowa Secretary of State administratively dissolved New Bohemia Group, Inc., for failure to file a "2007 Biennial Report."²⁴ New Bohemia then filed the report and the corporation was reinstated *nunc pro tunc* the date it was dissolved.²⁵ Plus contends that, because the corporation was administratively dissolved at the time the Application was filed, New Bohemia misrepresented a material fact when Mr. Richards certified the Application listing New Bohemia as a corporation. It urges that we should, therefore, dismiss the New Bohemia Application or designate it for hearing.²⁶ Precedent does not support Plus' position.

In general, the Commission will not consider issues of a licensee's compliance with the requirements of state corporate law unless a challenge to an applicant's corporate status has been made in state court.²⁷ No such challenge has been raised with respect to New Bohemia. Moreover, Plus has offered no evidence that Mr. Richards was aware of the administrative dissolution of the corporation when he executed the Application, much less that he intentionally misrepresented New Bohemia's corporate status.

The circumstances here parallel those in *Fatima Response, Inc.* ("*Fatima*"),²⁸ where an applicant corporation had been dissolved by the state corporate authorities for failure to pay an annual filing fee. A competing applicant alleged that the corporate dissolution was a basis for disqualifying the applicant on misrepresentation grounds. In response, the applicant furnished opinion of counsel regarding the status of the corporation under state law and a declaration by the person certifying the application that he was unaware of the dissolution. The Commission found that the applicant had not misrepresented its corporate status and declined to dismiss the application. Here, we credit Mr. Richards' declaration that he was unaware of the corporate dissolution when he certified the Application and note local counsel's opinion that New Bohemia Group, Inc., remained a *de facto* corporation under state law, notwithstanding its dissolution for failing to file an annual report.²⁹ As in *Fatima*, we find no intent to deceive the Commission when Mr. Richards certified the Application, and reject Plus' fly-specking argument to the contrary. Moreover, inasmuch as New Bohemia's corporate status was restored *nunc pro tunc*, and because it remained a *de facto* corporation under state law during the dissolution period, the administrative dissolution of the corporation had no effect on New Bohemia's entitlement to a fair distribution preference.

Co., 49 RR 2d 1601 (ALJ 1981), the presiding judge added a certification issue only after reviewing affidavits which established "there is no evidence that [the applicant] personally reviewed this matter [the engineering section of the application]." *Id.* at 1602.

²² See *Fox River Broadcasting, Inc.*, Order, 93 FCC 2d 127, 129 (1983); *Scott and Davis Enterprises*, Decision, 88 FCC 2d 1090, 1099 (Rev. Bd. 1982). ("Misrepresentation and lack of candor charges are very grave matters. They ought not be bandied about. The duty to come forward with a *prima facie* showing of deception is particularly strong where a misrepresentation issue is sought. (Citation omitted.) The petitioner must also make a demonstration of a desire, motive, or logical reason to mislead in order to have an issue added. The Commission will not infer actual or attempted deceptions or improper motives from an enumeration of alleged application errors, omissions, or inconsistencies, accompanied by speculation and surmise but lacking factual support." (Citation omitted.))

²³ See, e.g., *Gary D. Terrell*, 102 FCC 2d 787 (1985); *OPUS Media Group*, 11 FCC Rcd 15485 (1996).

²⁴ Petition, Ex. B.

²⁵ See Opposition Ex. 2.

²⁶ Petition at 5-6.

²⁷ See *Aspen FM, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 17852, 17855 (1997) (citing *North American Broadcasting Co., Inc.*, 15 FCC 2d 979 (1969)).

²⁸ *Fatima Response, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 18543, 18546 (1999), *recon. dismissed*, 15 FCC Rcd 10520 (2000).

²⁹ See Opposition at 3 and Ex. 2.

Rescission of Selection of New Bohemia as Tentative Selectee. Plus requests that we rescind the selection of New Bohemia as the tentative selectee for the Coggon, Iowa, frequency, pending resolution of Plus' Petition for Reconsideration of the dismissal of its application for a Coggon facility. We see no good reason to do so because, as discussed herein, Plus has failed to establish either that New Bohemia is unqualified to be a Commission licensee or that it is not entitled to a fair distribution preference. Moreover, Plus' request is in the nature of a request for a stay. Stay requests may not be integrated into petitions for reconsideration or other pleadings; they must be made separately.³⁰ Even were we to reach Plus' pleading as a request for a stay, we would deny it because Plus has not met the established criteria for grant of a stay.³¹

Decision/Action. Plus has not established that the certification of the Application by an authorized member of New Bohemia's board of directors, and the date discrepancy between the technical and other portions of the Application are grounds for disqualifying New Bohemia. The temporary administrative dissolution of New Bohemia as a corporation does not affect New Bohemia's basic qualifications to be a Commission licensee or its entitlement to a fair distribution preference. We reject Plus' allegations of misrepresentation. They have no basis in fact or law.

Accordingly, IT IS ORDERED, that the Petition to Deny or in the Alternative Petition for Reconsideration filed by Plus Charities is DENIED. IT IS FURTHER ORDERED that the Application of New Bohemia Group, File No. BNPED-20071019BBN, IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

³⁰ See 47 C.F.R. § 1.44(e).

³¹ Under 47 C.F.R. § 1.102(b)(2), the Commission has the discretion to stay a proceeding pending review of a petition for reconsideration. It will issue such a stay if a petitioner can show that: (i) it is likely to prevail on the merits; (ii) it will suffer irreparable harm, absent a stay; (iii) other interested parties will not be harmed if the stay is granted; and (iv) the public interest would favor a grant of the stay. See, e.g., *Liberty Productions*, Order, 16 FCC Rcd 18966 (2001) (citing *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)). Plus has not addressed, much less met, the prerequisites for a stay.