

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

In the Matter of)	
)	
NCE October 2007 Window)	
MX Group 543)	
)	
In re Application of)	Facility ID No. 173822
)	File No. BNPED-20071019ARU
The KBOO Foundation)	
For a New NCE(FM) Station)	
Chehalis, Washington)	

MEMORANDUM OPINION AND ORDER

Adopted: January 27, 2016

Released: February 2, 2016

By the Commission: Commissioners Pai and O’Reilly issuing separate statements.

I. INTRODUCTION

1. The Commission has before it an Application for Review (“AFR”) filed on October 27, 2011, by Chehalis Valley Educational Foundation (“CVEF”), the licensee of KAHS(FM), Chehalis, Washington.¹ CVEF seeks review of a Media Bureau decision which denied its Petition to Deny (“Petition”) the referenced noncommercial educational (“NCE”) FM application (“Application”) filed by The KBOO Foundation (“KBOO”) and granted KBOO’s requests for waiver of Section 73.3573 of the Commission’s rules (“Rules”) and the Application.² For the reasons set forth below, we grant the AFR, rescind our grant of the waivers and Application and dismiss the Application.

2. Both KBOO and CVEF filed applications in the October 2007 NCE FM filing window.³ Their applications were mutually exclusive with 15 others and were designated NCE MX Group 543.⁴ While the Application was pending, KBOO experienced a greater than 50 percent change in membership of its governing board over the course of less than a year. Thus, on November 21, 2008, it amended the Application to reflect these changes in its Board membership. The amendment constituted a “major change” to a pending application under Section 73.3573 of the Rules.⁵ That section prohibits the filing of “major change” amendments outside of a filing window.⁶ Acknowledging this, KBOO requested a waiver. In the amendment, KBOO asked the Commission to waive this rule as it had for other NCE FM

¹ KBOO filed an Opposition to Application for Review on November 14, 2011. CVEF filed a Reply to Opposition to Application for Review on November 29, 2011.

² *The KBOO Foundation*, Letter, 26 FCC Rcd 13366 (MB 2011) (“*Letter Decision*”)

³ *Media Bureau Announces NCE FM New Station and Major Modification Application Filing Window for New and Certain Pending Proposals; Window to Open on October 12, 2007*, Public Notice, 22 FCC Rcd 6726 (MB 2007).

⁴ *See Media Bureau Identifies Groups of Mutually Exclusive Applications Submitted in the October 2007 Filing Window for Noncommercial Educational FM Stations*, Public Notice, 23 FCC Rcd 14730 (MB 2008).

⁵ 47 C.F.R. § 73.3573(a)(1) (“A major change in ownership is any change where the original party or parties to the application do not retain more than 50 percent ownership interest in the application as originally filed.”).

⁶ *See* 47 C.F.R. § 73.3573(b)(3).

applicants in the 2007 *Omnibus Order*.⁷ There, the Commission waived Section 73.3573 for pre-2007 NCE-FM applicants that had experienced “routine and inevitable changes in their boards” over the decade during which their applications were pending due to unique processing delays caused by the judicial challenges to the new NCE FM comparative procedures.⁸

3. In September 2010, the Commission designated another applicant – Grays Harbor LP FM – the tentative selectee in NCE MX Group 543.⁹ The Bureau subsequently granted that application and dismissed the KBOO and CVEF applications.¹⁰ KBOO petitioned for reconsideration of the dismissal of the Application, and amended its Application to reflect a settlement agreement it had entered into with other mutually exclusive applicants that would render its Application grantable as a singleton. The Commission granted the petition and reinstated the Application, triggering a 30-day petition to deny period.¹¹ CVEF timely filed the Petition, arguing that KBOO did not qualify for a waiver of Section 73.3573’s prohibition on the filing outside a filing window of amendments reflecting post-filing changes of more than 50 percent to an applicant’s board because the Application was not “similarly situated” to those addressed in the *Omnibus Order*.¹² KBOO opposed the Petition, arguing that its Board turnover was gradual because it did not occur at one single time.¹³ Moreover, it claimed that the changes were routine, in accordance with its bylaws,¹⁴ and did not alter the nature of the organization or break continuity of control.¹⁵

4. The Bureau denied the Petition, granted KBOO’s waiver requests¹⁶ and granted the Application. In addressing the waiver requests, the Bureau agreed with CVEF that KBOO was not “similarly situated” to those applicants granted waiver of Section 73.3573 in the *Omnibus Order* because the KBOO board member change was not gradual over a long period. However, in light of the purpose of the rule and the special circumstances it found to be present, the Bureau found good cause to waive Section 73.3573.

5. CVEF asks us to vacate the *Letter Decision* and dismiss the Application. It argues that the Bureau’s grant of the KBOO waiver requests was contrary to established Commission precedent and policy.¹⁷ We reject CVEF’s argument that the Bureau was bound by an earlier proceeding in which the

⁷ Application at Exhibit 1 (received Nov. 21, 2008), citing *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, 6125 (2007) (“*Omnibus Order*”) (subsequent history omitted).

⁸ *Omnibus Order*, 22 FCC Rcd at 6125.

⁹ *Comparative Consideration of 24 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 25 FCC Rcd 12887, 12909-10, 12922 paras. 64-66, 102 (2010).

¹⁰ See *Broadcast Actions*, Public Notice, Report No. 47343 (MB Oct. 18, 2010); *Broadcast Actions*, Public Notice, Report No. 47354 (MB Nov. 2, 2010).

¹¹ *Broadcast Applications*, Public Notice, Report No. 27378 (MB 2010).

¹² Petition to Deny filed by Chehalis Valley Educational Foundation (Jun. 7, 2011 (“Petition”)) at 2-4.

¹³ Opposition to Petition to Deny filed by The KBOO Foundation (Jan. 19, 2011) (“Opposition to Petition”) at 3.

¹⁴ *Id.* at 4.

¹⁵ *Id.*

¹⁶ On January 19, 2011, KBOO submitted an additional amendment in which it reported another majority Board turnover during the course of about one year and requested an additional waiver of Section 73.3573 with respect to this second occurrence.

¹⁷ AFR at 4-5. CVEF also asserts that two cases cited by the Bureau in the *Letter Decision* were inapposite. *Id.* at 4, citing *Center for Study of Black Economic Development*, Initial Decision, 8 FCC Rcd 2116 (ALJ 1993) and *Texas Educational Broadcasting Co-operative*, Memorandum Opinion and Order and Notice of Apparent Liability, 22

(continued....)

Commission set forth tentative conclusions in the context of a notice of inquiry regarding transfers of control.¹⁸ Tentative conclusions do not bind the Commission or the Bureau.¹⁹ We also reject the arguments of both CVEF and KBOO that rely on the *Omnibus Order* to urge either denial or grant of the waiver request.²⁰ The Commission's direction to the staff in the *Omnibus Order* to waive Section 73.3573 for similarly situated NCE applicants applied only to "pre-2007 NCE applicants."²¹ Other applicants, including KBOO, then, are subject to the general waiver standard set forth in Section 1.3 of the Rules.²²

6. Under that standard, the Commission may waive its policies or rules only for good cause shown. The Commission must give waiver requests "a hard look," but an applicant for waiver "faces a high hurdle even at the starting gate"²³ and must support its waiver request with a compelling showing.²⁴ Waiver of the Commission's policies or rules is appropriate only if both (1) special circumstances warrant a deviation from the general rule, and (2) such deviation will serve the public interest.²⁵ We find that the Bureau erred in finding here that waiver was justified under Section 1.3 of the Rules. First, in each of its two identically-worded waiver requests, KBOO merely cited and relied exclusively on the *Omnibus Order*, failing to allege, much less demonstrate, any "special circumstances" that would justify the grant

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FCC Rcd 13038 (MB 2007). Given our findings herein and rescission of the waiver grants, *see infra* para. 7, we need not reach this issue.

¹⁸ AFR at 4, *citing Transfers of Control of Certain Licensed Non-Stock Entities*, Notice of Inquiry, 4 FCC Rcd 3403, 3405 para. 15 (1989) ("*Transfers of Control*") ("It appears to us that a change in the majority of a governing board, which occurred over a period of less than one year, would effectively break continuity in the board . . ."). *But see Letter Decision* at 4 (stating "at no one time since the application's filing have Board changes disrupted continuity of organizational operations because they occurred incrementally over time and in accordance with its bylaws").

¹⁹ *Public Citizen, Inc. v. Shalala*, 932 F.Supp 13, 18 n. 6 (D.D.C.1996) (noting that a "tentative conclusion articulated in a nonfinal proposed rule does not command deference from the Court nor is it binding on the agency"), *citing Public Citizen Health Research Group v. Commissioner, Food & Drug Administration*, 740 F.2d 21, 32 (D.C.Cir.1984). *See also WFCL(FM), Nashville, TN*, Letter, 29 FCC Rcd 2869 (MB 2014) ("Because the *Transfers of Control* proceeding was merely a Notice of Inquiry and the proposals there were never codified into the Rules or adopted by the Commission, we have not formally adopted standards for what constitutes a change in control of a non-stock NCE entity that would require prior Commission approval on a long-form FCC Form 315."). For the same reason, we reject KBOO's claim that because a sudden change in a governing board's majority would be an insubstantial transfer under the tentative conclusion in the *Non-Stock Transfer NOI*, the change in its Board was not a major change. *See* Opposition to AFR at 5. CVEF also argues that applicants have relied on *Transfers of Control* as the standard in cases involving changes in governing boards of nonstock entities, though it does not provide any supporting evidence. AFR at 4. That some applicants may have relied upon the tentative conclusions contained in the *NOI* does not alter the fact that such conclusions do not constitute binding precedent.

²⁰ *See* AFR at 6 ("if the Commission had wished to extend . . . waiver . . . to applicants with shorter-term turnover on their Boards . . . it could have and would have done so in the *Omnibus Order*"); Opposition to AFR at 4, 6, *citing Omnibus Order*.

²¹ *Holy Family Communications, Inc.*, Memorandum Opinion and Order, 28 FCC Rcd 4854, 4855 para. 4 (2013). *See also Omnibus Order*, 22 FCC Rcd at 6125, paras. 59-60.

²² *See supra* note 24. *See also, Central Texas Communications, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 7644, 7648 para. 11 (2010) (finding that, in specifying factors that would warrant favorable waiver treatment, the Commission did nothing to foreclose a waiver grant pursuant to the general waiver standard set forth in Section 1.3).

²³ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (subsequent history omitted).

²⁴ *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090, 7094 para. 9 (1999), *citing Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 para. 5 (1974).

²⁵ *Network IP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

of its requested waiver under Section 1.3.²⁶ While the Bureau on its own motion determined that special circumstances existed because grant of the KBOO Application by virtue of a settlement would not preclude grant of another application, we agree with CVEF that the presence of this factor, even if it had been alleged by KBOO, is not unique to this case.²⁷ KBOO is not the first, nor is it likely to be the last, applicant to render its application a grantable singleton via settlement.²⁸ Accordingly, we find that the Bureau erred in finding that special circumstances existed here.²⁹ For this reason, and consistent with the judicial precedent cited in note 25 *supra*, we conclude that KBOO has not demonstrated good cause for grant of the waivers that it has requested. Accordingly, we grant the AFR, rescind the Bureau's grant of KBOO's waiver requests and its grant of the Application, and dismiss the Application.³⁰

7. Accordingly, IT IS ORDERED that, pursuant to section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and section 1.115(g) of the Commission's Rules, 47 C.F.R. §§ 1.115(g), the October 27, 2011, Application for Review filed by Chehalis Valley Educational Foundation, IS GRANTED. IT IS FURTHER ORDERED that the grant of the waiver requests and the grant of the application for a new noncommercial FM station at Chehalis, Washington (File No. BNPED-20071019ARU) filed by The KBOO Foundation ARE RESCINDED. Finally, IT IS ORDERED that the application filed by The KBOO Foundation for a new noncommercial FM station at Chehalis, Washington (File No. BNPED-20071019ARU) IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁶ See *supra* nn. 7, 16.

²⁷ AFR at 6.

²⁸ See 47 C.F.R. § 73.7003(d) (providing that mutually exclusive NCE FM applicants may settle "at any time during this process").

²⁹ We also disagree with the Bureau that KBOO "prove[d]" that "at no one time . . . have Board changes disrupted continuity of organizational operations because they occurred incrementally over time and in accordance with its bylaws." *Letter Decision* at 4-5. In demonstrating whether a waiver is warranted, the burden of proof rests with the petitioner. See *Tucson Radio, Inc. v. FCC*, 452 F.2d 1380, 1382 (D.C. Cir. 1971). We need not reach the issue of whether the maintenance of "continuity" in organizational operations is relevant in assessing a request for waiver of Section 73.3573(a)(1) under the general waiver standard in Section 1.3 because, even if it were, we find no basis for the Bureau's conclusion that KBOO "prove[d]" that there was no break in continuity caused by the repeated changes in control of the KBOO Board after the filing of its Application. As an initial matter, as noted above, KBOO did not attempt to make this showing in either waiver request; rather, it attempted to make this showing only in response to a Petition to Deny. See *Opposition to Petition* at 4-5. While the Bureau relied on the fact that 50 percent of the KBOO Board was not replaced "at any one time," 50 percent of the Board members changed within a short period of time (less than one year), and there is no basis in the record to conclude that this change, or the second reported change for which waiver was similarly sought, did not impact continuity in the organization. While KBOO claimed that these changes were in accordance with its Bylaws, this fact standing alone does not prove that there had been no break in continuity.

³⁰ Given our findings and decision to rescind the Bureau's grant and dismiss the KBOO Application, we note that we need not reach CVEF's argument that the filing of a transfer of control application necessitated by the Board turnover constitutes an admission by KBOO of an organizational "break in continuity." *Reply to Opposition* at 3.

**STATEMENT OF
COMMISSIONER AJIT PAI**

Re: *NCE October 2007 Window, MX Group 543, Application of the KBOO Foundation for a New NCE(FM) Station, Chehalis, Washington, Facility ID No. 173822, File No. BNPED-20071019ARU.*

I am voting to approve this Order because I agree with the Commission that there aren't special circumstances present to justify granting the KBOO Foundation's (KBOO's) waiver request. But I do not agree with the underlying rule that requires us to dismiss KBOO's application for a new NCE FM station and hope that the Commission will change it before the next NCE FM filing window.

A nonprofit organization's board of directors will often experience routine turnover. Members, who are generally volunteers leading busy lives, decide to resign for a variety of reasons or their terms expire. And if such turnover results in the majority of a board's membership changing hands while an organization has an NCE FM application pending with the Commission, that application should not be dismissed absent evidence of a lack of continuity in the organization's operations (e.g., evidence that the organization was the subject of a hostile takeover or had dramatically changes its mission or character).

It is not the Commission's job to micromanage the governance of nonprofit organizations, and I see no reason why those groups should be put to the choice of preventing routine turnover on their boards of directors or rendering an NCE FM application defective.

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: *NCE October 2007 Window, MX Group 543, Application of the KBOO Foundation for a New NCE(FM) Station, Chehalis, Washington, Facility ID No. 173822, File No. BNPED-20071019ARU.*

While this Order reaches a suitable conclusion given the byzantine structure concocted to award NCE FM licenses in the last filing window, I agree with Commissioner Pai that the rationale for the Commission to micromanage the composition of nonprofit boards seems tenuous at best. Unfortunately, this is not the only decision regarding NCE FM applications filed in the October 2007 window that has turned on subjective licensing requirements and an unpredictable process used by the Commission to award LPFM licenses. It is my hope that for the next application window, to the extent there is one, the Commission will reconsider its past decisions and adopt a straightforward process, free of extraneous, ambiguous, or subjective criteria that we have seen can lead to years of uncertainty.