Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Reexamination of the Comparative Standards and Procedures for Licensing Noncommercial Educational Broadcast Stations and Low Power FM Stations	)	MB Docket No. 19-3

To: the Commission:

PETITION FOR RECONSIDERATION
BY DISCOUNT LEGAL

Michael Couzens and Alan Korn, d/b/a Discount Legal, here seek reconsideration of the Report and Order adopted herein, FCC 19-127, released on December 11, 2019, 34 FCC Rcd 12519, 85 F Reg. 7880 (February 12, 2020). Couzens and Korn are California attorneys practicing before the Commission who developed a service plan to assist applicants beginning in the 2007 noncommercial educational (NCE) filing window, and with a subsequent Low Power FM (LPFM) filing window. More than fifty of the applicants we have assisted made it through the Commission's selection processes and currently are on the air.

The prime contention in our comments, submitted on May 20, 2019, was that the Commission should endeavor, so far as possible, to maximize the number of non-conflicting authorizations from each filing window, by reviewing all mutually exclusive (MX) “daisy chain” situations for possible secondary grants. As we said, this practice will serve the Commission's charge with fostering an "efficient, Nation-wide. . . radio communication service with adequate facilities. . ." 47 U.S.C. Sec. 152, and to "generally encourage the larger and more effective use of radio in the public interest," 47 U.S.C. 303(g). The Commission has experience with this issue in adjudicated cases, not least from Discount Legal's submissions to

it on appeal, *Greene/Sumter Enterprise Community*, 30 FCC Rcd 7694, FCC 15-87 released on July 15, 2015 [Application for Review, October 29, 2010]; *Hawaii Public Radio, Inc*., 30 FCC Rcd 13775, FCC 15-152 released on November 18, 2015.

In the referenced cases we were told that the issue was best treated through rule making proceedings, and so here we briefed it fully again. It came as a tremendous disappointment that the Commission rejected the idea, again, in a lone footnote, R&O fn. 68 at 12529, repeating all the same tired refrains that we have heard before, notwithstanding the established facts and arguments that refute them, one by one:

- *See, e.g., Greene/Sumter Enterprise Community*, Memorandum Opinion and Order, 30 FCC Rcd 7694, 7699 (2015) (noting that such an approach would "vastly expand staff burdens" and entail "multiple iterative comparative analyses of virtually all NCE MX groups").

This characterization of staff burdens does not hold up. After each filing window, virtually all the staff work for the ascertainment of secondary grants has been done already. By then, a wave of hundreds or more applications will have been clustered into mutually exclusive groups. That is a laborious task of engineering analysis that can take months. Then each group is analyzed through a close reading of the applications for each applicant's point system qualifications. These are reduced to a spread sheet, then ranked, and a tentative selectee chosen. The result is depicted in a narrative description of every applicant in that group for publication in the resulting Order, to be circulated as a Commission agenda item.

The fruit of all that work remains available for secondary analysis. Once the first selectee becomes final, the group can be re-scanned at a glance for applicants not in MX conflict with the winner. Free standing applicants can be selected secondarily. Others, in sub-

conflict, can be readily compared under the point system, from work previously done.[1]

In our comments in this proceeding, we related the example of our applicant on the Big Island of Hawaii that was caught in a daisy-chain MX group of 57 applicants. A winner in the group was declared based on superior coverage under 47 U.S.C. Section 307(b). Our applicant was approximately 300 miles and seven channels away. In that huge group, only ours and one other applicant, besides the winner, had dispositive coverage superiority, so that the work in fashioning a comparative "run off" would have been minor. The staff refused to do this and the Commission upheld the result, *Hawaii Public Radio, Inc, supra*. The Report and Order here does not even mention this case, and thus does not explain how its resolution, in the face of demonstrated overwhelming demand in the Islands, would have been just too much staff work.

- "Specifically, after the best qualified applicant is selected, it is possible that remaining applicants that are not mutually exclusive with this primary selectee and thus potentially secondary selectees, may also be significantly inferior to other applicants that are eliminated because they are mutually exclusive with the primary selectee," [quoted from the Recon. Order in 2001 adopting comparative points].[2]

As we stated in this proceeding and elsewhere,[3] there is no relevant comparison between an

1 In actuality only the groups that remained after an engineering and settlement window, and that involved three or more applicants, would be affected. In those cases, only the appearance of one or more applicants not in conflict with the primary winner would receive further consideration. The claim that this would entail "multiple iterative comparative analyses of virtually all NCE MX groups" is ridiculous. At that point all the comparative work already exists in a spread sheet on file.

2 16 FCC Rcd at 5074, para. 90. We will refer to this document as Recon. 2001. The full citation is 13 FCC Rcd 21167 (1998) (*NCE FNPRM*), *rules adopted,* Report and Order, 15 FCC Rcd 7386 (2000) (*NCE Report and Order*), *vacated in part on other grounds sub nom.*, *National Public Radio v. FCC,* 254 F.3d 226 (D.C. Cir. 2001), *clarified,* Memorandum Opinion and Order, 16 FCC Rcd 5074 (2001) (*NCE MO&O*), *Erratum,* 16 FCC Rcd 10549, *recon. denied,* Memorandum Opinion and Second Order on Reconsideration, 17 FCC Rcd 13132 (2002) (*NCE Reconsideration Order*), *aff'd sub nom., American Family Ass'n v. FCC,* 365 F.3d 1156 (D.C. Cir. 2004), *cert. denied,* 543 U.S. 1000 (2004).

3 *Greene / Sumter*, *supra*, Application for Review, October 29, 2010.

applicant that is in conflict with the tentative selectee and one that is not. The former is unqualified technically, 47 U.S.C. Sec. 308(b), and must be dismissed. The latter is potentially fully qualified and should receive normal processing. That one versus the other may have comparatively superior point system portfolios is irrelevant – no more relevant than the fact that an applicant dismissed for defective engineering may have a better points system outlook than somebody else's still-pending application. The idea that an applicant must be dismissed because it might be comparatively inferior to an unqualified applicant being dismissed is a violation of the rights of secondary applicants to be compared on all relevant difference, and not to be compared on differences that are immaterial, *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 66 S. Ct. 148, 90 L. Ed. 108.

- We note, however, that we will continue to permit additional grants from an MX group if an applicant—by technical amendment, the voluntary dismissal of competing applications, and/or a valid settlement agreement—eliminates all conflicts to other applications in the group.

Some MX conflicts can be resolved through minor engineering changes. Others cannot be. There is no rational basis to approve of multiple grants that come by means of settlements, while opposing multiple grants created by secondary analysis. Indeed, because a party with a losing hand on the point system is more likely to settle a case than a party with a winning hand, additional grantees by way of settlement are *more likely* to be inferior than are additional grantees by secondary analysis.[4]

4 The staff has tied itself in knots trying to defend the validity of grants via settlement, but not by secondary grants. The Commission has stated a requirement that a settlement "eliminates all conflicts to other applications in the group" (quoted from para. 90 *Id*.) But a Public Notice announcing a proposed window for settlement agreements, DA 07-4571 rel. November 8, 2007, at p. 2 "repealed" the Commission's direction and stated: "Universal settlements are encouraged but not required." In *Christian Music Network, Inc*. DA 10-1272 (MB, rel. July 8, 2010), after the tentative selections was

- [Quoting from the Recon. 2001 again:] ". . . we believe it is appropriate to dismiss all of the remaining applicants and permit them to file again in the next filing window."

We appreciate the fact that the Commission in this proceeding adopted our recommendation that unsuccessful applicants who reapply in a subsequent window be accorded a tie-breaker preference, Report and Order at para 19, p. 12527. See fn. 66: "Discount Legal also states that its proposed tie-breaker preference may curtail 'the harrowing possibility of an applicant, denied in a first window, denied in a second window, and having to re-apply 30 years later or even more.'" Unfortunately this frank acknowledgement of the perpetuity of application freezes and the rarity of filing windows did not carry over to the analysis of secondary grants. Certainly, the Commission in the passage quoted from 2001, could not have anticipated the severity of these waits, or it well might have struck the balance differently.

- The Commission has consistently applied the current policy and rejected requests to consider and process secondary applications. *See, e.g., Greene/Sumter Enterprise Community, Memorandum Opinion and Order, 30 FCC Rcd 7694, 7699 (2015)*

We dispute that there exists any such Commission "policy." At the reconsideration in 2001, the University of Northern Iowa suggested that a daisy chain be resolved by selecting a "key station" in the geographic middle that might free up grants at both ends of the chain. The Order at para. 90 rejected that approach (misnaming the petitioner as University of Northern Ohio). The Order correctly noted that the University proposal was ignoring use of the point system to ascertain the best applicant. And by selecting a "key station" it ran the risk of disfavoring

announced, one applicant dismissed voluntarily. Two others submitted engineering to show that they were now separate, and asked for severance from the MX group. A month later they submitted a settlement between them, resulting in one of them being granted. The settlement was approved and the application granted. In the same decision the staff rejected a secondary analysis requested by another applicant. To summarize: Settlement good. Secondary grant bad. Or not. As the case may be.

superior point system claims – no doubt a gateway to litigation. This single paragraph, which came at reconsideration and was not part of a developed record in notice-and-comment rule making, became the asserted bedrock foundation over the years of staff rejections to the secondary grant idea (with – as noted – occasional Commission affirmance). Dressing this history up as a policy, let alone a consistent policy, misapplies that paragraph of the Recon. 2001 and grants it weight that was never intended.

To the contrary the staff had been granted expansive discretion. "Other than specifying these broad guidelines, we did not establish processing procedures either for pending or future applications, instead delegating the responsibility to the Mass Media Bureau," Recon. 2001 at para. 87. We seek reconsideration here in the hope that, at long last, the Commission will simply ask that the staff do its job, and in so doing, expand needed service to the public.

Respectfully submitted,

MICHAEL COUZENS
ALAN KORN
d/b/a DISCOUNT LEGAL

Michael Couzens Law Office
6536 Telegraph Avenue, Suite B201
Oakland, CA 94609
Tel. (510) 658-7654
Cuz@well.com

Law Office of Alan Korn
1840 Woolsey Street
Berkeley, CA 94703
Tel. (510) 548-7300
alan@alankorn.com

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