DOCKET FILE COPY ORIGINAL

RECEIVED

JUN 1 6 2003

Federal Communications Commission
Office of Secretary

ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC

In the Matter of	)	
	)	
Reexamination of the Comparative Standard for Noncommercial Educational Applicants	)	MM Docket No. 95-31
	)	
	)	
	)	
	)	

To: The Commission

PETITION FOR RECONSIDERATION

Marist College ("Marist"), the applicant for a construction permit for a Noncommercial Educational FM Station to serve Rosendale, New York, File No. BPED-19960111BA (the "Application"), by its attorneys and pursuant to Section 1.106(f) of the Commission's Rules and Regulations, hereby petitions for reconsideration of that portion of the Commission's *Reexamination of the Comparative Standard for Noncommercial Educational Applicants, Second Report and Order*, FCC 03-44, released April 10, 2003 ("*Second R&O*")[1] in which the Commission dismissed pending applications for non-reserved spectrum for noncommercial educational ("NCE") stations as unacceptable for filing. The policy upon which the Commission based its decision to reject summarily such applications, including Marist's Application, runs contrary to the Balanced Budget Act of 1997 ("1997 Balanced Budget Act"),[2] the Communications Act of 1934, as amended (the "Communications Act"), and the opinion of the United States Court of Appeals for the District of Columbia Circuit in *NPR v. FCC*, 254 F.3d 226 (D.C. Cir. 2001). The Commission's rejection of Marist's Application was, therefore,

[1] *See also* 68 Fed. Reg. 26220 (2003). This Petition is timely filed within thirty days of the May 15, 2003 publication of a synopsis of the *Second R&O* in the Federal Register.

[2] Pub. L. No. 105-33, Title III, 111 Stat. 251 (1997).

rec'd 0+4

arbitrary and capricious, and contrary to law, and must now be reversed. In support thereof, Marist states as follows.

In the *Second R&O*, the Commission promulgated spectrum licensing policies vis-à-vis applicants for NCE service seeking spectrum not exclusively reserved for NCE broadcast stations. *See Second R&O* at ¶ 1. The Commission ultimately adopted a policy of allowing "applicants for NCE stations to submit applications for non-reserved spectrum in a filing window, subject to being returned as unacceptable for filing if there is any mutually exclusive application for a commercial station." *Id.* at ¶ 21. On the basis of this policy, the Commission further determined that pending applications for NCE stations that were mutually exclusive with applications for commercial stations would be dismissed as unacceptable for filing:

> [G]iven that we have already offered settlement opportunities to all applicants in these pending cases, we are not persuaded that the equities favoring the applicants for NCE stations in these pending proceedings outweigh the delay in initiating new broadcast service to the public as well as the unfairness to applicants for commercial stations. As a result, we believe that it will serve the public interest best to return as unacceptable for filing the pending applications for NCE stations, and move the process forward by subjecting any remaining mutually exclusive applications to auction.

Id. at ¶ 41.

The Commission's adoption of a policy of returning accepted NCE station applications for non-reserved spectrum if there exists a mutually exclusive application for a commercial station violates the plain language of the 1997 Balanced Budget Act. The 1997 Balanced Budget Act amended Section 309(j)(1) of the Communications Act to provide that if "mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding." 1997 Balanced Budget Act § 3002(a)(1)(A), 47 U.S.C. § 309(j)(1). *Section 309(j)(2) sets forth exceptions to the Commission's competitive*

bidding authority, stating that it "shall not apply to licenses or construction permits issued by the Commission" for, among other things, NCEs. 47 U.S.C. § 309 (j)(2) (cross-referencing 47 U.S.C. § 397(6)). The plain language of the statute thus sets forth the Commission's competitive bidding authority, and then limits this authority by precluding the application of auction procedures to NCEs. The Commission's interpretation of these provisions as a limitation on the ability of NCEs to apply for non-reserved spectrum, rather than as a limitation on the Commission's ability to apply competitive bidding procedures to applicants, flies in the face of the clear, unambiguous terms of the 1997 Balanced Budget Act.

In *NPR*, the D.C. Circuit Court struck down the Commission's attempt to interpret these provisions as exempting NCEs from participating in auctions for broadcast license when they apply on channels in the spectrum reserved for them, but not when they apply for channels in the unreserved spectrum. *See* 254 F.3d at 227. In finding that the Commission's interpretation violated the plain language of the statute, the Court rebuffed the Commission's attempt to argue that through ambiguities in the statute, Congress essentially delegated to the Commission the authority to determine the applicability of auction procedures to NCEs seeking non-reserved band spectrum. While recognizing the Commission's task in implementing an imperfectly drafted statute, the Court reminded the Commission that "[i]nartful drafting is not the same as ambiguity." *Id.* at 229. The Court rejected the Commission's claim that the statute's grant of competitive bidding authority to the Commission was in conflict with the removal of such authority vis-à-vis NCEs, stating that "we do not understand how a general rule (Section *309(j)(1)) can conflict with its own exception (Section 309(j)(2)).*" *Id. at 230.*

The Court also dismissed the Commission's claim that exempting NCEs from auctions for commercial licenses would run counter to the congressional intent underpinning the 1997

Balanced Budget Act, namely recovering a portion of the value of commercial spectrum through auctions. In so doing, the Court correctly concluded that in setting forth an NCE exception to the Commission's competitive bidding authority, Congress had clearly intended to protect NCEs, even if this meant accepting less revenue from auctions:

> [N]otwithstanding Congress's desire to increase revenue, it expressly exempted NCEs from participating in auctions, thus demonstrating that it understood that pursuit of this goal would be limited by the NCE exemption. 'Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.'

Id. (citing *Rodriguez v. United States*, 480 U.S. 522, 526 (1987)). The *NPR* Court thus clearly established that the plain language of the statute as well as the underlying congressional intent require Commission policies that exempt NCEs from competitive bidding procedures for the benefit of NCEs, not with a view to the Commission's coffers. The policy adopted by the Commission does just the opposite: by requiring dismissal of all NCE applications for non-reserved spectrum if a mutually exclusive commercial application is present, the Commission has severely limited NCEs' ability to be awarded non-reserved spectrum licenses, solely for the sake of increased revenue. This policy is clearly unacceptable under the first part of the two-part test set forth in *Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (if "Congress has directly spoken to the precise question at issue...that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress"). The portion of the *Second R&O* conditioning NCEs' ability to apply for non-reserved spectrum on the absence of mutually exclusive commercial applications contravenes the 1997 Balanced Budget Act and the D.C. Circuit

Court's interpretation thereof in *NPR*, and therefore must be reconsidered.

Given that this Commission policy violates the plain language of the 1997 Balanced Budget Act, the Commission's decision to dismiss all pending NCE applications for non-reserved spectrum that are mutually exclusive with commercial applications is arbitrary and capricious and contrary to law. In an attempt to ameliorate the patent unfairness of its decision summarily dismissing NCE applications that have been pending for nearly a decade, the Commission pointed out that settlement opportunities had been offered to NCE applicants, and further suggested that the public interest against further delay in resolving mutually exclusive applications as well as fairness to commercial applicants supported its decision. *See Second R&O* at ¶ 41. The Commission's attempt to raise mitigating factors fails to overcome the fact that it based its decision on a policy wholly at odds with the plain language of, and the congressional intent underpinning, the 1997 Balanced Budget Act. Moreover, proper mitigating factors would result in fairer treatment of NCE applicants – applicants who applied for facilities under established procedures and prosecuted their applications in good faith, only to find that commercial applications were allowed to proceed and noncommercial applications were dismissed – not just statements as to why unfair treatment is excusable under the circumstances.[3] Neither the 1997 Balanced Budget Act nor equitable considerations justify the Commission's decision to treat, at this late date, applications such as Marist's Application as unacceptable for filing. The Commission's decision must accordingly be reversed, as "[a] decision resting solely on a ground that does not justify the result

[3] For example, rather than simply exclude NCE applicants from contending for non-reserved spectrum altogether, the Commission could have offered applicants such as Marist opportunity to amend their applications to apply for a commercial station as an alternative simply to having their applications dismissed outright.

reached is arbitrary and capricious." *MCI Telecommunications Corp. v. FCC*, 10 F.3d 842, 846 (D.C. Cir. 1993) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 50 (1983)).

WHEREFORE, it is respectfully requested that the Commission reverse its decision to dismiss the application of Marist College for a construction permit for a Noncommercial Educational FM Station to serve Rosendale, New York, reinstate the Application, and devise fair and effective procedures for applicants for Noncommercial Educational Stations, such as Marist, to compete with applicants for Commercial Stations for non-reserved spectrum without being required to engage in a competitive bidding procedure.

Respectfully submitted,

MARIST COLLEGE

By:_____

Barry A. Friedman
John C. Butcher
Thompson Hine LLP
1920 N. Street, N.W.
Washington, D.C. 20036
(202) 331-8800
Its Attorneys

Dated: June 16, 2003

CERTIFICATE OF SERVICE

I, John C. Butcher, hereby certify that I have served on this 16th day of June, 2003, a copy of the foregoing **PETITION FOR RECONSIDERATION** upon the following parties by first-class mail, postage pre-paid:

Mr. Eric J. Bash*
Media Bureau
Policy Division
Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

John C. Butcher

*By Hand