



Federal Communications Commission
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DA 07-4383

In Reply Refer to:

1800B3-MFW

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In re: KNYD(FM), Broken Arrow, Oklahoma
Creative Educational Media Corp.
Facility ID No. 14429

**New Tower Submission Packets
Regarding File No. BPED-20070727ADB**

Dear Mr. Tepper:

We have before us two New Tower Submission Packets on FCC Form 620 (the "Applications") filed by Creative Educational Media Corporation, Inc. (the "Applicant" or "Creative") regarding the proposed modification of its main station and auxiliary station facilities for Station KNYD(FM), Broken Arrow, Oklahoma.¹ For the reasons set forth below, we find no adverse effect with respect to the proposed construction of its main station facilities, direct Creative to prepare a cultural resource survey report regarding the proposed auxiliary facility, and admonish Creative for its failure to comply with the Commission's environmental rules prior to undertaking some initial construction.

Background. The Commission's environmental rules require an applicant initially to determine whether its proposed facility may significantly affect the environment and, if so, submit an Environmental Assessment ("EA").² Specifically, the Commission's Rules (the "Rules") require an applicant to evaluate the effect of a proposed transmission tower on "districts, sites, buildings, structures, or objects, significant in American history, architecture, archeology, engineering or culture, that are listed or are eligible for listing, in the National Register of Historic Places," or Indian religious sites.³ The Commission, in implementing Section 106 of the National Historic Preservation Act,⁴ developed FCC Form 620, which an applicant must submit to the pertinent state historic preservation officer ("SHPO") prior to any construction activity.⁵

¹ See Application No. BPED-20070727ADB.

² 47 C.F.R. § 1.1307(a), 1.1311.

³ 47 C.F.R. § 1.1307(a)(4)(5) (emphasis supplied).

⁴ 16 U.S.C. § 470 *et seq.*, particularly 16 U.S.C. § 470f ("Section 106").

⁵ *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, Report and Order, 20 FCC Rcd 1073 (2004), *clarified*, 20 FCC Rcd 17995 (2005), *aff'd*, *CTIA-The* (footnote continued)

Creative indicates that it operated station KNYD(FM) from a television tower, but that it had been informed that its lease for that location was to expire on August 1, 2007, and would not be renewed.⁶ It indicates that its principals acquired property in October of 2003 on which a new KNYD(FM) transmission tower can be located and that, after a long and arduous zoning approval process, it has received permission from the local zoning board to construct a 1,260-foot transmission tower. As part of the approval process, Creative was required to construct a perimeter fence “that will keep third parties from accessing the . . . property.”⁷ Creative completed construction of the fence on May 23, 2005.

Creative tendered the Applications – one FCC Form 620 for the KNYD(FM) main facility (the “Main Facility”) and another for an auxiliary facility (the “Auxiliary Facility”) -- to the Oklahoma State Historic Preservation Office in February of 2007. On March 12, 2007, the Oklahoma SHPO indicated, with respect to the Main Facility, that it was “foreclosed” from commenting on the project because Creative had constructed the perimeter fence required by the state court and also a small equipment building. The SHPO also requested that Creative contact the Commission to complete the Section 106 process prior to the issuance of any authorization for the project.⁸ With respect to the submission for the Auxiliary Facility, the SHPO referred the project to the Oklahoma Archaeological Survey, which found that “archaeological materials are likely to be encountered” due to the “topographic and hydrologic setting” of the project. Accordingly, the SHPO requested the applicant to conduct an archeological field survey prior to construction of the Auxiliary Facility.⁹

Creative submitted the Applications to the Commission in April of 2007. On April 20, 2007, the staff requested additional information to supplement the Applications.¹⁰ Creative responded on May 7, 2007, supplying the requested information.

Discussion. Main Facility. We have reviewed the information provided by Creative’s cultural resource consultant in response to the April 20 Inquiry Letter as well as the original FCC Form 620

Wireless Ass’n. v. FCC, No. 05-1008 (D.C. Cir. September 26, 2006) (the “NPA”).

⁶ On May 20, 2007, Creative filed a request for special temporary authorization (“STA”) to operate from the site of co-owned station KDIM(FM), Coweta, Oklahoma. See File No. BSTA-20070520ADV. On June 19, 2007, the staff granted Creative’s STA request. See *Letter to Cary S. Tepper, Esq.* (Aud. Div. June 19, 2007). The STA is to expire on December 19, 2007.

⁷ See *In the Matter of the Appeal of Creative Educational Media Corporation, Inc. d/b/a/ Oasis Network Radio, Inc. from an Adverse Ruling by the Wagoner County Board of Adjustment*, Journal Entry of Judgment, Case No. CV-2004-144 (Dist. Wagoner County, Oklahoma, April 29, 2005) at 2.

⁸ *Letter to Mr. Scott Miller from Melvena Hatch, Deputy State Historic Preservation Officer* (Mar. 12, 2007). The Applicant did not submit any material for review by the SHPO or other entity prior to construction of the fence. The SHPO recommended that the Commission review the regulations of the Advisory Council on Historic Preservation, 36 C.F.R. Part 800 and determine whether it is appropriate to request the Council’s review under 36 C.F.R. §§ 800.9(a), (b), or (c).

⁹ *Letter to Scott Miller from Kurt Schuster, Staff Archaeologist, and Robert L. Brooks, State Archaeologist* (Feb. 28, 2007). There has been no construction activity at the site of the Auxiliary Facility.

¹⁰ *Letter to Cary S. Tepper, Esq. from Chief, Audio Division, Media Bureau*, Reference 1800B3 (Apr. 20, 2007) (“April 20 Inquiry Letter”).

submissions. Based on this review, we agree with Creative that, with respect to the Main Facility, the proposed tower will not have an adverse effect on historic properties, and the construction of the fence and equipment building did not disturb or adversely affect historic properties or cultural material. Therefore, we find that the proposal will not have a significant environmental impact. We request that Creative ask the SHPO to concur with these conclusions; absent an explicit opinion by the SHPO contradicting our findings here, construction of the Main Facility may proceed without further environmental processing.¹¹

Auxiliary Facility. With respect to the proposed Auxiliary Facility, we make no conclusive finding. Rather, Creative should prepare a cultural resource survey report for the proposed auxiliary site, as requested by the SHPO. This report should be submitted to the SHPO prior to commencement of any construction activity at that site. Upon receipt of the report, the SHPO may restart the Section 106 Review process for that project under the NPA.

Failure to Complete the Section 106 Process Prior to Commencement of Construction at the Main Facility Site. Under Section 1.1307(a)(4) of the Rules, parties constructing communication facilities are required to evaluate, before construction, whether the proposed facilities may affect districts, sites, buildings, structures, or objects significant in American history, architecture, archaeology, engineering, or culture that are listed or eligible for listing in the National Register of Historic Places.¹² Pursuant to the rules of the Advisory Council on Historic Preservation and its Delegation Memorandum,¹³ applicants, licensees, tower construction companies, and their authorized representatives are required to contact the SHPO to evaluate whether a proposed tower or facility may have an effect on historic properties inside the area of potential effects defined in the NPA. The SHPO consultation is to occur prior to commencement of construction or, in the case of broadcast applications, prior to making an affirmative certification of compliance with the Commission's environmental Rules.¹⁴

In this case, Creative did not complete its review of the effects of proposed construction on historic properties under Section 106 prior to constructing the fence required by the state court and an equipment building at the Main Facility site. We conclude that an admonishment, rather than a forfeiture, is appropriate in this case based on our finding that Creative's construction activity did not disturb or adversely affect any historic properties or cultural material.¹⁵

Accordingly, Creative Educational Media Corporation, Inc. IS ADMONISHED for its failure to comply with Section 1.1307(a)(4) of the Commission's Rules, and it is cautioned that it must complete its

¹¹ See 47 C.F.R. § 1.1308(d).

¹² 47 C.F.R. § 1.1307(a)(4).

¹³ See Memorandum from John Fowler, Advisory Council on Historic Preservation, to Federal Communications Commission, State Historic Preservation Officers, and Tribal Historic Preservation Officers (Sep. 21, 2000), regarding delegation of authority for the Section 106 Review of Telecommunications Projects.

¹⁴ See Letter to Lee W. Shubert, Esq. and David J. Kaufman, Esq., 20 FCC Rcd 12348 (MB July 20, 2005).

¹⁵ See 47 C.F.R. § 1.80(b)(4), Note. See also *Western Wireless Corporation and WWC Holding Co., Inc.*, Notice of Apparent Liability, 18 FCC Rcd 10319 (2003) (NAL issued for, *inter alia*, constructing tower prior to environmental review and where SHPO indicated adverse effect on historic properties) (subsequent history omitted).

review of the effects of any proposed construction on historic properties pursuant to Section 106 of the National Historic Preservation Act¹⁶ prior to making an affirmative environmental certification in Section III-B, Item 17, of FCC Form 301 for the Auxiliary Facility site.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Creative Educational Media Corp., Inc.
Miller Environmental, Inc.

¹⁶ 16 U.S.C. § 470f.