



Federal Communications Commission
Washington, D.C. 20554

October 24, 2008

DA 08-2350

In Reply Refer to:

1800B3-ALV

Released: October 24, 2008

Educational Media Foundation
c/o David D. Oxenford, Esq.
Davis Wright Tremaine LLP
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006

In Re: Educational Media Foundation
NEW (NCE FM), College, Alaska
Facility ID No. 122422
BNPED-20000210AAA

Application for New NCE FM Station

Dear Applicant:

We have before us a Petition for Reconsideration (the "Petition") filed on November 28, 2007, by Educational Media Foundation ("EMF"). The Petition seeks reconsideration of the October 24, 2007, dismissal of the above-captioned application for a new noncommercial educational ("NCE") FM radio station in College, Alaska. For the reasons discussed below, we deny the Petition.

Background. On February 10, 2000, EMF filed an application seeking authority to construct and operate a new NCE FM station in College, Alaska (the "Application"). The Application was paper-filed under the Commission's prior licensing procedures but was not cut-off prior to the April 2000, Commission-imposed NCE comparative licensing freeze.¹ Accordingly, the Application remained pending during the NCE filing freeze. In October 2007, the Media Bureau (the "Bureau") opened a filing window for new station and major modification NCE FM construction permits and mandated that applicants with pending proposals electronically amend their applications on FCC Form 340 to include comparative information.² In the *NCE Window Public Notice*, the Bureau explicitly cautioned applicants that "the failure to electronically amend and fully complete a pending application during the October

¹ See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000), *aff'd*, Memorandum Opinion and Order, 16 FCC Rcd 5074 (2001).

² See *Media Bureau Announces NCE FM New Station and Major Change Filing Procedures for October 12-October 19, 2007 Window; Limited Applications Filing Freeze to Commence on September 8, 2007*, Public Notice, 22 FCC Rcd 15050 (2007) ("*NCE Window Public Notice*"). Applicants were directed to electronically amend their pending applications by completing Sections III (Fair Distribution of Service), IV (Point System Factors), V (Tie Breakers), and VI (Certification) of FCC Form 340.

window will result in its dismissal with prejudice.”³ EMF failed to amend its Application by the close of the NCE filing window.⁴ Accordingly, the Bureau staff, by Public Notice, dismissed the Application.⁵ In its Petition, EMF urges the Bureau to reconsider the dismissal, accept its late paper-filed amendment to the Application, and reinstate its Application *nunc pro tunc*. EMF concedes that it failed to timely submit an amendment, but argues that its “inability to timely file the FCC application electronically was due to a failure of the FCC’s electronic filing system to accept an application.”⁶ Specifically, EMF explains that its attempts to submit the Application a “full half-hour before the end of the filing window” were not accepted by the FCC’s electronic filing system and that it remedied the problem by filing an amendment to its Application on paper one day after the established deadline.⁷ Accordingly, EMF asserts that the Application cannot be dismissed.

Discussion. Reconsideration is appropriate only where the petitioner either demonstrates a material error or omission in the underlying order or raises additional facts not known or not existing until after the petitioner’s last opportunity to present such matters.⁸ EMF fails to make such a showing.

EMF fails to provide any compelling explanation for its neglect to timely amend its Application. Its attempt to place the entire blame on the FCC’s electronic filing system for its failure to amend by the established deadline is unavailing. In the *NCE Window Public Notice*, as well as a prior April 2007, Public Notice announcing the NCE filing window, the Bureau unambiguously warned applicants several times that pending non-cut-off applications, such as EMF’s Application, would be dismissed for failure to timely amend and that amendments must be submitted electronically.⁹ Moreover, the Bureau specifically

³ *NCE Window Public Notice*, 22 FCC Rcd at 15051.

⁴ The filing window opened on October 12, 2007, and closed October 22, 2007. See *NCE Window Public Notice; Media Bureau to Extend Window for NCE FM New Station and Major Change Applications; Window Will Close on October 22, 2007*, Public Notice, 22 FCC Rcd 18680 (2007) (“*NCE Window Extension*”).

⁵ See Public Notice, *Broadcast Applications*, Rpt. No. 46601 (October 29, 2007).

⁶ EMF Petition at 3; see also Declaration of David Velasquez (explaining that “At 1:30 pm EST on October 22, 2007, I attempted to upload an amendment to a pending EMF application for a new station in College, Alaska, but was unable to complete the application and file because CDBS was functioning abnormally slow.”).

⁷ EMF paper-filed an amendment to its Application on October 23, 2007. EMF never electronically amended its Application.

⁸ See 47 C.F.R. § 1.106; *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff’d sum nom.*, *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966); *National Ass’n of Broadcasters*, Memorandum Opinion and Order, 18 FCC Rcd 24414, 24415 (2003).

⁹ The *NCE Window Public Notice* explicitly stated, in bold-faced type, that: “**The failure to electronically amend and fully complete a pending application during the October window will result in its dismissal with prejudice.**” *NCE Window Public Notice*, 22 FCC Rcd at 15051 (emphasis in original). In the same Public Notice, applicants were again cautioned that “All FCC Form 340 applications and amendments must be filed electronically... [p]aper-filed not cut-off FCC Form 340 submissions filed prior to April 22, 2000, for which no amendment to FCC Form 340 is submitted during the window will be dismissed,” and, once again, warned that “[t]he Commission staff will return applications and amendments not submitted in accordance with the procedures described in this Public Notice.” *Id.* at 15053-54 (emphasis in original). The Bureau’s earlier April 2007, Public Notice also explained that: “[t]he Bureau will dismiss any pending non-cut-off NCE new station or major change application that is not amended by the close of the window to include the required information.” See *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 (2007).

cautioned applicants to file early to ensure proper submission¹⁰ and afforded applicants considerable time to prepare and submit their applications. Specifically, the Bureau announced the October filing window six months in advance, and applicants were free to initiate and complete applications during this six-month period. The filing window was to remain open for seven days, 24 hours per day, from October 12, 2007, through 11:59 p.m., October 19, 2007. Although the electronic filing system became temporarily unavailable for a period of six and one-half hours on October 19, the Bureau promptly extended the filing window until October 22, 2007, at 2 p.m., *i.e.*, for a period substantially longer than the outage itself, to avoid any hardship.¹¹

Despite the caution to file early, sufficient opportunity to plan ahead to meet the deadline, and ample filing opportunities, EMF waited until the “eleventh hour” and did not attempt to submit its amendment until the final half-hour of the extended 10-day filing window. Applicants that wait until the last minute before submitting their applications risk untimely filing.¹² EMF fails to show good cause why it could not have submitted its amendment earlier but rather attempts to lay blame on the FCC’s electronic filing system.¹³ EMF, however, is ultimately responsible for taking precautions to ensure its application is complete and timely submitted, and EMF must bear the consequences of its actions.¹⁴ Accordingly, we find no error in the Bureau’s dismissal of the Application for failure to meet a clearly articulated deadline.¹⁵

Accordingly, IT IS ORDERED, That the Petition for Reconsideration, filed by Educational Media Foundation IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

¹⁰ See *NCE Window Public Notice*, 22 FCC Rcd at 15054 (“Applicants are encouraged to access the system and prepare their applications and amendments at their earliest convenience ... Applicants are also encouraged to submit their applications early during the window to ensure proper submission.”).

¹¹ See *NCE Window Extension*, *supra* note 4.

¹² See, e.g., *Scottsdale Horizons School*, Order, 17 FCC Rcd 16872, 16874-75 (2002)

¹³ The additional two and one-half days that the Bureau extended the filing window amply compensated for any time EMF may have lost to the less than seven-hour, early-morning outage on October 19.

¹⁴ See, e.g., *Request for Waiver by Center City Schools*, Order, 17 FCC Rcd 22424 (2003) (“it is the applicant who has responsibility ultimately for the timely submission of the application.”).

¹⁵ See, e.g., *Green Valley Broadcasters, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 13341 (2004) (affirming dismissal of an application for failure to submit Section 307(b) information, requested through a Bureau Public Notice, by the established deadline). See also 47 C.F.R. § 73.3568 (“Failure to prosecute an application, or failure to respond to official correspondence or request for additional information, will be cause for dismissal.”).