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

In re: Application of

THE STATE OF OREGON ACTING BY AND THROUGH THE STATE BOARD OF HIGHER EDUCATION FOR THE BENEFIT OF SOUTHERN OREGON STATE COLLEGE — BPED-900129MH

For Construction Permit
For A New Noncommercial
Educational FM Station on
Channel 205C1 in Redding,
California

MEMORANDUM OPINION AND ORDER

Adopted: November 20, 1995; Released: January 18, 1996

By the Commission: Commissioner Ness dissenting and issuing a statement.

1. In *State of Oregon Acting By and Through The State Board of Higher Education*, 8 FCC Rcd 3558 (1993), the Commission denied an application for review filed on August 13, 1990 by the State of Oregon Acting By and Through The State Board of Higher Education ("Oregon"). Now before the Commission is a petition for reconsideration ("petition") of that denial filed by Oregon on June 17, 1993, and responsive pleadings.[1]

BACKGROUND

2. On June 10, 1988, Foundation filed an application for a new noncommercial station on Channel 205C1 in Redding, California (BPED-880610ML). On December 6, 1989, Foundation's application appeared on a Commission *Public Notice*, Report A-186, entitled "Noncommercial Educational FM Broadcast Applications Accepted for Filing and Notification of Cut-Off Date." The Public Notice specified January 10, 1990 as the date by which any application seeking to be considered mutually exclusive with Foundation's application was to be filed.[2] Through staff error, Foundation's application also appeared on a subsequent Public Notice, released December 28, 1989, Report A-188. The Public Notice specified a cut-off date of February 1, 1990. On January 12, 1990, the FM Branch released an *erratum* which notified the public that the Foundation application had been inadvertently listed on the cut-off list released December 28, 1989 and deleted the application from that list.

3. On January 29, 1990, in response to the second cut-off list, Oregon filed its mutually exclusive application for a new noncommercial FM station for Redding, California on Channel 205C1. Oregon sought a waiver of 47 C.F.R. §§ 1.227(b)(1), 73.3564(c) and 73.3573(d) (currently Section 73.3573(e)), requesting acceptance of its late-filed application and consolidation with the Foundation application. It argued that, though it was aware of the initial cut-off notice, it believed that notice had been issued in error. By letter dated June 21, 1990, the Chief, Audio Services Division, Mass Media Bureau ("Bureau") returned Oregon's application as untimely filed pursuant to 47 C.F.R. § 73.3573(e) and denied its request for waiver of this rule. The Bureau concluded that Oregon had failed to exercise reasonable diligence in the preparation and filing of its application, that the tardy filing was not attributable to circumstances beyond Oregon's control, and that Oregon had failed to make the requisite showing for waiver of the cut-off rule. On August 13, 1990, Oregon filed an application for review of the Bureau's action. The Commission denied the application for review in the 1993 *Memorandum Opinion and Order* (*"MO&O"*) at issue here.

4. In its petition for reconsideration of the *MO&O*, Oregon reiterates the arguments raised in its application for review. Specifically, Oregon claims that its efforts to ascertain the correct cut-off date, taken as a whole, reveal that Oregon acted reasonably and diligently, and the Commission therefore should have waived the cut-off rule to permit the filing of Oregon's application. Oregon also contends that it is entitled to reconsideration based on the decision of the United States Court of Appeals for the District of Columbia Circuit in *McElroy Electronics Corporation v. Federal Communications Commission*, 990 F.2d 1351 (D.C. Cir. 1993) (subsequent history omitted), which was decided two weeks prior to adoption of the *MO&O*. Oregon argues "that by issuing a second cut-off list in this case, the Commission failed to state its directives with a level of clarity "sufficient to apprise an applicant of what is expected." 990 F.2d at 1358.

DISCUSSION

5. With the possible exception of Oregon's reliance on the decision in *McElroy*, Oregon has advanced no new arguments or changed circumstances since our last decision in this case. In addition to addressing the *McElroy* argument, however, we take this opportunity to reaffirm our agreement with the Bureau's decision in this case.

6. First, as we have already stated, the December 28 cut-off notice was without legal effect. The Commission's rules provide for the release of a public notice listing applications that have been accepted for filing and an-

[1] The pleadings include (i) a motion for acceptance of late filed pleading filed by The University Foundation, California State University, Chico ("Foundation"), (ii) an opposition to petition for reconsideration filed by Foundation and (iii) a contingent reply to opposition to petition for reconsideration filed by Oregon.

[2] Under the cut-off procedure, applications accepted for filing are placed on an "A" cut-off public notice which provides a thirty-day period for the filing of applications that are directly in conflict with those listed. This procedure is designed to permit the Commission to cease accepting applications from new parties so that a choice can be made between timely filed applicants. *See* 47 C.F.R. § 73.3573(e).

nouncing a date by which all mutually exclusive applications must be filed. 47 C.F.R. § 73.3573(e). Prior to the December 28 notice, such a notice had already been issued. Thus, the December 28 notice could not supplant the earlier one. It "was without legal effect: '[i]t is a "well-settled rule that an agency's failure to follow its own regulations is fatal to the deviant action."'" *Florida Institute of Technology v. FCC*, 952 F.2d 549, 553 (D.C. Cir. 1992) (rejecting the argument that an inadvertently issued second cut-off date supplanted the original cut-off date) (quoting *Way of Life Television Network, Inc. v. FCC*, 593 F.2d 1356, 1359 (D.C. Cir. 1979) (quoting *Union of Concerned Scientists v. Atomic Energy Comm'n*, 499 F.2d, 1069, 1082 (D.C. Cir. 1974))). The January 10 cut-off date was the only validly-issued cut-off date.

7. Having failed to file by the relevant cut-off date, Oregon argues that it should have been granted a waiver of the cut-off rules. Oregon asserts that it exercised due diligence in attempting to determine the correct cut-off date, and that its failure to file on time was due to circumstances beyond its control. We remain unpersuaded. Oregon was presented with two plainly conflicting public notices. The second of the notices established a different cut-off date than the first, but made no reference whatsoever to the first cut-off date, much less rescind it as would be expected if the second public notice were intended to control. A reasonable party at that point, particularly one experienced in Commission practices (and represented by experienced counsel) as Oregon was, would have taken the obvious and logical step of requesting that the Commission issue an erratum or other written clarification to remove any uncertainty about the correct cut-off date. Alternatively, a reasonable party might have simply filed by the first cut-off date, in order to be sure of protecting its rights. Oregon, however, did neither of these things. Instead, it decided that the first cut-off date was in error, and that the second must have been intended to replace it. Then, having lost its filing opportunity when its decision proved incorrect, it asked for a waiver of the filing date.

8. At various stages of the proceeding, Oregon has offered a variety of explanations for the circumstances in which it found itself. Oregon has contended in some pleadings that it was misled by a staff deficiency letter addressed to Foundation, advising that further action on Foundation's application would be withheld for thirty days pending receipt of certain technical information. Thus, Oregon says it assumed that the Commission was precluded from placing an application on a cut-off list during the pendency of this thirty-day period. Oregon has also argued that it was misled when the Commission's unofficial data base, the Facility Application Information Report ("FAIR Report"), listed the Foundation application as acceptable for filing on December 28 and thus subject to a February 1 cut-off date rather than the January 10 cut-off date. Oregon points to its inability, because of the holiday season, to reach Commission staff to verify orally which of the two filing dates was valid and, as the dissenting Commissioner points out, ultimately called upon a member of Senator Packwood's staff to contact the Commission. That staff person reported back to Oregon that she had been told the second date was controlling, and Oregon relied on this statement. Finally, Oregon contends that the January 12, 1990 erratum failed to indicate whether the Commission was reinstating the January 10, 1990 cut-off date. None of those explanations, however, is adequate to justify a waiver of our strictly-applied cut-off rules, as fully discussed in our earlier decision in this case.

9. In fact, however, we believe the record indicates that, despite all of Oregon's protestations, its decision not to file on the first cut-off date was a conscious choice made for strictly business reasons and with full knowledge of the consequences of filing late. Ronald Kramer, Director of Broadcasting at Oregon State College, has indicated in a January 19, 1992 Supplement to its August 13, 1990 application for review[3] that even after it received a copy of the staff's deficiency letter to Foundation, Oregon "treated the [January 10, 1990] cut-off date as valid" and proceeded "with the clear intention of filing [an] application prior to January 10, 1990." Kramer indicates that the subsequent issuance of the second cut-off date "seemed unusual to me." Thus when Oregon's attorney failed to reach Commission staff during the holiday season for clarification, Kramer notes that he "was extremely uneasy regarding. . . . imprecision over the cut-off dates," especially since "I am fully aware of the importance of cut-off dates and the nearly insurmountable difficulty presented to any party which seeks to file on an untimely basis," and that he "was determined that [Oregon] would file on a timely basis." But Oregon apparently abandoned its plan to file on the January 10 cut-off date after consulting engineers informed Kramer that, if they had additional time, they could prepare an application using a directional antenna pattern which would permit Oregon to "optimize signal coverage" for the Redding station. It was at that point -- sometime in early January -- that Kramer decided to contact Senator Packwood's office for assistance. Kramer reports that Senator Packwood's staff aid spoke on approximately January 8, 1990 with a Commission staff member, though Kramer is "not totally certain of the identity of the staff member." Based on that conversation and despite all of Kramer's earlier misgivings, Oregon determined that it could file on the second published cut-off date and use the additional days "to complete the preparation of a directional pattern."

10. While it is always extremely unfortunate when a Commission staff person gives incorrect information over the phone -- especially in a case such as this one where much is at stake -- precedent is clear that the informal advice is not binding. *Mary Ann Salvatoriello*, 6 FCC Rcd 4705, 4708 (1991)(citing *Texas Media Group*, 5 FCC Rcd 2851, 2852 (1990), *aff'd sub nom. Malkan FM Associates v. FCC*, 935 F. 2d 1313 (D.C. Cir. 1991)("A person relying on informal advice given by the Commission staff does so at their own risk."); *see also Office of Personnel Management v. Richmond*, 496 U.S. 414, 433-34 (1990); *Livingston Radio Co.*, 10 FCC Rcd 574, 575 (1995). Given Kramer's undisputed understanding of the Commission and its processes, and especially of the dire consequences inherent in missing a cut-off date, Oregon's last minute decision to act according to such advice appears to be a matter of an applicant reacting to words that, for business reasons, it has been hoping to hear, even though it is aware that so doing is risky. We cannot conclude that such circumstances are sufficient to justify a waiver of our strictly enforced cut-off rules.

[3] Oregon indicates that it delayed in submitting Kramer's statement "for a variety of considerations."

11. The Court of Appeals has consistently upheld the Commission's cut-off rules as advancing administrative finality, aiding timely filed broadcast applicants by giving them a protected status, and furthering the public interest objective of providing expeditious new service. *See, e.g., City of Angels Broadcasting, Inc. v. FCC*, 745 F.2d 656, 660 (D.C. Cir. 1984). The *Florida Institute* Court emphasized that a key objective of the cut-off rule was to afford protected status to timely filed applicants and indicated that the Commission must balance the equities and assess the fairness to a timely filed applicant of accepting an untimely filed application in its decision to waive the cut-off rule. In denying waiver of the cut-off rule for Oregon, we followed that path. Foundation timely filed its application with the legitimate expectation that it would be protected from competing applications once its established cut-off date had passed. It would have been inequitable to Foundation, and further delayed the establishment of broadcasting service, to waive the cut-off rule, accept Oregon's untimely application and commence a hearing in the instant proceeding based upon Oregon's misinterpretation of our established cut-off procedures. "The Commission has granted waivers from compliance with the cut-off rules . . . only in extreme cases involving extraordinary circumstances,' and only when the untimely applicant has demonstrated that it acted with reasonable diligence and thus that its tardiness was attributable to circumstances beyond its control." *Florida Institute of Technology*, 952 F.2d at 553 (quoting *Nazarene Theological Seminary Radio Corp.*, 52 R.R.2d 539, 563 (1982)). Oregon has failed to demonstrate compelling circumstances surrounding its situation or that circumstances beyond its control prevented it from filing a timely application.

12. The cases previously cited by Oregon in support of waiving the rules here are, as explained in our earlier decision, distinguishable from this case. See *MO&O* at paras. 14-15. The *McElroy* case, cited by Oregon in the instant Petition for Reconsideration, is also inapposite and does not change our conclusion that a waiver is not appropriate here. Oregon claims that the flaws in the Commission's order at issue in *McElroy* are analogous to its erroneous placement of an application on a second cut-off list. We disagree. In *McElroy* the Court found the Commission's Order establishing filing instructions for applicants in the evolving cellular radio service so lacking in clarity "that even a careful reader of the order ... could not have been expected to understand [the proper procedure]." 990 F.2d at 1353. It therefore ordered the reinstatement *nunc pro tunc* of several applications dismissed pursuant to the Order. *Id.* at 1367. In this case, by contrast, the Commission's cut-off rules are well-established and the procedures are clear. *See, inter alia*, 47 C.F.R. § 73.3564; 47 C.F.R. § 73.3573. The Court of Appeals has consistently upheld them as advancing administrative finality, aiding timely filed broadcast applicants by giving them a protected status, and furthering the public interest objective of providing expeditious new service. *See, e.g., City of Angels Broadcasting, Inc. v. FCC, supra*, 745 F.2d at 660. Likewise, the Court of Appeals has clearly held that the placement of an application on duplicative cut-off lists does not constitute lack of adequate notice of the correct cut-off date and therefore does not start the cut-off process over again. *See Florida Institute of Technology, Inc., supra*, 952 F.2d at 549. The policy enunciated by *Florida Institute* was in no way altered by the decision in *McElroy*, and is controlling here. The argument that a waiver of cut-off procedures is warranted when a duplicative cut-off list has been issued is particularly unavailing here, where Oregon does not claim it was unaware of the first list.

CONCLUSION

13. Accordingly, IT IS ORDERED, That the petition for reconsideration filed by Oregon on June 17, 1993 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

DISSENTING STATEMENT
OF
COMMISSIONER SUSAN NESS

Re: *Redding, California: Petition for Reconsideration*

I respectfully dissent from today's decision. From my examination of the record in this case, I conclude that Oregon exercised reasonable diligence in seeking to clarify conflicting application deadlines, and therefore that its application should have been accepted for filing.

This case is about whether an otherwise bona fide applicant received adequate notice of a filing deadline in circumstances where the Commission issued two conflicting public notices, specifying two different filing deadlines, and failed to clarify until after the first deadline passed that this was the "real" deadline. These actions misled Oregon and unfairly resulted in it not timely filing its application.

In response to the conflicting public notices, Oregon responsibly and diligently took reasonable steps to clarify which of the two deadlines announced by the Commission, January 10 or February 1, was correct. The information that Oregon received from the Commission, both official and unofficial, repeatedly and consistently indicated that February 1 was the deadline. Not until after January 10 had passed did the Commission clarify that it regarded January 10, and not February 1, as the correct date.

To recount the sequence of events is to demonstrate that Oregon exercised diligence:

> Oregon received a courtesy copy of a letter dated November 29, 1989, from the Mass Media Bureau to Foundation, the party who filed the original application for a noncommercial FM station in Redding, California. The letter stated that the Commission would withhold further action on Foundation's application for thirty days to permit filing of a corrective technical amendment.
>
> The Commission, in error, placed Foundation's application on two public notices. One was issued on December 6 and a second was issued on December 28, 1989. This mistake created two deadlines for filing competing applications, January 10 and February 1, 1990.
>
> On December 28, 1989, Foundation filed its technical amendment, and the second public notice was issued that same day. This second public notice was consistent with the November 29 letter withholding further Commission action pending receipt of a corrective amendment.

Faced with the conflicting public notices, Oregon checked the filing deadline in the Commission's computer database, the Facility-Application Information Report (FAIR). FAIR, like the second public notice, showed that competing applications were due by February 1.

Oregon states that between December 28, 1989, and January 5, 1990, it attempted several times to contact Commission staff, but received no authoritative response regarding the correct cut-off date.

On January 2, 1990, Foundation filed a letter with the Commission requesting that its application be removed from the second public notice. Oregon stated that, although it already was a party to this proceeding and had received a copy of the Bureau letter of November 29, 1989, it did not receive a copy of Foundation's letter and had no notice of Foundation's request. Foundation does not claim to have served Oregon.

When it was unable to obtain clarification, Oregon sought assistance from a Senatorial office on January 5, 1990. In a letter submitted for the record in this proceeding, Senator Packwood stated that the Commission informed his staff member that the correct filing deadline was February 1, and that his staff member conveyed this information to Oregon.

January 10, the deadline created by the first public notice, passed uneventfully.

On January 12, 1990, the Commission issued an erratum deleting Foundation's application from the second public notice. Although not explicitly addressed in the erratum, the effect was to decide -- after the fact -- that January 10 had been the filing deadline. Because the erratum was issued on January 12, it eliminated Oregon's opportunity to timely file its competing application on January 10.

On January 15, 1990, the next business day after the erratum was issued, Oregon by letter notified the Commission of its intent to file a competing application and, if necessary, a waiver request. There was no response from the Commission.

On January 29, 1990, Oregon filed its application and requested a waiver of the Commission's deadline.

On June 21, 1990, the Mass Media Bureau denied the request for a waiver and returned Oregon's application. This action was later affirmed on review.

The Commission consistently has required strict adherence to its cut-off rules by applicants, and the courts have upheld the Commission's strict policies regarding filing deadlines. This policy is a reasonable means by which to balance the interests of initial applicants with the interests of competing applicants and the public, while maintaining administrative practicability and fairness. This was the Commission's goal when it adopted these strict procedural requirements, and I support our cut-off policies wholeheartedly.

While the Commission has correctly held that reliance on a single source of informal information does not necessarily justify waiver of an application deadline, both the Commission and the Court of Appeals have held that a waiver is appropriate if the applicant exercised reasonable diligence attempting to clarify a relevant ambiguity. We therefore have a duty to examine all of the circumstances in this case to determine whether Oregon exercised reasonable diligence to ascertain the correct deadline. Faced with the discrepancy between the deadlines established by the two public notices, Oregon made multiple attempts in a timely fashion to ascertain the correct filing deadline, as I have set out above.

The U.S. Court of Appeals for the D.C. Circuit has upheld Commission waiver of a filing deadline where circumstances justified the waiver. In Satellite Broadcasting Co. v. FCC,[1] the Court held that, when the Commission failed to give clear notice of where to file applications, it was arbitrary and capricious to dismiss applications as untimely that were filed in the wrong location. Failing to give clear notice of where to file applications in that case created the same problem that failing to clarify the correct deadline, until after it had passed, caused in this case. In Florida Institute of Technology v. FCC,[2] while the Court rejected arguments that it was reasonable to rely upon a second public notice that was issued in error, the public notice there at issue was released almost two years after the application deadline. Unlike the case before us, under those circumstances there could have been no confusion during the permissible filing period as to the correct deadline. Nevertheless, even under those circumstances, the Court explicitly acknowledged that the Commission would be arbitrary and capricious were it to reject applications based on a failure to comply with "an ambiguous cut-off provision, not clarified by FCC interpretations if the applicant made a reasonable effort to comply."[3] The situation before us is such a case.

The Florida Institute court is not alone in stating that reasonable diligence is grounds for waiving a filing deadline where there has been legitimate confusion. The Commission itself has explicitly recognized that a waiver is appropriate if the applicant had "exercised

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[1] 824 F.2d 1 (D.C.Cir. 1987)

[2] 952 F.2d 549 (D.C.Cir. 1992)

[3] Florida Institute, supra note 2, at 550 (citing Salzer v. FCC, 778 F.2d 869, 875 (D.C. Cir 1985)).

reasonable diligence."[4] Additional Commission precedent provides substantial support for a waiver if the cut-off notice was defective or if the petitioner exercised reasonable diligence.[5] I am at a loss to explain what efforts would be sufficient if the persistent and varied efforts demonstrated by the petitioner before us do not meet the reasonable diligence standard articulated both in our own decisions and those of the Court of Appeals.

Finally, I disagree that Oregon's decision to file on January 29 was due to nothing more than "strictly business reasons." This conjecture is not supported by the record. Instead, the record demonstrates that Oregon continued to prepare its application for a January 10 filing throughout its attempts to clarify the deadline.[6] It was not until the Commission's verbal and electronic confirmation of the February 1 deadline that Oregon decided that it was "prudent and reasonable to take advantage of the additional time afforded by the latter cut-off [date]."[7] There is no evidence nor contention in the record that Oregon was not fully prepared to file its application by January 10 had the Commission provided a timely clarification of the applicable deadline.

Strict enforcement of our deadlines places all applicants on equal footing before the Commission, and is critical to fair and efficient operation. Even where mistakes are made by the applicant, the Commission must hold to its strict filing requirements. However, where the Commission itself has erred, and the applicant demonstrates that it exercised reasonable diligence by sincere and repeated efforts to clarify the resulting ambiguity, a waiver is justified. Such waivers are appropriate, and in the words of the U.S. Court of Appeals, act as a "safety valve procedure for consideration of an application for exemption based on special circumstances."[8]

For these reasons, I dissent from the majority's decision.

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[4] In Re Application of The Florida Institute of Technology, Inc., Memorandum Opinion and Order, 4 F.C.C. Rcd 1549, para. 8 (1989) (citing Bronco Broadcasting Co., Inc., 58 RR 2d 909, 911 (1976)); see also Way of Life Television Network, Inc., 67 F.C.C.2d 90 (1977), *rev'd on other grounds*, 593 F.2d 1356, 1359 (D.C.Cir. 1979).

[5] "[I]t is a potential applicant's responsibility to consult [the Commission's official records] and perform a 'pending check.' *There is no contention that the cut-off notice was defective or not properly released* . . . . " In Re Request of 220 Television, Inc., 81 F.C.C.2d. 575, para. 4 (1980) (emphasis added); "A prerequisite to such a waiver is that an applicant demonstrate that it has exercised *reasonable diligence*." In Re Application of Caldwell Television Associates, Ltd., 94 F.C.C. 2d. 69, para. 3 (1983) (emphasis added).

[6] In Re Application of The State of Oregon Acting By and Through the State Board of Higher Education for the Benefit of Southern Oregon State College, Petition for Reconsideration, 7 (petition date June 17, 1993) (citing Mr. Kramer's Declaration at 3).

[7] Id. at 8.

[8] WAIT Radio v. F.C.C., 418 F.2d 1153, 1157 (D.C.Cir. 1969).