

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

In re Applications of)	
)	
FISHBURNE MILITARY SCHOOL	)	File No. BPLIF-930201DC
Harrisonburg, Virginia	)	BMPLIF-950524EU
)	
SHENANDOAH VALLEY ACADEMY	)	File No. BPLIF-931230FN
Harrisonburg, Virginia)	
)	
C.F. RICHARDS SCHOOL	)	File No. BPLIF-920911DA
Waynesboro, Virginia)	
)	
MASSANUTTEN TECHNICAL	)	File No. BPLIF-931230FH
CENTER)	
Harrisonburg, Virginia)	
)	
WAYNESBORO CITY SCHOOLS	)	File No. BPLIF-930201DD
Harrisonburg, Virginia	)	BMPLIF-950524EV
)	
AUGUSTA COUNTY SCHOOLS	)	File No. BPLIF-930201DE
Harrisonburg, Virginia	)	BMPLIF-950524ET
)	
ROCKINGHAM COUNTY SCHOOL	)	File No. BPLIF-931230FO
BOARD)	
Harrisonburg, Virginia)	
)	
HUNTER MCGUIRE SCHOOL	)	File No. BPLIF-931230EY
Harrisonburg, Virginia)	
)	
STUART HALL, INC.	)	File No. BPLIF-930201DF
Harrisonburg, Virginia	)	BMPLIF-950524FW
)	
For Construction Permit and License)	
in the Instructional Television Fixed)	
Service on Channels A1-A4, B1-B4,)	
C1-C4 and D1-D4)	
)	
For Modification of Construction Permits)	
and Licenses in the Instructional)	
Television Fixed Service)	

APPENDIX A

Comments

Ameritech

The Association for Local Telecommunications Services (ALTS)

AT&T Corp. (AT&T)

Bell Atlantic Communications, Inc. (Bell Atlantic)

BellSouth Corp. (BellSouth)

Cable & Wireless, Inc. (CWI)

The Competitive Telecommunications Association (Comptel)

Excel Communications, Inc. (Excel)

MCI Telecommunications Corp. (MCI)

NYNEX Corporation (NYNEX)

Pacific Telesis Group, Inc. (Pactel)

Public Utilities Commission of Ohio (PUCO)

SBC Communications Inc. (SBC)

Sprint Communications Company, L.P. (Sprint)

The Telecommunications Resellers Association (TRA)

U S West Inc. (U S West)

The Telecommunications Association (UTC)

Vanguard Cellular Systems, Inc. (Vanguard)

Reply Comments

Ameritech

AT&T Corp. (AT&T)

Bell Atlantic Communications, Inc. (Bell Atlantic)

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The Telecommunications Resellers Association (TRA)

U S West Inc. (U S West)

Vanguard Cellular Systems, Inc. (Vanguard)

Worldcom, Inc d/b/a LDDS WorldCom (LDDS WorldCom)

MEMORANDUM OPINION AND ORDER**Adopted:** June 28, 1996**Released:** July 24, 1996

By the Commission:

1. The Commission has before it for consideration a petition jointly filed by Shenandoah Valley Academy (Shenandoah), Massanutten Technical Center (Massanutten), Rockingham County School Board (Rockingham), and Hunter McGuire School (Hunter) (collectively, the "Petitioners"). Petitioners seek reconsideration of our action in which we granted the applications of Fishburne Military School (Fishburne), Waynesboro City Schools (Waynesboro), Augusta County Schools (Augusta), and Stuart Hall, Inc. (Stuart Hall) (collectively, the "winning applicants") for construction permits and licenses in the Instructional Television Fixed Service (ITFS) in Harrisonburg, Virginia, and denied the mutually exclusive applications of Petitioners. *Fishburne Military School*, 10 FCC Rcd 5975 (1995). The Commission also has before it motions to dismiss amendments to the winning applications and motions to dismiss and objections to applications for modification of the winning applicants' facilities, which were filed by Petitioners individually.

I. BACKGROUND

2. In evaluating the applicants pursuant to our ITFS comparative selection process,¹ we awarded the winning applicants ten merit points and Petitioners only nine, with the critical distinction being the award to the winning applicants of one merit point under the instructional programming criterion. Under this comparative factor, one point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. § 74.913(b)(4).

3. On reconsideration, Petitioners argue that they were improperly denied a programming merit point, which would have resulted in a tie among all of the applicants for each channel group. Petitioners also argue, in their motions to dismiss and objections, that the staff acted

¹ In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order* in MM Docket No. 83-523, 101 FCC 2d 49, 65-72 (1985) (*Second Report and Order*); 47 C.F.R. § 74.913. Specifically, points are awarded to applicants based on localism, accreditation, compliance with the four-channel limitation, E- and F-channel group relocation, and specified levels of proposed ITFS programming.

improperly when it accepted for filing amendments submitted by the winning applicants after their applications had been granted, and then treated the amendments as minor modification applications.

II. DISCUSSION

4. To assist us in our comparative determination under the instructional programming criterion, we require all ITFS applicants to detail their formal educational and other ITFS programming proposals in both an illustrative schedule and a programming grid. Question 5 of FCC Form 330 states, in pertinent part, that for each channel requested, the applicant must complete the chart on the following page to provide "a proposed weekly schedule of ITFS programming together with a brief description of programs not recognizable by their titles." Applicants must also "[i]ndicate by "F" [for formal] those programs which are delivered to enrolled students for academic credit." Question 6 sets out a program grid which requires that the applicant summarize, among other things, both the "[t]otal hours [of] formal education programming for credit for enrolled students on [each] channel" and the "[t]otal hours [of] other ITFS service (see 47 C.F.R. § 74.931(b)) on [each] channel."

5. The completed programming grids set forth at Question 6 of Petitioners' applications proposed an average of 21 hours of formal educational programming per week. However, none of the programming specified in the illustrative schedules by Shenandoah (33.25 hours), Massanutten (24.125 hours), Rockingham (24.75 hours) or Hunter (35.75 hours) was identified as formal educational programming. It is our long-standing practice that where the amounts and types of programming proposed in the schedule and the grid are inconsistent, we consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant. See *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992); *Van Vleck Independent School District*, 7 FCC Rcd 7231 (1992); *Gonzales Independent School District*, 8 FCC Rcd 404 (1993). Accordingly, we considered the programming set forth in the illustrative schedules as nonformal for the purpose of determining merit points and since the amounts specified did not reach the threshold amount at which points are awarded, none of the Petitioners was entitled to a programming merit point.

6. Petitioners claim on reconsideration that because the programming grids in their applications proposed an average of 21 hours of formal educational programming per channel, they are in "literal and actual compliance" with the *Second Report and Order* and Section 74.913(b)(4), and that our decision to rely upon the lesser amount or type of programming when the application contains inconsistent programming proposals is illogical. Petitioners are correct that Section 74.913(b)(4), which sets forth the minimum hours and types of programming for the award of merit points under our instructional programming comparative criterion, does not address how an applicant's programming designation should be made. FCC Form 330, however, explicitly requires an applicant to detail, at Questions 5 and 6, the total amount of formal educational programming to be offered on each ITFS channel. Moreover, we have held that the lesser amount or type of programming would be credited in the event that inconsistent

programming proposals were set forth at Questions 5 and 6 of their applications.² As we stated in another ITFS comparative proceeding, for the Commission to resolve internal inconsistencies created by an applicant to the applicant's comparative advantage would not only be contrary to our long-standing prohibition of comparative upgrading after the "B" cut-off date,³ but also "would be grossly unfair to applicants whose proposals are internally consistent and could foster undesirable comparative gamesmanship." *Waelder Independent School District*, 8 FCC Rcd 976, 977 (1993).

7. Petitioners also argue that to the extent their illustrative schedules are inconsistent with their programming grids, this "procedural defect [was] cured by the time of processing" by their August 1, 1994 amendments, which specified all of the programming listed in the illustrative schedules as formal. We have consistently designated the "B" cut-off date as the date by which the comparative position of the applicants must be fixed, because comparative cases "cannot be efficiently processed if the comparative positions of applicants change throughout the hearing." *WWOR-TV, Inc.*, 6 FCC Rcd 6569, 6572, n.13 (1991), *appeal dismissed*, *Garden State Broadcasting Ltd. Partnership v. FCC*, 996 F.2d 386 (D.C. Cir. 1993); *see also Second Report and Order*, 101 FCC 2d at 74; *Canistota Public Schools*, 10 FCC Rcd 13649, 13650 (1995). The "B" cut-off date in this proceeding was May 31, 1994. Accordingly, Petitioners' August 1, 1994 amendments were not entitled to comparative consideration.⁴ The case Petitioners cite in support of their contention that the relevant cut-off date for considering an amendment is the date on which the application was reached for "processing" is inapposite. In *Moore's Service*, 86 FCC 2d 787 (1981), the Common Carrier Bureau determined that under the "acceptable for filing" standard for applications for facilities in the Domestic Public Land Mobile Radio Service (DPLMRS), where the staff overlooked an application defect during its prescreening of mutually exclusive applications and the defective application was cured by a post cut-off amendment, the application would be retained on file and given comparative consideration pursuant to 47 C.F.R. § 22.31. Thus, the Common Carrier Bureau's decision in *Moore's Service* not only dealt with

² The two 1992 cases cited for this proposition in the order on reconsideration, *Hispanic Information and Telecommunications Network, Inc.*, *supra*, and *Valley View Independent School District*, 7 FCC Rcd 7228, were released over a year before Petitioners filed their applications.

³ *See Doylan Forney*, 5 FCC Rcd 5423, 5425 (1990), *aff'd per curiam*, 951 F.2d 1324 (D.C. Cir. 1991) ("It is a firm policy of the Commission that amendments are not to be used as vehicles for belated comparative upgrading."); *Mountain Media, Inc.*, 101 FCC 2d 787, 788 (Rev. Bd. 1985) ("Few principles are more firmly fixed in our case law than that which holds that an applicant may not seek to improve or upgrade its comparative posture after the "B" cut-off date for amendments as of right.").

⁴ While not crucial to our decision here, we also note that while Petitioners' August 1 amendments stated that all the proposed programming in the illustrative schedules was formal educational programming, the schedules filed in Petitioners' applications appear to include staff development and adult education courses which do not constitute formal educational programming. *See Second Report and Order*, 101 FCC 2d at 78-83; 47 C.F.R. § 74.931.

a different service,⁵ it also did not address the issue of permissible comparative upgrading. The Commission, however, did specifically address this issue in its rulemaking proceeding adopting rules governing the application and selection processes for ITFS, and concluded that the traditional A/B cut-off approach offered the best method for the filing and evaluation of mutually exclusive ITFS applications and that "no comparative advantage will be derived from amendments filed after the "B" cut-off date." *Second Report and Order*, 101 FCC 2d at 73-74.

8. Finally, Petitioners contend on reconsideration that the programming proposed by Petitioners and the winning applicants are "substantively so similar" that to accept one, but the not the other, as formal educational programming is arbitrary and capricious, citing *Melody Music, Inc. v. FCC*, 345 F. 2d 730 (D.C. Cir. 1965). Unlike Petitioners, however, each of the comparative winners submitted a programming grid and illustrative schedule prior to the "B" cut-off date, proposing an average of 21 or more hours of clearly designated formal educational programming per channel per week. Thus, Petitioners and the winning applicants were not similarly situated and *Melody Music* does not apply. See *Waelder Independent School District*, 8 FCC Rcd at 977-78.

9. The motions to dismiss and the objections filed by Petitioners with respect to proposed technical changes to the winning applicants' facilities will also be denied. The winning applicants each filed an amended Section V Engineering data portion of FCC Form 330 on May 24, 1995 (after the Commission had adopted the order granting their applications, but before it had been released), to make minor modifications to their proposed ITFS facilities.⁶ By *Public Notice*, Report No. 23524, dated June 8, 1995, the Mass Media Bureau announced its acceptance for filing of the May 24, 1995 submissions as minor modification applications.⁷ We reject Petitioners' argument that the staff's treatment of the amendments as modification applications raises questions of procedural fairness. The winning applicants' May 24 submissions, which were submitted on FCC Form 330 and signed by competent appointed officials, fully complied with the Commission's rules regarding requests for modification of ITFS facilities. See 47 C.F.R. §§ 74.951, 73.3513. Petitioners' argument that the staff's action somehow precluded them from objecting to the May 24 submissions is inconsistent with our rules regarding the filing of informal objections (see 47 C.F.R. § 73.3587). Finally, Petitioners' stated concern that the staff would

⁵ It is well established that different processing treatment for different services has always existed in our rules. See, e.g., *North Florida MMDS Partners*, 10 FCC Rcd 11593, 11607, n.45 (1995).

⁶ The winning applicants state that these changes, which consist of modification of antenna configurations and a correction of the specified site coordinates by one second, are necessary to conform their stations with other collocated facilities in the Multipoint Distribution Service to be used by CFW Cable, Inc., their excess channel capacity lessee, which had assumed the obligations and rights under the winning applicants' original lease with American Telecasting, Inc.

⁷ Shenandoah, Massanutten, Rockingham and Hunter filed identical motions, arguing that the May 24 petitions for leave to amend and amendments should be dismissed because the winning applications, which had been granted May 17, were no longer pending. We need not, and do not, address this issue since we find that the Bureau's acceptance of the May 24 submissions as minor modification applications mooted Petitioners' procedural objections.

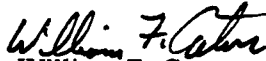
grant the modification applications, thereby creating an impression of pre-judgment of the merits of the petition for reconsideration, is unfounded; the modification applications are pending and await resolution of the petition for reconsideration.

10. Accordingly, IT IS ORDERED, That the petition for reconsideration filed by Shenandoah Valley Academy, Massanutten Technical Center, Rockingham County School Board and Hunter McGuire School IS DENIED.

11. IT IS FURTHER ORDERED, That the motions to dismiss petitions for leave to amend and amendments tendered therewith filed by Shenandoah, Massanutten, Rockingham and Hunter ARE DISMISSED; and that the motions to dismiss and objections to the above-captioned modification applications filed by Shenandoah, Massanutten, Rockingham and Hunter ARE DENIED.

12. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the parties by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary