FEDERAL COMMUNICATIONS COMMISSION
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Educational Media Foundation
5700 West Oaks Boulevard
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Commonwealth Broadcasting, LLC
500 Dominion Tower
999 Waterside Drive
Norfolk, VA 23510

In re: KLVR(FM), Middletown, CA
Facility ID# 18801
Educational Media Foundation ("EMF")
BPED-20070119AFR

KSXY(FM), Geyersville, CA
Facility ID# 72925
Commonwealth Broadcasting, LLC
BPH-20070119ADI

Dear Applicant:

This letter is in reference to the above-captioned contingent minor change applications to propose a community change.

The modification application cannot be considered at this time. As stated in Paragraph 38 of the Report and Order, "[t]he procedural requirements for FM NCE applicants for change of community of license will become effective after approval [of Form 340] by OMB....Upon OMB approval, we will issue a Public Notice announcing the effective date of this rule." As of the file date of this application, the Form 340 had not been approved by OMB nor announced by the staff as effective.

Waiver Request

The applicant recognizes this violation and requests waiver to file the application prior to the effective date of the Form 340. In support of the waiver request, the applicant states that waiver would prevent a violation of "fundamental due process" arising from "disparate treatment."[1] It states that the Court of Appeals for the

[1] Waiver request at 1.

District of Columbia Circuit dictated in *Melody Music v. FCC*[2] that similarly situated parties may not be treated disparately without substantive justification; as the applicant here would be similarly situated to any other party proposing to relocate to the same community, it should not be deprived of an opportunity to file an application when other similarly situated parties may do so. Additionally, EMF states that deferring its ability to file the captioned application would also violate the fundamentals of broadcast regulation that require comparative consideration of two mutually exclusive applications.[3] EMF states that when the Commission bars some applications and accepts others from similarly situated parties that are mutually exclusive, it violates *Ashbacker*.

Discussion

An applicant for waiver "faces a high hurdle"[4] and must demonstrate that deviation from the general rule or Commission pronouncement is warranted by special circumstances that will serve the public interest.[5] We have given EMF's waiver request the requisite "hard look"[6] and, for the reasons set forth below, find that waiver of the effective date of the procedural requirements for NCE FM applicants established in the *Report and Order* is not warranted.

The Commission stated in Paragraph 38 of the *Report and Order* that, because it was extending the new community of license minor modification procedures to NCE FM applicants and permittees, FCC Form 340 must be modified to accommodate new information collection requirements of those procedures. We do not believe that the public interest would be served by allowing applicants to file using application forms that do not contain the information necessary to process the forms; such a procedure would only result in inefficiency and administrative delay in approving otherwise grantable proposals.

Moreover, under the Paperwork Reduction Act of 1995,[7] these new information collection requirements of FCC Form 340 must be approved by the Office of Management and Budget prior to their use by the Commission. Thus, we believe that it would be of at best questionable legality to allow noncommercial educational applicants to file and provide the additional information necessary under the *Report and Order* prior to OMB approval of our ability to collect such information.

Additionally, EMF's reliance on *Melody Music* and *Ashbacker* are misguided. Under *Melody Music*, the Commission must treat similarly situated applicants and licensees consistently, and disparate treatment without adequate and substantive justification is considered an arbitrary and capricious abuse of discretion. In this case, the applicant is not being "deprived of an opportunity to file an application" where others have such an opportunity. EMF here may file the subject proposal once the Commission has OMB approval of FCC Form 340 and released a *Public Notice* announcing its effective date. A licensee proposing to relocate its station to Middletown, CA will be evaluated under the same standards: those adopted in the *Report and Order*. To that extent, it is premature to suggest that EMF here is somehow being treated differently than a hypothetical applicant proposing to relocate to the same community. To the extent that the applicant wishes us to consider

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[2] 345 F.2d 730 (D.C. Cir. 1965).

[3] The applicant cites *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

[4] *WAIT Radio v. FCC*, 418 F.2d 1152, 1157 (D.C. Cir. 1969) ("*WAIT Radio*").

[5] *See Northeast Cellular Telephone Co. v FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio*). *See also* 47 C.F.R. § 1.3 (stating that rule provisions may be waived "for good cause shown").

[6] *WAIT RADIO*, 418 F.2d at 1157.

[7] Pub. L. No. 104-13, 109 Stat. 163 (1995), codified in Chapter 35 of Title 44, U.S.C.)

ALL commercial and NCE FM applicants to be "similarly situated" such that all should be permitted to file community change proposals on the same date, we believe the Commission offered strong and adequate justification for any perceived "disparate treatment": the necessity to revise and obtain OMB approval for FCC Form 340.

EMF's reliance on *Ashbacker* is equally unavailing. Under *Ashbacker,* the Commission may not "grant one mutually exclusive application without holding the comparative hearing required by the Communications Act."[8] That situation clearly is not applicable here, because there are no "mutually exclusive" proposals here that must be compared. However, the D.C. Circuit also has held that "*Ashbacker* rights inhere in potential applicants whose right to file a timely competing application is frustrated by a Commission freeze order."[9] EMF is not being denied a right to file a competing application with some hypothetical proposal from a licensee wishing to specify Middletown, CA; rather, it may file an application on the first day on which the revised FCC Form 340 is effective.

Conclusion

When an applicant seeks waiver of the rules, it must plead with particularity the facts and circumstances which warrant such action. *Columbia Communications Corp. v. FCC*, 832 F.2d 189, 192 (D.C. Cir. 1987) (quoting *Rio Grand Family Radio Fellowship, INC. v. FCC*, 406 F.2d 644, 666 (D.C. Cir. 1968) (per curiam)). We have afforded your waiver request the "hard look" called for under the *WAIT* Doctrine, *WAIT Radio v. FCC*, 418 F2d 1153 (D.C. Cir. 1969), but find that the facts and circumstances set forth in the justification are not sufficient to establish that granting this waiver would be in the public interest.

Thus, the request for waiver IS HEREBY DENIED and application BPED-20070119AFR IS HEREBY DISMISSED. We note that the application was filed as part of a contingent application group with BPH-20070119ADI. Pursuant to 47 CFR Section 73.3517(e), dismissal of any one of the related applications as unacceptable will result in the dismissal of all the related applications. Therefore, application BPH-20070119ADI IS HEREBY DISMISSED. These actions are taken pursuant to 47 CFR Section 0.283.

Sincerely,

James D. Bradshaw
Deputy Chief
Audio Division
Media Bureau

cc: David D. Oxenford, Esq.
Howard Weiss

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[8] *Bachow Communications, Inc. v. FCC, 237 F.3d 683, 689 (D.C. Cir. 2001) (citing Ashbacker* ("B*achow*"). The Commission clearly has the authority to the authority to promulgate rules limiting eligibility to apply for a channel if those rules would expedite enhanced service to the public. *Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application*, 8 FCC Rcd 4735, 4739 (1993) citing *U.S. v. Storer*, 351 U.S. 192 (1956). As noted above, [the applicant] is not in any way being denied an opportunity to apply for its desired community.

[9] *Bachow*, 237 F.3d at 690 n.7 (citing *Kessler v. FCC*, 326 F.2d 673, 686-88 (D.C. Cir. 1963).