

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

In the Matter of
R B Schools
Applications for Construction Permits for New
Noncommercial Educational FM Stations:
Channel 201 at Plymouth, Michigan
Channel 202 at Southfield, Michigan
Channel 217 at Bay City, Michigan
Channel 210 at Kalamazoo, Michigan
Channel 215 at Wooster, Ohio
Channel 201 at Bloomfield Hills, Michigan
Channel 201 at Winnetka, Illinois
Channel 205 at Elgin, Illinois
Channel 203 at Glenview, Illinois
Channel 203 at Flossmoor, Illinois
Channel 208 at Decatur, Illinois
Channel 204 at St. Charles, Iowa
Channel 214 at Longmont, Colorado
Health Radio, Inc.
Application for Construction Permit for a New
Noncommercial Educational FM Station on
Channel 216 at Knoxville, Tennessee

File No. BNPED-20040901ADQ
File No. BNPED-20040901ADR
File No. BNPED-20040901ADT
File No. BNPED-20040901ADU
File No. BNPED-20040901ADW
File No. BNPED-20041001AWW
File No. BNPED-20041101AHS
File No. BNPED-20041101AHT
File No. BNPED-20041101AHU
File No. BNPED-20041101AHV
File No. BNPED-20041101AHW
File No. BNPED-20050103AJW
File No. BNPED-20050301AEU
File No. BNPED-20040706ACK

MEMORANDUM OPINION AND ORDER

Adopted: September 24, 2008

Released: September 26, 2008

By the Commission:

I. INTRODUCTION

1. R B Schools and Health Radio, Inc. (individually, a "Time-Share Applicant" and, collectively, the "Time-Share Applicants") have filed an Application for Review of the dismissal of each of their captioned applications for new noncommercial educational ("NCE") FM construction permits (individually, a "Time-Share Application" and, collectively, the "Time-Share Applications").

1 The Applications for Review were filed on the dates set forth in the Appendix, pursuant to Section 5(c)(4) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(4), and Section 1.115 of the Commission's Rules (the "Rules"), 47 C.F.R. § 1.115.

2 The opposing licensees are listed in the Appendix. The letter decisions of the Bureau ("Letter Decisions") and pleadings under consideration herein also are listed in the Appendix. Except as indicated in the next paragraph of this Note and in the Appendix, each request for extension of time or motion to accept a late-filed pleading with respect to any of such pleadings is hereby granted. To the extent that any of the parties have raised any other issues concerning the acceptability of any of the Time-Share Applications, those issues are rendered moot by our decision here.

(continued . . .)

presented is whether the Audio Division of the Media Bureau (the “Bureau”) erred by dismissing the Time-Share Applications because the Time-Share Applicants failed to demonstrate in each instance that they attempted to reach a time-sharing agreement with the existing NCE FM station licensee before filing their Time-Share Application.³ For the reasons set forth below, we affirm the Bureau’s dismissals of the Time-Share Applications.

II. BACKGROUND

2. The licensees of certain existing NCE FM radio stations filed license renewal applications for their stations in 2004. With respect to each of those applications, either R B Schools or Health Radio, Inc., pursuant to Section 73.561(b) of the Rules, timely filed one of the captioned applications proposing to share time on the station’s frequency.

3. Section 73.561(b) establishes the requirements for proposing a time-sharing arrangement with an NCE FM station, including the non-consensual arrangements proposed by the Time-Share Applicants.⁴ The application filed by a non-consensual time-sharing proponent must be filed no later than the deadline for filing a petition to deny the license renewal application of the existing licensee. The existing licensee and the time-sharing proponent must endeavor to reach an agreement on a time-sharing schedule.⁵ If such an agreement is reached, the agreement must be filed “in triplicate with each application to the Commission for initial construction permit or renewal of license.”⁶ If the parties “are unable to agree on a division of time, the Commission shall be so notified by statement to that effect filed with the application proposing time sharing.”⁷

4. None of the Time-Share Applications contained either a time-sharing agreement or a statement that efforts to reach a time-sharing agreement were unsuccessful, as required by the Rules.⁸ In each instance, the Time-Share Applicant confirmed that it had made no effort to reach a time-sharing

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The Applications for Review listed in Paragraphs G and K of the Appendix were untimely filed. *See* Appendix, Paragraphs G and K (stating the governing sections of the Rules, the public notice and/or Letter Decision release dates, and the Application for Review due dates). Those Applications for Review are dismissed as untimely. Although this *Memorandum Opinion and Order* will also address the merits of those Applications for Review on the core issue presented here, we do not address any collateral issues presented therein.

³ *See, e.g., Letter to Donald E. Martin, Esq.*, 21 FCC Rcd 6945 (MB June 29, 2006) (dismissing a Time-Share Application); *see also* 47 C.F.R. § 73.561(b)(1)-(2) (requiring that an application proposing time-sharing with an existing NCE FM station that operates for less than 12 hours per day include either a time-sharing agreement with the existing NCE FM station or a statement that the parties were unable to agree on such an arrangement).

⁴ Pursuant to Section 73.561(b), NCE FM stations “which do not operate 12 hours per day each day of the year . . . will be required to share use of the frequency upon the grant of an appropriate application proposing such share time arrangement.” *See Piscataway Board of Education*, Order, 20 FCC Rcd 12150 (MB 2005) (if a party files an appropriate application proposing time-sharing with an NCE FM station that was on the air less than 12 hours a day during its last license term, Section 73.561(b)(2) requires that the time-sharing application be designated for hearing with the NCE FM station’s license renewal application to determine whether the public interest would be better served by a time-sharing arrangement or by renewal of the NCE FM station’s license).

⁵ 47 C.F.R. § 73.561(b)(1).

⁶ *Id.*

⁷ 47 C.F.R. § 73.561(b)(2) (emphasis added).

⁸ 47 C.F.R. § 73.561(b)(1)-(2).

agreement with the existing licensee prior to filing the Time-Share Application.⁹ The Bureau dismissed the Time-Share Applications based on failure to meet the requirement of Section 73.561(b)(2) to submit, with the application, a statement that efforts to reach a time-sharing agreement with the existing NCE FM licensee were unsuccessful.¹⁰

III. DISCUSSION

5. In order to obtain relief through an application for review of action taken pursuant to delegated authority, the aggrieved party must meet at least one of the criteria set forth in Section 1.115(b)(2) of the Rules.¹¹ The Time-Share Applicants fail to make the required showing.

6. The Time-Share Applicants do not contest any of the facts cited in the Letter Decisions, as summarized above. Rather, they criticize the Bureau's interpretation of Section 73.561(b) and its reliance on the Commission's decision in *Westchester*. The Time-Share Applicants claim that Section 73.561(b) does not explicitly require that a time-share proponent initiate an attempt to reach a time-sharing agreement prior to filing a non-consensual time-sharing application.¹² They claim that the Bureau's reliance on the *Westchester* decision is misplaced because that decision actually turned on the applicant's failure to prosecute its application.¹³ The Time-Share Applicants claim that the analysis of Section 73.561(b) in *Westchester* accordingly is *dicta*. They also claim that the Bureau imposed a new requirement in a rule outside the context of a rulemaking.¹⁴

7. We disagree. The requirement that a non-consensual time-share application include a statement that the applicant was unsuccessful in negotiating a time-share arrangement with the existing NCE FM licensee is explicitly set forth in Section 73.561(b)(2), as quoted above in Paragraph 3. The *Westchester* decision did not inject a new requirement into the rule, as the Time-Share Applicants claim, but only affirmed the requirement as a basis for dismissing a non-compliant application.¹⁵ Moreover, this requirement serves the important public policies of encouraging licensees to consider the possibility of sharing their existing frequency and preventing the filing of non-feasible applications that will tie up

⁹ See, e.g., *Letter to Donald E. Martin, Esq.*, 21 FCC Rcd at 6946 (Time-Share Applicant, in response to the Bureau's inquiry letter, acknowledged that it did not initiate time-sharing negotiations prior to filing the Time-Share Application, but argued that this was not required).

¹⁰ See, e.g., *id.* (citing *Westchester Council for Public Broadcasting*, Memorandum Opinion and Order, 8 FCC Rcd 2213, 2214 (1993) ("*Westchester*")).

¹¹ 47 C.F.R. § 1.115(b)(2).

¹² See, e.g., Application for Review cited in Paragraph A of the Appendix, at 4-6.

¹³ *Id.* at 3 and 6.

¹⁴ *Id.* at 6-7.

¹⁵ See *Westchester*, 8 FCC Rcd at 2214: "[P]ursuant to Section 73.561, these efforts to negotiate [a time-share agreement] should have been initiated prior to the filing of the application, so that either a time-share agreement, or a statement that no agreement could be reached, could have been filed with WCPB's application." The analysis of Section 73.561(b) was an independent basis for the dismissal of the time-share application in *Westchester* and has been cited subsequently by the Commission as precedent on this issue. See *Nassau Community College*, Memorandum Opinion and Order, 12 FCC Rcd 12234, 12238 (1997) (citing *Westchester* as "upholding dismissal of share-time request where the applicant did not indicate whether it attempted to reach an agreement with the existing licensee"). Accordingly, we disagree with the Time-Share Applicants that the Bureau was free to ignore *Westchester* as precedent for the Letter Decisions. See 47 C.F.R. § 0.283(c); *Quinnipiac College*, Memorandum Opinion and Order, 8 FCC Rcd 6285 (1993); *Walter P. Faber, Jr.*, Memorandum Opinion and Order, 4 FCC Rcd 5492, 5493 (1989), *recon. denied*, 6 FCC Rcd 3601 (1991), *aff'd mem. sub nom. Faber v. FCC*, 962 F.2d 1076 (D.C. Cir. 1992).

Commission resources unnecessarily.¹⁶ The Time-Share Applicants cite no contrary precedent to support their arguments. Accordingly, pursuant to Section 1.115(b)(2) of the Rules, we deny the Applications for Review filed by the Time-Share Applicants.

IV. ORDERING CLAUSE

8. ACCORDINGLY, IT IS ORDERED, that the Applications for Review filed by R B Schools and Health Radio, Inc. listed in the Appendix ARE DENIED, and those listed in Paragraphs G and K of the Appendix also ARE DISMISSED as untimely.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁶ For instance, R B Schools filed a non-consensual time-sharing application against the license renewal application of WXTS-FM, Toledo, Ohio, which already had a time-sharing agreement in place. *See* FCC File No. BNPED-20040901ADV. (R B Schools did not seek review of the dismissal of that application.) Similarly, R B Schools filed a Time-Share Application against the license renewal application of WGBK-FM, Glenview, Illinois, which was operating for more than 12 hours per day, thereby negating any obligation to share time under Section 73.561(b). *See* FCC File No. BNPED-20041101AHU; *see also* note 4 *supra*. Had R B Schools engaged in discussions with the licensees prior to filing these applications, it would have known that neither licensee could be required to share time pursuant to Section 73.561(b) and the Bureau would not have been required to analyze and dismiss the applications, as well as address subsequent pleadings arising from the faulty applications.

APPENDIX

Letter Decisions, Parties and Pleadings

A. Plymouth, Michigan

Letter to Plymouth-Canton Community Schools and Donald E. Martin, Esq. from Peter H. Doyle, Chief, Audio Division (MB May 12, 2005), public notice summary as described in 47 C.F.R. § 1.4(b)(4) released on May 17, 2005.

“Application for Review” filed by R B Schools (“RBS”) on June 16, 2005; “Opposition of Plymouth-Canton Community Schools to Application for Review” filed by Plymouth-Canton Community Schools, licensee of WSDP(FM), Plymouth, Michigan, on June 30, 2005.

B. Southfield, Michigan

Letter to Board of Education of Southfield Public Schools and Donald E. Martin, Esq. from Peter H. Doyle, Chief, Audio Division (MB May 12, 2005), public notice summary as described in 47 C.F.R. § 1.4(b)(4) released on May 17, 2005.

“Application for Review” filed by RBS on June 16, 2005; “Opposition to Application for Review” filed by Board of Education of Southfield Public Schools, licensee of WSHJ(FM), Southfield, Michigan on July 11, 2005.

C. Bay City, Michigan

Letter to Donald E. Martin, Esq. from Peter H. Doyle, Chief, Audio Division (MB June 29, 2006), public notice summary as described in 47 C.F.R. § 1.4(b)(4) released on July 5, 2006.

“Application for Review” filed by RBS on August 2, 2006; “Opposition to Application for Review” filed by School District, Bay City, Michigan, licensee of WCHW-FM, Bay City, Michigan, on August 18, 2006.

D. Kalamazoo, Michigan

Letter to David Tillotson, Esq. and Donald E. Martin, Esq. from Peter H. Doyle, Chief, Audio Division (MB May 9, 2005), public notice summary as described in 47 C.F.R. § 1.4(b)(4) released on May 12, 2005.

“Application for Review” filed by RBS on June 13, 2005; “Opposition to Application for Review” filed by Board of Education of Kalamazoo, Michigan, licensee of WKDS(FM), Kalamazoo, Michigan, on June 28, 2005.

E. Wooster, Ohio

Letter to Cary S. Tepper, Esq. and Donald E. Martin, Esq. from Peter H. Doyle, Chief, Audio Division (May 12, 2005), public notice summary as described in 47 C.F.R. § 1.4(b)(4) released on May 17, 2005.

“Application for Review” filed by RBS on June 16, 2005; “Opposition to Application for Review” filed by The College of Wooster on June 21, 2005; “Reply to Opposition to Application for Review” filed by RBS on July 15, 2005.

F. Bloomfield Hills, Michigan

Letter to Donald E. Martin, Esq. from Peter H. Doyle, Chief, Audio Division (MB Aug. 18, 2006), public notice summary as described in 47 C.F.R. § 1.4(b)(4) released on August 23, 2006.

“Application for Review” filed by RBS on September 22, 2006.

G. Winnetka, Illinois

Letter to Donald E. Martin, Esq. from Peter H. Doyle, Chief, Audio Division, 21 FCC Rcd 6945 (MB 2006), public notice of full text of decision as described in 47 C.F.R. § 1.4(b)(2) released on June 29, 2006.

“Application for Review” filed by RBS on September 27, 2006.

Pursuant to 47 C.F.R. §§ 1.4(b)(2) and 1.115(d), the Application for Review was due on or before July 31, 2006. There was also a public notice summary of the decision as described in 47 C.F.R. § 1.4(b)(4) released on August 28, 2006. *See* Public Notice, “Broadcast Applications,” Report No. 26308 (August 28, 2006). However, 47 C.F.R. § 1.4(b)(2) establishes the public notice date where the full text of the decision is released, as in this case.

H. Elgin, Illinois

Letter to Donald E. Martin, Esq. from Peter H. Doyle, Chief, Audio Division (MB June 29, 2006), public notice summary as described in 47 C.F.R. § 1.4(b)(4) released on July 26, 2006.

“Application for Review” filed by RBS on August 23, 2006; “Opposition to Application for Review” filed by Board of Education for School District U-46, licensee of WEPS(FM), Elgin, Illinois, on September 5, 2006; “Reply to Opposition to Application for Review” filed by RBS on September 15, 2006.

I. Glenview, Illinois

Letter to Donald E. Martin, Esq. from Peter H. Doyle, Chief, Audio Division (MB June 29, 2006), public notice summary as described in 47 C.F.R. § 1.4(b)(4) released on July 26, 2006.

“Application for Review” filed by RBS on August 23, 2006; “Opposition to Application for Review” filed by Glenbrook High School District, licensee of WGBK(FM), Glenview, Illinois, on September 7, 2006.

J. Flossmoor, Illinois

Letter to Donald E. Martin, Esq. from Peter H. Doyle, Chief, Audio Division (MB June 29, 2006), public notice summary as described in 47 C.F.R. § 1.4(b)(4) released on July 26, 2006.

“Application for Review” filed by RBS on August 23, 2006.

K. Decatur, Illinois

Letter to John F. Garziglia, Esq., and Donald E. Martin, Esq., from Peter H. Doyle, Chief, Audio Division, DA 07-1952 (MB, rel. April 30, 2007), public notice of full text of decision as described in 47 C.F.R. § 1.4(b)(2) released on April 30, 2007.

“Application for Review” filed by RBS on June 4, 2007; “Opposition to Application for Review” filed by Millikin University on June 19, 2007; “Reply to Opposition to Application for Review” filed by RBS on July 5, 2007.

Pursuant to 47 C.F.R. §§ 1.4(b)(2) and 1.115(d), the Application for Review was due on or before May 30, 2007. There was also a public notice summary of the decision as described in 47 C.F.R. § 1.4(b)(4) released on May 3, 2007. *See* Public Notice, “Broadcast Actions,” Report No. 46478 (May 3, 2007). However, 47 C.F.R. § 1.4(b)(2) establishes the public notice date where the full text of the decision is released, as in this case.

L. St. Charles, Iowa

Letter to Donald E. Martin, Esq. from Peter H. Doyle, Chief, Audio Division (MB June 29, 2006), public notice summary as described in 47 C.F.R. § 1.4(b)(4) released on July 26, 2006.

“Application for Review” filed by RBS on August 23, 2006.

M. Longmont, Colorado

Letter to Donald E. Martin, Esq. from Peter H. Doyle, Chief, Audio Division (MB Oct. 25, 2006), public notice summary as described in 47 C.F.R. § 1.4(b)(4) released on October 31, 2006.

“Application for Review” filed by RBS on November 30, 2006; “Opposition to Application for Review” filed by Longmont Community Radio, licensee of WGUD(FM), Longmont, Colorado, on December 14, 2006; “Reply to Opposition to Application for Review” filed by RBS on December 26, 2006.

N. Knoxville, Tennessee

Letter to Donald E. Martin, Esq. from Peter H. Doyle, Chief, Audio Division, 21 FCC Rcd 1258 (MB 2006), public notice of full text of decision as described in 47 C.F.R. § 1.4(b)(2) released on February 6, 2006.

“Application for Review” filed by Health Radio, Inc. on March 3, 2006; “Opposition of Fulton High School to Health Radio, Inc.’s Application for Review” filed by Fulton High School, licensee of WKCS(FM), Knoxville, Tennessee, on March 13, 2006.

Pursuant to 47 C.F.R. §§ 1.4(b)(2) and 1.115(d), the Application for Review was due on or before March 8, 2006 and therefore was timely filed. There was also a public notice summary of the decision as described in 47 C.F.R. § 1.4(b)(4) released on March 9, 2006. *See* Public Notice, “Broadcast Applications,” Report No. 26188 (March 9, 2006). However, 47 C.F.R. § 1.4(b)(2) establishes the public notice date where the full text of the decision is released, as in this case.