FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

July 7, 2005

DA 05- 1947
IN REPLY REFER TO:
1800B3-SS

Mr. Edward P. Cunningham
Northside Community Council
2931 Feltz Avenue
Cincinnati, OH 45211

In re: NEW LPFM, Cincinnati, OH
Northside Community Council
Facility ID No. 131812
File No. BNPL-20010119AEB

Dear Mr. Cunningham:

This letter refers to the captioned application filed by Northside Community Council ("NCC") for a new low power FM ("LPFM") station at Cincinnati, Ohio.

Background. On January 28, 2004, the Commission released a *Public Notice* identifying, by applicant name and number of points, the tentative selectee, or those applications tied for the highest point total in each closed group of pending LPFM mutually exclusive applications.[1] This *Public Notice* indicated that NCC, with only one point, was not a tentative selectee in Mutually Exclusive Group 66. On February 27, 2004, NCC filed a Petition for Reconsideration of the points awarded its application in the *Public Notice*. It is that Petition we consider in this document.

On February 27, 2004, NCC and Media Bridges Cincinnati, Inc., another applicant in Group 66, filed a voluntary time-share agreement.[2] On May 3, 2004, the staff denied the agreement because it was not an agreement among those tied for the highest point total in the group; thus, it was impermissible under the Commission's LPFM processing rules.[3] On June 1, 2004, NCC filed a second Petition for

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[1] *See Public Notice, Closed Groups of Pending Low Power FM Mutually Exclusive Applications Accepted for Filing,* DA 04-123, (rel. Jan. 28, 2004) ("*Public Notice*").

[2] The agreement states the hours in which both mutually exclusive applicants agreed to share use of the frequency allotted to them.

[3] *Letter to Edward P. Cunningham and Belinda R. Rawlins* (MB May 3, 2004). *See also* 47 C.F.R. § 73.872(c); *Creation of a Low Power Radio Service, Report & Order,* 15 FCC Rcd 2205, 2264 (2000) ("*LPFM Report and Order*"); *Creation of a Low Power Radio Service, Memorandum Opinion & Order on Reconsideration,* 15 FCC Rcd 19208 (2000); and *Creation of Low Power Radio Service, Second Report & Order,* 16 FCC Rcd 8026 (2001).

Reconsideration seeking reversal of the denial of the share-time agreement. This petition raised arguments similar to those in NCC's first Petition. On October 14, 2004, the staff denied NCC's second petition for reconsideration.[4] Per our *Notice,* the captioned application remains in received status.

Discussion Pursuant to Section 1.106[5] of the Commission's rules, a party seeking reconsideration must state with particularity the manner in which its interests were adversely affected by the action taken and the reasons why it believes that any findings of fact or conclusions of law were in error. The rule further requires that any new facts or arguments must be accompanied by a showing that they are based on events or changed circumstances arising after the last opportunity to present such matters, or be based on facts that could not have been learned at an earlier stage by the exercise of ordinary diligence.[6] We find that reconsideration is unwarranted in this case.

In its February 27, 2004, petition for reconsideration,[7] NCC argues that the Bureau erred in rejecting its July 2001 amendment to improve its comparative position *vis a vis* the other mutually exclusive applications in Group 66.[8] Acceptance of the amendment would result in NCC receiving two additional points. This would have given NCC three points, enabling it to participate in any settlement or shared-time agreements with the other tentative selectees in its group. NCC contends that Section 73.871(b),[9] which prohibits the filing of amendments after the close of the pertinent filing window that would improve an applicant's comparative position, was not adopted until March 22, 2001;[10] hence, there "was no way for the NCC to know about the rule. . . ."[11] Further, NCC states that the rule was not "codified" in the Code of Federal Regulations until October 1, 2001, more than three months after NCC filed its amendment. Therefore, NCC asserts that there was no "notice" of the negative impact that filing certain LPFM amendments would have on its application at the time of the Ohio Filing Window. Further, NCC argues that the Commission is guilty of "retroactive" rulemaking.

The staff action was proper.[12] The Commission made clear that the rule changes promulgated in the *Second Report and Order* were to apply to pending applications.[13] The *Second Report and Order* and

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[4] *See Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau, Federal Communications Commission, to Edward P. Cunningham* (rel. Oct. 14, 2004).

[5] 47 C.F.R. § 1.106.

[6] *See* 47 C.F.R. § 1.106(b)(1)(2)(i)(ii) and (d)(2).

[7] Northside Community Council Petition for Reconsideration (filed February 27, 2004) ("NCC Petition"). The staff was unaware of this pending petition when it took action on the June 1, 2004, petition for reconsideration on October 14, 2004.

[8] In the amendment, NCC proposed an increase in its local programming and hours of operation in order to garner a merit point under each of those criteria.

[9] 47 C.F.R. § 73.871(b). Petitioner mistakenly refers to the rule as "73.872(b)." *See* NCC Petition at 1.

[10] *See Creation of Low Power Radio Service, Second Report & Order,* 16 FCC Rcd 8026 (2001) ("*Second Report and Order*").

[11] NCC also indicates that it contacted an FCC staff member "for detailed information on filing amendments and no mention was made of the policies" prohibiting the filing of amendments improving a party's comparative position. NCC Petition at 1.

[12] *See* n.6, *supra.*

Section 73.871(b) became effective on June 11, 2001, 30 days after publication in the *Federal Register*[14] and prior to NCC's submission of its point-upgrade amendment.

We also find that NCC's claim of retroactive rulemaking is without merit. Assuming *arguendo* the accuracy of NCC's contention that LPFM applicants could file amendments improving their comparative positions prior to the effective date of the *Second Report and Order*,[15] the Commission may change current policies even though such changes may upset an expectation that current rules and policies would remain in place.[16] Additionally, the Supreme Court has made clear that pending applications may be dismissed based on changed processing rules.[17]

In light of the foregoing, and pursuant to 47 C.F.R. § 0.283, the petition for reconsideration filed by Northside Community Council IS DENIED, and its application (File No. BNPL-20010119AEB) IS HELD IN RECEIVED STATUS.

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau

cc: Public Radio Camp Dennison
Our Lady of the Holy Spirit Center
United Universal Fellowship
MKWS, Inc.
Forest Hills School District

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[13] *See id.* at 8028.

[14] The *Second Report and Order* was published in the *Federal Register* on May 10, 2001. *See* 66 Fed. Reg. 23861.

[15] In the *Second Report and Order*, the Commission stated that:

> Under well-established processing policies, only minor amendments may be filed outside the window period. Although the LPFM rules define the permissible scope of minor changes in authorized facilities, they do not define the scope of minor amendments to pending applications.

Second Report and Order, 16 FCC Rcd at 8031.

[16] *Landgraf v. USI Film Products*, 511 U.S. 244, 269 & n. 24 (1994) (a law does not act retrospectively merely because it is applied in a case arising from conduct antedating its enactment or upsets expectations based in prior law; rather, the issue is whether the new provision attaches new legal consequences to events completed before its enactment); *DirecTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997) ("[A] new rule or law is not retroactive 'merely because it . . . upsets expectations based on prior law,'" quoting *Landgra*f); *Chemical Waste Management, Inc. v. EPA,* 869 F.2d 1526, 1536 (D.C. Cir. 1989) ("[I]t is often the case that a business will undertake a certain course of conduct based on the current law and will then find its expectations frustrated when the law changes. This has never been thought to constitute retroactive lawmaking . . .").

[17] *United States v. Storer Broadcasting Co*., 351 U.S. 192, 202 (1956). Indeed, an agency may even apply new or modified rules to pending applicants. *See, e.g., Community Television, Inc. v. FCC,* 216 F.3d 1133, 1143 (D.C. Cir. 2000); *Chadmore Communications, Inc. v. FCC,* 113 F.3d 235, 240-241 (D.C. Cir. 1997).

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Vineyard Community Church
M&M Community Development, Inc.
Victory Church
Media Bridges Cincinnati, Inc.
O'Connor Communications, Inc.
Cincinnati Community Radio, Inc.
The Nathan B. Stubblefield Wireless Group