



Federal Communications Commission
Washington, D.C. 20554

February 6, 2006

DA 06-292
In Reply Refer To
1800B3-ALM

Donald E. Martin, Esquire
6527 Bay Tree Court
Falls Church, Virginia 22041

In re: NEW (Ed. FM), Knoxville, TN
Health Radio, Inc.
Facility ID No. 162163
File No. BNPED-20040706ACK
Petition For Reconsideration

Dear Mr. Martin:

This is in reference to the July 1, 2005, Petition for Reconsideration (the "Petition") regarding the captioned application in which Health claims that its application was incorrectly dismissed by the staff. In a letter of May 31, 2005,¹ the Chief Audio Division dismissed the application of Health Radio, Inc. ("Health") for failure to timely respond to a staff inquiry letter dated March 24, 2005.² The Petition demonstrates, however, that Health provided a timely response on April 25, 2005. The filing was not brought to the staff's attention prior to issuance of the May 30, 2005, letter. We will therefore grant reconsideration to the extent that the staff erroneously dismissed Health's application.

However, the application of Health for a new noncommercial educational ("NCE") FM station in Knoxville, Tennessee, was filed pursuant to Section 73.561 of the Commission's rules and proposed to share time with WKCS(FM), licensed to Fulton High School, Knoxville, Tennessee. NCE FM radio stations, such as WKCS(FM), are licensed to operate for an unlimited number of hours each day, unless they operate pursuant to a time sharing arrangement with another qualified noncommercial broadcaster.³ Section 73.561(b) of the Commission's rules outlines the requirements for proposing such an arrangement, including, as in this case, non-consensual proposals for time sharing. Specifically, the Commission will consider non-consensual proposals for time sharing only in connection with renewal of the NCE FM station's license and only if the station operates less than 12 hours per day.⁴ In addition, the party seeking to share time must file its application no later than the deadline for filing petitions to deny the renewal application of the existing licensee, after first seeking to reach an agreement.⁵

¹ Letter to Donald E. Martin, Esquire, and Fulton High School, Reference 1800B3-ALM (MB May 31, 2005)

² Letter to Donald E. Martin, Esquire, Reference 1800B3-ALM (MB March 24, 2005)

³ 47 C.F.R. § 73.561(a).

⁴ 47 C.F.R. § 73.561(b); *Nassau Community College*, 12 FCC Rcd 12234 (1997) ("*Nassau*").

⁵ 47 C.F.R. § 73.561(b); *Westchester Council for Public Broadcasting*, 8 FCC Rcd 2213, 2214 (1993) ("*Westchester*") ("[E]fforts to negotiate [must be] initiated prior to the filing of the application, so that either a share-

The Commission will not entertain proposals that do not conform to these requirements.⁶ Health's does not. We find that the record clearly establishes that Health did not attempt to reach an agreement with Fulton High School prior to filing its time share application, as is required by the Commission's rules. Thus, Health's application is subject to dismissal.

In its April 25, 2005 response to the staff inquiry letter, Health states that it disagrees with the staff's contention that it had an obligation to initiate share-time negotiations with the Board of Education prior to filing its application. To the extent *Westchester* imposes such a requirement, states Health, the case "is not consistent with the text of Section 73.561 itself, which does not explicitly require such negotiations"⁷ We reject Health's argument, as the Commission has spoken directly to this issue in *Westchester* and it clearly requires a putative share-time applicant to attempt to negotiate an agreement with the incumbent licensee prior to filing a share-time application. The staff is, of course, bound by Commission precedent.⁸

Accordingly, in light of the above discussion, Health's Petition for Reconsideration IS GRANTED to the extent indicated and IS DENIED in all other respects and the application of Health Radio, Inc. (BNPED-20040706ACK) REMAINS DISMISSED because there is no longer an individual licensing requirement for the subject frequencies.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Health Radio, Inc.

time agreement, or a statement that no agreement could be reached, [may be] filed with [the] application.").

⁶ *Nassau*, 12 FCC Rcd at 12238 (citing *Westchester*, 8 FCC Rcd at 2214).

⁷ April 8, 2005 RB response at 1.

⁸ See *Quinnipiac College*, 8 FCC Rcd 6285 (1993); *Walter P. Faber, Jr.*, 4 FCC Rcd 5492, 5493 (1989), *recon denied*, 6 FCC Rcd 3601 (1991), *aff'd mem. Faber v. FCC*, 962 F.2d 1076 (D.C. Cir. 1992).