



Federal Communications Commission
Washington, D.C. 20554

March 15, 2007

DA 07-1325

In Reply Refer to:
1800B3-TSN

Radio Training Network, Inc.
c/o A. Wray Fitch III, Esq.
Gammon & Grange, P.C.
8280 Greensboro Drive, 7th Floor
McLean, VA 22102-3807

In re: **Broadcast Auction No. 70**
Form 175 Application of
Radio Training Network, Inc.
FRN 0001843341

Dear Applicant:

The Commission has received a short-form application (FCC Form 175) application from Radio Training Network, Inc. ("RTN"), seeking to participate in the upcoming FM Broadcast Auction ("Auction No. 70"). In a Public Notice released January 26, 2007, the staff rejected RTN's application, because it responded "yes" to the Noncommercial Educational ("NCE") election question in its Form 175 application.¹ In this letter, we address RTN's Petition for Reconsideration or Request for Waiver of the Rules for Reinstatement ("Petition"). In the Petition, RTN argues that the instructions regarding the NCE election in Form 175 were unclear, and that its intent to participate in the auction was evident from its selection of multiple FM allotments. In the alternative, RTN requests waiver of Section 1.2105(b)(2) of the Commission's Rules,² and asks that it be allowed to amend its Form 175 application to indicate that it is not seeking to be considered an NCE applicant for purposes of its short-form application. For the reasons discussed below, we deny the Petition and waiver request.

In the Petition, RTN first contends that an amendment to change its NCE election from "yes" to "no" is "in reality a clerical-type minor amendment that is permitted."³ This is incorrect. The Commission has unequivocally stated that applicants responding "yes" to the NCE election in Form 175 may not amend that response after the Form 175 filing deadline:

Applicants that seek an NCE station license must identify themselves by checking the box labeled "noncommercial educational," which will serve as a preliminary showing that they intend to use the station to advance an educational program and that they meet

¹ *Auction of FM Broadcast Construction Permits – Status of Short-Form Applications to Participate in Auction No. 70*, Public Notice, DA 07-190 (MB/WTB Jan. 26, 2007).

² 47 C.F.R. § 1.2105(b)(2).

³ Petition at 1.

all other Commission eligibility requirements for NCE stations. Applicants that do not check this box will be considered, as a matter of law, applicants for commercial broadcast stations. Because an applicant's self-identification as "noncommercial educational" affects its eligibility to hold an NCE station license and therefore its eligibility to participate in an auction, *we will treat any applicant's attempt to change its self-identification as a major amendment, which is prohibited after the short-form application filing deadline. As a result, we decline to adopt the suggestion that applicants for NCE stations can change their status once they learn they have filed an application that is mutually exclusive with a commercial applicant, as at least one commenter suggested; instead, we limit this opportunity in a manner that is consistent with our current rules, which permit major amendments before the short-form filing deadline, but not after.*⁴

In support of its Petition, RTN also cites the staff's decision to allow such amendments after the close of the short form filing window for the 2004 FM Broadcast Auction ("Auction No. 37").⁵ In Auction No. 37, the Media Bureau and Wireless Telecommunications Bureau (the "Bureaus") found that the instructions to the then-current version of Form 175 were unclear with regard to whether the NCE election constituted a major change that could not be amended after the Form 175 filing deadline, and on that basis allowed applicants responding "yes" to the NCE election to amend their applications to select "no." However, the Bureaus pointed out that this circumstance (the then-unclear instructions to the Form) was "unique to [that] auction."⁶ In addition to the clear guidance provided by the *NCE Second R&O*, Form 175 has since been modified to clarify the consequences of responding "yes" to the NCE election question.

In addition, the Commission's Integrated Spectrum Auction System ("ISAS"), through which Form 175 is electronically filed, includes a series of online "Common Questions" that further assist an applicant in responding to the Form 175 questions and certifications. With regard to the NCE election, the following three "Common Questions" and answers appeared in the electronic Form 175 filed during the Auction No. 70 filing window, that made clear to applicants that they could not amend to change a "Yes" NCE election in the Form:

Which applicants should check "Yes" to Noncommercial Educational election?

Applicants that seek a noncommercial educational construction permit must identify themselves by checking "yes" to the Noncommercial Educational Election question. This will serve as a preliminary showing that the applicant is either (a) a nonprofit educational organization applying for a radio or television broadcast station (AM, full-power FM, FM translator, or full-power television) that will be used to advance an educational purpose and meeting all other service-specific eligibility requirements, or (b) a municipality applying for a radio or television broadcast station that will transmit only noncommercial programs for educational purposes.

⁴ *Reexamination of the Comparative Standard for Noncommercial Educational Applicants*, Second Report and Order, 18 FCC Rcd 6691, 6700 (2003) ("*NCE Second R&O*") (emphasis added) (citations omitted).

⁵ *Letter to American Family Association, et al.*, 19 FCC Rcd 18681, 18684-85 (WTB/MB 2004) ("*AFA Letter*"). See also *Supplemental Notice Concerning Status of FCC Form 175 Applications to Participate in Auction No. 37 – Auction of FM Broadcast Construction Permits*, Public Notice, 19 FCC Rcd 18696 (WTB/MB 2004).

⁶ *AFA Letter*, 19 FCC Rcd at 18684.

The definition of “noncommercial educational” applies to broadcast applicants only, and is contained in 47 USC Section 397(6) and 47 CFR Sections 73.503(a) (for radio) and 73.621(a) (for television).

Can an applicant check “yes” to the NCE election and later de-select it?

Not after the Form 175 filing deadline. Because an applicant’s self-identification as “noncommercial educational” affects its eligibility to hold an NCE station license and therefore its eligibility to participate in an auction, the Commission treats an applicant’s attempt to change its self-identification as a major amendment, which is prohibited after the Form 175 filing deadline.

Do I risk return of my application as unacceptable for filing if I seek a construction permit for a NCE station?

Yes. If any application for a noncommercial educational broadcast station, as defined in 47 U.S.C. § 397(6), is mutually exclusive with applications for commercial broadcast stations, and the applicants that have the opportunity to resolve the mutual exclusivity pursuant to 47 C.F.R. § 73.5002(c) and (d) fail to do so, the application for noncommercial educational broadcast station, as described in 47 U.S.C. § 397(6), will be returned as unacceptable for filing and the applicant will not be permitted to participate in the auction. 47 C.F.R. § 73.5002(b).⁷

RTN states that the NCE election question is unclear, because it asks if an applicant is a nonprofit educational organization applying for a station eligible to be licensed as an NCE station.⁸ It contends that because “any frequency applied for by an educational broadcaster can be licensed as a noncommercial station, the obvious answer on its face is ‘Yes.’”⁹ We disagree. The Commission, in the *NCE Second R&O*, provided applicants an opportunity to participate in the competitive bidding process by allowing entities to select “no” to the noncommercial educational election question. The *NCE Second R&O* makes clear that an applicant should only respond “yes” to this item if it meets both conditions – being a nonprofit educational organization *and* intending to use the station, if awarded, to advance an educational purpose. However, the Commission emphasized that such an applicant that was mutually exclusive with any application for a commercial broadcast station would have its application returned as unacceptable for filing.¹⁰ Moreover, the ISAS common questions listed above appear in hyperlinks immediately to the right of the NCE question on the electronic Form 175. Any uncertainty regarding the meaning of the question could have been resolved by reviewing the linked information.

We likewise reject RTN’s argument that its selection of fewer than all of the 120 FM allotments offered in Auction No. 70 somehow proves its intent to participate as a bidder rather than an NCE

⁷ FCC Form 175, “Applicant Information” screen (December 2006).

⁸ The question in its entirety reads: “Are you a nonprofit educational organization or a municipality applying for a station eligible to be licensed as a noncommercial educational radio or television broadcast station?”

⁹ Petition at 3.

¹⁰ *NCE Second R&O*, 18 FCC Rcd at 6700.

applicant.¹¹ We see little, if any, connection between the number of licenses selected by an applicant and an intent to participate in the auction process. In fact, of the six rejected applicants that responded “yes” to the NCE election question, only one selected all 120 FM allotments. On the other hand, two rejected applicants selected only one FM allotment and one selected only four. None of the other rejected applicants sought reconsideration of the return of their Form 175 applications. Thus, RTN’s intent to participate in the auction is not manifest from its selection of 67 FM allotments.

We also deny RTN’s waiver request. As RTN notes, to obtain a waiver of the Commission’s competitive bidding rules,¹² an applicant must show: (i) that the underlying purpose of the rule would not be served, or would be frustrated, by its application in this particular case, and that grant of the requested waiver would be in the public interest; or (ii) that the unique facts and circumstances of the particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, or that the applicant has no reasonable alternative.¹³ RTN’s sole stated reason for waiver is that the public interest would be advanced by “allowing an otherwise qualified bidder to participate” in the auction.¹⁴ We disagree. Under the Commission procedures set forth in the *NCE Second R&O*, RTN is not a qualified bidder, because it responded “yes” to the NCE election question and, in so doing, indicated not only that it was a qualified nonprofit educational entity, but also that it intended to use any station awarded to advance an educational program.¹⁵ RTN’s claim that it is “otherwise qualified” rests on its recanting the representation made in its Form 175 application that RTN is, in fact, a nonprofit educational entity seeking an NCE facility. It is precisely this type of *post-hoc* repudiation of an NCE election that the *NCE Second R&O*’s procedures were intended to bar.

Moreover, we find no merit in RTN’s claim that the public interest would be served by granting a waiver and allowing an additional bidder in the auction. Any benefit to be derived from adding an additional auction participant would be outweighed by the public benefit in affording legitimate auction applicants reasonable certainty as to the fair and predictable application of the Commission’s auction rules and procedures.¹⁶ Thus, we reject RTN’s assertion that waiver of the rules in this instance would be in the public interest, or that application of the rules would be inequitable or unduly burdensome.

¹¹ Petition at 2.

¹² 47 C.F.R. § 1.2105(b)(2).

¹³ *Id.* § 1.925.

¹⁴ Petition at 3.

¹⁵ *NCE Second R&O*, 18 FCC Rcd at 6700.

¹⁶ See *Letter to James K. Davis, Vice President and General Manager, Vero Beach Broadcasting, LLC*, 20 FCC Rcd 19346 (WTB 2005).

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The Commission's Rules and the integrity of the competitive bidding process are best served by applying the auction eligibility rules in a fair and consistent manner. For the foregoing reasons, RTN's Petition and request for waiver of Section 1.2105(b)(2) of the Rules are DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

Margaret W. Wiener
Chief, Auctions and Spectrum Access Division
Wireless Telecommunications Bureau