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DA 10-604

In Reply Refer to:

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In re: **Heartland Ministries, Inc.**
WTRT(FM), Benton, KY
Facility ID No. 88122
File No. BPED-20070906AGB

Petition for Reconsideration

Dear Counsel:

We have before us a Petition for Reconsideration ("Petition") filed May 8, 2008, and Supplement to the Petition for Reconsideration ("Supplement") filed July 24, 2008, by Heartland Ministries, Inc. ("Heartland"),¹ licensee of noncommercial educational ("NCE") station WTRT(FM), Benton, Kentucky (the "Station"). Heartland seeks reconsideration of the April 3, 2008, letter dismissing the above-referenced minor change application (the "Application") as unacceptable for filing.² For the reasons set forth below, we deny the Petition and dismiss the Supplement.

Background. The Application was filed on September 6, 2007. The window for filing new NCE FM applications opened on October 12, 2007, and closed on October 22, 2007.³ During the window, Bowling Green Community Broadcasting ("Bowling Green") filed an application for a new NCE FM station at Nortonville, Kentucky.⁴ The Nortonville Application was in technical conflict with the prior-filed Application. A staff engineering review of the Application revealed that it failed to comply with Section 73.525 of the Commission's Rules (the "Rules")⁵ with respect to Channel 6 station WPSD(TV), Paducah, Kentucky. The Application requested a waiver of Section 73.525 regarding protection of TV Channel 6 stations, or in the alternative, a grant of the Application conditioned on the Station not operating with the proposed facilities until WPSD(TV) was no longer operating on Channel 6.

¹ On July 24, 2008, Heartland also filed a Motion for Leave to Supplement Petition for Reconsideration ("Motion").

² *Letter to Heartland Ministries, Inc.* (MB rel. Apr. 3, 2008) ("Staff Decision"); see also *Broadcast Actions*, Public Notice, Report No. 46710 (MB rel. Apr. 8, 2008) (public notice of the April 3, 2008, letter dismissing the Application).

³ See *Media Bureau Announces NCE FM New Station and Major Modification Application Filing Window for New and Certain Pending Proposals; Window to Open on October 12, 2007*, Public Notice, 22 FCC Rcd 2726 (MB 2007); *Media Bureau to Extend Window for NCE FM New Station and Major Change Applications; Window Will Close on October 22, 2007*, Public Notice, 22 FCC Rcd 18680 (MB 2007).

⁴ See File No. BNPED-20071012ASV (the "Nortonville Application").

⁵ 47 C.F.R. § 73.525.

On April 3, 2008, the *Staff Decision* was released. It found that the Application did not comply with Section 73.525 of the Rules, that waiver of this rule was not justified, and that a conditional grant of the Application was not warranted. In particular, the *Staff Decision* noted that acceptance of the Application would be unfair to those window applicants that filed rule-compliant proposals. The staff also found that: (1) the proposal constituted a “contingent application” under Section 73.3517 of the Rules;⁶ (2) a waiver of the contingent application rule would be necessary to grant the Application; and (3) a waiver of the rule in this case would be contrary to the public interest. Accordingly, the staff dismissed the Application.

In its Petition, Heartland argues that the Media Bureau (the “Bureau”) should reconsider its denial of its requests for a waiver of Section 73.525 and/or a conditional grant. Specifically, Heartland argues that: (1) the issues raised here should have been referred to the full Commission for resolution; (2) the staff erred in concluding that the Application is a contingent one, because “established precedent” defines a contingent application as “one whose grant depends upon the grant or denial of another application;”⁷ (3) WPSD-DT already holds a license for digital television (“DTV”) operation on Channel 32, and “its analog operation on Channel 6 must cease by operation of law, no later than February 17, 2009;”⁸ (4) the Application will entail minimum staff effort because the event upon which implementation of the Application depends can be managed easily by adding a simple condition to the grant requiring that the Station not commence operation with modified facilities until WPSD(TV) has ceased operating on Channel 6; and (5) the *Staff Decision* erred in finding that grant of the Application would unfairly prejudice other NCE FM licensees, permittees, and applicants because similarly situated licensees or permittees “who failed to exercise their imagination and to act proactively” should not blame Heartland for doing so.⁹

On July 24, 2008, Heartland filed the Motion and Supplement. In its Supplement, Heartland submits a consent letter, dated July 10, 2008, and signed by Richard Paxton, President and General Manager of WPSD(TV), stating that “WPSD-TV, LLC, licensee of station WPSD-TV . . . Paducah, Kentucky, hereby consents to the grant of the FCC Form 340 application of Heartland Ministries, Inc. for a Construction Permit to improve the licensed facilities . . . of WTRT. . . .”¹⁰ Heartland contends that “the Commission’s acceptance of the tendered consent will avoid the need for further litigation on the merits of the Application.”¹¹ In its Motion, Heartland argues that, although Section 1.106(f) of the Rules requires that a petition or supplement be filed within 30 days of public notice of the action being petitioned, waiver of the 30-day limitation is “fully warranted in this case.”¹²

⁶ See 47 C.F.R. § 73.3517.

⁷ Petition at 4, citing *Seattle Public Schools, Initial Decision*, 103 FCC 2d 862, 864 (1986). Heartland indicates that “the same concept applies with respect to FM allotment rulemaking proposals,” citing four cases not relevant to application proceedings. *Id.* Heartland also states that the only citation offered in support of the finding that its application was impermissibly contingent was a staff level case, *Family Life Educational Foundation*, Letter, 23 FCC Rcd 4779 (MB 2008) (“*Family Life*”), released exactly one week before the *Staff Decision* and containing identical language. Heartland submits that *Family Life* does not constitute “established precedent” for this proposition. Petition at 3-4.

⁸ *Id.* at 4-5.

⁹ *Id.* at 5-6.

¹⁰ See Supplement filed July 24, 2008, at Exhibit A.

¹¹ Supplement at 5.

¹² Motion at 3.

Discussion. Section 1.106(f) of the Rules,¹³ implementing Section 405(a) of the Communications Act of 1934, as amended (the “Act”),¹⁴ provides that a “petition for reconsideration *and any supplement thereto* shall be filed within 30 days from the date of public notice of the final Commission action” unless leave to file is granted pursuant to a separate request.¹⁵ The Commission does not generally or readily accept late-filed supplements to petitions for reconsideration.¹⁶ It will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order, or raises additional facts, not known or existing at the time of petitioner's last opportunity to present such matters.¹⁷ Petitions for reconsideration which rely on facts not previously presented to the Commission may be granted if the Commission determines that consideration of the facts relied on is required in the public interest.¹⁸ For the reasons set forth below, we find that Heartland has not met these standards for acceptance of the Supplement or for granting the Petition.

The 30-day reconsideration filing period was initiated by the April 8, 2008, public notice of the *Staff Decision's* dismissal of the Application. Thus, the filing deadline for Heartland's Petition and Supplement expired on May 8, 2008, more than two months before Heartland filed the Supplement. Heartland argues in its Motion that a waiver of the 30-day limitation on filing supplements should be granted in this case for “good cause.”¹⁹ Specifically, Heartland claims that WPSD(TV)'s consent eliminates any question regarding the Application's compliance with Section 73.525, the Petition is unopposed, and the Supplement reports a new fact and supplies a document²⁰ that did not exist at the time of the Petition's filing.²¹ In addition, Heartland argues that “the tendering of the [S]upplement does not

¹³ 47 C.F.R. § 1.106(f).

¹⁴ 47 U.S.C. § 405(a).

¹⁵ 47 C.F.R. § 1.106(f) (emphasis added).

¹⁶ See *Satellite Signals of New England, Inc.*, Memorandum Opinion and Order, DA 09-1849, 2009 WL 2595827 n.18 (WTB rel. Aug. 21, 2009) citing 47 C.F.R. § 1.106(f) (motion for leave to file supplement to petition for reconsideration denied); *Richard R. Zaragoza, Esq., Gregory Masters, Esq., et al.*, Letter, 24 FCC Rcd 5743, 5746 (MB 2009) (“*Zaragoza*”) (petitioners' motion for leave to file supplement denied for not providing grounds for granting of such leave); *Pathfinder Communications*, Memorandum Opinion and Order, 3 FCC Rcd 4146 (1988) (Commission may decline to exercise discretion to consider late-filed supplement). See also *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192 (D.C. Cir. 2003) (affirming the Commission's decision not to exercise its discretion to hear late-filed supplements when the petitioner offered no plausible explanation as to why supplemental arguments were not made in its initial petition); *Fortuna Systems Corp.*, Order on Reconsideration, 3 FCC Rcd 5122, 5123 (1988).

¹⁷ See 47 C.F.R. § 1.106(c) and (d). See also *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sum nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966) (“*WWIZ, Inc.*”).

¹⁸ See 47 C.F.R. § 1.106(c)(2). See also *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Scranton and Surfside Beach, South Carolina)*, Memorandum Opinion and Order, 4 FCC Rcd 2366 (MB 1989).

¹⁹ Motion at 1, 4.

²⁰ Heartland secured the consent of WPSD(TV) on July 10, 2008.

²¹ Motion at 3. It indicates that it requested WPSD(TV)'s consent prior to filing the Petition; the television station “took [Heartland's] request under advisement and ultimately decided to grant its consent,” albeit after the statutory 30-day reconsideration period had run. Heartland indicates that “the timing of the Channel 6 licensee's decision is obviously a matter beyond [its] concern.” *Id.*

disrupt the orderly conduct of the staff in considering . . . [the] Petition. . . . No other party would be unfairly prejudiced.”²²

We disagree. We do not find that “good cause” exists merely because Heartland tried and failed to obtain WPSD(TV)’s timely consent or because the receipt of WPSD(TV)’s consent removes an impediment to the processing of the Application. In addition, Heartland is incorrect when it argues that no party would be unfairly prejudiced by tendering of the Supplement. Acceptance of the Supplement does, in fact, prejudice another party – Bowling Green – which filed the Nortonville Application on October 12, 2007. At the time of filing, the Nortonville Application complied with the requirements of Section 73.525 of the Rules and was otherwise technically acceptable. The Nortonville Application conflicts with Heartland’s Application such that both cannot be granted. Thus, Heartland’s reporting of “new facts,” *i.e.*, the WPSD(TV) consent letter, would be fatal to the Nortonville Application. For these reasons, we find that Heartland does not present “good cause” to accept the late-filed Supplement, and thus, we will not consider Heartland’s proffer of a letter of consent from WPSD(TV).²³

We also conclude that the Petition otherwise lacks merit. It is uncontested that Heartland’s initial proposal did not comply with Section 73.525 of the Rules with regard to the operation of TV Channel 6 station WPSD(TV). Thus, the issue is whether a waiver is warranted. The Bureau’s application processing rules and policies are designed to promote the fair and transparent consideration of facility proposals to use increasingly scarce broadcast spectrum. Under these processing policies, the failure to perfect certain issues prior to filing may be fatal to the application.²⁴ The Commission has adopted a more flexible approach regarding technical acceptability issues. These defects can be cured while an application is pending or in connection with a timely filed petition for reconsideration. An applicant can amend its proposal or identify changed circumstances that eliminate the rule violation.

Long-established Commission processing policy and the Rules, however, limit the filing of premature and hypothetical applications. The Commission’s *nunc pro tunc* reconsideration procedures afford dismissed applicants one opportunity to file curative amendments that eliminate all application defects.²⁵ Under Section 1.106(f), an applicant must perfect its technical proposal within 30 days of the release of the order dismissing the pertinent application. Accordingly, Heartland’s failure to cure its Section 73.525 violation by May 8, 2008 is fatal to its application. We note that in April 2009, one year after the dismissal of the Application, the Bureau released a Public Notice setting forth NCE FM/TV Channel 6 processing policies. These processing policies conform to the position taken by the staff in the *Staff Decision*.²⁶ The Public Notice stated that Section 73.525 would continue to apply to all NCE FM

²² *Id.* at 4.

²³ *See, e.g., Zaragoza*, 24 FCC Rcd at 5746.

²⁴ *E.g., Edward A. Schober*, Memorandum Opinion and Order, 23 FCC Rcd 14263, 14265 (2008) (“The Commission, however, has repeatedly held that ‘an applicant will not be permitted to amend where it did not have the requisite reasonable [site] assurance to begin with. . . .’”).

²⁵ *See Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, Public Notice, 49 Fed. Reg. 47331 (Dec. 3, 1984) (FCC 84-366) (providing a second opportunity on reconsideration to cure application defects would be unfair to other applicants, would add to processing delays and would encourage the filing of incomplete and poorly prepared applications).

²⁶ *See Media Bureau Provides Guidance to NCE FM Stations Regarding Television Channel 6 Protection Requirements*, Public Notice, 24 FCC Rcd 3916 (MB 2009) (“*Channel 6 Protection Notice*”). The Public Notice states, in part:

The Bureau will dismiss any NCE FM station application that fails either to (1) satisfy Section 73.525 protection requirements, or (2) include an unconditional consent letter from the affected
(continued . . .)

reserved band applications until such time as the Commission expressly stated otherwise, regardless of the date on which a potentially impacted television Channel 6 station terminated analog broadcast service.²⁷ Although new facts may eliminate an acceptability defect, the critical changed circumstances in this case came too late to save the Application. On October 13, 2009, almost 18 months after the deadline for the Heartland petition for reconsideration, the Bureau released a Public Notice announcing October 27, 2009, as the date when it would begin accepting applications, premised on the termination of analog TV Channel 6 transmissions. The Public Notice cautioned that applications filed prior to this date that did not comply with Section 73.525 would be subject to dismissal.²⁸

These processing policies are intended to promote the fair and transparent consideration of all applications. Thus, we find unpersuasive Heartland's contention that it should not be punished for acting "creatively" and "proactively."²⁹ This claim ignores the fundamental fact that acceptance of the Application could foreclose filing opportunities for some, and be fundamentally unfair to other, potential applicants and licensees that chose to defer filings based on the recognition that such filings would not comply with the Rules.³⁰ As observed above, Heartland's "preclusive filing"³¹ also would unfairly prejudice and require dismissal of the technically acceptable at filing Nortonville Application. We therefore conclude that a waiver of Section 73.525 of the Rules is not warranted. We also find no merit in Heartland's contention that the Bureau's consistent adherence to its processing policies raises novel issues that can only be addressed by the Commission.

Having concluded that the staff properly dismissed the Application for its failure to comply with Section 73.525, we need not consider Heartland's argument that the staff incorrectly concluded that the Application also was subject to dismissal as a contingent application. Thus, for clarification purposes only, we agree with Heartland that the contingent application rule has generally been applied in situations where grant of an application is contingent on the grant, denial, or dismissal of a second application. However, Heartland has not identified any precedent so limiting the application of the rule. The wording of Section 73.3517 does not so explicitly limit its scope. It is clear that the Commission has recognized as application "contingencies" actions other than the grant or denial of another application. For example, the Commission's AM interference reduction agreement policy, a codified exception to the general contingent application prohibition, recognizes and permits the processing of applications which are

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television Channel 6 station concurring with the proposed NCE FM facilities. An NCE FM station application must take into account all stations licensed to operate on Channel 6 as of September 7, 2008. Any tentatively selected NCE FM application that relies upon the anticipated termination of analog Channel 6 broadcast service to demonstrate compliance with the Rule, or to request a waiver of the Rule, will be dismissed. Amendments and petitions for reconsideration based upon the subsequent termination of analog Channel 6 operations will not be entertained.

²⁷ *Id.*

²⁸ See *Media Bureau Establishes October 27, 2009, Initial Filing Date for Acceptance of Certain Noncommercial Educational FM Station Minor Change Applications*, Public Notice, 2009 WL 326629, DA 09-2214 (rel. Oct. 13, 2009).

²⁹ Petition at 6.

³⁰ See *Family Life*, 23 FCC Red at 4780.

³¹ Petition at 6.

contingent on the deletion of other facility authorizations.³² Accordingly, we find that the staff reasonably concluded that the Application failed to comply with Section 73.3517.

Conclusion/Action. Heartland has not shown a material error or omission in the *Staff Decision*. Accordingly, IT IS ORDERED, that the May 8, 2008, Petition for Reconsideration and July 24, 2009, Motion filed by Heartland Ministries, Inc., ARE DENIED. IT IS FURTHER ORDERED, that the July 24, 2009, Supplement filed by Heartland Ministries, Inc., IS DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Heartland Ministries, Inc.
Bowling Green Community Broadcasting

³² See, e.g., *Letter to JCE Licenses, LLC and M&M Broadcasters, Ltd.*, 24 FCC Rcd 4161, 4162 (MB 2009) (interference reduction agreement approved that involved deletion of Station KVLJ(AM), Paul's Valley, Oklahoma and contingent application to improve the facilities of Station KNIT(AM), Dallas, Texas), *citing Policies to Encourage Interference Reduction between AM Broadcast Stations*, Report and Order, 5 FCC Rcd 4492, 4494 (1990) ("We emphasize that a significant factor underlying our decision to grant or deny a contingent application arrangement involving deletion or reduction in AM facilities would be whether it satisfies the public interest requirement of a local service floor.").