



Federal Communications Commission
Washington, D.C. 20554

November 24, 2023

DA 23-1106
In Reply Refer to:
1800B3-ATS/RDM
Released: November 24, 2023

Brush School District RE-2J
c/o John Jason Bennett
7107 South Yale #444
Tulsa, OK 74136
(sent by electronic mail to: jason@fmexpansion.com)

Turbo Tech Services
c/o Mr. Jim Turvaville
360 Patton Street
PO Box 144
Mobeetie, TX 79061
(sent by electronic mail to: jimturbo61@gmail.com)

In re: **Brush School District RE-2J**
New NCE FM, Brush, Colorado
Facility ID No. 768440
Application File No. 0000166836

Informal Objection

Dear Applicant and Objector:

We have before us the application filed by Brush School District RE-2J (Brush) for a construction permit for a new noncommercial educational (NCE) FM station at Brush, Colorado.¹ We also have before us the Informal Objection to the Application (Objection), filed by Turbo Tech Services (Turbo),² and related responsive pleadings.³ For the reasons set forth below, we deny the Objection and grant the Application.

Background. Brush filed its Application during the 2021 NCE FM filing window.⁴ The Media Bureau (Bureau) identified the Application as part of NCE MX Group 43,⁵ but as a result of technical

¹ Application File No. 0000166836 (Application).

² Pleading File No. 0000186267 (filed Mar. 10, 2022).

³ Brush filed an Opposition. Pleading File No. 0000211455 (filed Feb. 27, 2023). Turbo filed a Reply. Pleading File No. 0000211837 (filed Mar. 3, 2023).

⁴ *Media Bureau Announces NCE FM New Station Filing Procedures and Requirements for November 2-9, 2021, Window; Limited Application Filing Freeze to Commence on October 5, 2021*, Public Notice, 36 FCC Rcd 11458 (MB 2021) (*Procedures Public Notice*).

⁵ *Media Bureau Identifies Groups of Mutually Exclusive Applications Submitted in the November 2021, Filing Window for New Noncommercial Education Stations; Opens Window to Accept Settlements and Technical Amendments*, Public Notice, 36 FCC Rcd 16452 (MB 2021) (*MX Groups Public Notice*).

amendments, the Application is now a singleton.

The Bureau dismissed the Application on January 6, 2022, because it failed to comply with section 73.509 of the Commission's rules (Rules).⁶ On February 4, 2022, Brush filed a corrective technical amendment to the Application, which changed the channel of the proposed facility, and a Petition for Reconsideration seeking *nunc pro tunc* reinstatement of the Application.⁷ The February Amendment provided the same coordinates in the Antenna Location Data as the coordinates specified in the original Application. The Bureau granted the Petition for Reconsideration, accepted the February Amendment, and reinstated the Application.

In the Objection, Turbo argues that the Application, as amended by the February Amendment, remains defective for several reasons, and should therefore be “dismissed with prejudice for failure to provide proper curative amendments at the single opportunity provided by the Commission staff.”⁸ Specifically, Turbo asserts that the Application fails to meet the spacing requirements with regard to Station KWNB-TV, Hayes Center, Nebraska, which operates on Channel 6, and Brush does not include the showing required by section 73.525 of the Rules.⁹ The Objection also argues that the Application and the February Amendment either contain a site error or misrepresent the location of the proposed transmitter.¹⁰ Turbo notes that although an exhibit attached to the Application and the February Amendment state that the land where the tower and antenna will be located are owned by Brush, the antenna coordinates correspond to a residential and business area that is not owned by Brush.¹¹ Finally, Turbo contends that the Application and the February Amendment state that the proposed facility uses an existing tower, even though there is no tower at the site identified in the relevant attachment.¹²

Brush filed another amendment on March 15, 2022, which changed the antenna coordinates in the Antenna Location Data field of the Application and provided a Channel 6 showing.¹³ In the Opposition, Brush argues that the Application, as originally filed, was dismissed due to a “typographical error in the proposed channel.”¹⁴ Brush further states that, under the *Nunc Pro Tunc Public Notice*, the March Amendment is acceptable because the Application was never dismissed a second time.¹⁵

In the Reply, Turbo argues that notwithstanding Brush's characterization of its dismissal as due to

⁶ *Actions*, Public Notice, Report No. PN-2-220110-01 (MB Jan. 10, 2022) (“Section 73.509 violation - 92 sq km of overlap received from the co-channel license (BLED-20160212ABE) of WCBE(FM), Columbus, Ohio”); *see also* 47 CFR § 73.509.

⁷ Application, Amendment (filed Feb 4, 2022) (February Amendment); *see also* Petition for Reconsideration, Pleading File No. 0000184388 (filed Feb 4, 2022).

⁸ Objection at 2.

⁹ *Id.* at 1; *see also* 47 CFR § 73.525.

¹⁰ Objection at 2.

¹¹ *Id.*; *see also* Application and February Amendment at Attach. “Brush All Purpose.pdf”.

¹² *Id.*; *see also* Application and February Amendment at Attach. “Brush Environmental 2020204.pdf”.

¹³ Application, Amendment (filed Mar. 15, 2022) (March Amendment) at Antenna and Attach. “Brush TV6 20220315b.pdf”.

¹⁴ Opposition at 1.

¹⁵ *Id.* at 2; *see also Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, Public Notice, 56 RR 2d 776 (1984), recon. denied, 57 RR 2d 1603 (1985) (as subsequently published in the Federal Register, 49 Fed. Reg. 47331 (Dec. 3, 1984)) (*Nunc Pro Tunc Public Notice*).

a typographical error, it was nonetheless dismissed, and the February Amendment failed to correct all the defects in the Application.¹⁶ Turbo further asserts that the March Amendment should be rejected because it was not filed within 30 days of the dismissal of the Application.¹⁷

Discussion. Pursuant to section 309(d) of the Communications Act of 1934, as amended (Act),¹⁸ petitions to deny and informal objections must provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with the public interest.¹⁹

Upon the dismissal of its Application, Brush, as directed, timely filed its corrective February Amendment and a petition for reconsideration, requesting reinstatement of the Application *nunc pro tunc*. The Bureau reviewed the February Amendment, determined it rendered the Application acceptable, and reinstated the Application. Subsequent to the reinstatement, Brush filed its March Amendment to provide the required Channel 6 showing and adjust the coordinates specified in the Antenna Location Data section of the Application.²⁰ We find that the March Amendment, which made additional minor revisions to the Application, was permissible and does not contravene the *Nunc Pro Tunc Public Notice*.

Specifically, we reject Turbo's argument that the *Nunc Pro Tunc Public Notice* does not allow an applicant to file additional amendments after reinstatement.²¹ In prior cases applying the *Nunc Pro Tunc Public Notice*, the Bureau accepted subsequent amendments to applications following reinstatement, provided the application was not dismissed a second time.²² The *Procedures Public Notice*, the *Dismissed Singletons Public Notice*, and the *MX Groups Public Notice* all state that a dismissed NCE FM applicant is entitled to one curative amendment *to request reinstatement* of an application *nunc pro tunc*.²³

¹⁶ Reply at 1-2.

¹⁷ *Id.* at 2.

¹⁸ 47 U.S.C. § 309(d).

¹⁹ See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff'd sub nom. Garden State Broad. L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *rehearing denied* (Sep. 10, 1993); *Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864, para. 6 (1986) (petitions to deny and informal objections must contain adequate and specific factual allegations sufficient to warrant the relief requested).

²⁰ The site identified by the coordinates in the February Amendment, while incorrect, was otherwise rule-compliant and complied with the spacing requirements.

²¹ See *Nunc Pro Tunc Public Notice* (“[W]e have . . . granted reconsideration of an action dismissing or returning an application as unacceptable for filing when an applicant submits a relatively minor curative amendment within 30 days. In contested proceedings, the result of this procedure is that applications are accepted *nunc pro tunc*. . . . Thereafter, if the same application is returned or dismissed a second time, it will not be afforded *nunc pro tunc* reconsideration rights.”)

²² See *Lehigh Valley Community Broadcasters Board of Directors*, Hearing Designation Order, 8 FCC Rcd 1643, 1645, para. 15 (ASD 1993) (*Lehigh*); *A.G.A., Inc.*, Hearing Designation Order, 1986 WL 292736, para. 3 (ASD 1986) (*A.G.A.*).

²³ *Procedures Public Notice*, 36 FCC Rcd at 11467-68 (“A dismissed applicant will have *one* opportunity to file a minor curative amendment to its application and a petition for reconsideration, requesting reinstatement of the application *nunc pro tunc*” (emphasis in original)); *Media Bureau Dismisses Defective Singleton Applications Submitted in the November 2021, Filing Window For New Noncommercial Educational FM Stations*, Public Notice, 36 FCC Rcd 16718 (MB Dec. 8, 2021) (*Dismissed Singletons Public Notice*); *MX Groups Public Notice*, 36 FCC Rcd at 16453 (“Each applicant has one opportunity to file a minor curative amendment and petition for reconsideration, requesting reinstatement of the application *nunc pro tunc*”). Accordingly, if the Bureau deemed the

These Notices, consistent with the *Nunc Pro Tunc Public Notice*,²⁴ do not, however, preclude subsequent minor amendments after reinstatement.²⁵

Moreover, the corrections addressed by Brush in its March Amendment—lack of Channel 6 showing and mistaken Antenna Location Data—are not defects for which the Bureau would dismiss an application.²⁶ This is particularly true in light of the Commission’s continuing efforts to expand opportunities for FM applicants by simplifying compliance with TV6 interference rules.²⁷ Further, in similar instances, we have allowed additional amendments after an initial *nunc pro tunc* reinstatement amendment where the defects in the amended application do not render the application patently defective.²⁸

While some minor deficiencies remained in the Application after the February Amendment, they did not render the Application patently defective, and therefore, were not defects for which the Bureau would dismiss an application. When Brush corrected the deficiencies in its March Amendment, the Application had been reinstated and remained in an accepted for filing status. The Application was never dismissed a second time. Accordingly, we deny the Objection and grant the Application.

Conclusion/Action. Accordingly, **IT IS ORDERED** that the Informal Objection filed by Turbo Tech Services on March 10, 2022 (Pleading File No. 0000186267), **IS DENIED**.

February Amendment unacceptable, and did not reinstate the Application, Brush would not be permitted a second attempt to amend and reinstate its Application.

²⁴ Each Notice cites to the *Nunc Pro Tunc Public Notice*. See *Procedures Public Notice*, 36 FCC Rcd at 11468, n. 66; *Dismissed Singletons Public Notice*, 36 FCC Rcd at 16718, n. 3; *MX Groups Public Notice*, 36 FCC Rcd at 16452, n. 4.

²⁵ In the past, we have found that, in certain circumstances, the *Nunc Pro Tunc Public Notice* permits multiple corrective amendments to an application post-reinstatement. See, e.g., *Clear Communications, Inc.*, Letter Order, 36 FCC Rcd 12500 (MB 2021) (second curative amendment permitted where translator application was dismissed due to predicted interference complaint, application was amended to address complaint and reinstated *nunc pro tunc*, and complainant submitted new predicted interference complaints based on the initial amendment).

²⁶ The coordinates corrected by the March Amendment, while mistaken, were otherwise rule-compliant. Had the mistaken location data resulted in a rule violation, such as prohibited overlap with another station in violation of 47 CFR § 73.509, failure to reach 50 percent of the community of license in violation of 47 CFR § 73.515, or a violation of applicable processing policies for noncommercial educational stations, the Application would have been dismissed. Compare *NCE MX Group 82*, Letter Order, DA 23-348 (MB Apr. 25, 2023) (rejecting amendment to dismissed application that created new mutual exclusivity in violation of the *MX Groups Public Notice*).

²⁷ See *Amendments of Parts 73 and 74 to Improve the Low Power FM Radio Service Technical Rules*, Report and Order, 35 FCC Rcd 4115, 4126-4129, paras. 34-35 (MB 2020) (“the staff will consider waiver requests to use FM spectrum that is short-spaced to TV6, and grant such requests if it determines that the FM applicant demonstrates no interference.”); *Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television and Television Translator Stations*, MB Docket No. 03-185, Report and Order, FCC 23-58, 2023 WL 4700523 at *23, para. 65 (July 20, 2023).

²⁸ See *Lehigh*, 8 FCC Rcd at 1645, para. 15 (second corrective amendment acceptable where the defects in the amended application do not cause the application to violate Commission policy on the processing of patently defective applications); *A.G.A.* at para. 2 (dismissal of an amended application is unwarranted where errors in the application “are not of a nature rendering the proposal patently defective”). In *A.G.A.*, the Audio Services Division found that “Dismissal is unwarranted . . . as these errors are not of a nature rendering the proposal patently defective under our rules. Rather, we were able to process the amended application without undue delay and determine that the proposal conformed to all relevant acceptance criteria. The application is therefore acceptable for filing.” *Id.* at para. 3.

IT IS FURTHER ORDERED that the application of Brush School District RE-2J (Application File No. 0000166836), **IS GRANTED**.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau

cc (via electronic mail):

Mr. Scott Trautwein
(sent by electronic mail s.trautwein@brushschools.org)