Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Colorado Christian University	)	
	)	File No. BPED-971222MB
Application for a New, Noncommercial	)	
Educational FM Station	)	
Channel 214C2, Sterling, CO	)	
	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: February 8, 2001 **Released: February 15, 2001**

By the Commission:

1. The Commission has before it an Application for Review filed by Colorado Christian University ("CCU") on April 24, 2000, pursuant to 47 C.F.R. § 1.115 of the Commission's rules. CCU seeks Commission review of the March 24, 2000 decision of the Chief of the Audio Services Division, Mass Media Bureau, which denied CCU's August 10, 1998 Petition for Reconsideration and Other Relief.[1] CCU requests that the Commission rescind an "A" cut-off list on which the above-captioned application appeared and place the application on a "B" cut-off list. For the reasons set forth below, the Application for Review is denied.

2. **Background**. On December 22, 1997, CCU filed an application for a new noncommercial educational ("NCE") station to operate on channel 214C2 at Sterling, Colorado (FCC File No. BPED-971222MB). At the time it was filed, CCU's application was mutually exclusive with the prior-filed but not cut-off application of Educational Communications of Colorado Springs, Inc. ("ECCS") for a new noncommercial educational station to operate on channel 212A at Brush, Colorado (FCC File No. BPED-971017MB).[2] However, on January 15, 1998, prior to the release of an "A" cut-off list, ECCS amended its application to designate channel 208, instead of 212, thus eliminating the conflict between CCU's and ECCS' applications. In a letter to ECCS dated March 9, 1998, the Audio Services Division staff, *inter alia*: (1) accepted the amended application; (2) assigned it a new file number because the amendment

[1] *See March 24, 2000 Letter from Linda Blair, Chief, Audio Services Division, to Peter Gutmann, Esq., Counsel for CCU* ("*ASD March 2000 Letter*").

[2] Under the former cut-off procedure for new and major change noncommercial educational ("NCE") station applications, the staff would place the first-filed "lead" application on an "A" cut-off list which would establish a deadline for mutually exclusive purposes. After the deadline, the staff would issue a "B" cut-off notice of all timely-filed mutually exclusive proposals, including those filed prior to the issuance of the "A" cut-off list. The release of the "B" cut-off notice would start the 30-day period for the filing of petitions to deny. The Commission's A/B cut-off list procedure has been replaced with a filing window system, similar to that used for full power commercial FM stations. *See Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 15 FCC Rcd. 7386, 7421 (2000), *recon. pending*.

reflected a major change to the original application; and (3) indicated that the amended application would be placed on an upcoming "A" cut-off public notice.[3] On March 19, 1998, the amended ECCS application, bearing the new file number, appeared on an "A" cut-off list, Report No. A-326, which established an April 20, 1998 deadline for the filing of competing applications (the "*First A Notice*").[4] However, the *First A Notice* improperly failed to reflect the amended channel 208, and instead identified channel 212. No competing applications were timely filed in response to that notice. Due to the error on the *First A Notice*, the staff listed the amended ECCS application with the correct file number and channel on a subsequent July 13, 1998 "A" cut-off list (the "*Second A Notice*"). This notice also listed the CCU application. On August 10, 1998, CCU filed a Petition for Reconsideration and Other Relief of the *Second A Notice*, arguing that placement of its application on an "A" cut-off list was inappropriate, insofar as it was mutually exclusive with the unamended application of ECCS, which CCU maintains had already proceeded through an "A" cut-off.[5] On reconsideration, the staff rejected CCU's contention that the *First A Notice* established cut-off rights for its application and therefore that the staff had erred in placing the CCU application on an "A" cut-off list.

3. In its Application for Review, CCU asks us to determine whether the Commission should give effect to the erroneous *First A Notice*, which was neither modified nor withdrawn, and upon which CCU claims it "relied." CCU states it is not aware of precedent for the staff's action. It claims that since it relied on the *First A Notice* and since other interested parties were, or should have been, aware of the notice, the *First A Notice* cannot be ignored. CCU argues that the staff's action defeats the purpose of a public notice – to advise potentially interested parties of their rights. CCU argues that because it acted in accordance with the *First A Notice*, it acquired the right to receive its construction permit without delay, cost and uncertainty of having to litigate against future applicants who did not respond to the original cut-off notice. CCU notes that the Court of Appeals has accepted the Commission's stringent enforcement of the cut-off rules, provided that explicit notice has been afforded. *Application for Review* at 3-4 citing *Florida Institute of Technology v.* FCC, 952 F. 2d 549, 550 (D.C. Cir. 1992). CCU states that unlike the cut-off notice invalidated by the Court of Appeals in *Way of Life Television Network, Inc. v. FCC*, 593 F.2d 1356 (D.C. Cir. 1979), this is a case where "because all potentially interested parties were advised by the first cut-off list (A-326) of the need to file timely competing applications," the Commission should give legal effect to the *First A Notice.* *Application for Review* at 4. CCU requests that the Commission (1) reverse the staff's action by placing its application on a "B" cut-off notice and (2) dismiss the Competing Applications as untimely filed with respect to the *First A Notice*.

4. **Discussion.** The staff action was proper. The primary purposes of the former NCE cut-off

[3] *See March 9, 1998 Letter from Daniel J. Fontaine, Supervisory Engineer, Audio Services Division, to Mr. Lee J. Pelzman, Esq., Counsel for ECCS ("1998 Staff Letter").*

[4] CCU's application was not listed on Report No. A-326.

[5] See Petition for Reconsideration and Other Relief at 5 ("Petition for Reconsideration"). Subsequent to the filing of the Petition for Reconsideration, two competing applications were filed prior to the last day for filing competing proposals under the *Second A Notice* (the "Competing Applications"). The Competing Applications each seek authorization for a new noncommercial educational station to operate on channel 214 at Sterling, Colorado. *See* Broadcasting for the Challenged, Inc. (File No. BPED-19980814MI) and Educational Communications of Colorado Springs, Inc. (File No. BPED-19980813MF). Because the Competing Applications were filed after the Petition for Reconsideration, CCU did not request any action with respect to the Competing Applications in its Petition for Reconsideration. However, in the Application for Review, CCU amends its request for relief to also request dismissal of the Competing Applications.

procedures were to attract all mutually exclusive applications in an efficient way and to identify the universe of potential competitors. The Commission has insisted on strictly enforcing cut-off rules to promote the even-handed treatment of all applicants. *See RKO General Inc. (WNAC-TV)*, 89 FCC 2d 297, 321 n. 96 (1982), *aff'd summarily sub nom. Atlantic Television Corp. v. FCC*, No. 82-1263 (D.C. Cir. Oct. 21, 1982). The Court has upheld this approach provided the Commission has given "explicit notice of all application requirements." S*alzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985). As a result, the Commission will not give effect to substantively or procedurally deficient cut-off notices. *See Sacramento Community Radio, Inc.*, 8 FCC Rcd 4067, 4068-69 (1993) (inadvertent listing of already cut-off application on "A" list did not create new opportunity for filing competing applications); *Florida Institute of Technology v. FCC*, 952 F.2d 549, 553 (D.C. Cir. 1992) (mistaken issuance of second "A" cut-off list by Commission did not establish new deadline for competing applications); S*alzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985) (overturning Commission dismissal of application as untimely where cut-off provision was ambiguous).

5. Analytically, "explicit notice" of an "A" list application under the former A/B cut-off procedures required, at a minimum, a description of the "lead" application sufficient to permit potential competitors to determine its preclusionary impact, a deadline for filing conflicting proposals, and the publication of the "A" cut-off notice in accordance with the Commission's rules. In this case, the listing of the file number of the *amended* application and the channel number of the *originally-filed* application clearly defeated the Commission's attempt to give "explicit notice" of the ECCS application to potential competitors. Therefore, the *First A Notice* was without legal effect and the staff properly issued the remedial *Second A Notice* listing both the proper file and channel numbers of the amended ECCS application. CCU's assertion that the *First A Notice* "advised" interested parties of the deadline for competing applications baldly ignores the *First A Notice's* failure to successfully identify any particular "lead" application, a failure which undermined the ability of any such party to determine whether its technical proposal would be a "competing application." CCU's silence as to which ECCS application was, in fact, listed on the *First A Notice* merely highlights the fundamentally ambiguous notice description.

6. CCU claims that well-settled precedent invalidating defective cut-off notices is not controlling because those cases stand only for the proposition that an erroneous *second* notice does not create additional rights for parties that rely on it. CCU argues that a different result is warranted where a party "relies" on a *first* notice. In the latter situation, CCU contends that "there is no basis for abrogating the rights CCU gained on account [of the *First A Notice*] merely because that list had been inaccurate." *Application for Review* at 3. We reject these contentions for several reasons. First, the application of our cut-off rules does not in any respect turn on applicant "reliance." To the contrary, cut-off rights are determined solely on the basis of objective technical criteria and filing deadlines. Secondly and contrary to CCU's view, the Court has drawn no distinction between erroneous "first" and "second" notices. For example, in *Way of Life Television Network, Inc.*, 593 F.2d 1356 (D.C. Cir. 1979) it struck down a cut-off notice that established the deadline for filing competing broadcast station proposals because the Commission had neglected to publish the cut-off notice as required by its rules at the time. The Court's decision, as is the case here, deprived timely-filed applicants of the putative cut-off rights established by the flawed initial cut-off notice.

7. CCU assumes without argument that should we conclude that the *First A Notice* was properly issued, it would have established the deadline for the filing of applications in conflict with the CCU proposal. This assumption is necessarily founded on a strained and selective parsing of the *First A Notice.* An application received cut-off protection under our former processing rules only if it was in conflict, directly or indirectly, with the lead application as of the "A" filing deadline. *See Kittyhawk Broadcasting Corp.*, 7 FCC 2d 153 (1967), *recon. denied*, 10 FCC 2d 160 (1967), *appeal dismissed sub*

nom. Cook, Inc. v. United States, 394 F.2d 84 (7th Cir. 1968). No other mutually exclusive applications to either ECCS application were filed by the *First A Notice* deadline. Thus, the CCU application would be entitled to cut-off protection only if CCU can establish that the *First A Notice* gave "explicit notice" of the originally filed ECCS application. We find that potential competitors could not have unambiguously concluded that the file number in the *First A Notice* was incorrect and that the Commission intended to establish cut-off rights for an application no longer before it at the time the *First A Notice* was released.

8. Accordingly, for the reasons set forth herein, IT IS ORDERED, that the Application for Review filed by Colorado Christian College IS DENIED. 47 C.F.R. § 1.115. IT IS FURTHER ORDERED that the request of Colorado Christian College to dismiss the competing applications of Broadcasting for the Challenged, Inc. (File No. BPED-19980814MI) and Educational Communications of Colorado Springs, Inc. (File No. BPED-19980813MF) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary