

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

In the Matter of Application of)
EDUCATIONAL TELEVISION ASSOCIATION)
OF METROPOLITAN CLEVELAND, INC.) File No. BPLIF-951020JJ
For a New Instructional Television Fixed Service)
Station on the A Group Channels at Copley, Ohio)

MEMORANDUM OPINION AND ORDER

Adopted: July 11, 2003

Released: July 15, 2003

By the Commission:

I. INTRODUCTION

1. We have before us an application for review filed by the Educational Television Association of Metropolitan Cleveland, Inc. (ETAMC) on May 18, 2000.1 The AFR contests the dismissal of an application filed by ETAMC on October 20, 19952 for authority to construct a new Instructional Television Fixed Service (ITFS) station on the A Group Channels at Copley, Ohio. For the reasons discussed below, we deny the AFR.

II. BACKGROUND

2. On October 20, 1995, ETAMC filed an application to construct a new ITFS station on the A Group Channels at Copley, Ohio. The Distribution Services Branch (Branch), Video Services Division (Division) of the former Mass Media Bureau dismissed the application on June 30, 1997 because the proposed facilities were predicted "to cause co-channel interference, as defined in Section 74.903(a) of the Commission's Rules, to the protected service area and/or the receive sites of the licensed facilities of Catholic Diocese of Youngstown, WHR-696, at Salem, OH; Boardman Local School District, WNC-297, at Youngstown, OH; and Champion Local School District, WNC-360, at Wick, OH."3 On August 8, 1997, ETAMC filed a Petition for Reconsideration and Reinstatement Nunc Pro Tunc (Petition).4 ETAMC supplemented the Petition on June 3, 1999 to notify the Commission that it was amending its application to provide copies of three "no-objection" letters from the licensees of Stations WHR696, WNC297, WNC360.5

1 Application for Review (May 18, 2000) (AFR).

2 FCC File No. BPLIF-951020JJ (Oct. 20, 1995) (application).

3 Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau, FCC to Applicant, Educational Television Association of Metropolitan Cleveland, Inc. (June 30, 1997) (Dismissal Letter).

4 Petition for Reconsideration and Reinstatement Nunc Pro Tunc (Aug. 8, 1997) (Petition).

5 Supplement to Petition for Reconsideration and Reinstatement Nunc Pro Tunc (June 3, 1999) (Supplement); see Letter from Catholic Diocese of Youngstown, Licensee of ITFS Station WHR696, Salem, Ohio, to Magalie R. (continued...)

3. On April 18, 2000, the Branch denied the Petition.⁶ The Branch noted that ETAMC, on reconsideration, did not dispute that the application failed to comply with Section 74.903 of the Commission's Rules with respect to ITFS Stations WHR696, WNC297, and WNC360 and that it was aware of this fact when it filed the application.⁷ The Branch explained that it is well established that "[t]he Commission is under no obligation to accept curative showings after an application has been dismissed or returned."⁸ The Branch also concluded that ETAMC failed to present any extenuating circumstances to warrant the reinstatement of the application.⁹ The Branch specifically noted that "ETAMC apparently knew at the time that it filed its application that consent letters would be required, yet it did nothing during the almost two years its application was pending to obtain the letters Moreover, ETAMC did not submit the consent letters with its petition for reconsideration, but waited almost another two years before filing the letters."¹⁰ The Branch therefore found that, "[t]o allow ETAMC to cure its application at this late date is not only inconsistent with our filing requirements and processing procedures, it would also unduly disrupt the staff's processing of other pending applications which fully comply with the Commission's requirements."¹¹ ETAMC filed the instant AFR on May 18, 2000.

III. DISCUSSION

4. ETAMC makes four arguments in its AFR. First, ETAMC argues that the dismissal of its application was inconsistent with the Branch's treatment of other ITFS applications for Copley, Ohio that were filed during the same filing window.¹² Second, ETAMC alleges that the dismissal of its application was allegedly inconsistent with a staff policy of allowing ITFS applicants to submit minor amendments.¹³ Third, ETAMC alleges that the dismissal of its application was inconsistent with Section 74.903(b)(4) of the Commission's Rules and the *Part 74 Report and Order* establishing the ITFS filing window requirements.¹⁴ Finally, ETAMC argues that the delay in submitting the consent letters caused no harm and that the public interest would be served by allowing ETAMC to initiate ITFS operations to benefit

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Salas, Secretary, FCC (dated May 26, 1999); Letter from Boardman Local School District, Licensee of ITFS Station WNC297, Youngstown, Ohio, to Magalie R. Salas, Secretary, FCC (undated); Letter from Champion Local School District, Licensee of ITFS Station WNC360, Wayne, Ohio, to William F. Caton, Acting Secretary, FCC (dated Aug. 8, 1997). We note that, of the three letters, one does not contain a date and another is dated August 8, 1997. ETAMC fails to explain in the Supplement or in the AFR why it did not submit the August 8, 1997 letter with or immediately following the filing of the Petition on August 8, 1997. Rather, it appears that ETAMC waited to submit the August 8, 1997 letter until it filed all three no-objection letters on June 3, 1999.

⁶ Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau, FCC, to Steve C. Shaffer, Esq, Schwartz, Woods & Miller (Apr. 18, 2000) (Denial Letter).

⁷ See Denial Letter at 1.

⁸ Denial Letter at 1 (*quoting* In the Matter of 62 Applications for Authority to Construct and Operate Multipoint Distribution Service Stations at 24 Transmitter Sites, *Memorandum Opinion and Order on Reconsideration*, 10 FCC Rcd 11178, 11210 (1995); *citing* In the Matter of Deleted Station WPHR(FM), Ashtabula, Ohio, *Memorandum Opinion and Order*, 11 FCC Rcd 8513, 8516 (1996)).

⁹ Denial Letter at 2.

¹⁰ *Id.*

¹¹ *Id.* (internal citation omitted).

¹² AFR at 2-3.

¹³ *Id.* at 3-4.

¹⁴ *Id.* at 5 (*citing* Amendment of Part 74 of the Commission's Rules with Regard to the Instructional Television Fixed Service, *Report and Order*, 10 FCC Rcd 2907 (1995) (*Part 74 Report and Order*)).

area students and to lease its excess capacity as part of a two-way digital system in the Cleveland-Akron area.¹⁵

5. We find that the staff acted properly in this matter. First, the AFR argues that dismissal of the application in this instance constitutes “unfair and discriminatory treatment” of ETAMC because four other similarly situated Copley applicants¹⁶ were granted conditional licenses without filing the consent letters required of ETAMC.¹⁷ We find that ETAMC failed to afford the Branch an opportunity to pass on this issue, as required pursuant to Section 1.115(c) of the Commission’s Rules.¹⁸ The applications referenced in the AFR were granted immediately prior and subsequent to the filing of ETAMC’s petition for reconsideration.¹⁹ We find that ETAMC had ample opportunity to raise this issue before the Branch, but did not. Indeed, nearly twenty-two months after the Petition was filed in this matter and twenty months after the last application referenced in the AFR was granted, ETAMC filed a supplement to the Petition without discussing this issue. Section 1.115(c) of the Commission’s Rules forecloses consideration of this issue at this stage in the proceeding.

6. Notwithstanding ETAMC’s failure to comply with Section 1.115(c) of the Commission’s Rules, we nevertheless find that ETAMC’s application was not treated in an unfair or discriminatory manner. Each of the four Copley Applications contained a “Statement Regarding Interference” identifying two stations that might be susceptible to interference.²⁰ One of the two stations identified in each Copley Application was co-located at Wick, Ohio with the same technical parameters.²¹ With regard to each Copley Application, the Commission’s staff has performed an independent engineering analysis and determined that, in each instance, terrain blockage precluded a finding that the proposed application would cause harmful electrical interference to the Wick Station in question. Therefore, the Copley Applications were incorrect in stating that consent letters were required from the Wick Stations. Similarly, with respect to Station WLX456, Salem, Ohio, the staff’s independent engineering analysis shows that Northeastern was not required to obtain consent from that licensee because of terrain blockage between Northeastern’s proposed transmitter site and Station WLX456. In addition, Akron, Copley-Fairlawn, and Revere each submitted, at the time that the application was filed, a consent letter from the other station identified in the “Statement Regarding Interference.” In comparison, ETAMC failed to

¹⁵ *Id.* at 6-7.

¹⁶ Northeastern Educational T.V. of Ohio, Inc., FCC File No. BPLIF-951020HG (Oct. 20, 1995); Akron City School District, FCC File No. BPLIF-951020EF (Oct. 20, 1995); Copley-Fairlawn City Schools, FCC File No. BPLIF-951020EL (Oct. 20, 1995); and Revere Local Schools, FCC File No. BPLIF-951020CU (Oct. 20, 1995) (collectively, the “Copley Applications”). We may hereinafter collectively refer to Northeastern Educational T.V. of Ohio, Inc (Northeastern), Akron City School District (Akron), Copley-Fairlawn City Schools (Copley-Fairlawn), and Revere Local Schools (Revere) as the “Copley Applicants.”

¹⁷ *See* AFR at 2. ETAMC contends that, even though all four Copley Applications stated that consent letters were required, they “all received grants without provision of those letters.” AFR at 2. ETAMC states that the only consents letters submitted by the Copley Applicants were those provided by ETAMC. AFR at 2.

¹⁸ 47 C.F.R. § 1.115(c).

¹⁹ *See* AFR at 2-3.

²⁰ FCC File No. BPLIF-951020HG, Exhibit 8; FCC File No. BPLIF-951020EF, Exhibit 8; FCC File No. BPLIF-951020EL, Exhibit 8; FCC File No. BPLIF-951020CU, Exhibit 8.

²¹ The four stations identified were Stations WNC375, WNC232, WNC387, and WNC315 (collectively, the “Wick Stations”).

timely submit consent letters for Stations WHR696 and WNC297.²² Because ETAMC failed to do so, the Branch was correct in distinguishing its application from the Copley Applications.

7. Second, we reject the argument that the dismissal of ETAMC's application was allegedly inconsistent with a staff policy of allowing such consent letters to be submitted after the application was filed. ETAMC does not provide any evidence or citation to precedent that such a staff policy existed.²³ Case precedent indicates that there has been a requirement that consent letters from affected parties be submitted with the original application.²⁴ Applications for new ITFS stations may be submitted only during a specific period or "window" announced by public notice.²⁵ Pursuant to Section 74.903 of the Commission's Rules,²⁶ an application for an ITFS station must protect previously proposed facilities from interference and will not be granted if interference is predicted to occur. Given that applications must be filed only during designated filing windows, it is vital that all necessary consent letters be submitted with the original application. Considering consent letters that did not exist at the time the original application was filed encourages the filing of incomplete applications and places an undue burden on the Commission's limited resources.²⁷

8. Even if we were to consider consent letters submitted after the application was filed, the Branch properly denied ETAMC's Petition because it did not submit its consent letters until almost two years after it filed its Petition. Any supplements to petitions for reconsideration filed more than thirty days after public notice of the action for which reconsideration is sought must be filed with a motion seeking leave to accept the supplement.²⁸ ETAMC did not file a motion for leave to supplement its Petition. The supplement that ETAMC filed therefore was clearly untimely and thus should not be subject to consideration at this time.²⁹

9. With regard to ETAMC's third argument, its reliance on Section 74.903(b)(4) of the Commission's Rules³⁰ and on the *Part 74 Report and Order* is misplaced.³¹ ETAMC fails to explain how language in either instance supports its argument that the Branch was obligated to accept the three no-objection letters submitted by ETAMC on June 3, 1999 to cure a defective application that had been filed on October 20, 1995 and dismissed on June 30, 1997.³² Section 74.903(b) lists the showings relating to

²² For the reasons noted above, it appears that both ETAMC and the Branch were incorrect when they stated that ETAMC was required to obtain a consent letter from the licensee of Station WNC360, Wick, Ohio.

²³ See Petition at 3.

²⁴ See, e.g., *Guadalupe Valley Electric Cooperative, Order on Reconsideration*, 11 FCC Rcd 7434, 7442-43 (1996); *In the Matter of 4,330 Applications for Authority to Construct and Operate Multipoint Distribution Service Stations at 62 Transmitter Sites, Memorandum Opinion and Order on Reconsideration*, 10 FCC Rcd 1335, 1465-66 (1994); *Family Entertainment Network, Inc., Order on Reconsideration*, 9 FCC Rcd 566, 567-68 n.10 (1994).

²⁵ See *Part 74 Report and Order*.

²⁶ 47 C.F.R. § 74.903.

²⁷ See *Albion Community Development Corporation, Order on Further Reconsideration*, DA 03-1191 (WTB PSPWD rel. Apr. 24, 2003).

²⁸ 47 C.F.R. § 1.106(f).

²⁹ See *TPS Utilicom, Inc., Order on Reconsideration*, DA 03-480 (WTB rel. Feb. 21, 2003) at n.24.

³⁰ 47 C.F.R. § 74.903(b)(4) (permitting ITFS applicants to submit, in lieu of interference studies, statements from affected co-channel or adjacent channel licensees that any resulting interference is acceptable).

³¹ See AFR at 4-5.

³² The AFR also contends that *Educational Media Foundation, Inc.*, 10 FCC Rcd 4433 (1995) (*Educational Media*) supports the acceptance of consent letters during the reconsideration stage. See AFR at 5. As a preliminary matter, we note that the licensee in *Educational Media* amended its application prior to dismissal and not during the

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interference that all applicants “must include . . . with the application.”³³ The *Part 74 Report and Order* discusses amendments of pending applications. In this case, ETAMC did not submit its consent letters until over two years after its application was dismissed. We therefore conclude that both authorities address actions that may be taken by an applicant while an application remains pending with the Commission, and do not support ETAMC’s argument.

10. The Branch correctly noted that the Commission is under no obligation to accept curative showings after an application has been dismissed or returned.³⁴ While ETAMC concedes that proposition is correct with respect to commercial services,³⁵ it contends that the Commission should permit ITFS applicants to cure defects in applications that have been dismissed by providing consent letters “during the time after filing of the Petition for Reconsideration but prior to action by the Division on that Petition.”³⁶ According to the AFR, such a distinction is warranted because of “the need of non-profit educational ITFS licensees for additional time to comply with rules that are necessary and sustainable for commercial services.”³⁷ To support its proposition, the AFR analogizes to the Commission’s 1985 decision to allegedly exclude ITFS from the “strict construction period” standard applicable to commercial broadcast stations.³⁸ We find that the AFR’s characterization of the *Broadcast Station Construction MO&O* is inaccurate. In the *Broadcast Station Construction MO&O*, the Commission actually adopted the same construction period of eighteen months for AM and FM radio and other broadcast and auxiliary stations, including ITFS.³⁹ The *Broadcast Station Construction MO&O* did not exempt ITFS applicants and licensees from complying with the Commission’s Rules.⁴⁰ In fact, the Commission advised all permittees to commence and complete station construction “expeditiously.”⁴¹ If stations were not timely constructed, the Commission reiterated that permittees will lose their authorizations and that “others more able to commence operations and provide expeditious service to the

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reconsideration stage of the proceeding. *Educational Media*, 10 FCC Rcd at 4433 ¶ 2. Rather, it was a party that had filed a petition to deny the application that sought reconsideration of the application grant. In addition, as noted by the Branch, *Educational Media* concerned specific Commission’s Rules applicable to the processing of applications in the noncommercial educational broadcast service. See Denial Letter at 2 n.1. We find that the Branch correctly found *Educational Media* inapplicable to the instant matter before the Commission.

³³ 47 C.F.R. § 74.903(b).

³⁴ Denial Letter at 1 (*citing* In the Matter of 62 Applications for Authority to Construct and Operate Multipoint Distribution Service Stations at 24 Transmitter Sites, *Memorandum Opinion and Order*, 10 FCC Rcd 11178, 11210 (1995)).

³⁵ See AFR at 3-4.

³⁶ *Id.* at 4.

³⁷ *Id.*

³⁸ See *id.* (*citing* Amendment of Section 73.3598 and Associated Rules Concerning the Construction of Broadcast Stations, *Memorandum Opinion and Order*, 102 FCC 2d 1054, 1055 n.4 (1985) (*Broadcast Station Construction MO&O*)).

³⁹ See *Broadcast Station Construction MO&O*, 102 FCC 2d at 1055 ¶ 2.

⁴⁰ For example, the *Broadcast Station Construction MO&O* did not absolve ITFS permittees from timely filing applications for extensions of time to construct their stations. Rather, if timely filed and otherwise sufficient, the ITFS application would not be denied or dismissed simply because the underlying basis for the extension does not fall within one of the three categories that comprise the “strict criteria” therein adopted by the Commission.

⁴¹ *Id.* at 1057 ¶ 4.

public will be given the opportunity [to do so]”⁴² We therefore find that the *Broadcast Station Construction MO&O* does not support the relief requested by ETAMC.

11. We also reject ETAMC’s fourth argument that grant is in the public interest because “the delay harmed no one except ETAMC.”⁴³ ETAMC was aware that its application was defective at the time of filing on October 20, 1995. ETAMC failed to amend its application for the nearly two years that it remained pending. After the application was dismissed on June 30, 1997, ETAMC failed to file curative amendments when it sought reconsideration on August 8, 1997. Thereafter, ETAMC failed to supplement the Petition within the permissible period of time.⁴⁴ ETAMC therefore effectively seeks a constructive and indefinite waiver of Section 1.106 of the Commission’s Rules⁴⁵ to allow ITFS applicants to supplement their petitions for reconsideration at any point prior to final Commission action. For example, in this instance, the Supplement was filed nearly twenty-two months after the thirty-day window for such filings closed. In addition, throughout this time, the public has failed to gain the benefit of additional ITFS programming in the Copley, Ohio area. The filing of incomplete applications constitutes an unnecessary burden on the Commission’s resources. We thus find that the public interest would not be served by encouraging ITFS applicants to take similar actions in the future.

IV. CONCLUSION AND ORDERING CLAUSE

12. ETAMC has failed to show that the dismissal of its application was inconsistent with the Commission’s Rules or with the public interest. We therefore deny its application for review.

13. Accordingly, IT IS ORDERED that pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), and Section 1.115 of the Commission’s Rules, 47 C.F.R. § 1.115, the Application for Review filed by the Educational Television Association of Metropolitan Cleveland, Inc. on May 18, 2000 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁴² *Id.*

⁴³ AFR at 6.

⁴⁴ 47 C.F.R. § 1.106(f).

⁴⁵ 47 C.F.R. § 1.106.