

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

In the Matter of
ROMAN CATHOLIC DIOCESE OF PORTLAND, MAINE
Application for Construction Permit for A New Noncommercial Educational FM Radio Station, Scarborough, Maine
NEW HAMPSHIRE PUBLIC RADIO, INC.
Application for Construction Permit for A New Noncommercial Educational FM Radio Station, Holderness, New Hampshire
UNIVERSITY OF MASSACHUSETTS
Application for Construction Permit for A New Noncommercial Educational FM Radio Station, Gloucester, Massachusetts
and
PLUS CHARITIES
Application for Construction Permit for A New Noncommercial Educational FM Radio Station, Coggon, Iowa

File No. BNPED-20071018ATK
Facility ID No. 170926

File No. BNPED-20071019ALH
Facility ID No. 174186

File No. BNPED-20071019AUQ
Facility ID No. 174558

File No. BNPED-20071022BMC
Facility ID No. 171762

MEMORANDUM OPINION AND ORDER

Adopted: December 10, 2014

Released: December 11, 2014

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we grant in part four Applications for Review of Media Bureau ("Bureau") decisions dismissing applications for new noncommercial educational ("NCE") FM radio stations. The four Applications for Review ("AFRs") were filed on April 30, 2009 ("Diocese AFR") by the Roman Catholic Diocese of Portland, Maine ("Diocese"); on July 13, 2009 ("NHPR AFR"), by New Hampshire Public Radio, Inc. ("NHPR"); on July 16, 2009 ("UOM AFR") by the University of Massachusetts ("UOM"); and on November 10, 2010 ("Plus AFR"), by Plus Charities ("Plus") (collectively, the "Applicants").¹ Diocese, NHPR, UOM, and Plus seek review of the Bureau's

¹ Also before us are the July 27, 2009, Opposition to the NHPR AFR filed by Wentworth Baptist Church, and NHPR's August 3, 2009, Reply to Opposition; the July 29, 2009, Opposition to the UOM AFR filed by Light of Life Ministries, Inc., and UOM's August 12, 2009, Reply; and the November 24, 2010, Opposition to the Plus AFR filed by New Bohemia Group, Inc., and Plus's December 1, 2010, Reply.

denial of their respective Petitions for Reconsideration of the dismissal of their applications for new NCE FM radio stations (collectively, the “Applications”).² In each case, the applicant specified incorrect coordinates in the Tech Box of its application, but also set forth, elsewhere in the Tech Box, a valid Antenna Structure Registration (“ASR”) number of an existing tower upon which the proposed facility is to be located.

2. For the reasons set forth below, we grant the AFRs in part and return the Applications to the Bureau for further processing. As discussed below, however, our decision is based solely on an apparent ambiguity in the state of the decisional law in this area. We further announce a clear policy with regard to inconsistencies in the specification of antenna sites for applicants in future radio station applications, under which staff will review an FCC Form 301, 318, or 340 application based solely on the site coordinates provided by the applicant in response to the specific application question calling for them, without reference to any other information submitted in the application.

II. BACKGROUND

3. Diocese, NHPR, UOM, and Plus filed the Applications, FCC Forms 340, during the 2007 NCE FM application filing window.³ Each of the Applications was dismissed because the applicant made a typographical error in the antenna location coordinates entered in Item 3 of Section VII – FM Engineering (the “Tech Box”) of its Application,⁴ and the specified facilities at those coordinates did not comply with our Rules.⁵ All four of the Applicants timely filed petitions for reconsideration, including proposed curative amendments correcting the coordinates. While some of the Applicants made additional arguments, each pointed out that it had, in Item 5 of the Tech Box in its application, provided the ASR number of the existing tower structure that the Applicant proposed to use, from which registration the Bureau could identify the correct site coordinates. The Bureau nevertheless denied the Petitions for Reconsideration, stating that the magnitude of the proposed coordinate corrections made the amendments impermissible major changes.⁶ Additionally, the Bureau stated in some cases that the Applicants failed to show good cause warranting reconsideration or acceptance of their amendments; that the staff is not responsible for resolving discrepancies in applications; and that each corrective amendment would create mutual exclusivity with another window-filed application.⁷

² See *Roman Catholic Diocese of Portland, Maine*, Letter (MB Mar. 31, 2009) (“*Diocese Decision*”); *New Hampshire Public Radio, Inc. and Wentworth Baptist Church*, Letter (MB June 12, 2009) (“*NHPR Decision*”); *University of Massachusetts and Light of Life Ministries, Inc.*, Letter (MB June 16, 2009) (“*UOM Decision*”); *Dennis J. Kelly, Esq. and Richard S. Myers, Esq.*, Letter, 24 FCC Rcd 2410 (MB 2009) (“*Plus Decision I*”); *Dennis J. Kelly, Esq. and Richard S. Myers, Esq.*, Letter, 25 FCC Rcd 14352 (MB 2010) (“*Plus Decision II*”).

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 6726 (MB), extended by *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 In the case of the Diocese, UOM, and NHPR applications, digits in parts of the antenna coordinates were entered in error. In the case of the Plus application, applicant Plus checked East Longitude instead of West Longitude, resulting in an antenna location in China instead of Iowa.

⁵ Diocese, UOM, and Plus specified coordinates that did not provide sufficient community coverage of their designated communities of license. 47 C.F.R. § 73.515. NHPR’s specified coordinates would have caused prohibited contour overlap with licensed station WLJH(FM), Glenn Falls, New York, as well as a previously filed modification application for WLJH(FM). 47 C.F.R. § 73.509.

⁶ 47 C.F.R. § 73.3573(a)(1).

⁷ See *Diocese Decision* at 1-2; *NHPR Decision* at 1-2; *UOM Decision* at 1-2; *Plus Decision I*, 24 FCC Rcd at 2412; *Plus Decision II*, 25 FCC Rcd at 14355.

III. DISCUSSION

4. We concur with the Bureau that, under ordinary circumstances, it is not the duty of the staff to resolve discrepancies caused by typographical or other applicant errors. In 1998, the Commission acted to eliminate the need for repeated staff amendment requests and attendant processing delays, necessitated by minor errors and discrepancies within applications, by consolidating most technical application information in the Tech Box (which is Section VII of FCC Form 340).⁸ As a result, and as pointed out by opponents of the AFRs as well as the Bureau, in the event of any discrepancies between the Tech Box and data submitted elsewhere in the Applications, the Tech Box controls.⁹ Thus, under this processing policy, had the staff been required to compare the antenna locations specified in the Applications' Tech Boxes to conflicting data set forth elsewhere in the Applications, or required an amendment to definitively resolve any discrepancy, dismissal would have been appropriate.¹⁰

5. However, the Applicants argue, as stated by Diocese, that “[i]t has been longstanding Commission policy that if an applicant has specified inconsistent data, but clearly proposes to locate its antenna on an existing tower to which specific reference is made in its application, the staff takes official notice of data specified in Commission records for the licensed facilities, and thus often can confidently and reliably resolve the inaccuracy or inconsistency in the data given for the proposed tower location or height.”¹¹ Applicants support this contention with citations to various Commission cases in which, while antenna location coordinates were incorrectly stated in applications, the applications contained references to registered towers from which the staff could have determined the correct coordinates.¹² While opponents argue that these cases antedate, and thus were overruled by, the *1998 Streamlining R&O*,¹³ nothing in that order expressly overrules or disapproves of that line of cases, nor does any subsequent Commission decision. On the other hand, given that the *1998 Streamlining R&O* was meant to relieve the staff of choosing among conflicting data in an application, it was not unreasonable for the staff in these cases to conclude that the 1998 order controlled. However, while the Commission in the *1998 Streamlining R&O* did state that data in the Tech Box would prevail over data in other parts of or

⁸ *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes*, Report and Order, 13 FCC Rcd 23056, 23081 (1998) (“*1998 Streamlining R&O*”), recon. granted in part, Memorandum Opinion and Order, 14 FCC Rcd 17525 (1999).

⁹ *Id.* See also, e.g., Opposition to [Plus] Application for Review, filed by New Bohemia Group, Inc., Nov. 24, 2010, at 4.

¹⁰ See, e.g., *R. Donnie Goodale*, Memorandum Opinion and Order, 7 FCC Rcd 1495, 1495-96 (1992) (“*Goodale*”).

¹¹ Diocese Petition for Reconsideration at 1-2 and n.2; Diocese AFR at 3-4 and n.4. See also NHPR AFR at 5-9; UOM AFR at 6-12; Plus AFR at 7-11.

¹² See, e.g., *David T. Murray*, Memorandum Opinion and Order, 5 FCC Rcd 5770, 5770-71 (1990); *Lehigh Valley Community Broadcasters Board of Directors*, Hearing Designation Order, 8 FCC Rcd 1643, 1645 (MMB 1993) (citing *Goodale*). See also *Steven B. Courts*, Memorandum Opinion and Order, 4 FCC Rcd 4764, 4766 (1989) (denying rehearing and noting that the Bureau consistently dismissed applicants whose proposals contained conflicting geographic coordinates for the location of an antenna which was not proposed to be side mounted on an existing tower); *Goodale*, 7 FCC Rcd at 1495-96 (denying reconsideration in part because applicant did not specify antenna location on a licensed tower); *JEM Broadcasting Co., Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 4324, 4326 (1992), recon. denied, 8 FCC Rcd 77 (1992), *aff'd*, *JEM Broadcasting Co., Inc. v. F.C.C.*, 22 F.3d 320 (D.C. Cir. 1994) (“[T]he Commission does not resolve a conflict in coordinates by referencing information beyond the face of the application, with the sole exception of applicants proposing to mount on existing licensed towers.”). We note that these cases enunciated this principle under the Commission’s former, more stringent, “hard look” processing standards set forth in *Amendment of Sections 73.3572 and 73.3573 Relating to Processing of FM and TV Broadcast Applications*, Report and Order, MM Docket No. 84-750, 50 Fed. Reg. 19936, 19945-46 (May 13, 1985), recon. denied, Memorandum Opinion and Order, 50 Fed. Reg. 43157 (Oct. 24, 1985), *aff'd sub nom. Hilding v. FCC*, 835 F.2d 1435 (9th Cir. 1987).

¹³ See, e.g., Opposition of Wentworth Baptist Church to NHPR AFR at 4.

attachments to an application, it did not address the situation before us, namely, that in which the discrepancy occurs among conflicting data that are contained within the Tech Box.

6. The law on this point, then, is ambiguous as to whether the Applicants could have expected the staff to resolve a discrepancy between antenna location coordinates, which did not conform to our Rules, set forth in their Tech Boxes, and other information within the Tech Boxes from which the staff could ascertain a rule-compliant site. Given that the Applicants provided valid ASR numbers for their proposed antenna structures, that those structures matched the technical exhibits attached to the Applications, and that the specified erroneous coordinates in all cases were quite distant from the proposed communities of license, we find that the staff could have confidently and reliably resolved the inconsistent data, and that given the unsettled state of the law in this area should not have dismissed the Applications.¹⁴ We therefore grant the AFRs to the extent that we direct the Bureau to reinstate the Applications and return them to pending status. To the extent that the Applicants, in particular NHPR and Plus, argue in their AFRs that their Applications are superior to other window-filed applications,¹⁵ or that there are defects in the applications filed by tentative selectees,¹⁶ we dismiss the AFRs without prejudice to refile, once the staff has evaluated the reinstated Applications. We remand the Applications to the Bureau for processing consistent with our procedures for evaluating NCE applications.¹⁷

7. Although we find that the state of the law, at the time the Applications were filed, did not support dismissal of those Applications, we believe that for future AM and FM filings a clear policy with regard to antenna site coordinates is needed. The antenna location coordinates represent perhaps the most crucial technical datum in an application, as it determines the proposed facility's compliance with general technical rules such as channel spacing and community coverage. In an NCE application in particular, the antenna location coordinates take on increased importance, because the threshold fair distribution determination hinges on accurate calculation of the proposed station's contour, as do the points awarded for local diversity of ownership and technical parameters.¹⁸ We are also mindful of the fact that the Commission, in the *1998 Streamlining R&O*, intended that staff resources not be consumed by attempts to divine applicants' intentions or requests for numerous curative amendments.¹⁹ Finally, while in the cases before us the misstated coordinates were the result of honest errors,²⁰ we do not wish to open the door to potential mischief by future applicants. For example, an NCE applicant might specify one rule-compliant antenna site in its Tech Box and, elsewhere in the same Tech Box, list the ASR number for a structure at another rule-compliant site some distance from the specified coordinates. After the NCE filing window closes and competing applications have been filed, the applicant could ask the staff to consider only the antenna location that confers the greater competitive advantage. We do not believe it is in public interest to permit any such gamesmanship during our infrequent NCE filing windows.²¹

¹⁴ *Salzer v. FCC*, 778 F.2d 869, 875-76 (D.C. Cir. 1985).

¹⁵ See NHPR AFR at 11-12.

¹⁶ See Plus AFR at 11-15.

¹⁷ 47 C.F.R. §§ 73.3573, 73.7000 *et seq.*

¹⁸ See *id.* §§ 73.7002, 73.7003(b)(2), (b)(4).

¹⁹ *1998 Streamlining R&O*, 13 FCC Red at 23081.

²⁰ However, not all applicants making the same honest error would have been as fortunate as the Applicants. Any applicants making the same error who did not or who were not able to specify the ASR number of a registered tower could not avail themselves of the precedents cited by Applicants.

²¹ Cf. *Community Religious Broadcasting, Inc. v. Harry F. Cole, Esq.*, Letter, 23 FCC Red 15363, 15365 (MB 2008) (Bureau held that to allow late amendment of NCE FM application would undermine the integrity of the window filing process: "Specifically, because the comparative information of all of the applicants filing during the NCE filing window was publicly available at the time CRB submitted its amendment, CRB had a considerable advantage and could have potentially manipulated its comparative showing to prevail over other mutually exclusive

(continued....)

8. Accordingly, given the above-noted importance of this datum, we will require henceforth, for radio station applications, that the antenna location coordinates specified in Item 3 of the FCC Form 340 Tech Box, in Item 2 of the FCC Form 318 Tech Box, and in the Tech Boxes of FCC Form 301,²² or their equivalents in future form revisions, be set forth accurately. We further direct that the staff may make any technical and legal evaluations of, and take any actions regarding, such applications based upon the stated antenna location coordinates specified in the Tech Box, without resort to any other data in the Tech Box or elsewhere in the application or attachments. Such staff actions may include, but are not limited to, dismissal of such defective applications and refusal to accept amendments where such amendments would conflict with accurate and rule-compliant window-filed applications. While this standard will require that future applicants exercise a somewhat greater degree of care when preparing their applications, we are confident that this requirement will not be unduly burdensome, considering that fewer than a dozen of the over 3,000 applications filed during the 2007 NCE window suffered from this deficiency.²³ To the extent that our application processing policy as clarified herein conflicts with that followed in previous cases, we hereby overrule that precedent.

IV. CONCLUSION / ORDERING CLAUSES

9. Therefore, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended,²⁴ and Section 1.115(g) of the Commission's Rules,²⁵ the Applications for Review filed by the Roman Catholic Diocese of Portland, Maine, New Hampshire Public Radio, Inc., the University of Massachusetts, and Plus Charities, ARE GRANTED to the extent set forth herein, and ARE DISMISSED WITHOUT PREJUDICE in all other respects. IT IS FURTHER ORDERED that the Applications filed by the Roman Catholic Diocese of Portland, Maine, File No. BNPED-20071018ATK; by New Hampshire Public Radio, Inc., File No. BNPED-20071019ALH; by the University of Massachusetts, File No. BNPED-20071019AUQ; and by Plus Charities, File No. BNPED-20071022BMC, ARE REINSTATED AND RETURNED TO PENDING STATUS, and that the Media Bureau shall process the aforementioned Applications in accordance with the procedures set forth in Sections 73.3573 and 73.7000, *et seq.*, of the Rules.²⁶

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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applications. Further, allowing CRB to gain this advantage by violating a filing deadline could encourage applicants in future cases to take similar liberties.”).

²² See FCC Form 301, Section III, Item 4b (AM daytime coordinates), Item 5b (AM nighttime coordinates), and Item 6b (AM critical hours coordinates); and Section III-B, Item 3 (FM antenna location coordinates) and Item 4 (FM proposed allotment or assignment coordinates);

²³ We note that each relevant application form requires both that the applicant certify that the information in the application is “true, complete and accurate” and that the preparer of the engineering Tech Box portion certify that the information provided is “accurate and true.” See Form 301, Sections II and III; Form 318, Sections V and VI; and Form 340, Sections V and VI.

²⁴ 47 U.S.C. § 155(c)(5).

²⁵ 47 C.F.R. § 1.115(g).

²⁶ *Id.*, §§ 73.3573, 73.7000 *et seq.*