

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

In the Matter of)	
)	
SMILE FM)	File No. BNPED-20071019AMN
)	Facility ID No. 175918
Application for a Construction Permit)	
For a New Noncommercial Educational)	
FM Station at Yates, Michigan)	

MEMORANDUM OPINION AND ORDER

Adopted: June 12, 2014

Released: June 13, 2014

By the Commission:

1. The Commission has before it an Application for Review (“AFR”) filed by Smile FM on June 15, 2011. Smile FM challenges the dismissal of its application for a new noncommercial educational FM station at Yates, Michigan (“Application”).

2. Smile FM filed the Application during a filing window opened by the Commission in October 2007. On May 22, 2008, the Media Bureau (“Bureau”) dismissed the Application as unacceptable for filing.¹ The Bureau explained that its engineering study revealed that the directional antenna proposed by Smile FM violated Sections 73.510(a) and (b) of the Commission’s Rules (“Rules”)² and that the proposed facility violated the 1991 United States-Canada FM Broadcast Agreement (“USA-Canada Agreement”).

3. Smile FM challenged the Bureau’s decision in a Petition for Reconsideration (“June Petition”).³ It concurrently sought to amend the Application to eliminate the engineering defects identified by the Bureau. The Bureau granted the June Petition, finding the amendment modified the proposed facility’s directional antenna pattern to comply with Section 73.510 of the Rules and the USA-Canada Agreement.⁴ The Bureau went on to dismiss the application, though, finding that the community Smile FM proposed to serve could not be defined and thus that the Application failed to satisfy the community coverage requirements set forth in Section 73.515 of the Rules.⁵

4. Smile FM challenged this decision in a second Petition for Reconsideration (“September Petition”).⁶ It argued that the Bureau’s determination that Yates was not a licensable community was “arbitrary and capricious” and that the Bureau should have given it the opportunity to demonstrate that Yates met the Commission’s definition of a licensable community. Smile FM acknowledged that Yates

¹ Letter from James D. Bradshaw, Deputy Chief, Audio Division, Media Bureau, to Smile FM (dated May 22, 2008).

² 47 C.F.R. §§ 73.510(a), (b).

³ Smile FM, Petition for Reconsideration (rec’d June 30, 2008).

⁴ Letter from Rodolfo F. Bonacci, Assistant Chief, Audio Division, Media Bureau, to Smile FM (dated Aug. 7, 2008).

⁵ 47 C.F.R. § 73.515.

⁶ Smile FM, Petition for Reconsideration (rec’d Sept. 11, 2008).

was an unincorporated community but offered evidence that it claimed demonstrated that Yates nonetheless was a licensable community. Smile FM also indicated that it “will be amending this reconsideration shortly” with additional evidence.⁷ In a Supplement filed a little over two years later, Smile FM submitted this evidence.⁸

5. On May 11, 2011, the Bureau dismissed the Supplement without consideration, finding it was filed more than two years after the filing deadline for petitions for reconsideration and any supplements thereto and noting that Smile FM did not file a motion seeking leave to file its Supplement after this deadline.⁹ The Bureau considered the evidence submitted and arguments made in the September Petition and concluded Smile FM had not demonstrated that Yates was a licensable community. Accordingly, the Bureau denied the September Petition.

6. Smile FM now seeks Commission review of the Bureau’s decisions. It argues for the first time that the Bureau improperly dismissed the Application as originally filed.¹⁰ We dismiss this portion of the AFR as procedurally defective. Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(c) of the Rules bar applications for review that rely “on questions of fact or law upon which the [designated authority issuing the decision] has been afforded no opportunity to pass.”¹¹

7. Smile FM also asserts that the Bureau should have considered the evidence and arguments contained in the Supplement. It specifically focuses on the fact that the Bureau found it did not request leave to file the Supplement and argues that it actually did so in a footnote to the Supplement itself.¹² Section 1.106(f), however, specifically states: “No supplement or addition to a petition for reconsideration ... filed after expiration of the 30 day period [for filing such a petition], will be considered except upon leave granted upon a *separate pleading* for leave to file, which shall state the grounds therefor.”¹³ The Supplement was unaccompanied by a separate pleading seeking leave to file or making such a showing. Moreover, Smile FM made no attempt to show that it could not have timely filed

⁷ *Id.* at 2.

⁸ Smile FM, Supplement to Petition for Reconsideration (rec’d Sept. 20, 2010). Smile FM did not state any grounds for its failure to timely file the Supplement. Instead, it asserted in a footnote that the filing “corrects and supplements original filing based on information that has become available since that time” and “[t]o the extent necessary,” asked the Commission to accept the Supplement. *Id.* at 1 n.1.

⁹ *Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau, to Edward Czelada, Smile FM* (dated May 11, 2011) (“2011 Letter Decision”).

¹⁰ AFR at 2-5. We note that, in its June Petition, Smile FM stated that “[d]iscussions with the staff have revealed that some of the issues raised in the letter were incorrect.” June Petition at 1. It went on to state that Smile FM “disagree[d] with the staff assertion that [the] 20 dB ratio is only valid if all domestic assignments can be treated as omni[directional].” *Id.* at 1 n. 1. However, despite this assertion, Smile FM merely “reserve[d] the right to challenge this assertion if the need arises.” *Id.* Smile FM did not actually present the issue to the Bureau for decision in the June Petition, much less give the Bureau the opportunity to pass on it.

¹¹ See 47 U.S.C. § 155(c)(5); 47 C.F.R. § 1.115(c). Likewise, we dismiss Smile FM’s argument that Yates is analogous to another community that the Bureau determined was licensable in an unpublished decision. AFR at 7, citing *Letter from James D. Bradshaw, Deputy Chief, Audio Division, Media Bureau, to Great Lakes Radio, Inc.* (dated Oct. 08, 2008) (“*Great Lakes*”). Setting aside the fact that *Great Lakes* is an unpublished Bureau decision and therefore not binding upon the Commission, we find that the Bureau did not have the opportunity to consider this assertion either.

¹² AFR at 6.

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

the material that it submitted with its Supplement.¹⁴ Accordingly, we affirm the Bureau's dismissal of the Supplement without consideration.

8. Finally, Smile FM claims that the Bureau erred in dismissing the Application as amended. Smile claims that failure to specify a licensable community constitutes a "grantability defect" not an "acceptance defect" and thus that the Bureau should have sent a deficiency letter to it and allowed it time to submit information demonstrating Yates was a licensable community.¹⁵ Assuming for sake of argument that the Bureau erred, we find such error to have been harmless.¹⁶ The Bureau ultimately did consider all of the evidence that Smile FM timely submitted on this issue and concluded that Smile FM had not demonstrated that Yates was a licensable community. Upon review of the evidence submitted with the September Petition, we conclude that Smile FM has failed to demonstrate that the Bureau erred in concluding that Yates is not a licensable community. The Bureau properly decided this issue, and we uphold its finding for the reasons stated in its decision.

9. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended,¹⁷ and Sections 1.115 (c) and (g) of the Commission's rules,¹⁸ the Application for Review IS DISMISSED for the reasons stated above and IS otherwise DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁴ See 2011 Letter Decision at n. 17, citing *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). Indeed, in its rather untimely Supplement, Smile FM stated: "If we obtain additional information we will amend our reconsideration to further demonstrate the establishment of a community." Supplement at 5. This reflects a fundamental misunderstanding of the Commission's procedural rules.

¹⁵ AFR at 4-5.

¹⁶ To the extent that Smile FM asserts that this alleged error did result in harm because it caused the Bureau to decline to consider the evidence included in the Supplement, AFR at 6, we find no merit to this argument. As a separate and independent basis for our decision, we have reviewed this evidence and do not find that its consideration would have altered the finding that Yates is not a licensable community. Specifically, the evidence, including maps and a list of businesses and other locations that Smile FM attributes to Yates, reveals that part of the area that Smile FM claims is Yates lies within the incorporated City of Rochester Hills. See *Penacook, New Hampshire*, Report and Order, 2 FCC Rcd 459, 460 ¶ 6 (MMB 1987) (proposed community found not to be licensable as it was an unincorporated area not listed in the Census and evidence demonstrated that the area was, in fact, a mere neighborhood which traversed the incorporated boundaries of two adjacent cities).

¹⁷ 47 U.S.C. § 155(c)(5).

¹⁸ 47 C.F.R. § 1.115(c), (g).