

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

In the Matter of
Larlen Communications, Inc.
Application for New Noncommercial Educational
FM Station, Weare, Michigan
File No. BNPED-20071022AQG
Facility ID No. 175718

MEMORANDUM OPINION AND ORDER

Adopted: July 16, 2015

Released: July 16, 2015

By the Commission:

1. The Commission has before it a July 25, 2011, Application for Review ("AFR") filed by Larlen Communications, Inc. ("Larlen"). Larlen seeks review of a June 23, 2011, Media Bureau ("Bureau") decision which denied Larlen's second petition for reconsideration and dismissed an amendment to the captioned application for a construction permit for a new noncommercial educational ("NCE") FM Station on Channel 220 (91.9 MHz) at Weare, Michigan ("Application") due to a prohibited contour overlap.

2. On review, Larlen does not dispute that its application proposes a prohibited contour overlap. Rather, Larlen reiterates its arguments that due to the minimal nature of the prohibited overlap and the imprecision that can occur when extracting and calculating distances from the FCC propagation curves, consistent with prior staff practices, it should have been afforded a further opportunity to submit a further corrective amendment.

3. Upon review of the AFR and the entire record, we conclude that the Bureau properly decided the matters considered in the Second Reconsideration Decision and we uphold the Bureau's findings for the reasons stated therein. We find unpersuasive Larlen's arguments that it should be permitted to file a third corrective amendment to the Application.

1 Letter to Mrs. Helen Harp, (MB Jun. 23, 2011) ("Second Reconsideration Decision").

2 See AFR, at 3-5.

3 See Id., at 8.

4 See Id., at 6-7. See also Letter to Mrs. Helen Harp.

5 See Public Notice, 49 Fed. Reg. at 47332 (applicants are expected "to completely review all portions of a returned or dismissed application. Thereafter, if the same application is returned or dismissed a second time, it will not be afforded nunc pro tunc reconsideration rights.") See also Comparative Consideration of 32 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations filed in the October 2007 Filing Window, Memorandum Opinion and Order, 25 FCC Red 5015, 5022 (2010) ("The staff's rejection of an additional attempt to correct acceptance defects was fully consistent with the Commission's

(continued....)

would not only conflict with long-standing Commission policy, but would also undermine the Commission's goals of expeditiously processing applications.⁶

4. Finally, Larlen also raises new arguments and submits new engineering data and analysis in the AFR that it did not submit in any of its earlier pleadings.⁷ Accordingly, we dismiss these portions of the AFR as procedurally barred.⁸

5. Accordingly, IT IS ORDERED that: (1) the July 25, 2011, Application for Review filed by Larlen Communications, Inc. IS DISMISSED, pursuant to 47 C.F.R. § 1.115(c), to the extent that it relies on evidence or questions of fact or law not previously presented to the Bureau; and (2) the Application for Review otherwise IS DENIED, pursuant to section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and section 1.115(g) of the Commission's rules, 47 C.F.R. § 1.115(g).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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longstanding policy placing ultimate responsibility on the applicant to perfect its application and disallowing a piecemeal approach to correcting patently defective applications.”).

⁶ See, e.g., *Canyon Area Residents for the Environment*, Memorandum Opinion and Order, 14 FCC Rcd 8152, 8154 (1999) (“We cannot allow a party to sit back and hope that a decision will be in its favor and, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.”) (quoting *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941)).

⁷ On review, Larlen improperly raises for the first time the following new arguments and attachments supplying new engineering information. First, Larlen contends that the Application as originally filed “was improperly dismissed, because none of the technical reasons [cited in the staff's February 25, 2008, dismissal letter] for its dismissal were valid.” AFR at 3. Next, Larlen asserts that the AFA Petition should have been dismissed as prematurely filed, because at the time of the AFA Petition's filing, Larlen's application was not a singleton, but rather was mutually exclusive with another applicant and had not been chosen as a tentative selectee. *Id.* at 4. Additionally, Larlen submits as an attachment to the AFR, engineering data demonstrating its calculations of “the 110-190 radials for the proposed facility and the matching 331.15 to 321.38 degree radials for WMCQ, in approximately 1-degree increments.” *Id.* at 6. Larlen also submits as an attachment to the AFR a staff letter concerning another station “to demonstrate past staff practices . . . in which the staff engineer afforded the applicant a 30-day corrective period for 0.96 km of overlap with another contour-protected facility.” *Id.* at 5. Larlen does not provide any explanation as to why it did not raise these arguments or submit the engineering supplements previously to the Bureau. In particular with regard to the claim that the Application was improperly dismissed, Larlen has not shown that it raised this argument until the application for review stage. Rather, Larlen submitted a post-dismissal March 26, 2008, amendment attempting to cure these specific defects. This attempt to cure its defective Application undercuts its claim that the dismissal of its Application was improper.

⁸ See 47 U.S.C. § 155(c)(5); 47 C.F.R. § 1.115(c). 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.”