

FEDERAL COMMUNICATIONS COMMISSION

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APR 10 2008

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Board of Regents of the University of Wisconsin System
1730 Van Hise Hall
1200 Linden Drive
Madison, WI 53706

Re: NEW(FM); Ashland, WI
Facility ID No. 176548
Board of Regents of the University of
Wisconsin System
BNPED-20071019AIX

Dear Applicant:

This letter refers to the above-captioned application filed by the Board of Regents of the University of Wisconsin Systems ("UWS") for a new non-commercial educational ("NCE") FM facility to serve Ashland, WI.

An engineering review of the application reveals that the application fails to comply with Section 73.525¹ of the Commission's Rules (the "Rules") with respect to Channel 6 TV station, KBJR(TV), Superior, WI. To address this issue, UWS has obtained an agreement with KBJR(TV). UWS states that the application will not begin operations with the proposed facilities until KBJR(TV) ceases Channel 6 transmissions. We nevertheless conclude that neither Sections 73.525² nor established precedent provides a basis for the acceptance of such a contingent arrangement as sufficient to satisfy Channel 6 protection requirements.³ Accordingly, we will dismiss the referenced application.

A waiver of the Commission's contingent application rule also would be necessary to grant the UWS application. The proposed facility cannot become operational unless KBJR(TV) implements certain changes in its technical operations based on certain future events. With the exception of certain narrowly defined filings, the Commission's rules prohibit generally the filing of contingent applications.⁴ Such proposals can frustrate the introduction of new and improved services. Processing such applications also can result in the expenditure of limited staff resources on proposals that may never be implemented. UWS has neither sought nor demonstrated that it has cleared the high hurdle for the required waiver.⁵ We conclude that a waiver in the instant circumstances would be contrary to the public interest.

¹ 47 C.F.R. § 73.525.

² *Id.*

³ See Family Life Educational Foundation, Letter, DA 08-626 (MB, rel. March 21, 2008).

⁴ 47 C.F.R. § 73.3517.

⁵ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1158 (D.C. Cir. 1969), *aff'd* 459 F.2d 1103 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972).

In this case, UWS has sought, albeit prematurely, to take advantage of the expected termination of KBJR(TV) analog Channel 6 operations in order to file an application in the October 2007 NCE FM window. Accepting this application – or any application that relies on a similar contingent arrangement with a potentially impacted Channel 6 station – could foreclose filing opportunities of other potential applicants and licensees that desire to file new station and modification applications based on the forthcoming vacation of analog Channel 6 allotments but have deferred such filings based on the recognition that it is not presently possible to file rule-compliant proposals. Accordingly, we find that acceptance of the UWS application in these circumstances would be fundamentally unfair to those applicants that have filed applications that complied with Section 73.525⁶ and to those potential applicants that deferred their filings as a result of Channel 6 protection requirement issues. The public interest is better served by dismissing the UWS application.

In light of the foregoing, Application BNPED-20071019AIX is unacceptable for filing and is **HEREBY DISMISSED** pursuant to Section 73.3566(a)⁷ of the Rules. This action is taken pursuant to Section 0.283⁸ of the Rules.

Sincerely,

A handwritten signature in blue ink, appearing to read "Rodolfo F. Bonacci".

Rodolfo F. Bonacci
Assistant Chief
Audio Division
Media Bureau

cc: Dow, Lohnes & Albertson, PLLC
Doug Vernier Telecommunications Consultants

⁶ For example, acceptance of an NCE new station application filed in the October 2007 window that includes a contingent agreement with a Channel 6 station could unfairly skew the “fair distribution” analysis to the detriment of mutually exclusive applications that filed rule-compliant proposals.

⁷ 47 C.F.R. § 73.3566(a).

⁸ *Id.* at § 0.283.