



PUBLIC NOTICE

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NCE FM NEW STATION AND MAJOR CHANGE APPLICATIONS DISMISSED FOR FAILURE TO TIMELY FILE

By this *Public Notice*, the Media Bureau (“Bureau”) announces the dismissal of the pending noncommercial educational (“NCE”) reserved band¹ FM new station and major modification applications listed in Attachment A (“Applications”). Each of the listed applicants (“Petitioners”) failed to timely file a complete FCC Form 340 application or failed to electronically amend its pending application by the close of the October 2007 NCE filing window. Petitioners instead submitted new and major change applications on paper after the close of the filing window, along with petitions for waiver of the Bureau’s filing deadline.

On April 4, 2007, the Bureau released a *Public Notice* announcing a filing window for applications for NCE FM new station and major modification construction permits.² The *Announcement Notice* specified an October 19, 2007, deadline for electronically filing a complete FCC Form 340 application. Following an outage of the Bureau’s electronic filing system, the Consolidated Database System (“CDBS”), for a period of six and one-half hours on October 19, 2007, the Bureau promptly extended the filing window until October 22, 2007 at 2 p.m. EDT.³

Petitioners claim that they continued to experience technical problems with CDBS during the extended window, including slow performance and, according to many Petitioners, an outage lasting

¹ Channels 201-220 are reserved for noncommercial educational FM broadcasting. See 47 C.F.R. § 73.501.

² 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 2007) (“*Announcement Notice*”).

³ *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). Contrary to one Petitioner’s claim that the Bureau had no authority to impose a deadline other than 11:59 p.m. (See *Petition for Extraordinary Relief and for Leave to File Applications*, filed by Concordia Ministries, Inc., Picayune, Mississippi (Nov. 21, 2007)), the Bureau has delegated authority to establish and limit the dates and times of the relevant filing window as it sees fit. See, e.g., *Auction of FM Broadcast Construction Permits Scheduled for November 1, 2005*, Public Notice, 20 FCC Rcd 10492, 10504 (MB/WTB 2005) (closing the filing window at 6:00 p.m. ET).

approximately two hours in the early morning of October 22, 2007.⁴ Petitioners request that the Commission waive the filing deadline and accept their late-filed applications *nunc pro tunc*.⁵

The Commission may waive its rules for good cause.⁶ A waiver is appropriate if (1) special circumstances warrant a deviation from the general rule, and (2) such deviation would better serve the public interest than would strict adherence to the rule.⁷ Generally, a waiver is warranted in a particular case only if the relief requested would not undermine the policy objective of the rule in question, and would otherwise serve the public interest.⁸ For the reasons described below, we find that Petitioners have failed to demonstrate that good cause exists to waive the filing deadline.

Petitioners fail to provide any compelling explanation for their failure to timely file or amend their Applications. Petitioners' attempts to place the entire blame for their late filings on CDBS are unavailing. In the *Announcement Notice* and the *NCE Window Public Notice*, the Bureau explicitly warned Petitioners several times that late-filed new station applications would be returned without further consideration.⁹ Moreover, the Bureau specifically cautioned applicants to file early in the window to ensure proper submission¹⁰ and afforded applicants considerable time to prepare and submit their applications. Specifically, the Bureau announced the October filing window six months in advance, and applicants were free to initiate and complete applications during this six-month period.¹¹ Petitioners are ultimately responsible for taking precautions to ensure that their applications are complete and timely submitted, and they must bear the consequences of their actions.¹²

⁴ See, e.g., Petition for Waiver and Acceptance of Application, filed by Mountaintop Ministries, Inc., Midvale, Idaho at 1-2 (Oct. 31, 2007) ("*Mountaintop Ministries Petition*") (citing "chronic under-performance" of CDBS and a total outage from approximately 1:00 a.m. to 3 a.m. on October 22); Petition for Leave to File, filed by St. Francis University, Loretto, Pennsylvania at 2 (Oct. 25, 2007) (citing "erratic functionality" of CDBS in the final ten minutes of the extended filing window and an outage from approximately 1:45 a.m. to 4 a.m. on October 22).

⁵ Alternatively, some Petitioners requested that the Commission open an additional two-hour filing window to replace the time lost due to CDBS's alleged malfunctioning during the window extension.

⁶ 47 C.F.R. § 1.3. See also *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) ("*WAIT Radio*"); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1166 (D.C. Cir. 1990) ("*Northeast Cellular*").

⁷ See *Northeast Cellular*, 897 F.2d at 1166.

⁸ *WAIT Radio*, 418 F.2d at 1157.

⁹ See *Media Bureau Announces NCE FM New Station and Major Change Filing Procedures for October 12 – October 19, 2007 Window*, Public Notice, 22 FCC Rcd 15050, 15053-54 ("*NCE Window Public Notice*"). *Announcement Notice*, 22 FCC Rcd at 6726. See also *Dr. James J. McCluskey*, Letter, 23 FCC Rcd 867, 868-69 (2008) (rejecting applicant's claim that the *NCE Window Public Notice* was unclear).

¹⁰ See *NCE Window Public Notice*, 22 FCC Rcd at 15054 ("Applicants are encouraged to access the system and prepare their applications and amendments at their earliest convenience.... Applicants are also encouraged to submit their applications early during the window to ensure proper submission.").

¹¹ In these circumstances, applicants must bear the risks of filing procrastination. For example, Bishop Wilfret Johnson Ministries International, Inc. ("BWJM") complains that its attempt to file an application for a new station at Poite A La Hoche, Louisiana, "was thwarted by the chronic underperformance and occasional non-performance of the Commission's online application filing mechanism." Petition for Waiver and Acceptance of Application at 1. However, an October 23, 2007, email from BWJM's counsel discloses that he did not see application information sent by BWJM on the afternoon of October 22, 2007, until after the close of the window because the information was routed to a spam folder and counsel "was much occupied with other applications." Email from Donald Martin to Bishop Johnson, Oct. 23, 2007 at 7:16 p.m.

¹² See, e.g., *Request for Waiver by Center City Schools*, Order, 17 FCC Rcd 22424 (2003) ("[I]t is the applicant who has responsibility ultimately for the timely submission of the application."). Catholic Radio Association ("CRA")

We find that a waiver based on alleged applicant filing difficulties is unwarranted. Although CDBS became temporarily unavailable in the early morning of October 19, the Bureau promptly extended the filing window until October 22, 2007, at 2 p.m., *i.e.*, for a period substantially longer than the outage itself, to avoid any hardship. Notwithstanding Petitioners' claims of degraded CDBS performance shortly before the close of the extended filing window, more than 830 applications were successfully filed during the last seven hours of the window. We conclude that the Bureau's extension of the window amply compensated all applicants for any time lost due to technical problems during the filing period.¹³

Finally, several Petitioners assert that waiver of the filing deadline is appropriate in this case because strict adherence to the deadline would be contrary to the public interest and because the underlying purpose of the deadline has already been met.¹⁴ We disagree. Filing deadlines provide significant benefits to the public as a whole, and particularly to the vast majority of timely applicants. Strict enforcement of filing deadlines promotes consistency, predictability, and treats fairly all parties that are similarly situated. The Commission has repeatedly stated that strict adherence to filing deadlines is required to permit the Commission to begin processing a defined group of applications at a specific time without the specter of facing numerous waiver requests.¹⁵

Moreover, the Commission has repeatedly disallowed the late submission of requested information in comparative cases, finding that such an allowance would "inevitably lead to abuse of the Commission's processes, applicant gamesmanship, and unfair advantage."¹⁶ Similarly, we find that

argues that CDBS malfunctions disproportionately harm those applicants that have entrusted the preparation and submission of their applications to a third party, like CRA, which is charged with filing hundreds of applications. *See* Petition for Leave and Waiver Request, filed by CRA on behalf of fifteen of its members (Nov. 2, 2007). However, whether an applicant files an application on its own or accepts assistance from a third party, the applicant itself must ultimately bear the consequences of a late-filed application.

¹³ *See Educational Media Foundation*, Letter, 23 FCC Rcd 15366 (2008) (rejecting applicant's argument that the October 22, 2007, NCE FM window deadline should be waived due to CDBS's technical malfunctions during the extension). Many Petitioners cite the Commission's previous decision in *Roamer One* in support of their waiver requests. *See Roamer One, Inc.*, Order, 17 FCC Rcd 3287 (2002) ("*Roamer One*"). In that case, the Commission granted waivers of a filing window because "the Commission appear[ed] to be at least partially responsible for technical difficulties associated with the filing of applications...." *Roamer One*, 17 FCC Rcd at 3291. Here, in contrast, the Bureau amply corrected for any technical difficulties by extending the filing window two and one-half days.

¹⁴ Specifically, many Petitioners assert that, if granted a construction permit, they would provide first and/or second NCE service to their communities and that denial of their waiver requests would deprive NCE service to numerous communities for years. *See, e.g., Mountaintop Ministries Petition* at 5-6.

¹⁵ *See Roamer One*, 17 FCC Rcd at 3290 n.22, quoting *First Auction of Interactive Video and Data Service (IVDS) Licenses*, Memorandum Opinion and Order, 11 FCC Rcd 1134 (1996) ("[t]his strict standard is necessary to ensure that applicants are treated fairly and equally ..."). *See also Roamer One*, 17 FCC Rcd at 3290 n.22, quoting *Mary R. Kurpis and WLOS TV, Inc.*, Memorandum Opinion and Order, 5 FCC Rcd 5142, 5142 (1990) ("Although we understand that difficulties are sometimes encountered by parties trying to meet those deadlines, a strict policy as to the official close of business avoids confusion, establishes consistency and treats fairly all parties that are similarly situated."). *Accord Pathfinder Communications Corp.*, Memorandum Opinion and Order, 3 FCC Rcd 4146, 4146 (1988) ("The importance of enforcing the Commission's rules governing filing periods and procedures cannot be overstated.... [f]ailure to enforce the rules with respect to timeliness poses a grave danger of the staff being overwhelmed by a seemingly never-ending flow of pleadings."), quoting *Pathfinder Communications Corp.*, Memorandum Opinion and Order, Mimeo No. 7157 (1985).

¹⁶ *Silver Springs Communications*, Memorandum Opinion and Order, 3 FCC Rcd 5049, 5050 (1988), *rev. denied*, 4 FCC Rcd 4917 (1989) (concluding that the rejection of an untimely filed notice of appearance in a comparative case

accepting late-filed applications would be prejudicial to NCE applicants that properly adhered to the deadline, and would undermine the integrity of the window filing process.¹⁷ Allowing late-filed applications in this case could induce applicants in future filing windows to gain an unfair advantage by submitting applications after the deadline.

Accordingly, for the foregoing reasons, the Bureau hereby denies Petitioners' requests for waiver of the October 22, 2007, filing deadline and dismisses the Applications.¹⁸

For additional information, contact James Bradshaw or Rudy Bonacci (engineering), Irene Bleiweiss, Amy Van de Kerckhove, or Peter H. Doyle (legal) of the Audio Division at (202) 418-2700.

This Public Notice contains the following Attachment:

Attachment A: NCE FM New Station and Major Change Applications Dismissed for Failure to Timely File

By: Chief, Audio Division, Media Bureau

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is necessary in order to maintain the integrity of the Commission's processes and to ensure that an applicant's gamesmanship does not result in an unfair advantage). *See also Comparative Consideration of 76 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 22 FCC Rcd 6101 (2007) (finding that the consideration of late-filed point supplements could potentially prejudice the comparative positions of mutually exclusive applicants that timely filed supplements); *LRB Broadcasting*, Memorandum Opinion and Order, 8 FCC Rcd 3076 (1993) (finding that allowing the late filing of a post-designation notice in a comparative hearing would provide an unfair advantage over applicants that timely filed).

¹⁷ *See Community Religious Broadcasting, Inc.*, Letter, 23 FCC Rcd 15363 (2008) (finding that waiving the October 22, 2007, NCE FM filing deadline would give applicant an unfair advantage *vis a vis* applicants that filed on time).

¹⁸ 47 C.F.R. § 73.3568(a)(1).

Attachment A

NCE FM Window October 2007

Applications Dismissed for Failure to Timely File or Amend

APPLICANT	FACILITY ID	CITY	STATE
Alaska Educational Radio System	173250	Girdwood	AK
American Educational Broadcasting, Inc.	177333	Jericho	VT
Arcade Christian Broadcasting Corporation	176435	Stillwater	OK
Ardmore Community Health and Education Org., Inc.	176078	Arcade	NY
Ardmore Community Health and Education Org., Inc.	176276	Ardmore	OK
Baker Valley Unified School Dist.	177468	Baker	CA
Bedford Columbian Home Ass'n	173361	Shoals	IN
Better Life Television, Inc.	173596	Selma	OR
Bishop Wilfret Johnson Ministries Int'l, Inc.	174973	Pointe A La Hache	LA
Bonnors Ferry Seventh-Day Adventist Church	174779	Bonnors Ferry	ID
Chehalis Valley Educational Foundation	177503	Chehalis	WA
Colleges of the Seneca*	175275	Macedon	NY
Community Wireless of Park City, Inc.	175156	Cedar City	UT
Community Wireless of Park City, Inc.	175155	Coalville	UT
Community Wireless of Park City, Inc.	175161	Moab	UT
Community Wireless of Park City, Inc.	174182	Nephi	UT
Community Wireless of Park City, Inc.	Not listed	Price	UT
Community Wireless of Park City, Inc.	175157	Richfield	UT
Concordia Ministries, Inc.	176789	Picayune	MS
Corning Christian Radio Corporation	174461	Corning	NY
Cross to Crown Int'l, Inc.	175690	Dayton	TN
Divina Misericordia	171738	Del Rio	TX
Educational Media Foundation*	94220	Gallup	NM
First Pentecostal Church of God in Christ	177404	Battle Creek	MI
Haw River Seventh-Day Adventist Church	174664	Burlington	NC
Howell Mountain Broadcasting Co.	175818	Napa	CA
I Work for God	174542	California	MD
Indiana Ass'n of Seventh-Day Adventists	176340	Bloomington	IN
Indiana Ass'n of Seventh-Day Adventists	176434	Greensburg	IN
Inspirational Media, Inc.	174776	Allardt	TN
La Vida Missions, Inc.	176225	White Rock	NM
Lean on Me Foundation	177456	St. Thomas	VI
Lisa Sansone	Not listed	Norfolk	VA
Manhattan Catholic Schools	176888	Manhattan	KS
Marquette Columbus Home Corp.	172345	Marquette	MI
Mater Angelica	173852	Westhampton	NY
Mountaintop Ministries, Inc.	176101	Midvale	ID
Orosi Seventh-Day Adventist Church	175180	London	CA
Rolla Columbian Home Ass'n, Inc.	172332	St. James	MO
Roswell Seventh-Day Adventists	174464	Roswell	NM
Sacred Heart JR/SR High School	171777	Salina	KS
St. Clare Productions	171898	Cuero	TX
St. Francis University	173849	Loretto	PA

St. John Evangelist Roman Catholic Parish	176817	McAlester	OK
St. Joseph Educational Radio Ass'n	174555	Stevensville	MT
St. Lawrence Roman Catholic Church	172373	Brookston	IN
St. Michael Radio, Inc.	177433	Conrad	MT
St. Michael Radio, Inc.	177437	Ft. Benton	MT
St. Michael Radio, Inc.	177486	Vaughn	MT
St. Stephen's Charitable Fund*	173969	Hot Springs	AR
St. Thomas Educational Society	171897	Huntsville	TX
Temple University of the Commonwealth System of Higher Education	177350	Reading	PA
The College of Charleston	Not listed	Charleston	SC
Totally Jesus Network, Inc.	175729	Gold Beach	OR
Tuba City High School Board, Inc.	Not listed	Tuba City	AZ
Upper Columbia Media Ass'n	175474	Dover	ID
Walla Walla University	175273	Wasco	OR
WGTS/Columbia Union College Broadcasting, Inc.	175044	Chincoteague	VA

* Seeking to file a major-change amendment