

COPY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FILED/ACCEPTED

JUL 27 2009

Federal Communications Commission
Office of the Secretary

In re Applications of)	
)	
NEW HAMPSHIRE PUBLIC RADIO,)	FCC File No. BNPED-20071019ALH
INCORPORATED)	
NEW(FM); Holderness NH)	Facility ID #174186
Channel 214, 90.7 MHz)	
)	
and)	
)	
WENTWORTH BAPTIST CHURCH)	FCC File No. BNPED-20071017ADV
NEW(FM); Plymouth NH)	Facility ID #175347
Channel 214, 90.7 MHz)	
)	
For Construction Permit)	

To: The Secretary, for delivery to the Commission

OPPOSITION TO APPLICATION FOR REVIEW

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AUDIO SERVICES DIVISION

1. Wentworth Baptist Church ("WBC"), by its counsel and pursuant to Section 1.115(d) of the Commission's rules, hereby opposes the Application for Review filed by New Hampshire Public Radio, Incorporated ("NHPR"), on July 13, 2009, seeking reversal of the June 12, 2009, staff action undertaken pursuant to delegated authority regarding the above-captioned applications. *Letter from Rodolfo F. Bonacci, Associate Chief, Audio Division, to New Hampshire Public Radio, Incorporated, and to Wentworth Baptist Church, June 12, 2009* (hereinafter, the "*Letter Decision*").¹ As demonstrated herein, NHPR's request for Commission review should be denied.

¹ See also Public Notice, *Broadcast Applications*, Report No. 27008, at 47 (rel. June 17, 2009); Public Notice, *Broadcast Applications*, Report No. 47008, at 13 (rel. June 17, 2009).

2. In its Letter Decision, the Media Bureau (the “Bureau”) correctly: (1) denied NHPR’s petition for reconsideration of the dismissal of the above-captioned NHPR application for a new noncommercial FM station (the “Holderness Application”); (2) denied NHPR’s “Petition to Return to Processing Line as Inadvertently Accepted for Filing” filed against WBC’s above-captioned application for a new noncommercial FM station (the “Plymouth Application”); and (3) granted the Plymouth Application.

3. As NHPR acknowledged, the Holderness Application as originally filed was defective. In violation of 47 C.F.R. § 73.509, the facilities specified the application’s Tech Box failed to protect the licensed facilities of Station WLJH, Glens Falls, New York. Accordingly, the Holderness Application was properly dismissed as patently defective pursuant to 47 C.F.R. § 73.3566 and in accordance with Commission precedent.² NHPR’s reconsideration request for reinstatement and leave to amend the Holderness application was thereafter properly dismissed as contrary to the terms of the Commission’s August 2, 1984 *Public Notice*, in that the proposed corrections to the Holderness Application would, under Section 73.7573(a)(1) of the Commission’s Rules, constitute a major, rather than minor, change in the facilities specified.³ Moreover, the proposed corrective amendment would bring the Holderness Application in direct conflict with the Plymouth Application, and thus is *prima facie* unacceptable for filing and processing.⁴ Well-established Commission policy militates against “permit[ting] a perfecting

² *Letter Decision*, at 2 (citing *Plus Charities*, 24 FCC Rcd 2410 (Chief, Audio Div. 2009).

³ *Letter Decision*, at 2 (citing *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, Public Notice, FCC 84-366, 56 RR 2d 776 (1984) and *Plus Charities*, *supra*).

⁴ *Letter Decision*, at 2 (citing *Window Opened to Expedite Grant of New NCE FM Station Construction Permits; Bureau Will Accept Settlements and Technical Amendments*, Public Notice, 22 FCC Rcd 19438 (2007) (hereinafter the “*Settlement Public Notice*”)).

amendment that creates a conflict with an application filed prior to such amendment [because it] harms the public interest in expedition of service and processing certainty that the window processing system seeks to accomplish.” *Processing of FM and TV Broadcast Applications*, Report and Order, FCC 85-125, 58 RR 2d 776, ¶ 31 (1985). Indeed, the Commission explicitly stated in its November 8, 2007, Public Notice announcing the settlement window that no “amendments which create any new application conflicts” would be accepted.⁵ Thus the Bureau was correct in refusing to permit a curative amendment and reinstatement of the amended Holderness Application.

4. NHPR argues that the Bureau staff was obliged to review, ascertain and resolve the Holderness Application discrepancy. But as underscored in the Letter Decision, the onus is on the applicant to ensure the *entire* application, including the Tech Box, is without error before it is filed; it is not the role of the staff to proofread applications or attempt to divine an applicant’s intent in order to resolve defects. The institution of the “Tech Box” on applications more than a decade ago was intended to consolidate critical engineering information in order to achieve greater efficiencies and promote faster processing of applications.⁶ In adopting this policy in 1998, the Commission was explicit: “[i]n the event of any discrepancies between data in the Tech Box and data submitted elsewhere in an application, the data in the Tech Box will be used.”⁷

⁵ *Settlement Public Notice*, 22 FCC Rcd at 19441.

⁶ *1998 Biennial Regulatory Review, Streamlining of Mass Media Applications, Rules, and Processes*, Report and Order, 13 FCC Rcd 23056, 23081 (1998) (hereinafter “*1998 Streamlining Order*”), *recon. granted in part by*, Memorandum Opinion and Order, 14 FCC Rcd 17525 (1999).

⁷ *Id.* (internal quotations omitted).

5. Applicants thus have been on notice that they are responsible for detecting and correcting potentially fatal errors in their application Tech Boxes before submitting such applications; the Bureau staff was not obliged to do anything but follow established procedure, as it did here. NHPR seeks to have the Commission return to the inefficient ways of the past and cites cases including *David T. Murray*, 5 FCC Rcd 5770 (1990), and *R. Donnie Goodale*, 7 FCC Rcd 1495 (1990), in support. As NHPR is well aware, these cases pre-date the *1998 Streamlining Order* and are no longer good law. Moreover, NHPR misinterprets, in the co-location and ASR examples it cites, the *1998 Streamlining Order's* instructions regarding the use of information beyond the Tech Box in application processing. In the past, the Commission staff was overburdened with the task of synthesizing disparate engineering information throughout the application in order to arrive at the applicant's intent. While the *1998 Streamlining Order* confirmed that the staff will utilize its own resources to corroborate the information supplied by the applicant in the Tech Box,⁸ it explicitly provides that the Tech Box is the definitive determinate of the applicant's intent. NHPR's claim of 20 years of supportive precedent ignores the policy change adopted in the *1998 Streamlining Order* and confirmed in subsequent precedent, which the Bureau correctly followed.

6. Finally, NHPR's argument invoking WBC's recent curative minor amendment to the Plymouth Application is also inapposite. Unlike the proposed Holderness amendment, the Plymouth coordinate correction amendment was a minor amendment pursuant to Section 73.7573(a)(1) of the Rules, and thus compliant with the Commission's policies on minor curative

⁸ See, e.g., *1998 Streamlining Order*, at 23082 (noting that the staff will continue to utilize information from its own engineering databases in conjunction with tech box information to evaluate applications proposing co-location).

application amendments.⁹ Whether the staff alerted WBC to the defect is irrelevant; the staff certainly did not resolve the deficiency on its own motion, as NHPR demands they should have done with regard to its Holderness Application. Regardless, NHPR fails to comprehend that notification from the staff of the defect in its application would not have saved it; the Holderness coordinate error rendered the application patently unacceptable and thus unable to be “cured”.

7. NHPR has not demonstrated any legitimate legal or policy basis for a reversal of the Decision. The Bureau acted in the public interest and in accordance with Commission legal and policy precedent, thus its actions should be affirmed.

8. WHEREFORE, in light of the foregoing, the NHPR Application for Review should be DENIED.

Respectfully submitted,

WENTWORTH BAPTIST CHURCH

By: 

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July 27, 2009

⁹ *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, Public Notice, FCC 84-366, 56 RR 2d 776 (1984).

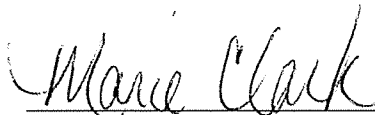
CERTIFICATE OF SERVICE

I, Marie Clark, a secretary with the law firm of Fletcher, Heald & Hildreth, P.L.C., hereby certify that on July 27, 2009, I caused a copy of the foregoing "Opposition to Application for Review" to be served via U.S. mail, postage prepaid, or by hand delivery (denoted by *) upon the following persons:

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