



Federal Communications Commission
Washington, D.C. 20554

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In Reply Refer to:
1800B3-RFB

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Northland Community Broadcasters [Monroe]
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In re: **WSDP(FM), Plymouth, Michigan**
Facility ID No. 52840
File No. BPED-20150610ABL

WSMF(FM), Monroe, Michigan
Facility ID No. 89277
File No. BPED-20150512AAM

WSMF(FM), Monroe, Michigan
Facility ID No. 89277
File No. BPED-20150610ABN

Petition for Reconsideration

Dear Counsel:

We have before us a Petition for Reconsideration (Plymouth Petition) filed by Plymouth-Canton Community Schools (Plymouth) on August 21, 2015. The Plymouth Petition seeks reconsideration of the July 17, 2015, grant of the above-referenced modification application for noncommercial educational (NCE) Station WSMF(FM), Monroe, Michigan (WSMF), filed on May 12, 2015, by Northland Community Broadcasters (Northland).¹ The Plymouth Petition also seeks reconsideration of the Bureau's July 17, 2015, dismissals of two other modification applications: (1) one filed on June 10, 2015, by Plymouth for NCE Station WSDP(FM), Plymouth, Michigan (WSPD) (June 10 Plymouth Application);² and (2) one filed on June 10, 2015, by Northland for WSMF (June 10 Northland Application).³

On December 16, 2005, Northland filed a modification application to change WSMF's antenna height, location, effective radiated power, and directional antenna (2005 Northland Application).⁴ The 2005

¹ File No. BPED-20150512AAM (May 12 Northland Application).

² See FCC File No. BPED-20150610ABL; *Letter from Rodolfo F. Bonacci to Plymouth Canton Community Schools*, Letter Order, Ref. No. 1800B3-TB (July 17, 2015) (Plymouth Dismissal Letter).

³ FCC File No. BPED-20150610ABN; *Broadcast Actions*, Public Notice, Report No. 48536 (July 22, 2015).

⁴ FCC File No. BPED-20051216ACF. Northland had filed an earlier modification application for the same transmitter site, which was dismissed on March 14, 2005. FCC File No. BPED-20041001AWT; *Letter from Rodolfo F. Bonacci to Northland Community Broadcasters*, Letter Order, Ref. No. 1800B3-KT (Mar. 14, 2005), *recon. denied* November 21, 2005.

Northland Application was granted on March 1, 2006.⁵ Northland did not build the requested facilities, and the construction permit expired on March 1, 2009. On March 2, 2009, Northland filed another modification application specifying the same facilities (2009 Northland Application).⁶ The same day, March 2, 2009, Plymouth filed a mutually exclusive application seeking to modify the facilities of WSDP (2009 Plymouth Application).⁷ The 2009 Northland Application was dismissed by letter decision on April 7, 2009, for technical issues arising from faulty directional antenna pattern data.⁸ On May 11, 2009, Northland amended the 2009 Northland Application and filed a petition for reconsideration of its dismissal. On April 16, 2010, the Bureau granted Northland's petition for reconsideration and reinstated the 2009 Northland Application *nunc pro tunc* as of March 2, 2009, so it remained mutually exclusive with the 2009 Plymouth Application. Eventually, the two applicants resolved their mutual exclusivity and both 2009 Applications were granted on February 13, 2012, with an expiration date of February 13, 2015.⁹

On January 15, 2015, Plymouth filed a license to cover the 2009 Plymouth Application, certifying that it had constructed in accordance with its underlying construction permit.¹⁰ Northland, however, failed to construct, so, on February 13, 2015, its construction permit expired. On May 12, 2015, Northland filed the May 12 Northland Application, again seeking to modify the WSMF facilities. Plymouth did not file a mutually exclusive modification application, nor did it otherwise oppose the May 12 Northland Application. On June 9, 2015, Bureau staff dismissed the May 12 Northland Application due to technical issues stemming from another directional antenna pattern data entry error.¹¹ On June 10, 2015, Northland filed the June 10 Northland Application. The same day, June 10, 2015, Plymouth filed the mutually exclusive June 10 Plymouth Application, seeking to further modify the WSDP facilities by increasing power and antenna height and proposing a directional antenna.¹² On June 30, 2014, it filed a petition for reconsideration (Northland Petition) of the June 9 dismissal of the May 12 Northland Application. On July 17, 2015, the Bureau granted the Northland Petition, granted the May 12 Northland Application, and dismissed both the June 10 Northland Application and June 10 Plymouth Application.

Plymouth contends that Northland "abandoned" the May 12 Northland Application when it filed the June 10 Northland Application, and should therefore not have been allowed to file the Northland Petition.¹³ Plymouth suggests that Northland filed the Northland Petition solely for the purpose of avoiding a comparative public interest analysis and that such "gamesmanship is an abuse of the Commission's process and should not be tolerated."¹⁴ Therefore, Plymouth argues, the June 10 Northland Application and June 10 Plymouth Application should be reinstated and considered together as mutually exclusive applications. According to Plymouth, the applicable procedure for resolving this mutual exclusivity would be a public interest analysis, focusing primarily on Northland's "warehousing" of spectrum.¹⁵

⁵ See *Broadcast Actions*, Public Notice, Report No. 46185 (Mar. 6, 2006).

⁶ FCC File No. BPED-20090302AAN.

⁷ FCC File No. BPED-20090302ADO.

⁸ *Letter from Rodolfo F. Bonacci to Northland Community Broadcasters*, Letter Order, Ref. No. 1800B3-TB (April 7, 2009).

⁹ See *Broadcast Actions*, Public Notice, Report No. 47676 (Feb. 16, 2012).

¹⁰ FCC File No. BLED-20150115AAU. The license application was granted on February 2, 2015. See *Broadcast Actions*, Public Notice, Report No. 48420 (Feb. 5, 2015).

¹¹ *Letter from Rodolfo F. Bonacci to Northland Community Broadcasters*, Letter Order, Ref. No. 1800B3-TB (June 9, 2015) (June 9 Dismissal Letter).

¹² June 10 Plymouth Application, Exh. 18.

¹³ Plymouth Petition at 3.

¹⁴ *Id.*

¹⁵ *Id.* at 4.

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order or raises additional facts not known or existing at the time of the petitioner's last opportunity to present such matters.¹⁶ Plymouth has failed to meet this burden.¹⁷

At issue here is the Commission's longstanding policy of favorably considering petitions for reconsideration of an initial dismissal or return of an application when the applicant submits "a relatively minor curative amendment" within 30 days.¹⁸ In such cases, the dismissed application is reinstated *nunc pro tunc*; that is, as of the date it was originally filed. This policy provides a "reasonable accommodation" to applicants; however, it inevitably subjects competing applicants to the original filing (cut-off) date of the reinstated application.¹⁹

Plymouth argues that this policy should not apply where the applicant has "abandoned" the dismissed application by filing a subsequent conflicting application.²⁰ We disagree. Under the Commission's rules, while an application is "pending and undecided," applicants are prohibited from filing a subsequent "inconsistent or conflicting" application.²¹ In this case, however, the May 12 Northland Application was dismissed before the filing of the June 10 Northland Application, so the May 12 Northland Application was no longer "pending and undecided." Likewise, the June 10 Northland Application was dismissed simultaneously with reinstatement of the May 12 Northland Application, so the two did not impermissibly conflict. Moreover, Northland complied with the above policy regarding minor curative amendments and with Section 1.106(b)(1) of the Rules, which provides that any party to the proceeding may file a petition requesting reconsideration of the action taken within 30 days.²² We find no basis in the Rules or case law to disallow an otherwise routine petition for reconsideration and curative amendment merely because in the interim between dismissal and reconsideration the same applicant filed for, and then voluntarily dismissed, a similar application.

Regarding Plymouth's contention that we should reconsider our grant of the May 12 Northland Application because it represents an attempt to warehouse spectrum, we note that our first-come, first-served processing system addresses this issue by preserving a single day window in which competing applications may be filed after a construction permit has expired even when the prior permittee opts to file a replacement modification application.²³ In this case, Plymouth could have filed a competing mutually

¹⁶ See 47 CFR § 1.106(c), (d); *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964).

¹⁷ Because Plymouth did not file an informal objection to the May 12 Northland Application or June 10 Northland Application and offers no "good reason" for its failure to do so, it does not have standing to petition for reconsideration of the grant of those applications. See 47 CFR § 1.106(b)(1). However, Plymouth has standing under Section 1.106(b)(1) of the Rules to petition for reconsideration of the Bureau's July 17, 2015, dismissal of the June 10 Plymouth Application. *Id.* On that basis, we will consider its arguments herein.

¹⁸ See *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, Public Notice, 49 Fed. Reg. 47331, 47332 (Dec. 3, 1984) (*Defective Applications Public Notice*); *Hampton Roads Educational Telecommunications Association*, Memorandum Opinion and Order, 30 FCC Rcd 14906, 14908 (2015).

¹⁹ *Defective Applications Public Notice*, 49 Fed. Reg. at 47332; see also, e.g., *Gary Smithwick, Esq.*, Letter Order, 28 FCC Rcd 15494, 15497 (MB 2013).

²⁰ Petition at 4.

²¹ 47 CFR § 73.3518.

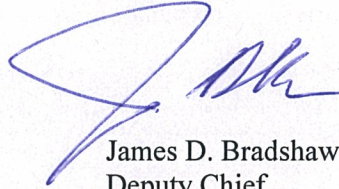
²² 47 CFR § 1.106(b)(1).

²³ *Board of Trustees of Eastern Mennonite University*, Letter Order, 29 FCC Rcd 5925, 5928 (MB 2014) (*Harrisonburg*).

exclusive application on May 12, 2015, but did not do so.²⁴ We note that Plymouth *did* follow this procedure in 2009 when it filed a mutually exclusive application against the 2005 Northland Application, which resulted in the two applicants being required to use “engineering solutions and good faith negotiation” to resolve their mutual exclusivity.²⁵ Northland’s failure to file a similar competing application on May 12, 2015, does not justify the Commission’s departure from its well established rules and procedures in this case.

Conclusion/Actions. For the reasons stated above, IT IS ORDERED that the petition for reconsideration filed by Plymouth-Canton Community Schools (Plymouth) on August 21, 2015 IS DISMISSED to the extent indicated in note 17, *supra*, and otherwise DENIED.

Sincerely,

A handwritten signature in blue ink, appearing to read 'J. Bradshaw', is written over a large, stylized blue 'X' mark.

James D. Bradshaw
Deputy Chief
Audio Division
Media Bureau

²⁴ Furthermore, we note that Plymouth could have filed a first-come, first-served application from February 14, 2015, the day after the 2009 Northland Application expired, until May 11, 2015, the day before Northland filed the May 12 Northland Application, and not compete with Northland, but did not do so.

²⁵ See, e.g., *Harrisburg*, 29 FCC Rcd at 5928.