



**Federal Communications Commission
Washington, D.C. 20554**

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DA 17-927
In Reply Refer To:
1800B3-ATS
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**In re: Big River Public Broadcasting
Corporation**
KIYU-FM, Galena, AK
Facility ID No. 178861
File No. BPED-20160229AAC

Petition for Reconsideration

Dear Counsel:

We have before us the Petition for Reconsideration (Petition) filed by Big River Public Broadcasting Corporation (Big River) on April 28, 2017, seeking reinstatement of its application (Application) to modify the facilities of noncommercial educational (NCE) FM Station KIYU-FM, Galena, Alaska (Station). For the reasons set forth below, we deny the Petition.

Background. KIYU-FM is a Class D NCE station licensed to operate at 10 watts on Channel 201.¹ The Application proposed to upgrade the facilities of the Station to Class C3 and operate at 1,000 watts.² On March 31, 2017, the Media Bureau (Bureau) dismissed the Application because it proposed a major change to the licensed facilities of the Station outside of a filing window in violation of Section 73.3573(e)(2) of the FCC's Rules (Rules).³

In the Petition, Big River argues that the Bureau erred in dismissing the Application because it failed to consider that Section 73.512(c) of Rules provides that Class D stations in Alaska may file major change applications at any time, and thus the restrictions of Section 73.3573(e)(2) are not applicable to those stations.⁴ Big River also cites instances where the Bureau has accepted and granted Big River's applications for new Class D stations and a major change application for an existing Class D station, all of

¹ File No. BLED-20160216ABO. Channels 201-220 are reserved for noncommercial educational FM broadcasting. See 47 CFR § 73.501.

² Application at Section VII, Questions 1 and 10.

³ *Big River Public Broad. Corp.*, Letter Order, Ref. 1800B3 (MB Mar. 31, 2017) (*Staff Letter*) (citing 47 CFR § 73.3573(e)(2) ("The FCC will specify by Public Notice a period for filing reserved channel FM applications for a new station or for major modifications in the facilities of an authorized station. FM reserved channel applications for new facilities or for major modifications will be accepted only during the appropriate filing period or "window." Applications submitted prior to the window opening date identified in the Public Notice will be returned as premature. Applications submitted after the specified deadline will be dismissed with prejudice as untimely.")).

⁴ Petition at 2 (citing 47 CFR § 73.512(c) ("Except in Alaska, no new Class D applications nor major change applications by existing Class D stations are acceptable for filing except by existing Class D stations seeking to change frequency. Upon the grant of such application, the station shall become a Class D (secondary) station.")).

which were filed outside of an NCE filing window.⁵ Thus, Big River argues that its Application to upgrade the facilities of the Station is subject to the same Alaskan Class D exception and should be reinstated.

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 new facts or changed circumstances not known or existing at the time of the petitioner's last opportunity to present such matters.⁶

In 1978, the Commission initiated a rulemaking to revise the rules governing noncommercial education FM stations.⁷ In response to comments showing that Class D stations were impeding development of new full-service facilities, the Commission determined it would no longer authorize new Class D stations and adopted restrictions on modifying existing Class D stations, which were codified as Section 73.512.⁸ However, the Commission determined that these restrictions would not apply to stations located in Alaska.⁹ The Commission's narrowly tailored exception for Alaskan Class D stations reflects its finding that "10-watt operations can be accommodated [in Alaska] without great harm. In fact, they seem well designed to serve the small and often isolated settlements of that State."¹⁰ The Commission further noted, however, that "if facts change as to spectrum crowding in Alaska, we can take such additional steps as later prove to be needed."¹¹

We reject Big River's interpretation of Section 73.512(c). Nothing in the *NCE Second R&O* indicates that the Commission intended for the narrow exception outlined in Section 73.512(c) to be used as a means to circumvent the Section 73.3573(e)(2) requirement that applications for new primary NCE stations be submitted only during filing windows, which is what Big River proposes. This exception is based precisely on the Commission's reasoning that "10-watt operations can be accommodated" in Alaska without impeding the development of full-service NCE stations. Allowing Big River's proposed 1,000 watt operation would eviscerate this limited exception and could lead to the spectrum crowding the Commission warned would warrant future action. Additionally, the text of Section 73.512(c) shows that the Commission intended for the limited Alaskan exception to apply only to secondary service stations. The Rule provides that upon the grant of a new Class D application or a major change application by an existing Class D station, "the station shall become a Class D (secondary) station."¹² Grant of the Application in this instance would result in the Station no longer being a Class D station.

⁵ Petition at 2-3.

⁶ 47 CFR § 1.106(c); *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686, para. 2 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 397 U.S. 967 (1966); *Davis & Elkins Coll.*, Memorandum and Order, 26 FCC Rcd 15555, 1556, para. 5 (MB 2011).

⁷ *Changes in the Rules Relating to Noncommercial Educational FM Broadcast Stations*, Notice of Proposed Rulemaking, 41 Fed. Reg. 16973 (March 17, 1976).

⁸ *Changes in the Rules Relating to Noncommercial Educational FM Broadcast Stations*, Second Report and Order, 69 FCC 2d 240 (1978) (*NCE Second R&O*); 47 CFR § 73.512.

⁹ *NCE Second R&O*, 69 FCC 2d at 250, para. 28.

¹⁰ *Id.*

¹¹ *Id.*

¹² 47 CFR § 73.512(c).

Finally, Big River cites no cases,¹³ and we are not aware of any, where the exception made in Section 73.512(c) for major change applications by Alaskan Class D licensees has been expanded to include requests to upgrade to a higher class of station. Applications for new NCE Class C3 stations in Alaska are still subject to the comparative process for new NCE stations adopted by the Commission,¹⁴ and we reject Big River's request that we accept its misinterpretation of Section 73.512(c) to circumvent this process. Accordingly, we will deny the Petition.

Conclusion. Accordingly, for the reasons stated above, IT IS ORDERED that the Petition for Reconsideration filed by Big River Public Broadcasting Corporation on April 28, 2017, IS DENEID.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

¹³ Section 0.44(e) of the Rules provides that unpublished decisions may not be cited as precedent. 47 CFR § 0.445(e). In any event, the file numbers cited by Big River are inapposite to the current proceeding. All involved either applications for *new* Class D stations in Alaska, or applications for major channel changes. None involved an upgrade in class as Big River proposes here.

¹⁴ See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Notice of Proposed Rulemaking, 10 FCC Rcd 2877 (1995), *further rules proposed*, Further Notice of Proposed Rulemaking, 13 FCC Rcd 21167 (1998), *rules adopted*, Report and Order, 15 FCC Rcd 7386 (2000), *vacated in part on other grounds sub nom. National Public Radio v. FCC*, 254 F.3d 226 (D.C. Cir. 2001), *clarified*, Memorandum Opinion and Order, 16 FCC Rcd 5074 (2001), *Erratum*, 16 FCC Rcd 10549, *recon. denied*, Memorandum Opinion and Second Order on Reconsideration, 17 FCC Rcd 13132 (2002), *aff'd sub nom. American Family Ass'n v. FCC*, 365 F.3d 1156 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 1000 (2004).