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Group 109

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

**FILED/ACCEPTED**  
**JUL 16 2009**  
Federal Communications Commission  
Office of the Secretary

In the Matter of the Applications of )

University of Massachusetts )  
Channel 218, Gloucester, MA )

File No. BNPED-20071019AUQ  
FCC Facility ID No. 174558

Light of Life Ministries, Inc. )  
Channel 218, Rockport, MA )

File No. BNPED-20071022ASE  
FCC Facility ID No. 176844

For a New Non-Commercial Educational  
Construction Permit

To: Marlene H. Dortch, Secretary, Federal Communications Commission  
To the Attention of the Commission

**APPLICATION FOR REVIEW**

**UNIVERSITY OF MASSACHUSETTS**

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## SUMMARY

The University of Massachusetts specified inconsistent data in the "Tech Box" of its application. Through a typographical error, the University of Massachusetts entered geographical coordinates into the CDBS electronic version of the application in CDBS that placed the proposed transmitter site in Canada. The proposed University of Massachusetts facility, however, is to be located on an existing tower in its proposed community of license. The University of Massachusetts correctly specified in the "Tech Box" of its application the FCC Antenna Structure Registration number of the existing tower which also contains other FCC licensed facilities upon which the proposed facility was to be located.

The University of Massachusetts submitted a corrective amendment requesting a reinstatement *nunc pro tunc* of its application in accord with applicable Commission precedent. The Audio Division refused the University of Massachusetts the opportunity to submit the corrective amendment to its application.

The University of Massachusetts application should be accepted *nunc pro tunc* with corrected geographic coordinates. The corrected geographic coordinates of its proposed facility can be reliably confirmed from the information contained in the "Tech Box" of its application. Since the Commission can reliably determine from the "Tech Box" information that the University of Massachusetts intended to locate its facility on an existing specified tower in the proposed community of license rather than in the middle of Canada, the acceptance of such a corrective amendment is in accord with applicable Commission precedent.

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|--------------------------------------|---|----------------------------|
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| University of Massachusetts          | ) | File No. BNPED-20071019AUQ |
| Channel 218, Gloucester, MA          | ) | FCC Facility ID No. 174558 |
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For a New Non-Commercial Educational  
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To: Marlene H. Dortch, Secretary, Federal Communications Commission  
To the Attention of the Commission

**APPLICATION FOR REVIEW**

The University of Massachusetts, by its attorneys, pursuant to Section 1.115(a) of the Commission's rules, hereby respectfully seeks review of the June 16, 2009 Audio Division letter (the "Audio Division Letter" -- copy attached)<sup>1</sup> denying a November 21, 2007 petition for reconsideration filed by the University of Massachusetts (the "Petition for Reconsideration"), and an October 10, 2008 petition to deny the Light of Life Ministries, Inc. application (the "Petition to Deny").

**I. STATEMENT OF FACTS**

1. The University of Massachusetts specified inconsistent data in the "Tech Box" of its application. In its application "Tech Box,"<sup>2</sup> an obvious typographical error

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<sup>1</sup> This Application for Review is filed within thirty days of the public notice date of the Audio Division Letter, pursuant to Section 1.115(d) of the Commission's rules.

<sup>2</sup> The application "Tech Box" was originally adopted in 1998 *Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules, and Processes; Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*. 13 FCC Rcd 23056 (1998). The "Tech Box" was a discrete technical section designed to facilitate electronic data entry and allow the Commission's computer engineering

occurred in entering the geographic coordinates. The geographic coordinates of the proposed University of Massachusetts facility, however, can be reliably determined from the information contained within the "Tech Box". The "Tech Box", at Section VII, Item 5, states that the Antenna Structure Registration number (the "ASR") of the existing tower upon which the proposed facility is to be located is ASR No. 1005284. This ASR has unique geographic coordinates associated with it. From the FCC data associated with this ASR, the Commission may take official notice of the correct geographic coordinates. Additionally, on this antenna structure are other FCC licensed facilities including the licensed FM translator W268AM (FCC Facility ID No. 138772), and CMRS facilities WPPK987 and WPOF374.

2. The Director of Engineering of the University of Massachusetts Boston Public Radio Stations, in entering the geographical coordinates into the electronic version of the application in CDBS, entered the North Latitude as 47° rather than 42°, thus resulting in an error of 556 kilometers, an error that placed the proposed transmitter site somewhat northwest of Baie-Saint-Paul, Quebec, Canada. An FCC application that contains geographic coordinates located in the middle of Canada in excess of 550 kilometers from the proposed city license – geographic coordinates that are completely disparate to every other aspect of the location information in the application – is without question an application that contains a typographical error in the coordinates.

3. The Audio Division, in a November 8, 2007 letter, dismissed the University of Massachusetts application for a failure of the proposed 60 dBu contour to

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programs to automatically execute certain review functions now performed by the staff. The Commission stated that the "Tech Box" would incorporate all critical technical data required for engineering review. And in the event of any discrepancies between data in the "Tech Box" and data submitted elsewhere in the application, the data in the "Tech Box" would be used.

cover at least 50% of the community of Gloucester, Massachusetts in violation of Section 73.515 of the Commission's rules. On November 21, 2007, the University of Massachusetts submitted its Petition for Reconsideration and an associated amendment requesting a reinstatement *nunc pro tunc* of its application in accord with applicable Commission precedent.

4. The Audio Division Letter, however, found that the typographical correction constituted a "major amendment" pursuant to Section 73.3571(a)(1) of the Commission's rules as the amended 60 dBu contour failed to overlap the originally filed-for 60 dBu contour, and that such an amendment can only be filed during an application filing window, citing as its authority for this a recently released Audio Division letter<sup>3</sup> and the Public Notice titled *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, FCC 84-366, 56 RR2d 776, 49 Fed. Reg. 47331 (released August 2, 1984) (hereafter "Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications").

5. The Audio Division Letter, after refusing the University of Massachusetts the opportunity to submit a corrective amendment to its application, inconsistently and in a contradictory fashion stated that "this constitutes [the University of Massachusetts'] one opportunity to amend the application and request reinstatement *nunc pro tunc*." In fact, the University of Massachusetts was not allowed to amend its application. Had it been allowed the opportunity to amend its application in accord with *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit*

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<sup>3</sup> Plus Charities, DA 09-441 (released February 25, 2009). The Audio Division Letter cites this letter for the proposition that "data in the Tech Box must be used". In fact, it is the ASR data in the Tech Box that is correct in the University of Massachusetts application and no data submitted elsewhere in the application is relied upon in either the Petition for Reconsideration or this Application for Review.

*Applications*, its application would now be acceptable for filing. The Audio Division with one hand refused to allow the amendment, and then with the other hand stated that it allowed the amendment.

## II. QUESTIONS PRESENTED FOR REVIEW

- (a) Is the correction of a typographical error in an application properly categorized as a major or minor amendment to the proposed facilities under the Commission's rules and existing Commission precedent, or is it categorized under the Commission's rules and existing precedent as a corrective amendment making that which is inconsistent in the application now consistent?
- (b) Is the existing Commission policy as stated in *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications* and previously applied precedent by the Commission and U.S. Court of Appeals no longer good law with respect to typographical errors when the geographic coordinates of the proposed facility can be reliably determined from the information contained in the "Tech Box" itself?
- (c) When the application requires the specification of an ASR in the "Tech Box", and the geographic coordinates are based upon the specified ASR, is the Commission's sole reliance upon an obvious typographical error in the geographic coordinates arbitrary and capricious?
- (d) If the answer to question (b) above is "yes" and to question (c) above is "no", was there advance notice given of the Commission's change in policy and, if not, should the University of Massachusetts be penalized with the ultimate sanction of dismissal for a failure to follow a policy not announced prior to the filing of its application?
- (e) Is the Commission elevating its convenience over the public interest to allow the Audio Division to

utilize only computers to process applications<sup>4</sup> and be unwilling to go to the trouble of acting in accord with *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications* by the acceptance of a corrective amendment?

### **III. THE RESPECTS IN WHICH THE ACTION TAKEN BY DELAGATED AUTHORITY SHOULD BE CHANGED AND THE FORM OF RELIEF SOUGHT**

6. The Commission should take official notice of the ASR in its own database of the geographic coordinates of the tower upon which the new University of Massachusetts facility is to be built, confirm that the stated ASR coordinates in the "Tech Box" match the geographic coordinates specified in the corrective amendment, accept the pending corrective amendment to the University of Massachusetts application, reinstate the University of Massachusetts application *nunc pro tunc*, and proceed with the processing of the University of Massachusetts application.<sup>5</sup>

7. Because an acceptance *nunc pro tunc* of this application is merited, neither the Commission's rule governing amendments in Section 73.3573(a)(1), nor the Commission's rule governing amendments in Section 73.3522(b), is applicable. Rather, since this typographical correction to the application is sought on a *nunc pro tunc* basis (i.e. "now for then") with no change in the transmitter site or the facilities specified whatsoever, there is neither an amendment of the applied-for facility nor the creation of any new mutual exclusivity. Rather, the application facilities remain as specified in the

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<sup>4</sup> The FCC's CDBS electronic filing system will not presently allow for the electronic filing of the University of Massachusetts amendment.

<sup>5</sup> The Light of Life Ministries application grant must also be rescinded but it is an application that should not have been granted in the first instance prior to the Commission accepting the corrective amendment to the University of Massachusetts application in accord with *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*.



application. In accord with existing case law and policy, the Commission's database and the application as filed should be corrected to reflect the geographic coordinates in accord with ASR No. 1005284 as: 42° 37' 28" North Latitude, 70° 39' 15" West Longitude (NAD 27).

#### IV. ARGUMENT

- (a) **Is the correction of a typographical error in an application properly categorized as a major or minor amendment to the proposed facilities under the Commission's rules and existing Commission precedent, or is it categorized under the Commission's rules and existing precedent as a corrective amendment making that which is inconsistent in the application now consistent?**

8. The University of Massachusetts is not making the argument that it should be allowed to amend its transmitter site a distance of 556 kilometers which would unquestionably be a "major" amendment. There is, in fact, no amendment of the University of Massachusetts transmitter site proposed at all. Rather, the University of Massachusetts wishes to keep its transmitter site exactly where intended which is at the geographic coordinates uniquely identified by the FCC's ASR No. 1005284 as stated in the "Tech Box" of its application.

9. The University of Massachusetts is simply seeking to make a typographical correction to its application, a correction that has always been allowed to NCE applicants under *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*. The Audio Division Letter ignored Media Bureau and Commission precedent, and established practices, in denying the Petition for Reconsideration.

10. Specifically, in *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, the Commission

allowed applicants to submit “a relatively minor curative amendment within 30 days”. A “relatively minor curative amendment is not the same as a “minor modification” as defined in Sections 73.3573(a) and (f) of the Commission’s rules, and is not the antonym of “major change”. In none of the cases in which the Commission has allowed for the correction of geographic coordinates pursuant to *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications* has the Commission ever evaluated whether the amendment represented a “major change” or a “minor change”.<sup>6</sup>

11. Previously, corrective amendments have been allowed in application situations where the geographic coordinates to transmitter sites were in error by a matter of degrees. In *Larry Langford*, 3 FCC Rcd 4746 (ASD 1988), the Audio Services Division, the predecessor to the Audio Division, allowed an applicant to amend its application to correct its geographic coordinates from 42 degrees to 41 degrees finding that the “Commission could ‘drawing on the application as a whole’, confidently verify the correct value”. Likewise, In *Gnot Broadcasting, Inc.*, 2 FCC Rcd 2101 (VSD 1987), the Video Services Division allowed for an amendment of an application from 45 degrees to 35 degrees which is an error of a magnitude twice that made by the University of Massachusetts which only misstated its geographic coordinates by a matter of five degrees.

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<sup>6</sup> There is one Commission decision, *Aerco Broadcasting Corporation*, 18 FCC Rcd 24417 (2003), in which a failure of the application’s geographic coordinates to match the tower ASR, along with six other enumerated application defects, caused a dismissal of the application as “patently defective” without an opportunity to correct the identified defects. The Commission found the application “grossly defective and [an] incomplete application [filed] as a mere placeholder...”. The factual situation in *Aerco Broadcasting Corporation* in no way compares in the least with the typographical error made by the University of Massachusetts yet the Audio Division attempts to use the same rule. Section 73.3666, to likewise dismiss the University of Massachusetts application as patently defective.

12. The same situation obtains with the University of Massachusetts application as it specified an existing tower uniquely identified at its intended location by its ASR, but made an obvious typographical error in the geographic coordinates which, when the application "Tech Box" is looked at as a whole, it is apparent are incorrect. There is no amendment whatsoever required to the transmitter site specified by the University of Massachusetts. Rather, there is only the correction of a typographical error in its application with a corrective amendment required.

- (b) **Is the existing Commission policy as stated in *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications* and previously applied precedent by the Commission and U.S. Court of Appeals no longer good law with respect to typographical errors when the geographic coordinates of the proposed facility can be reliably determined from the information contained in the "Tech Box" itself?**

13. It is settled FCC law that the Commission will look to information in an application to resolve a discrepancy in coordinates when the applicant intended to use an existing tower with licensed facilities on it. *See JEM Broadcast Company, Inc. v. FCC*, 22 F3d 320 (D.C. Cir. 1994).<sup>7</sup> As explained in *JEM Broadcasting Company, Inc. v. FCC*, the Commission can take official notice of the information in its records to verify the coordinates for an existing tower and thus resolve the question of where the applicant proposed to locate its proposed facility.

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<sup>7</sup> In fact, *JEM Broadcast Company, Inc. v. FCC* notes that the Commission even went further and explained to the Court of Appeals that the FCC "would only look to information outside an application to resolve a conflict in coordinates when an applicant intended to use an existing licensed tower; in such cases, the Commission could take official notice of the information in its records to verify the coordinates for the tower and thus resolve the inconsistency." In the University of Massachusetts application, it is not necessary to even go outside the Tech Box to reliably resolve the typographical error in geographic coordinates but it should be noted that the Commission stated its willingness to "look to information outside an application (emphasis added)" to resolve the correct geographic coordinates in an application in which an existing tower was specified.

14. This settled law has been applied in a number of cases and is regarded as "longstanding Commission policy". See *Lehigh Valley Community Broadcasters*, 8 FCC Rcd 1643 (HDO 1992) at Paragraph 11 which states:

It has been longstanding Commission Policy that if an applicant has specified inconsistent data, but clearly proposes to locate its antenna on an existing tower to which specific reference is made in its application, the staff takes official notice of data specified in Commission records for the licensed facilities, and thus often can confidently and reliably resolve the inaccuracy or inconsistency in the data given for the proposed tower location or height.

The University of Massachusetts is proposing to mount its antenna on an existing tower.

15. In *Steven B. Courts*, 4 FCC Rcd 4764 (1989), the Commission distinguished the situation where the proposed tower location could not be confidently and reliably resolved given an inaccuracy or inconsistency in the application data. The Commission stated in *Steven B. Courts* that:

the Bureau rejected Courts' argument that the Commission has accepted for filing other applications which contained similar transmitter site discrepancies. The Bureau distinguished the cases cited by Courts, pointing out that the applicants in those proceedings either proposed to side mount their antennas on the tower of an existing licensee and referenced the licensed facility in the application itself or the applicants supplied data in the application from which the coordinate discrepancy could be confidently and reliably resolved. See e.g., *A.B.C.D. Broadcasting Company*, 2 FCC Rcd 6551 (M.M. Bur. 1987); *Addison Broadcasting Company, Inc.*, 2 FCC Rcd 6358 (M.M. Bur. 1987) (emphasis added)

16. In *1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules, and Processes; Policies and Rules Regarding Minority and Female*

*Ownership of Mass Media Facilities*, 13 FCC Rcd 23056 (1998), the Commission stated that "in the event of any discrepancies between data in the "Tech Box" and data submitted elsewhere in the application, the data in the "Tech Box" would be used." Yet, the Audio Division Letter refused to use or even acknowledge the tower ASR information in the University of Massachusetts application "Tech Box".

17. The Audio Division Letter was based on noncompliance with Section 73.515 of the Commission's rules, a failure of the proposed 60 dBu contour failed to cover at least 50% of the proposed community of the license, which is an acceptance defect. Acceptance defects are subject to correction by the applicant pursuant to *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*. The University of Massachusetts properly submitted a corrective amendment to its application to remedy the perceived acceptability defect and with the corrective amendment, Section 73.515 is fully satisfied.

18. The Audio Division Letter cites no Commission level authority to indicate that "longstanding Commission policy" has changed. Therefore, the refusal to allow the amendment correcting the geographic coordinates of the University of Massachusetts application was erroneous.

- (c) **When the application requires the specification of an ASR in the "Tech Box", and the geographic coordinates are based upon the specified ASR, is the Commission's sole reliance upon an obvious typographical error in the geographic coordinates arbitrary and capricious?**

19. This situation of confidently and reliably resolving the accuracy of the geographic coordinates based upon the stated ASR in the "Tech Box" is the situation presented by the University of Massachusetts application. There is an inconsistency

15. between the geographic coordinates specified in "Tech Box" Section VII, Item 3, and the location of the tower in the Commission's ASR record specified in "Tech Box" Section VII, Item 5. The data in the "Tech Box" presents the question of whether the University of Massachusetts: (a) intended to locate the transmitter site for its new NCE station in the middle of Quebec, Canada at a distance greater than 550 kilometers from the proposed community of license; or (b) intended to locate its antenna on the tower which is FCC ASR No. 1005284 on Blackburn Drive, Gloucester, Massachusetts, in the proposed community of license.

20. There is no question in this situation that the Commission can confidently and reliably resolve, in accord with *JEM Broadcast Company, Inc. v. FCC*, 22 F3d 320 (D.C. Cir. 1994), that the University of Massachusetts intended to specify the existing tower with ASR No. 1005284 on Blackburn Drive, Gloucester, Massachusetts, and did not intend to specify a new tower more than 550 kilometers from the community of license in the middle of Quebec, Canada.

21. Because the University of Massachusetts application at issue is a noncommercial application on the reserved band, the application acceptance standard in *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications* is controlling. In *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, the Commission states that when a cut-off date could preclude the re-filing of a dismissed incomplete or patently defective application, the Commission has "not instituted draconian procedures with respect to [such] incomplete or defective applications".

22. The Commission states in *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications* that it grants reconsideration of an action dismissing or returning an application when the applicant submits corrected information within 30 days after dismissal along with a petition of reconsideration. The Commission states that in contested proceedings, such applications are accepted *nunc pro tunc*, which the Commission defines as an applicant being reinstated in the processing line with the filing date of the original submission.

23. The Commission further states in *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications* that it will continue to act favorably on such requests after an initial dismissal or return of an application as unacceptable for filing. The Commission stated that there is a "public interest benefit in permitting an applicant in a mutually exclusive situation to amend its application in order to maintain its basic qualifications and thereby afford the Commission a choice among the greatest number of applicants".<sup>8</sup>

24. Rather than following the dictates of *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, the Audio Division refused to accept the properly filed correction to the University of

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<sup>8</sup> Attached to the Petition for Reconsideration was the declaration of Grady Moates, Chief Engineer for University of Massachusetts Boston Public Radio Stations. Mr. Moates explains the reason for the typographical error in the application. Mr. Moates observes that his eyesight (Mr. Moates just passed his landmark birthday of 60 years) combined with a computer screen and the use of the "Tab" key led him to believe that he typed the number "42" into the Latitude "Degrees" box, after which he pressed the "Tab" key to move to the "Minutes" box and enter the number "37". Rather than performing this action accurately, he found he had overwritten the number "42" with the number "37" in the "Degrees" box. Mr. Moates attempted to make the correction back to the number "42" in the "Degrees" box and believed he had done so, but apparently with his blurry eyesight he believed he saw the number "2" and did not realize that it was a "7" resulting in the number "47" rather than the number "42" being in the "Degrees" box. Mr. Moates notes that he supplied the correct ASR number for the existing monopole at the proposed location, and verified that all of the studies performed by the engineering firm SpectreTech were based on the coordinates associated with this ASR.

Massachusetts application, claimed that it represented a change in transmitter site, refused to accept the amendment, and improperly branded it a "major amendment" which is a term not defined by the Commission's rules (the term "major change" is defined but a typographical correction to geographic coordinates is anything but a major change under Commission precedent).

25. The Audio Division Letter states that the University of Massachusetts needed "good cause" for its amendment. But, *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications* does not require good cause. Further, *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications* says nothing about whether the staff's dismissal was in error, or whether the error made by the applicant could have been discovered earlier, as considerations for whether the corrective amendment is accepted by the Commission.

26. The Audio Division Letter also makes the irrelevant statement that the "staff cannot be responsible for correcting errors made, inadvertently or not, in applications". At no point was the University of Massachusetts asking the staff to correct the error it made. Rather, the University of Massachusetts was asking the staff to follow established Commission precedent and the policy set forth in *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, and allow the University of Massachusetts itself to correct the application based upon the fact that even a cursory look at the information contained in the "Tech Box" as a whole would reveal that the University of Massachusetts intended to specify a transmitter site at the stated existing tower.



27. Finally, the statement in the Audio Division Letter that “[m]aking the coordinate correction sought [for the University of Massachusetts application] brings this proposal into direct conflict with [the Light of Life Ministries, Inc.] application ...”, is erroneous. The University of Massachusetts application has always been in conflict with, and mutually exclusive with, the Light of Life Ministries, Inc. application. There is no new application conflict being created. Rather, the Audio Division improvidently failed to follow Commission policy in *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications* and long-established Commission precedent in allowing for the correction of the geographic coordinates in the University of Massachusetts application in response to a timely-filed petition for reconsideration. The Audio Division’s improvident grant of the Light of Life Ministries, Inc. application gives Light of Life Ministries, Inc. no greater rights than it had when it filed its application which, as it turns out to be, is mutually-exclusive with the University of Massachusetts application.

- (d) **If the answer to question (b) above is “yes” and to question (c) above is “no”, was there advance notice given of the Commission’s change in policy and, if not, should the University of Massachusetts be penalized with the ultimate sanction of dismissal for a failure to follow a policy not announced prior to the filing of its application?**

28. Just as the Commission was required to give prior notice for its “hard look” FM commercial application processing policy some years ago,<sup>9</sup> if the Commission is to now change its policy for non-commercial educational applicants to be more strict and less forgiving (in essence a reinstatement of the commercial FM “hard look” policy except this time with respect to non-commercial educational applicants), the Commission

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<sup>9</sup> *Statement of New Policy Regarding Commercial FM Applications That Are Not Substantially Complete or Are Otherwise Defective*, 58 RR 2d 166 (1985)

is required to give notice of this change. The Commission has not done so. Thus, while the Commission may decide that on a going-forward basis, it will require exactitude in geographic coordinates and will no longer abide by the policy stated in *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications* and the established precedent in *JEM Broadcast Company, Inc. v. FCC*, 22 F3d 320 (D.C. Cir. 1994), it must do so prospectively and it cannot look back and change processing rules now properly relied upon by applicants before it.

- (e) **Is the Commission elevating its convenience over the public interest to allow the Audio Division to utilize only computers to process applications<sup>10</sup> and be unwilling to go to the trouble of acting in accord with *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications* by the acceptance of a corrective amendment?**

29. As noted in Footnote 2 above, the Commission adopted the "Tech Box" as a discrete technical section to facilitate electronic data entry and allow the Commission's computer engineering programs to automatically execute certain review functions then performed by the staff. Thus, there is an unstated reason that the Audio Division is attempting to change its policy and desires to no longer follow *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications* in the processing of FM applications.

30. The unstated reason the Audio Division wishes to change its policy is that, unlike the time period when *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications* was released, the Audio Division is automating its processing of FM applications as much as possible.

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<sup>10</sup> The FCC's CDBS electronic filing system will not presently allow for the electronic filing of the University of Massachusetts amendment.

Thus, the Audio Division ran both the University of Massachusetts application, and the Light of Life Ministries, Inc. application, through its computer system. Because of the typographical error on the University of Massachusetts application, the University of Massachusetts application and the Light of Life Ministries, Inc. application did not, as a result of the Audio Division's computer run, appear to be mutually-exclusive. Further, the Audio Division's computers properly showed that the geographic coordinates (but not the tower ASR in the same "Tech Box") specified by the University of Massachusetts were some 556 kilometers distant from the proposed city of license of Gloucester, Massachusetts. Thus, the Audio Division dismissed the University of Massachusetts application.

31. The error made by the Audio Division, however, was that when the University of Massachusetts timely filed a petition for reconsideration to the dismissal of its application in accord with *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, the Audio Division refused to have a human being take a look and determine that indeed the correct geographic coordinates for the University of Massachusetts application could be derived from looking at the "Tech Box" as a whole. The Audio Division needed to look no further than the tower ASR number in the "Tech Box" to the application which specified exactly upon which tower that the University of Massachusetts proposed to locate its facility.

## V. CONCLUSION

32. The University of Massachusetts application should be accepted *nunc pro tunc* with corrected geographic coordinates. The corrected geographic coordinates of its


proposed facility can be reliably confirmed from the information contained in the "Tech Box" of the application itself. The Commission can reliably determine from the "Tech Box" information that the University of Massachusetts intended to locate its facility on an existing specified tower in the proposed community of license rather than in the middle of Canada. The Commission's staff may take official notice of the data specified in the Commission's ASR records, including the geographic coordinates of the licensed facilities associated with that ASR on that existing tower, and confidently and reliably ascertain that the corrective amendment submitted by the University of Massachusetts contains the correct geographic coordinates for the proposed facility.

WHEREFORE, for the reasons above, an acceptance for tender *nunc pro tunc* of the corrected University of Massachusetts application seeking an original construction permit for new station on Channel 218 in Gloucester, Massachusetts (FCC File No. BNPED-20071019AUQ) is respectfully requested.

Respectfully submitted,

UNIVERSITY OF MASSACHUSETTS

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July 16, 2009

**FEDERAL COMMUNICATIONS COMMISSION**  
**445 12<sup>th</sup> STREET SW**  
**WASHINGTON DC 20554**  
**JUN 16 2009**

MEDIA BUREAU  
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Light of Life Ministries, Inc.  
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In re: NEW(FM), Gloucester, MA  
Facility ID No. 174558  
University of Massachusetts ("UOM")  
BNPED-20071019AUQ  
Petition for Reconsideration

NEW(FM), Rockport, MA  
Facility ID No. 176844  
Light of Life Ministries, Inc. ("Light")  
BNPED-20071022ASE  
Petition to Deny

Dear Applicant:

This is in reference to: (1) the above-captioned application file by UOM dismissed November 8, 2007, (2) the Petition for Reconsideration filed by UOM on November 21, 2007, (3) the Petition to Deny filed by UOM against Light's application on October 10, 2008 and (4) all other related pleadings. UOM requests reconsideration of the staff's November 8, 2007 dismissal of the above-captioned application. For the reasons stated below, we deny the Petition for Reconsideration, dismiss the Petition to Deny, and grant BNPED-20071022ASE.

By letter dated November 8, 2007, the staff informed UOM that the application, as originally filed, was in violation of 47 C.F.R. § 73.515. Specifically, the proposed 60 dBu contour failed to cover at least 50 percent of the community of license of Gloucester, MA. Consequently, the application was dismissed pursuant to 47 C.F.R. § 73.3566.

On November 21, 2007, UOM submitted a petition for reconsideration requesting reinstatement *nunc pro tunc* and an amendment. UOM also filed a Petition to Deny stating that its application and Light's application are mutually exclusive and that the staff should defer processing on Light's application pending the outcome of the petition for reconsideration. UOM claims that the original application contained a typographical error and requests that the coordinates be corrected from 42° 37' 28" to 47° 37' 28". However, a change in coordinates to this degree for a noncommercial educational ("NCE") FM application results in a major amendment:<sup>1</sup> such an amendment can only be filed during an application

<sup>1</sup> Pursuant to 47 C.F.R. Section 73.7573(a)(1), a major amendment occurs when the amended 60 dBu contour fails to

filing window required for NCE new and major change applications.<sup>2</sup> Consequently, your amendment and request for reinstatement cannot be accepted and processed under the terms of the Commission's August 2, 1984 *Public Notice*.<sup>3</sup>

In addition, your petition for reconsideration does not qualify for consideration under Section 1.106(c) of the Commission's rules. No good cause has been demonstrated that would warrant acceptance of an amendment. You have not shown that the staff's dismissal was in error, nor that facts and circumstances have occurred that could not have been discovered earlier using ordinary diligence. Indeed, the petition acknowledges that the error was solely the applicant's. It is the applicant's responsibility to ensure that *all* portions of its application are correct before filing the application.<sup>4</sup> The staff cannot be responsible for correcting errors made, inadvertently or not, in applications. Furthermore, the corrective amendment was filed after the October 22, 2007 close of the noncommercial educational FM application filing window period, and so, must protect all applications properly filed during the window period.<sup>5</sup> Making the coordinate correction sought for in the present application brings this proposal into direct conflict with window application BNPED-20071022ASE, Rockport, MA.<sup>6</sup> Any application, as amended, that proposes to create a new application conflict with another application filed in this NCE window will not be accepted.

In light of the above, the November 21, 2007 Petition for Reconsideration filed by the University of Massachusetts IS HEREBY DENIED, the October 10, 2008 Petition to Deny IS HEREBY DISMISSED, and application BNPED-20071022ASE IS HEREBY GRANTED. These actions are taken pursuant to 47 C.F.R. § 0.283. Please note, pursuant to the terms of the August 2, 1984 *Public Notice*, this constitutes UOM's one opportunity to amend the application and request reinstatement *nunc pro tunc*. UOM is not entitled to another attempt to amend the application.

Sincerely,



Rodolfo F. Bonacci  
Assistant Chief  
Audio Division  
Media Bureau

cc: John F. Garziglia, Esq.

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overlap the originally filed 60 dBu contour.

<sup>2</sup> See Letter from Peter H. Doyle, Chief, Audio Division, to Plus Charities, DA 09-441 (rel Feb. 25, 2009) (rejected the contention that the staff should treat its proposed amendment correcting a coordinate discrepancy as a "minor" amendment.)

<sup>3</sup> Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications, Public Notice, FCC 84-366, 56 RR 2d 776, 49 FR 47331 (rel Aug 2, 1984).

<sup>4</sup> See Letter from Peter H. Doyle, Chief, Audio Division, to Plus Charities, DA 09-441 (rel Feb 25, 2009) (In the event of any discrepancies between data in the Tech Box and data submitted elsewhere in an application, the data in the Tech Box must be used.)

<sup>5</sup> See 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)

<sup>6</sup> This application was accepted for filing on September 11, 2008.

**CERTIFICATE OF SERVICE**

I, John F. Garziglia, hereby certify that a copy of the foregoing "Application for Review" was mailed on this 16<sup>th</sup> day of July 2009, to the following:

James Riley, Esquire  
Fletcher Heald & Hildreth PLC  
1300 North 17th Street  
11th Floor  
Arlington, Virginia 22209  
(Counsel to Light of Life Ministries, Inc.,  
Applicant for Channel 218 at Rockport, Massachusetts)

  
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John F. Garziglia