



Federal Communications Commission
Washington, D.C. 20554

October 29, 2015

In Reply Refer To:
1800B3-IB

State of Oregon Acting by and through
the State Board of Higher Education for
the Benefit of Southern Oregon University
c/o The Sanchez Law Firm
2300 M Street, N.W., Suite 800
Washington, DC 20037
Attn: Ernest T. Sanchez, Esq.

Re: **MX Group No. 880611**

KFPR(FM), Redding, CA
Facility ID No. 66567
BPED-19880610ML
BLED-19931123KD

NEW(FM), Redding, CA
Facility ID No. 62979
BPED-19900129MH

Petition for Reconsideration

Dear Counsel:

The Media Bureau, Audio Division ("Bureau") has before it a Petition for Reconsideration ("Petition") by State of Oregon Acting by and through the State Board of Higher Education for the Benefit of Southern Oregon University ("Oregon") and related pleadings.¹ Oregon seeks reconsideration of a Bureau *Decision*,² which dismissed its application to construct a new noncommercial educational ("NCE") FM station at Redding, California and granted the application of the Research Foundation, California State University at Chico ("Research Foundation"), which also proposed to serve Redding.³ For the reasons set forth below, we dismiss the Petition as untimely.

Background. This is the Commission's oldest pending NCE comparative case. The University Foundation, California State University, Chico ("University Foundation") and Oregon filed mutually exclusive applications in 1988 and 1990 respectively, but the Bureau dismissed Oregon's application as untimely. The Bureau granted the Foundation Application as a "singleton" in 1992, conditioned upon the outcome of Oregon's application for review. The University Foundation constructed at its own risk, and

¹ Petition For Reconsideration (Nov. 9, 2007) ("Petition"); Motion to Dismiss Or, In the Alternative, Opposition to Petition For Reconsideration (Nov. 21, 2007) ("Opposition"); Reply (Nov. 29, 2007) ("Reply").

² *State of Oregon Acting by and through the State Board of Higher Education for the Benefit of Southern Oregon University*, Letter, 22 FCC Rcd 17643 (MB 2007) ("*Decision*").

³ We will refer to the applications individually as the "Oregon Application" and the "Foundation Application," and collectively as the "Redding Applications." With respect to the parties to the Foundation Application, we refer to the Research Foundation and a predecessor in interest, the University Foundation, collectively as the "Foundations."

began operating with program test authority using call sign KFPR(FM).⁴ The Bureau licensed KFPR(FM) on March 28, 1996, but soon rescinded the grant upon learning that Oregon had appealed its dismissal in court.⁵ In May 1996, the California State University at Chico ("CSUC") formed the Research Foundation, as part of a restructuring. The new organization would potentially take on University Foundation roles, including broadcasting. The Research Foundation and University Foundation were under fifty percent common control.

In December 1996, the Court of Appeals for the D.C. Circuit (the "Court") ruled that the Commission should not have dismissed the Oregon Application.⁶ On remand, the Commission reinstated the Oregon Application and returned the Foundation Application to pending status. The Commission did not compare the two applications at that time because the Commission's broadcast comparative standards, had been called into question and rulemaking proceedings were underway to consider alternatives.⁷

On August 27, 1997, in conjunction with the aforementioned CSUC restructuring, the University Foundation filed an unopposed application to assign all of its broadcast interests, including those in KFPR(FM), to the Research Foundation.⁸ The Bureau granted the assignment on November 25, 1997. The Research Foundation continued to prosecute the Foundation Application but did not amend that application, which thus erroneously remained in the name of the University Foundation.

The Commission adopted a new NCE comparative process in April 2000, replacing traditional evidentiary hearings with more objective determinations in the form of a point system applied in a paper hearing process. The new process would apply to future applications as well as to pending applications filed under prior procedures.⁹ Oregon unsuccessfully challenged aspects of the point system in court.¹⁰ The Commission applied the point system to the Redding Applications in a 2007 *Omnibus Order*.¹¹ The applicants tied with two points each and the Commission tentatively selected the Foundation Application

⁴ See *University Foundation*, Letter, Ref. No. 1800B3-BJB (Nov. 5, 1993). The Commission denied Oregon's requests for review and reconsideration. See *State of Oregon*, Memorandum Opinion and Order, 8 FCC Rcd 3558 (1993), *recon. denied*, 11 FCC Rcd 1843 (1996).

⁵ See *University Foundation*, Letter, Ref. No. 1800B3-DJF (Apr. 15, 1996).

⁶ See *State of Oregon v. FCC*, 102 F.3d 583 (D.C. Cir. 1996) ("*Remand Order*") (finding inadequate notice of filing deadline).

⁷ See *Reexamination of Policy Statement on Comparative Broadcast Hearings*, GC Docket No. 92-22, Notice of Proposed Rulemaking, 7 FCC Rcd 2664 (1992); Second Further Notice of Proposed Rulemaking, 9 FCC Rcd 2821 (1994); *Reexamination of Comparative Standards for New Noncommercial Educational Applicants*, MM Docket No. 95-31, Notice of Proposed Rulemaking, 10 FCC Rcd 2877 (1995) ("*NCE NPRM*") (subsequent history omitted).

⁸ The consolidated application covered interests in KFPR(FM), KCHO(FM), Chico, California, and nine FM translators. See File No. BALED-19970827FB. The August 27, 1997 cover letter submitted with this short form application, filed on FCC Form 316, identified KFPR(FM) as a construction permit. See Opposition at 12.

⁹ See *Reexamination of Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386, 7424 (2000) ("*NCE R&O*"), *aff'd*, Memorandum Opinion and Order, 16 FCC Rcd 5074 (2001) ("*NCE MO&O*") (subsequent history omitted).

¹⁰ See *American Family Ass'n v. FCC*, 365 F.3d 1156, 1163-64 (D.C. Cir. 2004), *cert. denied*, 125 S.Ct. 634 (2004) ("*American Family*").

¹¹ See *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) ("*Omnibus Order*").

in a first round tie-breaker.¹² The Bureau's October 3, 2007, *Decision* (1) granted the Foundation Application and the application for covering license over Oregon's objection; (2) corrected the applicant's name in the database to reflect that the Research Foundation was the applicant; and (3) waived Section 73.3573 of the Rules to permit a major change in the Research Foundation's ownership structure, which otherwise would have eliminated it from consideration.¹³

Timeliness. Petitions for Reconsideration of the *Decision* were due by 5:00 p.m. November 8, 2007.¹⁴ Oregon's Petition was date stamped the following day. The Research Foundation and Oregon dispute whether the Petition should be dismissed as untimely.¹⁵ Oregon argues that the Petition was timely because: (1) Oregon mailed the pleading on November 7, 2007, with guaranteed next day delivery; (2) U.S. Postal Service records show that it "left notice" at the Commission at 10:18 a.m. on November 8, 2007; but (3) made final delivery on November 9, 2007, at 7:42 a.m.¹⁶

We will dismiss the Petition as untimely.¹⁷ Filing dates are established by date-stamps in the Office of the Secretary. Oregon's Petition was date-stamped after the due date. Filing deadlines for seeking reconsideration are statutory and not subject to Commission waiver.¹⁸ Parties that wait until a final deadline in reliance on third party couriers do so at their own peril.¹⁹

Substantive Arguments. Although we resolve this case procedurally, we note in the interest of a complete record that Oregon's arguments are wholly without merit. Oregon's first argument that the Commission improperly applied a point system to this group retroactively incorrectly reads the Court's *Remand Order*²⁰ and is inconsistent with the principle that an agency is not required to continue applying

¹² See *Omnibus Order*, 22 FCC Rcd at 6129 and Appendix; 47 C.F.R. § 73.7003(c)(1). The tie-breaker favors applicants with the fewest attributable authorizations. The Research Foundation reported interests in four authorizations and Oregon in 42.

¹³ *Decision*, 22 FCC Rcd at 17650. See 47 C.F.R. § 73.3573.

¹⁴ Petitions for reconsideration must be filed within 30 days of public notice. 47 U.S.C. § 405(a); 47 C.F.R. § 1.106(f). Here, the 30-day filing period was triggered by an October 9, 2007 public notice. See Broadcast Actions, Public Notice, Report No. 46587 (Oct. 9, 2007).

¹⁵ Opposition at 2-3 citing 47 C.F.R. §§ 1.4(b), 1.104(f), 1.106(f), and 47 U.S.C. § 405; Reply at 2-3

¹⁶ Reply at 2-3 and Attachments.

¹⁷ We note that the Petition is also defective because it exceeds the 25-page limit. In view of our dismissal of the Petition, we need not consider the parties' arguments concerning the impact of this additional defect.

¹⁸ There is one narrow exception not applicable here for "extraordinary circumstances." See *Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976).

¹⁹ See *Mary Ann Salvatoriello*, Memorandum Opinion and Order, 6 FCC Rcd 4705, 4708 (1991); see also *NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008).

²⁰ The *Remand Order* did not, as Oregon claims, require the Commission to compare the Redding Applications in a traditional evidentiary hearing. The *Remand Order* addressed a very limited issue – whether the Oregon Application should be treated as timely and mutually exclusive. Having decided that issue affirmatively, the Court simply "remand[ed] this case to the agency for further proceedings consistent with the foregoing opinion." *Remand Order*, 102 F.3d at 587. The Commission complied by treating the Redding Applications as mutually exclusive, awaiting adoption of meaningful comparative criteria, and comparing them under the criteria adopted. Nothing in the *Remand Order* prevented use of a point system, a type of paper "hearing" that fully satisfies the hearing requirements of *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). Nor did the Commission's use of the later-adopted point system amount to retroactive rulemaking without prior notice, in violation of Oregon's due process rights. See Petition at 8-9, citing *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 209 (1988) (courts

(footnote continued...)

a discredited policy.²¹ Oregon's second claim concerns the Commission's determination that Oregon had no local headquarters. Oregon's headquarters argument misconstrues the options by which governmental entities can establish themselves as local.²² Moreover, on the facts presented we would reject its claim that it has a local office. It has shown that, at best, the presence of the office of a related entity.²³ Oregon's third argument – that the Bureau incorrectly granted a waiver to allow a major change in the Foundation's governing board – attempts to re-open an assignment transaction that is long final.²⁴

should be reluctant to approve retroactive rulemaking). *See also Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994). These cases neither provide applicants with any vested right to be considered under the processing procedures in effect at the time of filing nor prohibit the Commission's use of revised rules in appropriate circumstances. *See Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, First Report and Order, 13 FCC Rcd 15920, 15937, nn.41, 42 (subsequent history omitted), The Commission did not engage in retroactive rulemaking when it chose to apply the new point system procedures to resolve NCE applications filed under prior comparative standards that it determined were vague and meaningless. *See NCE MO&O*, 16 FCC Rcd at 5106, n.45 (citing, *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 240-241 (D.C. Cir. 1997) (application of rule changes to pending applications is not considered retroactive rulemaking)). Moreover, Oregon is mistaken in its apparent belief that it was certain to prevail in a traditional hearing. For example, Oregon argues that it would have received a fair distribution preference under 47 U.S.C. § 307(b) but the Commission has always limited Section 307(b) analyses to proceedings for different communities, whereas the Redding Applications specify the same community. *See New York University*, 10 RR 2d 215, 216 (1967).

²¹ Oregon would require the Commission to use criteria found “vague,” “meaningless,” and no longer in the public interest. *See Real Life Educational Foundation of Baton Rouge, Inc.*, 6 FCC Rcd 2577, 2580, n.8 (Rev. Bd. 1991); *see also Washington Ass’n for Television and Children v. FCC*, 665 F.2d 1264, 1268 (D.C. Cir. 1981) (it would be useless to remand a case to the Commission to determine compliance with a policy no longer in effect). The Commission implemented a freeze to stop applying those standards in 1995, a year prior to remand of the Oregon Application, because the former standards were no longer workable. *See, e.g., Policy Regarding Character Qualifications in Broadcast Licensing*, Memorandum Opinion and Order, 1 FCC Rcd 421, 421 (1986) (subsequent history omitted).


²² Oregon contends that the Commission applied the rules in an arbitrary and discriminatory manner, preventing governments from claiming an out-of-state headquarters, while recognizing the local qualifications of non-government entities without regard to political boundaries. Government entities have two ways to qualify as local – one based upon a government's area of jurisdiction and one available to any applicant based on mileage. Governments and non-governments alike may qualify as local across jurisdictional lines under the 25-mile standard, but neither may rely upon a subsidiary or branch office. *See NCE R&O*, 15 FCC Rcd at 7409; *Patrick Vaughn, Esq.*, 28 FCC Rcd 10115, 10126-28 (2013). Here, the issue is not merely that Redding is located outside of Oregon, but that it is approximately 100 miles away.

²³ Oregon relies on the Redding office of Jefferson Public Radio (“JPR”), a radio network affiliated with Southern Oregon University that operates stations licensed to Oregon. The Commission did not view JPR's Redding offices as Oregon's headquarters. We cannot accept Oregon's reasoning that the California location is its sole place of “business” because its legislative and educational functions are not really “businesses.” When the Commission established points for a local headquarters, it was not engaging in a semantic examination of the extent to which noncommercial entities function like commercial businesses. Oregon fails to show that it (as opposed to a subsidiary) operates primarily in Redding. Moreover, even had the Commission considered Oregon's links to Redding sufficient for it to qualify as local, the outcome of this case would not have changed because, under such reasoning, the Research Foundation would have qualified for additional points as well because it also alleged connections to Redding through a local campus operated by an affiliated organization. If the Commission were, hypothetically, to reverse its reasoning, each party would receive three additional points and remain tied, subject to the same tie-breaker in which Research Foundation prevailed.

²⁴ Oregon argues that the waiver grant was based on inadequate consideration of and incorrect conclusions about the 1997 assignment from the University Foundation to the Research Foundation, which Oregon views as a “suicide amendment” that the parties tried to conceal. *See* Petition at 12-13, citing *Sacred Heart University*, Hearing Designation Order, 6 FCC Rcd 4606 (1991). We will not revisit the propriety of the assignment, a long-final matter (footnote continued...)

Ordering Clauses. Accordingly, IT IS ORDERED, that the Petition for Reconsideration by State of Oregon Acting by and through the State Board of Higher Education for the Benefit of Southern Oregon University date-stamped November 9, 2013 IS DISMISSED.

Sincerely,


Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Ms. Catherine Thoma
The Research Foundation
California State University
Chico, CA 95929

Jerold L. Jacobs, Esq.
Cohn and Marks LLP
1920 N Street, N.W., Suite 300
Washington, DC 20036

to which the Bureau consented many years ago. *See Decision*, 22 FCC Rcd at 17647. The Bureau determined that the assignment was not a major ownership change because the change concerned four out of eight directors (not over 50 percent) reported on Form 316 (a short form that cannot be used for substantial changes). *See Decision*, 22 FCC Rcd at 17644-48. Nor, as Oregon argues, is the current case inconsistent with the Commission's denial of a waiver for a McCloud, California applicant. *See Petition* at 9-10, citing *Omnibus Order*, 22 FCC Rcd at 6128. Unlike McCloud, the Bureau vetted and approved the Research Foundation's qualifications in the now-final assignment.