



Federal Communications Commission  
Washington, D.C. 20554

September 22, 2004

DA 04-3037

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Re: **FM Broadcast Auction No. 37** - Joint Petition for Reconsideration Or Waiver  
of the Rules for Reinstatement of Rejected Applications Relating to FM Auction No. 37

Dear Counsel and Applicants:

The Commission has received a Joint Petition for Reconsideration or Waiver of the Rules for Reinstatement of Rejected Applications Relating to FM Auction No. 37 (“Joint Petition”) filed by American Family Association, Cathedral of the Cross, Christian Ministries of the Valley, Community Radio, Inc., Educational Media Foundation, Family Stations, Inc., Illinois State University, Marfa Radio, Inc., Minn-Iowa Christian Broadcasting, Inc., Relevant Media, Inc., and World-Wide Missions, Inc. (collectively “Petitioners”) on September 16, 2004. Petitioners timely filed short-form (Form 175) applications to participate in FM Broadcast Auction No. 37 (“Auction 37”), and each of the Petitioners indicated “Noncommercial Educational” (“NCE”) in the “Applicant Status” portion of its Form 175 application.

As a result, pursuant to Commission policy announced in the *NCE Second Report and Order*,<sup>1</sup> Petitioners’ applications were listed as “rejected” in a *Public Notice* released September 13, 2004.<sup>2</sup> Specifically, that *Public Notice* stated:

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<sup>1</sup> *Reexamination of the Comparative Standards for Noncommercial Educational Applicants, Second Report and Order*, 18 FCC Rcd 6691 (2003) (“*NCE Second Report and Order*”).

In Auction No. 37, rejected short-forms applications include applications in which the applicant has checked the box labeled “noncommercial educational” in response to the “applicant status” question on the FCC Form 175. The Commission concluded in the [NCE Second Report and Order] that any application for an NCE station that is mutually exclusive with any application for a commercial broadcast station will be returned as unacceptable for filing.<sup>3</sup> The applications for noncommercial educational FM broadcast stations identified in Attachment C are mutually exclusive with applications for FM commercial broadcast stations, and therefore are excluded from further Auction No. 37 participation.<sup>4</sup>

Petitioners contend that they were “confused” by the fact that, although the Commission in the NCE Second Report and Order stated that applicants claiming NCE status would have their applications returned as unacceptable for filing, the instructions for the electronic Form 175 application stated that applicants “must” indicate applicant status, and because Petitioners are all NCE entities they were therefore compelled to so indicate.<sup>5</sup> Additionally, Petitioners state that allowing them to amend their applications to “uncheck” the NCE status indication “is in reality a clerical-type minor amendment that is permitted.”<sup>6</sup> Petitioners ask the Commission “to reconsider the dismissal of these applications, and, upon reconsideration, reinstate such applications for participation in [Auction 37].”<sup>7</sup> In the alternative, Petitioners ask the Bureaus to consider granting a waiver of Rule 1.2105(b)(2) so that NCEs would be permitted to change their applicant status after the short-form deadline.<sup>8</sup>

We waive Section 1.2105(b)(2) of our rules, to the limited extent detailed below, for Petitioners and other similarly situated applicants. To obtain a waiver of the Commission’s competitive bidding rules,<sup>9</sup> the applicant must show: (i) that the underlying purpose of the rule would not be served, or would be frustrated, by its application in this particular case, and that grant of the requested waiver would be in the public interest; or (ii) that the unique facts and circumstances of the particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, or that the applicant has no reasonable alternative.<sup>10</sup> In this case, we are persuaded that the unique facts and circumstances presented here render application of the rule inequitable.

The Commission determined, in the NCE Second Report and Order, that applicants for NCE stations would be allowed to submit applications for non-reserved spectrum in an auction filing window,

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<sup>2</sup> Public Notice, “Auction of FM Broadcast Construction Permits –Status of FCC Form 175 Applications to Participate in Auction No. 37,” DA 04-2948 (MB/WTB rel. Sept. 13, 2004) (“Status Public Notice”), at 2 and Attachment C. See also NCE Second Report and Order, 18 FCC Rcd at 6700.

<sup>3</sup> Id. This procedure has been codified at 47 C.F.R. § 73.5002(b).

<sup>4</sup> Status Public Notice, supra note 2, at 2.

<sup>5</sup> Joint Petition at 3-4.

<sup>6</sup> Id. at 2.

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> 47 C.F.R. § 1.2105(b)(2).

<sup>10</sup> 47 C.F.R. § 1.925.

subject to being returned as unacceptable for filing if their applicants were found to be mutually exclusive with any applications for commercial stations.<sup>11</sup> The Commission further stated that applicants seeking an NCE license must identify themselves as such by selecting the box labeled “Noncommercial Educational,” which serves as “a preliminary showing that they intend to use the station to advance an educational program and that they meet all other Commission eligibility requirements for NCE stations.”<sup>12</sup> Thus, an applicant’s selection of “noncommercial educational” applicant status signifies that the applicant both intends to apply for an NCE station, and that it meets all eligibility requirements to apply for an NCE station. In the *NCE Second Report and Order*, the Commission also noted that “applicants that do not check [the NCE status] box will be considered, as a matter of law, applicants for commercial broadcast stations.”<sup>13</sup> Such applications remain eligible to participate in an auction if mutually exclusive with other applications. These requirements were reiterated in the Public Notice released June 10, 2004, by the Media Bureau (“MB”) and the Wireless Telecommunications Bureau (“WTB”).<sup>14</sup> Moreover, in the *NCE Second Report and Order* the Commission specifically rejected the suggestion that applicants for NCE stations be allowed to change their status once they learn that their applications are mutually exclusive with one or more applicants for commercial stations, finding such changes to be prohibited major amendments.<sup>15</sup>

However, we find that other circumstances, unique to this auction, compel grant of the requested waiver as being in the public interest. Petitioners are correct that the Form 175 Profile instructions state that “Applicants *must* indicate legal classification *and applicant status*.” (emphasis added). We acknowledge that Petitioners may have read this instruction to mean that they must indicate their applicant status if applicable from among the listed categories. Petitioners state that their intention was only to indicate that they were, in fact, NCE entities, not that they intended to apply for NCE stations in Auction 37.<sup>16</sup> Moreover, we note that, in the auction filing system, under “FCC Auctions Form 175 Help,” it is stated that “[m]inor modifications [to Form 175] include a change to the applicant’s address, phone, or fax number, *applicant status*, names of bidders, or contact information.” (emphasis added) We note that this statement may have contributed to Petitioners’ confusion as to whether an amendment changing the indicated “Noncommercial Educational” applicant status would be an allowable minor amendment.

Because of the above-noted ambiguities between the electronic Form 175 and accompanying instructions, and the aforementioned Commission pronouncements, we find the public interest supports waiver of the prohibition against major amendments to Form 175,<sup>17</sup> for the limited purpose of allowing

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<sup>11</sup> *NCE Second Report and Order*, 18 FCC Rcd at 6699.

<sup>12</sup> *Id.* at 6700.

<sup>13</sup> *Id.*

<sup>14</sup> *Public Notice*, “Auction of FM Broadcast Construction Permits Scheduled for November 3, 2004 – Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures,” 19 FCC Rcd 10570, 10590 (MB/WTB 2004) (“*Procedures Public Notice*”) (“Accordingly, if an FCC Form 175 filed during the Auction No. 37 filing window identifying the applicant as noncommercial educational is mutually exclusive with any application filed during that window by an applicant for a commercial station, the former will be returned as unacceptable for filing.”).

<sup>15</sup> *NCE Second Report and Order*, 18 FCC Rcd at 6700.

<sup>16</sup> Joint Petition at 3-4.

<sup>17</sup> 47 C.F.R. § 1.2105(b)(2). *See, e.g., Salzer v. F.C.C.*, 778 F.2d 869, 875 (D.C. Cir. 1985); *Satellite Broadcasting Co. v. F.C.C.*, 824 F.2d 1, 3 (D.C. Cir. 1987) (an applicant may not be penalized for violating a rule if sufficient notice of the rule is not given, or if the rule or notice thereof is incomplete, ambiguous, or improperly promulgated).

Petitioners and other similarly situated Auction 37 applicants whose applications were rejected for indicating NCE status to de-select “Noncommercial Educational” as their applicant status, if they so choose.

Accordingly, we waive Section 1.2105(b)(2) of the Commission’s rules, to the limited extent noted above, for Petitioners and similarly situated Auction 37 applicants that indicated “Noncommercial Educational” applicant status and whose applications were listed as “rejected” in the *Status Public Notice*, and provide such applicants with an opportunity to change their applications to indicate their intended applicant status.<sup>18</sup> The MB and WTB will promptly advise such applicants of any additional deficiencies in their Form 175 applications, so that these may be corrected by the resubmission deadline, which is September 24, 2004 at 6:00 PM Eastern Time. To the extent that such applicants change their applicant status to no longer read “Noncommercial Educational,” they will be considered applicants for commercial broadcast stations. The Bureaus will release a Public Notice providing such applicants with instructions on how to provide written notice of intent to change their applicant status. Any such applicants that have not provided a written notice of intent to change from “Noncommercial Educational” applicant status after 6:00 P.M. Eastern Time on September 24, 2004, will remain in “rejected” status and will not be permitted to participate in Auction No. 37.

In light of our decision on Petitioners’ waiver request, we need not address their petition for reconsideration.

Sincerely,

Peter H. Doyle, Chief  
Audio Division  
Media Bureau

Margaret W. Wiener, Chief  
Auctions and Spectrum Access Division  
Wireless Telecommunications Bureau

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<sup>18</sup> We note that all short-form applications are submitted with a certification made under penalty of perjury, and that certification applies to any statement in the application indicating that the applicant is seeking a “noncommercial educational broadcast station” license within the meaning of 47 U.S.C. Sections 397(6) and 309(j)(2)(C).