

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Westchester Council
for Public Broadcasting, Inc.
to share time with Noncommercial
Educational Station WNYE(FM),
Brooklyn, New York

BPED-840430IB

MEMORANDUM OPINION AND ORDER

Adopted: March 11, 1993;

Released: March 29, 1993

By the Commission:

1. The Commission has before it an application for review filed on May 23, 1988 by the Westchester Council for Public Broadcasting ("WCPB") regarding denial of its petition for reconsideration of the dismissal of the above-captioned application to share time with WNYE(FM), Brooklyn, New York. The New York City Board of Education ("City Board of Education") is the licensee of WNYE. After review of the pleadings, we conclude that the Mass Media Bureau's ("Bureau") ruling was correct, and the application for review does not contain sufficient grounds to warrant a reversal or alteration of the ruling.

BACKGROUND

2. On April 30, 1984, pursuant to 47 C.F.R. §73.561(b), WCPB timely filed its application, which proposed to share time on WNYE's frequency, against that station's license renewal application.¹ On May 14, 1985, pursuant to 47 C.F.R. §73.3568(b), WCPB's application was dismissed by the staff for failure to respond to an official Commission request for additional information and for failure to prosecute its application.

3. In its letter, the staff outlined the threefold rationale that prompted its action as follows: First, the staff, by letter dated February 28, 1985, informed WCPB that pursuant to 47 C.F.R. §73.561(b), its application was deficient with regard to information on its share-time agreement with WNYE and that the applicant should supply the Commission with this information within 30 days of the date of the letter. Such information was not received by the Commission, and the staff therefore concluded that WCPB failed to respond to its official request. WCPB argued that it did respond to the Commission's request through two letters addressed to the Chief, FM Branch, dated March 29, 1985

¹ In pertinent part, 47 C.F.R. §73.561(b) requires that an applicant seeking to share time with a noncommercial educational FM station must attempt to reach an agreement with that station prior to filing its share time application. Upon reaching agreement, such agreement is to be filed with the application, or, if no agreement is reached, the applicant must submit a statement to that effect in the application. The rule calls for a

and May 10, 1985, respectively. The Commission has no record of having received these letters, and WCPB provided no evidence that they were either filed with the Commission or served upon WNYE or its counsel as required by Commission rules. Second, WCPB represented itself to the Commission as a corporate applicant and was required to provide, as an exhibit to its application, copies of its articles of incorporation (or charter) and by-laws, as certified by the Secretary of State or other appropriate official.² In its application, WCPB stated that it would later amend its application in this regard; however, over one year after the application was filed, the information was not received nor was any effort made by the applicant to inform the Commission about the status of any progress made regarding its efforts to incorporate. Accordingly, the staff then cited this inaction as a failure by WCPB to prosecute its application. Finally, several months after it filed its application, WCPB lost its transmitter site and requested that the Commission defer action on the application until September 15, 1984, in order to afford WCPB time to file an amendment specifying a new transmitter site. However, by May 15, 1985, no amendment was received naming a new site nor was any effort made to inform the Commission of progress made in the search for a new site or to request additional time to file the amendment. The staff cited this as further evidence of WCPB's failure to prosecute its application.

4. On June 24, 1985, in response to the staff's dismissal of its application, WCPB filed a petition for reconsideration regarding that action. The Bureau concluded that WCPB failed to establish the the dismissal of its application was either erroneous or improper, and the petition for reconsideration was denied on April 21, 1988. WCPB then filed its application for review requesting that the Commission overturn the Bureau's action and reinstate its application *nunc pro tunc*. WNYE filed an opposition to the application for review, and WCPB filed a reply.

DISCUSSION

5. In order to obtain relief through an application for review of action taken pursuant to delegated authority, the aggrieved party must meet at least one of the criteria outlined in 47 C.F.R. §1.115(b)(2). While we find that WCPB has not met its burden in this regard, and therefore does not warrant reversal or alteration of the staff's ruling, we will, nonetheless, briefly address the merits of its arguments.

Time Sharing Arrangement

6. WCPB argues in its application for review that the staff considered it an "undisputed fact" that WCPB failed to respond to its February 28, 1985 letter requesting information about the status of its time sharing arrangement. The staff, however, did not claim that the question of whether WCPB had responded to its letter was undisputed. Rather, the staff asserted that the Commission had no record of receiving WCPB's response and no evidence was

hearing in cases where a share-time arrangement cannot be agreed upon.

² The FCC Form 340 now in use no longer requires this documentation. The first revised version of Form 340 incorporating these new changes was made available to the public in July 1985.

provided to support WCPB's claim that it filed a response with the Commission. Moreover, WCPB provided no evidence that any response to the letter was served upon WNYE, or its counsel, as required by Commission rules. See 47 C.F.R. §1.47. WCPB acknowledges in its application for review that it did not serve WNYE a copy of its response to the staff's letter. WCPB states that because it was not represented by legal counsel, it was unaware that it was required to serve a copy upon WNYE.³

7. We agree with the staff's ruling that the photocopies of the two letters that WCPB says it sent to the Commission, dated March 29, 1985 and May 10, 1985, (and which lack any indication that they were filed with the Commission or upon opposing counsel), do not provide sufficient proof that WCPB responded to the official Commission correspondence regarding its time sharing arrangement. The relatively simple devices of securing file-stamped copies and serving documents on opposing parties give applicants the means necessary to document the existence of disputed filings. We recently affirmed that the applicant bears the burden of proving that the documents in question were received by the Commission. See *Hughes-Moore Associates, Inc.*, 7 FCC Rcd 1454 (1992).⁴ In this case, the burden has not been met.

8. Even if we were to credit WCPB's claim that the letters in question had been filed with the Commission, the letters merely provided status reports regarding efforts to set up meetings at station WNYE. We note that, pursuant to Section 73.561, these efforts to negotiate should have been initiated prior to the filing of the application, so that either a share-time agreement, or a statement that no agreement could be reached, could have been filed with WCPB's application. Instead, WCPB chose to first file an application and then attempt to proceed with negotiations. Thus, we conclude that WCPB's actions were not consistent with Section 73.561.

Corporate Status

9. When WCPB filed its application to share time with WNYE, certain information regarding the legal status of corporate applicants was required to be submitted with the application. As previously noted, this information was not submitted and the staff cited WCPB's inaction in this regard as evidence of its failure to prosecute its application. In its petition for reconsideration, WCPB stated that it had

been "vigorously seeking finalization" of its incorporation process, yet offered nothing to demonstrate its efforts in that regard. Similarly, WCPB alluded to "local political pressures" as the reason for its delay in the incorporation process, yet provided no evidence to support its claim. Therefore, in denying WCPB's reconsideration request, the staff concluded that there was no reason to disturb its earlier ruling on this matter.

10. In its application for review, WCPB now submits affidavits and documentary evidence regarding its unsuccessful efforts to secure the necessary state consents to incorporate. This information relates to a question of fact upon which the staff had no opportunity to pass because this information was not submitted at the reconsideration stage. Additionally, WCPB did not demonstrate why this information could not have been submitted at the reconsideration stage of this proceeding. Pursuant to 47 C.F.R. §1.115(c), "[n]o application for review will be granted if it relies on questions of fact § or law upon which the designated authority has been afforded no opportunity to pass." Accordingly, we will not address the arguments now presented to us on this matter *de novo*.

11. As to the question of why WCPB did not keep the Commission informed of its efforts to incorporate, WCPB claims that it was unaware that the Commission needed a status report, and "believed that if the Commission wanted a status report, it would request one." We find, however, that WCPB's argument is unacceptable, particularly in light of the fact that WCPB promised to amend its application but did not do so. We will, therefore, leave the staff's ruling on this issue undisturbed.

Transmitter site

12. WCPB also argues that the staff erred in concluding that WCPB failed to prosecute its application by not filing an amendment specifying a new transmitter site. WCPB argues that the staff manufactured a justification for condoning what WCPB considered as interference in its efforts to secure a transmitter site. Further, WCPB argues that the staff's rationale was contrary to fact and unsupported by evidence in the record. We disagree. In its reconsideration letter, the staff thoroughly examined WCPB's allegation that it was somehow improperly deprived of the use of its original transmitter site. The staff examined two letters from the Director of Broadcast Operations at Kings-

³ Throughout, WCPB has maintained that it was somehow entitled to special treatment because it was not represented by counsel until after its application was dismissed in May 1985. Further, it has referred to a "stated Commission policy of reluctance to dismiss applications, particularly non-commercial applications" and an "established Commission policy of patience toward, and adequate warning to unrepresented non-commercial applicants like WCPB." We are unaware of any policy which promotes the kind of special treatment to which WCPB refers. Contrary to WCPB's assertions, its decision not to initially retain counsel was a private one having no impact on the Commission's decision-making process in this matter. See *CSI Investments, Inc.*, 5 FCC Rcd 7653, 7654 (1990). With regard to our policy on incomplete and defective AM and noncommercial educational FM applications, the Commission has a policy of *nunc pro tunc* acceptance of applications cured by a relatively minor amendment submitted within 30 days following dismissal or return. See *Commission Statement of Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, 56 RR 2d 776, 778 (1984). In the instant case, none

of the amendments promised by WCPB, or requested from WCPB by the staff, were ever filed, either before or within 30 days after dismissal of its application.

⁴ In the *Hughes-Moore* case, the authenticity of a copy of an FCC stamped filing was disputed when neither the Commission nor the parties had a record of initially receiving the pleading in question. We stated that when the filing of such a document is in dispute, the applicant "has the initial burden to show that the document was properly delivered to the Commission when there is no record of such a filing in the Commission's files." Further, if the applicant used regular mail service, it "must submit proof that the mailed document was properly addressed to the Commission, had sufficient postage, and was deposited in the mail." 7 FCC Rcd at 1455, citing *In re Yoder Co.*, 758 F.2d 1114, 1118 para. 4 (6th Cir. 1985); and *Simpson v. Jefferson Standard Life Insurance Company*, 465 F.2d 1320 (6th Cir. 1972). Additionally, the type of proof that must be submitted is not materially affected if a delivery service other than the mail is used. *Id.*

borough Community College ("KCC"), the apparent owner of the original transmitter site, to an engineering consultant for WCPB and to the Chairman of WCPB. In the letter addressed to the Chairman of WCPB, the Director of Broadcast Operations at KCC stated that consent for site use was withdrawn because of the perceived impropriety of having "a part of the New York City Educational system" involved "in a challenge against another part."⁵ Apparently, KCC is affiliated with the Board of Higher Education, which in turn is affiliated with the State Education Department. Likewise, the City Board of Education is affiliated with the State Education Department. It is not unreasonable for one local government entity to decline to allow its property to be used by an organization prosecuting an application at the Commission which is being challenged by another local government entity. We disagree with WCPB that the staff should have taken this opportunity to examine whether the City Board of Education possesses the necessary qualifications to remain a Commission licensee.⁶ There is nothing in the record before us to demonstrate that withdrawal of permission by KCC for WCPB to use its site was somehow fueled by improper motives. WCPB's speculation regarding this matter does not warrant reversal of the staff's action.

CONCLUSION AND ORDERING CLAUSE

13. As discussed above, we find that WCPB's application to share time with WNYE was properly dismissed by the staff pursuant to 47 C.F.R. §73.3568(b) and its petition for reconsideration of that action was properly denied.

14. ACCORDINGLY, IT IS ORDERED, That the Application for Review filed on May 23, 1988, by Westchester Council for Public Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

⁵ WCPB notes that the staff, in its letter denying reconsideration, apparently mischaracterized the relationship that exists between the Board of Higher Education, the City Board of Education and KCC. The staff letter asserted that because these three entities were affiliated, permission was withdrawn to use the original site in order to avoid any conflict between the various factions of the organization and to maintain harmony within the ranks. WCPB points out, however, that while the Board of Higher Education and the City Board of Education are both affiliated with the State Education Department, the two boards are not in any other way connected with each other. Also, WCPB points out that while KCC is affiliated with the Board of Higher Education, it has no official relationship whatsoever with the City Board of Education. In any event, we find that WCPB's assertions with regard to these matters are not of decisional significance.

⁶ WCPB faults the staff for not "invoking the proper prece-

dent" in making its determination. However, the case WCPB relies upon as an example of an applicant's improper efforts to deny available transmitter sites to its competitor, *Alabama Citizens for Responsive Public Television*, 69 FCC 2d 1061 (1978), is not analogous to the instant case. In *Alabama*, a noncommercial educational television licensee whose several license renewal applications had already been denied, sought to extend its own exclusive rights to two of the leased sites for those facilities. In one renegotiated lease, the licensee extended its rights to the antenna and transmitter site for 5 years beyond the time the site ceased to be used for its studio and transmission tower. Moreover, unlike here, it was noted in *Alabama* that apparently neither of the site owners involved was opposed to making its site available to another applicant. The staff examined this precedent fully in its reconsideration letter and correctly determined that the situation it was presented with was not similar to the facts in *Alabama*.