

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

In re Application of

SACRAMENTO File No. BPED-870317MD
COMMUNITY
RADIO, INC.

For a Construction Permit for
A New Noncommercial
Educational FM Station
Sacramento, California

MEMORANDUM OPINION AND ORDER

Adopted: June 2, 1993;

Released: June 15, 1993

By the Commission:

I. INTRODUCTION

1. The Commission has before it a Petition for Reconsideration, filed on June 23, 1989, by Sacramento Community Radio, Inc. ("SCR").¹ SCR seeks review of an action by the Chief, Audio Services Division, denying SCR's January 28, 1988 Petition for Reconsideration of the return of its application as unacceptable for filing, affirming the return of SCR's application, and designating for comparative hearing five other applications for a construction permit for a new noncommercial educational FM ("NCE-FM") station at Sacramento, Ione, or West Highlands, California. *Yolo County Public Radio*, 4 FCC Rcd 4482 (MM Bur. 1989).

II. BACKGROUND

2. On December 17, 1985, Yolo County Public Radio ("Yolo") filed an application to provide NCE-FM service to West Sacramento, California, on Channel 205. Subsequently, on February 26, 1986, Sacramento City Unified School District ("SCUSD") filed an application to serve Sacramento, California, on Channel 209. The SCUSD application was not in conflict with the previously filed Yolo application. SCUSD's application was placed on an "A" cut-off list in *Public Notice*, Report No. A-119, released September 22, 1986, establishing October 23, 1986, as the cut-off date for the filing of mutually exclusive applications.² The *Public Notice* specifically stated that "any application seeking to be considered with any application

appearing on the attached list, or with any other application on file by the close of business on the cut-off date which involves a conflict necessitating a hearing with any application on this list, must be substantially complete and tendered for filing at the Office of the Commission in Washington, D.C., not later than the close of business on the cut-off date." (Emphasis added). On October 23, 1986, the last day for the filing of conflicting applications, Family Stations, Inc. ("Family") filed an application to serve North Highlands, California on Channel 207 which was mutually exclusive with SCUSD's application and with Yolo's prior-filed application.

3. Thereafter, on February 13, 1987, Yolo's application was inadvertently placed on an "A" cut-off list establishing March 17, 1987 as the last date for filing applications mutually exclusive with Yolo's. In fact, however, Yolo's application was linked to SCUSD's application by way of a "daisy chain" occasioned by the filing of Family's October 23, 1986 application. Yolo's application, having been on file at the Commission since December 17, 1985, was timely filed with respect to the SCUSD application, the "A" applicant, or the lead application which established the pertinent "A" cut-off date. Thus, the Yolo application was also governed by the SCUSD October 23, 1986 "A" cut-off date, and the Yolo application should not have been placed on a separate "A" cut-off list. Accordingly, by an *Erratum* released March 12, 1987, Report No. A-122A, Yolo's application was deleted from the second "A" cut-off list.

4. However, on March 17, 1987, in response to the erroneous listing of the Yolo application on the second "A" cut-off list, SCR tendered the above-captioned application to provide NCE-FM service to Sacramento, California, on Channel 205. SCR's application was mutually exclusive with the Yolo application and the Family application. Because the cut-off-date for the filing of applications mutually exclusive with Yolo's application was October 23, 1986, as established by the lead SCUSD application, SCR's March 17, 1987 application was not timely filed, and it was returned as unacceptable for filing by staff letter dated December 29, 1987.

III. THE PLEADINGS

5. In its first petition for reconsideration, SCR argued that it was impossible to determine that the filing of Family's application would link SCR in a "daisy-chain" to SCUSD's application. Therefore, SCR maintained, the staff unfairly applied the October 23, 1986 cut-off date to its application. Further, SCR argued that the staff erred by failing to place Yolo's application on an "A" cut-off list first, because that application was the first filed application in the group. SCR asserted that had Yolo's application been placed on an "A" cut-off list first, it would have timely filed a competing application. In its second petition, SCR argues that its application should be accepted because

¹ The Petition for Reconsideration ostensibly seeks reconsideration of the staff's denial of SCR's earlier Petition for Reconsideration, filed January 28, 1988. This second Petition for Reconsideration will therefore be treated as an application for Commission review of the staff's action.

² Under the cut-off procedure, NCE-FM applications accepted for filing are placed on an "A" cut-off public notice which provides a thirty-day period for the filing of applications that are in conflict with those listed. This procedure is designed to

permit the Commission to cease accepting applications from new parties so that a choice can be made between timely filed applicants. After any such competing applications are filed, these applications are placed on a "B" cut-off public notice which provides for a 30-day period for the filing of petitions to deny. See 47 C.F.R. § 73.3573(e)

it was materially misled by the staff's series of actions, culminating in the erroneous inclusion of Yolo's application on an "A" cut-off list released February 13, 1987.

IV. DISCUSSION

6. We deny SCR's petition for the reasons which follow. Regarding SCR's contention that the first-filed Yolo application should have been the first cut off, we note that Section 73.3573(e) states that applications in the reserved band will be processed as nearly as possible in the order in which they are filed, such applications being placed in the processing line in numerical sequence, and drawn by the staff for study, the lowest file number first. While applications are generally assigned to the staff for study in the same order as filed, it does not always follow that the first assigned NCE-FM application is the first cut off, nor is it required to be. More difficult and complex applications take longer to process than easier cases. Additionally, processing times differ because of the nature of the cases assigned and the varying priorities given to individual staff engineers. Moreover, unlike the processing of applications for commercial stations where communities and frequencies are preallotted and mutually exclusive cases can be easily identified and grouped for processing, applications in the reserved band are not preallotted as to frequencies and communities. Accordingly, mutually exclusive applications cannot be identified until after engineering study. As a result, noncommercial educational applications are generally processed independently and mutually exclusive applications are grouped only after a cut-off date has passed.

7. The Commission's cut-off rule serves two purposes. First, it advances the interest of administrative finality by permitting the Commission to fix a date certain by which mutually exclusive applications must be filed. Secondly, it aids timely filed broadcast applicants by granting them a protected status that allows them to prepare for what often will be an expensive and time-consuming contest, fully aware of the competitors they will be facing. *City of Angels Broadcasting, Inc. v. FCC*, 745 F.2d 656, 663 (D.C. Cir. 1984). The *Kittyhawk* corollary holds that an application will be considered timely only when filed prior to the cut-off date for the lead application of a group of conflicting applications. *Kittyhawk Broadcasting Corp.*, 7 FCC 2d 153 (1967), *appeal dismissed sub nom. Cook, Inc. v. United States*, 394 F.2d 84 (7th Cir. 1968).³ This policy balances the rights of applicants and potential applicants, while taking into account the public interest in the expeditious provision of new service. It allows applications to be processed without interruption and without the necessity of reprocessing when new applications are filed or pending applications are amended. See *Florida Institute of Technology*, 4 FCC Rcd 1549 (1989), *aff'd* 952 F.2d 549 (D.C. Cir. 1992); *Bill R. Wright*, 102 FCC 2d 1142 (1985).

8. The return of SCR's application was mandated by the "*Kittyhawk* doctrine." In *Kittyhawk*, as in the instant case, the mutual exclusivity arose from a linkage occasioned by

the tendering of an application not listed on the "A" cut-off list. The fact that SCR is linked to the SCUSD application through its mutual exclusivity with the timely-filed Family application and that SCR did not file its application by the cut-off date for the SCUSD application renders its application untimely. The Court of Appeals for the District of Columbia Circuit has emphasized the importance of a potential applicant diligently and responsibly pursuing an authorization. "[T]he burden ... is, and properly should be, upon an interested person to act affirmatively to protect himself." *Red River Broadcasting Co. v. FCC*, 98 F. 2d 282, 286 (D.C. Cir. 1938), *cert denied*, 305 U.S. 625 (1938); *Spanish International Broadcasting Company v. FCC*, 385 F.2d 615 (D.C. Cir. 1967). Applicants who ignore or fail to understand the cut-off procedures assume the risk that they will be prevented from filing competing applications. *Bill R. Wright, supra*, at 1147.

9. SCR's argument that it was misled by the staff's actions relating to the Yolo application is unavailing. The staff's actions regarding Yolo are immaterial since it is SCR's link to the SCUSD application that rendered it untimely. Whatever action the staff took or might have taken with regard to the Yolo application does not change that fact. If SCR intended its application to compete with the Yolo application, we note that it could have filed at any time between Yolo's filing date of December 17, 1985 and SCUSD's cut-off date of October 23, 1986. There is no legal requirement for a potential applicant to await the appearance of a mutually exclusive proposal on a cut-off list. SCR admits that it had actual knowledge that the Yolo application had been filed and was pending before the Commission. Thus, while it was clearly aware of the pendency of the Yolo application, SCR chose to await the appearance of the Yolo application on an "A" cut-off list, and purposely deferred the filing of its mutually exclusive application until that time.⁴

10. Concerning the erroneous cut-off list, it is well settled that the cut-off dates therein have no legal effect. As stated by the Court in *Florida Institute*:

The core of the [appellant's] case, however, is its contention that the FCC staff's mistaken issuance in September 1986 of the new "A" list, rather than the "B" list appropriate under the cut-off rules, gave the [appellant] rights it would not otherwise enjoy. This new "official notice," the [appellant] argues, effectively started the cut-off process over again, and this time the [appellant] applied on time. We do not agree. The new "A" cut-off date could not supplant the earlier one because the September 1986 notice was without legal effect: "[i]t is a well-settled rule that an agency's failure to follow its own regulations is fatal to the deviant action." *Way of Life Television Network, Inc. v. FCC*, 593 F.2d 1356, 1359 (D.C. Cir. 1979) (quoting *Union of Concerned Scientists v. Atomic Energy Comm'n*, 499 F.2d 1069, 1082 (1974).

³ In the *Kittyhawk* case the Commission addressed the factual situation where an applicant's proposal is not mutually exclusive with the first filed application, but is mutually exclusive with one or more applications filed on or before the "A" cut-off date. In this so-called "daisy chain" circumstance, the proposal

must still be filed by the "A" cut-off date in order for the Commission to consider at one time all mutually exclusive applications.

⁴ Furthermore, the Commission issued an *Erratum* five days prior to the actual SCR filing, providing notification that the Yolo application had been inadvertently placed on the second "A" cut-off list released February 13, 1987.

it was materially misled by the staff's series of actions, culminating in the erroneous inclusion of Yolo's application on an "A" cut-off list released February 13, 1987.

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⁴ Furthermore, the Commission issued an *Erratum* five days prior to the actual SCR filing, providing notification that the Yolo application had been inadvertently placed on the second "A" cut-off list released February 13, 1987.

952 F2d at 553. In the instant case, the deviant action was clearly the placement of Yolo's application on a second "A" cut-off list and the action was, consequently, without legal effect. Contrary to SCR's assertions, that erroneous action rendered the placement of Yolo's application on the second "A" cut-off list of February 13, 1987 null and void, and certainly did not create or establish new filing opportunities.

11. SCR cites only one case for the proposition that the Commission has allowed an applicant who had been misled by staff error to resubmit its application. SCR contends that the Commission has found compelling circumstances warranting waiver of the cut-off rule to have occurred when an applicant files late in reliance upon bad information supplied by the Commission via ambiguous or erroneous language in Commission documents. In support of this contention, SCR cites *Ramon Rodriguez & Associates*, 3 FCC Rcd 407 (1988). However, this case did not involve the issuance of a second, erroneous cut-off list. *Ramon Rodriguez & Associates* involved the disparate treatment and dismissal of an application which had been filed in response to erroneous data contained in an FM allocation order for a commercial channel. SCR has failed to demonstrate the existence of similarly unusual and compelling circumstances and, thus, failed to successfully meet the substantial burden warranting waiver of the cut-off rule.

V. CONCLUSION

12. Accordingly, for the reasons stated above, IT IS ORDERED That SCR's Petition for Reconsideration, when treated as an Application for Review, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary