



Federal Communications Commission  
Washington, D.C. 20554

May 17, 2007

In Reply Refer to:  
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FCC Mail Room

James P. Pappas  
The University of Oklahoma  
KGOU Radio  
860 Van Vleet Oval, Room 300  
Norman, OK 73019-2034

In Re: NEW (NCE FM), Woodward, Oklahoma  
Facility ID No. 122335  
File No. BMPED-20060315AEO

Application for Minor Modification

Dear Mr. Pappas:

We have before us the above-captioned application filed by the University of Oklahoma ("the University") to modify the construction permit for its new station at Woodward, Oklahoma. For the reasons set forth below, we dismiss the application.

**Background.** The University was among three mutually exclusive applicants for a new noncommercial educational ("NCE") FM station construction permit. Pursuant to established procedures,<sup>1</sup> the Media Bureau (the "Bureau") determined that the University was entitled to a decisive preference under Section 307(b) of the Communications Act of 1934, as amended,<sup>2</sup> and identified the University as the tentative selectee in NCE MX Group 990802.<sup>3</sup> Specifically, the Bureau concluded that the University's proposal would provide a first local service to 16,597 people, and neither of the other applicants could make an equivalent or better showing.<sup>4</sup> Accordingly, the Bureau identified the University as the tentative selectee, and on August 26, 2005, the University was awarded the construction permit. On March 15, 2006, the University filed the instant application for minor modification to the facilities of its new station, proposing to change the station's transmitter location and channel, decrease

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<sup>1</sup> See 47 C.F.R. § 73.7002; see also *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000), partially reversed on other grounds, *NPR v. FCC*, 254 F.3d 226 (D.C. Cir. 2001) (delegating authority to the Bureau to make 307(b) determinations in NCE cases) (the "NCE Order").

<sup>2</sup> 47 U.S.C. § 307(b).

<sup>3</sup> See *Letter to the University of Oklahoma, et al.*, 20 FCC Rcd 11984 (M.B. 2005).

<sup>4</sup> The University was the only applicant to assert that it was entitled to a first service preference.

the antenna height above ground and average terrain, decrease the power, and downgrade to a Class C1 station.

**Discussion.** Section 73.7002(c) of the Commission's Rules (the "Rules") provides that for a period of four years of on-air operations, an applicant receiving a decisive 307(b) preference must "construct and operate technical facilities substantially as proposed and shall not downgrade service to the area on which the preference was based."<sup>5</sup> The University recognizes this restriction and acknowledges that its proposed modification will result in a smaller number of persons receiving first NCE FM service. The University does not request a waiver of Section 73.7002(c) of the Rules, but instead asserts that its application should be deemed to comply with Section 73.7002(c).<sup>6</sup> Specifically, the University (1) explains that if it had specified the proposed operational parameters in its original application, it still would have easily won the decisive 307(b) preference over the two competing applications,<sup>7</sup> and (2) submits that its proposed modifications will result in a station that is substantially like the original.<sup>8</sup> Accordingly, the University submits that the proposed changes in the predicted service contour and population served are permissible.

We disagree. Applicants receiving a decisive 307(b) preference are not precluded from making minor changes to their proposed stations. Section 73.7002(c) of the Rules, however, explicitly prohibits any changes which will "downgrade service to the area on which the preference was based." The rule does not, as the University proffers, allow an applicant the discretion to downgrade so long as it would still have won a decisive 307(b) preference or the population served will be just "slightly smaller." Instead, FCC Form 340 specifically explains that if an applicant receiving a decisive 307(b) preference proposes to downgrade service prior to the expiration of the four-year holding period, the "application is unacceptable."<sup>9</sup>

The University's proposed modification, which will reduce the new Woodward station's service, violates the clear mandate of Section 73.7002(c) of the Rules. The University has not requested a waiver of the rule nor has it presented any unique circumstances or compelling public interest reasons to warrant a waiver on our own motion.<sup>10</sup> In the University's application, the University explains that a newly constructed tower has become available, and the new site would not require structural analysis/improvement and would permit the use of a much more cost-effective non-directional antenna. Accordingly, the University maintains that grant of the proposed modification application will allow it to realize significant cost benefits and reduce the amount of its requested PTFP grant. We find that the

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<sup>5</sup> 47 C.F.R. § 73.7002(c); *see also* NCE Order, 15 FCC Rcd at 7397.

<sup>6</sup> *See* Exhibit 9 to FCC Form BMPED-20060315AEO.

<sup>7</sup> The University asserts that although the proposed modifications would reduce the projected new first service population to 14,474 persons (a loss of 2,123 persons), the reduced number is eight times the size of the population claimed by the next best application. *Id.* at 2.

<sup>8</sup> The University maintains that the proposed changes will still provide service to approximately 94 percent of the population it originally planned to serve. *Id.* at 3.

<sup>9</sup> *See* Question 18 of FCC Form 340 (providing that if an applicant cannot certify that either (1) the proposed modification will not downgrade service to the area on which the Section 307(b) preference was based, or (2) although it proposes to downgrade service, the applicant has provided full service to that area for a period of four years of on-air operations, the application is unacceptable).

<sup>10</sup> *See* *Northeast Cellular Telephone Co. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("[A] waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest," citing *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969)); *see also* 47 C.F.R. § 1.3.

University's economic arguments do not justify a waiver.<sup>11</sup> Accordingly, we dismiss the application as unacceptable for filing.<sup>12</sup>

IT IS ORDERED that the application of the University of Oklahoma for a minor modification of the construction permit for its new station at Woodward, Oklahoma IS DISMISSED.

Sincerely,



Peter H. Doyle  
Chief, Audio Division  
Media Bureau

cc: Margaret L. Miller, Esq.

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<sup>11</sup> See, e.g., *PZ Entertainment Partnership, L.P.*, Memorandum Opinion and Order, 6 FCC Rcd 1240 (1991), *recon. denied*, 7 FCC Rcd 2696 (1992) (finding it inappropriate to depart from licensing standards solely on economic grounds); *Forum Communications Company*, Order on Reconsideration, 15 FCC Rcd 14 (1999).

<sup>12</sup> See 47 C.F.R. § 73.3566(a) (applications which are determined to be patently not in accordance with the FCC rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective and will not be accepted for filing).