



Federal Communications Commission
Washington, D.C. 20554

February 19, 2009

DA-09-406

In reply refer to:
1800B3-MJW/PHD
Released February 19, 2009

Christian Broadcasting, Inc.
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In re: **Christian Broadcasting, Inc.**

AM Auction No. 84
Facility Nos. 160857, 160902, 160906
File No. BNP- 20040129AJT - (MX Group 84-58)
File No. BNP- 20040129AJP - (MX Group 84-58)
File No. BNP- 20040129AJL - (MX Group 84-20)

Petition for Reconsideration and/or Waiver

Dear Counsel:

We have before us a Petition for Reconsideration and/or Waiver Request (the "Petition") filed February 27, 2007, by Christian Broadcasting, Inc. ("CBI"), seeking reconsideration of the dismissal of its application and three related tech box submissions for new AM broadcast stations in Anchorage, Alaska (the "Applications").¹ For the reasons set out below, we grant the Petition, waive the prohibition on major amendments to short-form applications found in Section 1.2105(b)(2) of the Commission's rules (the "Rules"),² permit CBI to amend the Applications, and accept the Section 307(b) showings that CBI tendered with its Petition.

Background. When it filed its electronic Form 175, "Application to Participate in an FCC Auction," on January 30, 2004, CBI checked a box (Item 9) indicating that it had Noncommercial Educational ("NCE") applicant status.³ An entity may apply for an NCE station during an AM auction filing window. Pursuant to established Commission procedure, however, its application is subject to dismissal if a mutually exclusive application is filed by an applicant

¹ Petition of Christian Broadcasting, Inc., filed Feb 27, 2007 (seeking reconsideration of dismissal of short-form application and three associated tech box submissions, FCC File Nos. BNP-20040129AJT – MX 84-58, BNP-20040129AJP - MX 84-58, and BNP-20040129AJL - MX 84-20).

² 47 C.F.R. § 1.2105(b)(2).

³ FCC Form 175 (October, 2000, version) "Application to Participate in an FCC Auction." Item 9 of the form required parties to designate their "Applicant Status." The choices were: "Rural Telephone Company, Minority Owned Business, Woman Owned Business, Noncommercial Educational, and None of the above."

for a commercial station, unless all applicants successfully effect a settlement agreement or provide an engineering solution removing the mutual exclusivity.⁴

Although there were applications for commercial stations that were mutually exclusive with CBI's Applications, CBI did not conclude a settlement agreement or implement an engineering solution that would have removed the mutual exclusivity with the other applicants.⁵ Accordingly, because CBI had checked the NCE box – and thereby appeared to be applying for NCE stations – its Applications were dismissed on January 29, 2007, in accordance with Section 73.5002(b) of the Rules.⁶ CBI, however, states that it checked the NCE box in error because it believed the Item 9 inquiry required CBI to identify only its legal classification, *i.e.*, as “a non-profit corporation organized under 501(c)(3) of the Internal Revenue Code.”⁷

CBI points out the similarity between its circumstance and that of certain applicants in FM Broadcast Auction 37 that mistakenly checked the “NCE” box, but were subsequently allowed to “deselect” NCE status. CBI references the *American Family* decision, released after CBI filed its Application. In that decision, the Media Bureau and the Wireless Bureau noted ambiguities between “the electronic Form 175 and the accompanying instructions.”⁸ The Bureaus found that those confusing ambiguities led applicants who were, in fact, eligible to claim NCE status to check the NCE box although their intent was to apply for a commercial, not an NCE, station. Thus, the Bureaus waived section 1.2105(b)(2)'s prohibition against major amendments to short-form applications for the limited purpose of allowing Auction 37 applicants whose applications were rejected for indicating NCE status an opportunity to de-select “Noncommercial Educational” as their applicant status, if they so chose.⁹ CBI argues that it encountered the same ambiguities, made a comparable error, and should be afforded relief equivalent to that given in *American Family*.¹⁰

⁴ See Reexamination of the Comparative Standards for Noncommercial Educational Applicants, Second Report and Order, 18 FCC Rcd 6691, 6699-6700 (2003) (“Second Report and Order”). See also Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, First Report and Order, 13 FCC Rcd 15920, 15978-15980 (1998), recon. granted in part and denied in part, Memorandum Opinion and Order, 14 FCC Rcd 8724 (1999), further recon. granted in part and denied in part, Memorandum Opinion and Order, 14 FCC Rcd 12541 (1999).

⁵ CBI filed three tech boxes in the filing window, each specifying a different AM frequency in Anchorage. These subsequently were determined to be in two mutually exclusive (“MX”) groups, MX Group 84-58 and MX Group 84-20. See *AM Auction No. 84 Mutually Exclusive Applicants Subject to Auction*, Public Notice, 20 FCC Rcd 10563 (MB/WTB 2005).

⁶ AM Auction No. 84 - Mutually Exclusive Applications Dismissed for Failing to File or Untimely Filing of Required Settlement Agreement, Engineering Solution, or Section 307(b) Showing, Public Notice, 22 FCC Rcd 1055 (2007). CBI claims that it did not file a Section 307(b) showing by the October 31, 2005, deadline because its NCE applicant status brought it “within the scope of the instruction contained in footnote 18” of a June 15, 2005, Commission Public Notice stating that “NCE applicants that failed to successfully resolve mutual exclusivities are returned as unacceptable for filing and therefore do not submit Section 307(b) showings.” Petition at 2 (quoting AM Auction No. 84 Mutually Exclusive Applicants Subject to Auction, Public Notice, 20 FCC Rcd 10563 (MB/WTB 2005)).

⁷ Petition at 5.

⁸ *American Family Association, et al.*, Letter, 19 FCC Rcd 18681, 18685 (MB/WTB 2004) (“*American Family*”).

⁹ *Id.* at 18684-18685.

¹⁰ Petition at 4-5. CBI also requests that the Section 307(b) showings that it tendered with its Petition be accepted.

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission’s original order, or raises additional facts, not known or existing at the time of petitioner’s last opportunity to present such matters.¹¹ At the time CBI’s Applications were dismissed, CBI’s reason for designating NCE status was not readily apparent on the face of the Applications. CBI’s Petition represented the first procedural opportunity for it to inform the Commission of why it checked the NCE box.

We agree with CBI that *American Family* is on point here. As was the case for Auction 37, applicants for Auction 84 faced the same Form 175 instructions requiring each applicant to indicate its legal classification and applicant status. While the Bureaus have since clarified the instructions to help applicants better understand the consequences of selecting NCE status on the short-form application, we recognize that the old instructions may have contributed to confusion on the part of CBI with regard to the consequences of selecting NCE legal classification.¹² Accordingly, consistent with the reasoning in *American Family* and in light of the singular circumstances present here, we are granting the Petition.¹³ In furtherance of that action, we provide CBI with an opportunity to amend the Applications to indicate its intended applicant status.¹⁴ Given this disposition, and consistent with the decision in *American Family*,¹⁵ we find good cause for waiving the prohibition on major amendments found in Section 1.2105(b)(2) which, absent such waiver, would foreclose acceptance of CBI’s amendment.¹⁶

Decision/Action. Accordingly, IT IS ORDERED that the CBI Petition for Reconsideration and/or Waiver IS GRANTED. IT IS FURTHER ORDERED that the Section 307(b) showings tendered with the CBI Petition for Reconsideration and/or Waiver ARE ACCEPTED. IT IS FURTHER ORDERED that Section 1.2105(b)(2) of the Commission’s Rules, 47 C.F.R. § 1.2105(b)(2), IS WAIVED to the extent indicated herein. IT IS FURTHER

¹¹ See *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff’d sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

¹² See *American Family*, 19 FCC Rcd at 18684.

¹³ As requested by CBI, we also will accept the Section 307(b) showings that CBI tendered with its Petition.

¹⁴ CBI shall file its amendments by electronic mail to the attention of Margaret Wiener, Chief, Auctions and Industry Analysis Division, at the following address: auction84@fcc.gov. The amendments must include a subject or caption referring to Auction No. 84 and must be sent by a duly authorized representative of CBI. A copy of the email shall be sent to kathryn.hostetter@fcc.gov and thomas.messinger@fcc.gov. If CBI fails to amend its Form 175 Applications and change its intended legal classification by electronic mail within 30 days of the date hereof, CBI’s Applications will remain dismissed with prejudice.

¹⁵ See *American Family*, 19 FCC Rcd at 18683.

¹⁶ See *Second Report and Order*, 18 FCC Rcd at 6700 (“we will treat any applicant’s attempt to change its self-identification as a major amendment, which is prohibited after the short-form application filing deadline”) (citing 47 C.F.R. § 1.2105(b)(2)).

ORDERED that, within thirty days of the release date hereof, CBI shall amend the above-referenced Applications as provided herein.

Sincerely,

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

Peter H. Doyle
Chief, Audio Division
Media Bureau

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