



Federal Communications Commission
Washington, D.C. 20554

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Re: Request for Declaratory Ruling
MM Docket No. 97-234
MB Docket No. 07-172
RM-11338

Waiver of Section 1.2105(b)(2)

Dear Counsel:

This letter addresses the March 21, 2013, Request for Declaratory Ruling (“Request”) of Bond Broadcasting, Inc. and East Kentucky Broadcasting Corp. (collectively, “Petitioners”). Petitioners request a declaratory ruling “clarifying that the Auction 83 procedures announced in *FM Translator Auction Filing Window and Application Freeze*,¹ . . . will not be altered without a notice and comment proceeding so as to allow for heretofore prohibited major changes to long-pending FCC Form 175 applications of non-commercial educational . . . applicants that specify non-commercial educational status.” For the reasons set forth below we deny the Request.

A declaratory ruling is appropriate to terminate a controversy or remove uncertainty.² No controversy or uncertainty exists here. Petitioners request that the Commission provide notice and comment before waiving Section 1.2105(b)(2)³ of the Commission’s rules to permit an Auction 83 applicant to amend its Form 175 application to de-select its noncommercial educational (“NCE”) filing status. It is well settled that the Commission may waive a rule if special circumstances warrant a deviation from the general rule and such deviation better serves the public interest.⁴ Petitioners provide no support for the unfounded proposition that the Commission must follow rulemaking procedures to waive a rule. Nevertheless, the Commission addressed this

¹ See *FM Translator Auction Filing Window and Application Freeze*, Public Notice, 18 FCC Rcd 1565, 1568 (MB/WTB 2003) (major modifications to FCC Form 175s not permitted after close of filing window).

² See 47 C.F.R. § 1.2(a).

³ 47 C.F.R. § 1.2105(b)(2) (“Major amendments cannot be made to a short-form application after the initial filing deadline.”)

⁴ See, e.g., *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-28 (D.C. Cir. 2008).

exact issue when it reconsidered⁵ the 2003 NCE comparative licensing rulemaking order⁶ which held that an NCE de-selection amendment would constitute a major change, and thus a prohibited amendment following the close of an auction filing window. On reconsideration, the Commission concluded that NCE applicants in certain commercial/NCE “mixed” groups should be permitted “to amend their pending applications for the sole purpose of applying for a commercial station.”⁷ It explained that permitting these amendments “will give applicants for NCE stations one opportunity to reevaluate their long-pending plans in the context of full and complete information about how the licensing process will work . . . and avoid the harsh result of dismissing applicants based on subsequently adopted processing rules”⁸ This Commission directive applies equally to Auction 83 NCE filers because the *Second Report and Order* was released several weeks after the close of the Auction 83 filing window. To date (and as Petitioners partially recognize), the Media and Wireless Telecommunications Bureaus on three separate occasions have waived the major change rule to permit NCE de-selection amendments for NCE applications.⁹ To the extent that Petitioners believe that Auction 83 applicants should not be subject to the processing policies adopted in *MOTOR* and implemented thereafter by the Media and Wireless Telecommunications Bureaus, those issues should be raised in the context of particular application proceedings rather than in a declaratory ruling request.

Section 1.2(b) of the Commission’s rules states, in part, “The bureau or office to which a petition for declaratory ruling has been submitted or assigned should docket such a petition [and] . . . seek comment on the petition via public notice.”¹⁰ In stipulating that petitions for declaratory rulings “should” rather than “must” seek comment, the Commission has afforded bureaus and offices discretion to act without public notice in unusual circumstances. In adopting Section 1.2(b) the Commission explained that it intended to make the process for petitions for declaratory rulings “similar” to that for petitions for rulemaking.¹¹ With regard to the latter, a bureau or office may deny or dismiss a petition without public notice when it is “moot, premature, repetitive, frivolous, or which do[es] not warrant consideration by the Commission”¹² We apply that standard here¹³ and, for the reasons stated above, find that the Request is frivolous, repetitive and not warranting consideration by the Commission.

⁵ *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Memorandum Opinion and Third Order on Reconsideration, 23 FCC Rcd 17423, 17427-28 (2008) (“*MOTOR*”).

⁶ *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Second Report and Order, 18 FCC Rcd 6691, 6699-6700 (2003) (“*NCE Second Report and Order*”).

⁷ *MOTOR*, 23 FCC Rcd at 17428.

⁸ *Id.*

⁹ See *American Family Association, et al.*, Letter, 19 FCC Rcd 18681 (MB/WTB 2004) (Auction 37); *Supplemental Notice Concerning Status of FCC Form 175 Applications to Participate in Auction 37*, Public Notice, 19 FCC Rcd 18696 (MB/WTB 2004) (providing opportunity for major amendments to Auction 37 applications); *Christian Broadcasting, Inc.*, Letter, 24 FCC Rcd 2212 (2009) (providing a 30-day opportunity for major amendments to certain Auction 84 applications); *Window Opened to October 30, 2009, to Permit Amendment of Applications for Noncommercial Educational Stations in Pending, Closed Mixed Groups*, Public Notice, 24 FCC Rcd 12188 (MB 2009) (providing opportunity for major amendments to certain Auction 88 applications).

¹⁰ 47 C.F.R. § 1.2(b).

¹¹ See *Amendment of Certain of the Commission’s Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, Report and Order, 26 FCC Rcd 1594, 1598-99 (2011) (¶ 12).

¹² 47 C.F.R. § 1.401(e).

¹³ See *James Edwin Whedbee*, Letter, 28 FCC Rcd 379 (WTB 2011) (denying petition for declaratory ruling under Section 1.401(e) standards).

For the reasons set forth above, IT IS ORDERED that the March 21, 2013, Request for Declaratory Ruling of Bond Broadcasting, Inc. and East Kentucky Broadcasting Corp. IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau