

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

**FILED/ACCEPTED**

**JAN 19 2007**

Federal Communications Commission  
Office of the Secretary

In the Matter of )  
)  
Revision of Procedures Governing ) MB Docket No. 05-210  
Amendments to FM Table of Allotments ) RM-10960  
and Changes of Community of License in )  
the Radio Broadcast Services )

To: Marlene H. Dortch, Secretary  
Office of the Secretary

**PETITION FOR RECONSIDERATION**

Educational Media Foundation ("EMF"), by its attorneys, and pursuant to Section 1.106 of the Commission's Rules,<sup>1</sup> hereby seeks reconsideration of the Commission's Report and Order, *In the Matter of Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, 21 FCC Rcd 14212 (2006) ("*Report and Order*").<sup>2</sup> EMF actively participated as a party in interest in the Commission's notice and comment proceeding which gave rise to the *Report and Order*. Furthermore, as the licensee and operator of numerous noncommercial educational full power broadcast stations operating on reserved and non-reserved FM channels, all of which are subject to the Commission's rules as revised in the *Report and Order*, EMF's interests are adversely

<sup>1</sup> 47 C.F.R. § 1.106 (2005).

<sup>2</sup> This Petition is timely filed by virtue of the fact that it is being tendered to the Commission within thirty days of publication of the *Report and Order* in the Federal Register. See 71 Fed. Reg. 76208 (Dec. 20, 2006).

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affected by the *Report and Order* and the rules promulgated therein. Accordingly, it has standing to file this Petition for Reconsideration.

As detailed further below, the Commission erred in drafting its rules to implement the streamlining procedures adopted by the *Report and Order*. Specifically, the Commission failed to properly revise the definition of a minor facility change for a noncommercial educational (“NCE”) FM station under Section 73.3573 of the Rules. As reformulated by the *Report and Order*, the rule section retains elements of the previous definition of a minor change for an NCE FM station, which conflicts with the new definition. This conflict between the remaining language from the old rule, and the clear language of the new rule would restrict NCE FM community of license changes to a degree not anticipated by the *Report and Order*. While this conflict appears to be unintended, if left unchanged, it will have the effect of restricting the scope of improvements and modifications available to NCE stations, including those licensed to EMF. EMF therefore requests that the Commission reconsider this narrow issue and revise its *Report and Order* to provide NCE FM stations with the degree of technical flexibility apparently intended by the Order, and otherwise afforded to all other AM and FM stations.

## I. DISCUSSION

By its *Report and Order*, the Commission streamlined the process for effectuating community of license changes in the FM service by deeming such changes to be ‘minor modifications’ and allowing licensees to file such applications on a first-come, first-served basis using a FCC Form 301 minor modification application.<sup>3</sup> In doing so, the Commission sought to “preserve limited agency resources, reduce the time needed to process community of license

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<sup>3</sup> See *Report and Order* at ¶ 1.

changes, and accordingly, expedite the provision of enhanced broadcast service to the public.”<sup>4</sup>

In redrafting its rules to implement this streamlining, however, the Commission erred with regard to defining permissible minor modifications for noncommercial FM stations. Rather than defining a permissible minor modification simply as a facility change that is mutually exclusive with the station’s current facilities or assignment as defined by Section 73.509, the Commission’s rules retain a vestige of the previous definition of a NCE minor modification, which has the effect of inadvertently restricting the minor modifications permitted for NCE stations.

In order to effectuate the streamlining order, the Commission revised, *inter alia*, 47 C.F.R. 73.3573(a)(1) to redefine what constitutes a minor facilities modification, and added a new section “(g)” to Section 73.3573, outlining the community of license changes that will be considered to be minor changes. Under the newly instituted Section 73.3573(g), a change of community of license of an FM station will be considered a minor modification if “the facilities specified by the applicant at the proposed community of license [are] mutually exclusive, as defined in Section 73.207 or 73.509 of this part, with the applicant’s current facilities or its current assignment.”<sup>5</sup> Just as Section 73.207 defines the circumstances under which a proposed modification by a commercial station is mutually exclusive with the station’s current facilities, Section 73.509 contains the parallel information for noncommercial stations. This cross-reference to Section 73.207 and Section 73.509, respectively, is sufficient to properly define

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<sup>4</sup> *Id.* at ¶ 9.

<sup>5</sup> *Report and Order* at Appendix A, ¶ 7 (containing the text of new Section 73.3573(g)(2)).

what constitutes a mutually exclusive change, and thus, when a proposed facilities modification can be deemed to be a minor change.

In redrafting Section 73.3573(a)(1), however, the Commission failed to eliminate one sentence that continues to retain aspects of the now-outdated definition of a minor facility change in the case of NCE FM reserved band channel stations. Specifically, the revised Section 73.3573(a)(1) states: **“In the case of a Class D or an NCE FM reserved band channel station, a major facility change is any change in antenna location which would not continue to provide a 1 mV/m service to some portion of its previously authorized 1 mV/m service area.”**<sup>6</sup> This sentence contained in 73.3573(a)(1) is plainly contradictory to the more permissive definition contained in 73.3573(g), discussed above, and will have the unintended effect of narrowing the number of facilities modifications that will be considered to be minor modifications for NCE FM stations. Rather than availing themselves of any community of license change that is mutually exclusive under Section 73.509, NCE FM stations will be limited to only those changes that are both mutually exclusive under that section and that satisfy the old definition of an NCE minor modification by continuing to provide 1 mV/m service to some portion of the station’s previously authorized 1 mV/m service. Essentially, this drafting error robs NCE stations of the full measure of the new definition of a minor modification. Clearly, this was not the Commission’s intent as it sought to expand the definition of minor modifications for commercial and noncommercial stations alike.

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<sup>6</sup> *Report and Order* at Appendix A, ¶ 7 (containing the text of the revised Section 73.3573(a)(1)).

Although the Commission expressly stated, “we find that the rationales for adopting the new procedure, such as streamlining of the current two-step process and maturity of the FM service, apply equally to NCE stations, and thus we will apply the new procedure to NCE stations,”<sup>7</sup> as a result of this inconsistency, NCE applicants, such as EMF, will receive little benefit from the Commission’s streamlined process. Notably, the *Report and Order* contains no discussion regarding a distinction between the minor modifications permitted for NCE FM stations versus those permitted for commercial stations, and there is no indication that the Commission intended to set different standards for NCE stations. Indeed, there is no support in the record for that conclusion either. Barring any discussion or explanation in the *Report and Order* for the apparent conflict between the rule sections, it is postulated that the discrepancy is merely an inadvertent oversight, and one that EMF requests that the Commission address on reconsideration by eliminating the superfluous language in Section 73.3573(a)(1).<sup>8</sup>

Ultimately, the revised Section 73.3573(a)(1) is inconsistent with the Commission’s intention to streamline community of license changes and disproportionately – indeed solely – restricts potential modifications by NCE FM stations. Accordingly, EMF respectfully requests that the Commission reconsider its action in this matter and rectify the situation by amending Section 73.3573(a)(1) to remove the sentence referring to the overlap of the 1 mV/m contours.

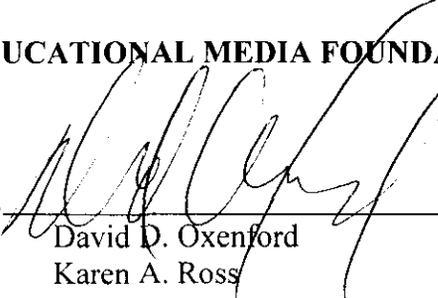
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<sup>7</sup> *Report and Order* at ¶ 13.

<sup>8</sup> It is well-established that if the Commission intends to change its rules it must provide a reasoned basis for the change. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (1970), *cert. denied*, 403 U.S. 923 (1971) (“an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored...”). Here, however, there has been no such effort at articulate a basis for treating NCE and commercial applicants disparately

Respectfully submitted,

**EDUCATIONAL MEDIA FOUNDATION**

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Dated: January 19, 2007

**CERTIFICATE OF SERVICE**

I, Rhea Lytle, a secretary with the law firm of Davis Wright Tremaine LLP, do hereby certify that I have this 19th day of January 2007, mailed by first-class United States mail, postage prepaid, copies of the foregoing "**PETITION FOR RECONSIDERATION**" to the following:

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