

BEFORE THE
Federal Communications Commission

WASHINGTON, D. C. 20554

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Federal Communications Commission
Office of the Secretary

In re Applications of)	MM Docket No. 92-62
CRYSTAL CLEAR COMMUNICATIONS, INC.)	File No. BPH-901214MA
THE RADIO MINISTRIES BOARD OF)	
VICTORY CHRISTIAN CENTER)	
ASSEMBLY OF GOD, INC.)	File No. BPH-901217MJ
For a Construction Permit for)	
a new FM Station on Channel 240A)	
Seelyville, Indiana)	

To: Administrative Law Judge John Frysiak

**REPLY TO OPPOSITION TO MOTION TO DISMISS
APPLICATION OF CRYSTAL CLEAR COMMUNICATIONS, INC.**

The Radio Ministries Board of Victory Christian Center Assembly of God, Inc. (the "Radio Board"), by counsel and pursuant to Section 1.294(c) of the Commission's rules, hereby responds to the "Opposition to Motion to Dismiss Application of Crystal Clear Communications, Inc." ("Opposition") filed May 26, 1992, by Crystal Clear Communications, Inc. ("Crystal"). In response, the following is stated:

Crystal does not dispute that it failed to file its Notice of Appearance by May 4, 1992, as directed by the Hearing Designation Order, DA 92-361 (released April 13, 1992) ("HDO"), and as required by Section 1.221(c) of the Commission's rules. In fact, the Commission's records show that Crystal's Notice of

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Appearance was not filed until May 18, 1992, two weeks after the filing deadline. See Attachment A hereto.

Crystal was on notice of the importance of the timely filing of its Notice of Appearance by May 4, 1992. The HDQ, ¶12, specifically directs that:

to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. (Emphasis added.)

Section 1.221(c) of the rules also directs applicants to make such a filing and warns that where an applicant fails to so file, "the application will be dismissed with prejudice for failure to prosecute." (Emphasis added.)

Crystal's excuse for its late filing is both vague and unsupported. It claims it submitted its Notice of Appearance "within ample time to the courier" for delivery by 5:30 p.m. on May 4, 1992. But Crystal does not identify the courier or reveal when the filing was submitted to that delivery service. Nor does it submit any documentation -- not so much as a courier receipt -- to corroborate its excuse.¹ Crystal's inability to support its assertions with documentation or facts, in itself, constitutes a failure to demonstrate "unusual and compelling circumstances"

¹ Neither Crystal's Opposition nor its Report dated May 18, 1992 and filed with the Commission on May 20, 1992 (see Attachment A), identifies the courier or includes documentation of Crystal's claims.

warranting consideration of a request for waiver of a filing deadline.

Moreover, even if Crystal had documented its claims, its cause would be lost. The Commission has repeatedly warned applicants about the dangers of relying upon couriers for delivery of time-sensitive filings such as a Notice of Appearance. In Caldwell Television Associates, Ltd., 94 FCC 2d 69, 53 RR 2d 1986 (1983),² the Commission accepted an untimely application where an overnight courier had failed to deliver because of a fog-related delay. However, in doing so, the Commission specifically admonished future applicants not to rely upon a courier delivery service to meet FCC deadlines:

We caution parties who wait until the last possible day to effect delivery of their submissions from out-of-town, based on the "guarantees" of all courier services that they run a considerable risk that delays in delivery will render their filings untimely. Absent unusual and compelling circumstances, a party's sole reliance upon the "guarantee" of these organizations would be misplaced and would not excuse the consequences of its untimely filings.

94 FCC 2d at 70-71, 53 RR 2d at 1687 (emphasis added).

In 1985, the Commission issued a notice overruling prospectively the Caldwell decision, with respect to waivers of filing deadlines. In Public Notice, 58 RR 2d 1706 (1985), the Commission said that henceforth, in order to be considered, untimely filings must have been caused by a "calamity of a widespread nature that even the best of planning could not have

² Recon. denied, FCC 83-462 (1983).

4.

avoided." The Commission warned that it would no longer consider as "unusual or compelling" requests for waiver based upon claims that a delivery service was responsible for a tardy filing:

Although these circumstances may be unexpected, they are reasonably foreseeable and therefore applicants should allow enough time to meet cutoff deadlines to account for such unanticipated delays. In other words, in the future, applicants who wait until the eleventh hour to meet Commission deadlines will be held to assume the risk for almost all events which may occur to prevent timely filing. To minimize the risk, applicants should build into their schedules a reasonable margin of error in anticipation of circumstances which may cause delay.

58 RR 2d at 1707.

In 1988, the Commission again addressed the issue of late delivery by couriers. In Kennebec Valley Television, Inc., 65 RR 2d 149 (1988), one of two applicants for a television station, Sebago Broadcasting Co., Inc. ("Sebago"), used the U.S. Post Office Express Mail delivery service to file an important "B" cut-off amendment. Sebago submitted an affidavit and a copy of the Express Mail receipt demonstrating its amendment had been submitted to the service on September 12, 1985 for delivery on the cut-off date, Friday, September 13, 1985. However, the amendment was not delivered until the following Monday, September 16, 1985. The Commission refused to allow comparative consideration of the untimely amendment -- which was "decisive" as to whether Sebago would be awarded the construction permit -- noting Sebago had been forewarned not to rely upon courier service guarantees. Through Caldwell and the 1985 Public Notice "the Commission made it clear

once again, that claims of delays caused by delivery services are not unusual or compelling circumstances," justifying waiver of a filing deadline. 65 RR 2d at 152. The Commission concluded:

. . . Sebago has not been able to demonstrate "unusual or compelling circumstances" or that the tardiness was attributable to circumstances completely beyond its control. Sebago merely relied on a guarantee of next-day delivery. As we warned applicants in Caldwell, such reliance standing alone does not excuse an untimely filing. . . . [T]he Commission had clearly warned applicants such as Sebago not to simply rely on the "guarantee" of a courier service. Sebago relied on the "guarantee" and it must now face the consequences of its chosen course of action.

The same result must ensue here. Crystal waited until the "eleventh hour" -- apparently even the very day its Notice was required to be filed,³ May 4, 1992 -- before submitting it to a courier for delivery. It must now face the consequences of its chosen course of action -- dismissal for failure to meet the requirements of Section 1.221(c), which provides that untimely filing of a Notice of Appearance "will" result in dismissal.

An applicant also must demonstrate that, after the event which caused the delay, all reasonable steps were taken to minimize or avoid further delay. See Public Notice, supra, 58 RR 2d at 1707. Crystal maintains it did not learn of the alleged non-

³ Crystal does not specify when it submitted the Notice to the unnamed courier, but its cover letter accompanying the Notice is dated May 4, 1992. It thus appears the filing was not submitted to "the courier" until the day of the filing deadline, which would have made a timely filing unlikely in any event. Of course, even if the Notice had been submitted to the courier earlier, as shown above, Crystal still must bear the consequences of the untimely delivery.

delivery until May 16, 1992, when it received a notice from the anonymous courier. Again, its claim is undocumented. Moreover, in the transmittal letter accompanying its Notice, Crystal requested that the Secretary of the Commission return a stamped-in copy of its Notice. Yet, when no stamped-in copy was forthcoming during the two weeks after the Notice was due to be filed, Crystal did not bother to check on whether the delivery had been made.

Furthermore, even after allegedly discovering, on May 16, that its Notice of Appearance had not been filed with the Commission, Crystal did not act promptly to move for its late acceptance, but waited another 10 days before filing such a motion.⁴ On May 20, Crystal did file a "Report" dated May 18 (see Attachment A hereto), stating that "additional information" was being sought as to the non-delivery matter. However, in its motion for acceptance of the late-filed Notice, filed a week later, Crystal provided neither additional details of the non-delivery nor documentation supporting its allegations.

Crystal maintains that the fact it timely paid its hearing fee, accompanied by a document entitled "Notice of Appearance," on July 15, 1991, is "the key point." But as Crystal is well aware, that fee was really only "on deposit" with the FCC since an applicant's failure to timely file a Notice of Appearance

⁴ Crystal filed a Motion to Accept Late Filed Notice of Appearance on May 26, 1992. The Radio Board is filing an opposition to that motion today.

allows it to seek a refund of that fee. See Section 1.1111(c)(2).⁵ Thus, timely filing of a post-designation Notice of Appearance under the "new" rules has the same impact -- a final commitment of the funds -- as timely filing of a post-designation Notice of Appearance accompanied by the fee under the "old" rules.⁶ Until that post-designation filing, the funds remain available to the applicant. The fact Crystal served copies of its Notice on the presiding judge and the Radio Board does not change its position. Had Crystal decided, after such service, not to file its Notice late, it still could have sought a refund of its fee since, under Section 1.221(c), the Notice must be "filed with the Commission." Thus, no rights or obligations would arise until the Commission filing was made.

Likewise, that Crystal chose to file a pleading entitled "Notice of Appearance" with its hearing fee in July 1991 is legally irrelevant. That filing was premature and did not toll Crystal's ability to obtain a refund of the hearing fee, as a post-designation filing does. Indeed, Crystal could hardly affirm an intent to meet issues and appear on the date set for hearing when neither the HDO specifying issues nor the prehearing order setting

⁵ That section provides, inter alia, that applicants which pay the hearing fee before designation are entitled to a refund when the application is dismissed, voluntarily or involuntarily, for failure to file a Notice of Appearance.

⁶ Crystal states that "it is significant" that there has been no change in the relevant language of Section 1.221 since the fee program was adopted. It does not explain how that fact is significant. Indeed, as pointed out above, Section 1.221(c) states, "the application will be dismissed" when a timely notice of appearance is not filed.

the hearing date, had been adopted. Moreover, both Rule 1.221(c) and the text of the HDO itself specifically directed Crystal to file its Notice of Appearance within 20 days after the date of the HDO mailing, that is, between April 14, 1992 (when the HDO was mailed) and May 4, 1992. Crystal did not do so.

The mere fact Crystal has filed other pleadings in this proceeding does not warrant waiver of Section 1.221(c). Compare Silver Springs Communications, 3 FCC Rcd 5049, 65 RR 2d 426 (Rev. Bd. 1988) (affirming dismissal of applicant for failure to meet notice of appearance filing deadline although all other procedural deadlines had been met), rev. denied, 4 FCC Rcd 4917 (1989). Moreover, the fact is, Crystal has missed other deadlines. It did not exchange documents on May 11, 1992, as required under Section 1.325(c) of the rules and as specified in the HDO.⁷ Moreover, Crystal's Integration Statement, due to be filed May 11, 1992, was filed one day late, on May 12, according to the Commission's Dockets History. See Attachment A hereto.

Crystal argues that it is in the public interest to have competition for selection of broadcast permittees. However, the Commission also has the responsibility to provide new service to the public in the most efficient, expeditious manner possible and that effective and expeditious dispatch of the FCC's business is,

⁷ As Radio Board has stated previously in several pleadings, it did not initiate discovery through production of documents to Crystal since, as of the May 11, 1992 document production date, it knew Crystal had not filed a notice of appearance with the Commission, and thus was ripe for dismissal under Section 1.221(c).

in itself, an integral part of the public interest. See CSJ Investments, Inc., 5 FCC Rcd 7653, 7654, 68 RR 2d 897, 899 (1990) (citations omitted); Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 157, 164 (1990), aff'd, 6 FCC Rcd 3403 (1991) ("The process of selecting which of otherwise qualified applicants should be granted must remain fair and effective, but undue delay in that process disserves the public by delaying the institution of new service and exacting an economic toll on both the Government and the applicants. To the extent that we can eliminate unnecessary delays in that process, we will be serving the potential listening and viewing public, the American taxpayer and the applicants."). Failure to abide by the Commission's rules, including filing deadlines, eviscerates those rules and promotes gamesmanship, at great expense to the public interest. Dismissal of Crystal, an applicant which has demonstrated little regard for the Commission's rules, and which, lacking a transmitter site, is not even basically qualified to hold a construction permit,⁸ would not disserve the public interest.

Applicants have a high burden to justify an exception to procedural deadlines. See CSJ Investments, supra, at 7654.

⁸ In its Opposition to Motion to Enlarge Issues dated May 28, 1992, Crystal admitted that its proposed transmitter site is not available, and that it is now searching for a new site. Indeed, even assuming, arguendo, that the property was available when initially specified, it was sold nearly a year ago. Thus, Crystal can hardly demonstrate the due diligence necessary to justify acceptance of an amendment specifying a new site, an issue the Radio Board will address in its opposition pleadings.

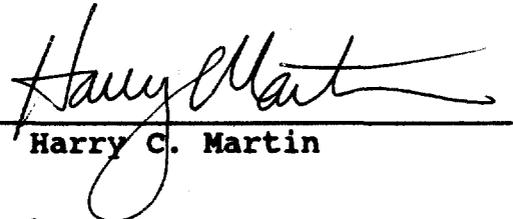
10.

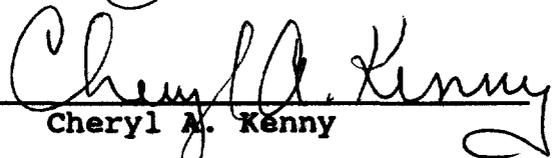
Lacking corroborating evidence or even specific allegations, waiting until the last possible moment to arrange for filing, and relying upon a courier service delivery guarantee despite repeated Commission warnings not to do so, Crystal has failed to meet that burden. Therefore, the directive of Section 1.221(c) -- that if an applicant fails to timely file a Notice of Appearance "the application will be dismissed" -- must be followed.

WHEREFORE, in light of the foregoing, the Motion to Dismiss filed by the Radio Board should be GRANTED and the application of Crystal Clear Communications, Inc. DISMISSED WITH PREJUDICE.

Respectfully submitted,

THE RADIO MINISTRIES BOARD
OF VICTORY CHRISTIAN CENTER
ASSEMBLY OF GOD, INC.

By 
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By 
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June 4, 1992

ATTACHMENT A

FCC DOCKET HISTORY

FEDERAL COMMUNICATIONS COMMISSION

Record Image Processing System

PRINT JOB REQUESTED

DKT/RM NO: 92-62
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RECORD INDEX DATA

DOCKET

Bur: MM Dkt/RM No: 92-62 Open/Closed: 0 Restricted: R POST
Assoc RM:
File No: BPH-901214MA; BPH-901217MJ
Subject: FOR CONSTRUCTION PERMIT FOR A NEW FM STATION
Applicant/Petitioner: CRYSTAL CLEAR COMMUNICATIONS; THE RADIO MINISTRIES BOARD
OF VICTORY CHRISTIAN CENTER ASSEMBLY OF GOD
Filed by:
Location: SEELYVILLE, IN
Channel: 240A Call Sign: Date Closed:
Appeal No:
Designation Date: 032392 Cmsn Decn: 0 PN Date:
ID Date: Docket Created: 032492 NPRM/NOI Date:
OA Date: Eff. Date: R&O Date:
RB Decn: Rules Sec:

::::: *** DKT/RM: 92-62 *** :::::

05/26/92 DOC TYPE: MOTION
APPL : CRYSTAL CLEAR COMMUNICATI ATT: BPH-901214MJ ET AL
LAW FIRM: MILLER & MILLER, P.C. EMERT, STANLEY G.
RELEASE/DENIED: FCC/DA#:
RM#: VIEWING STATUS: 0 EXPARTE:

05/26/92 DOC TYPE: MOTION
APPL : CRYSTAL CLEAR COMMUNICATI ATT: BPH-901214MJ ET AL
LAW FIRM: MILLER & MILLER, P.C. EMERT, STANLEY G.
RELEASE/DENIED: FCC/DA#:
RM#: VIEWING STATUS: 0 EXPARTE:

05/26/92 DOC TYPE: OPPOSE
APPL : CRYSTAL CLEAR COMMUNICATI ATT: BPH-901214MJ ET AL
LAW FIRM: MILLER & MILLER, P.C. EMERT, STANLEY G.
RELEASE/DENIED: FCC/DA#:
RM#: VIEWING STATUS: 0 EXPARTE:

05/21/92 DOC TYPE: CH ADDRESS
APPL : CRYSTAL CLEAR COMMUNICATI ATT: BPH-901214MJ ET AL
LAW FIRM: STANLEY G. EMERT, JR. EMERT, STANLEY G.
RELEASE/DENIED: FCC/DA#:
RM#: VIEWING STATUS: 0 EXPARTE:

05/20/92 DOC TYPE: CH ADDRESS
APPL : CRYSTAL CLEAR COMMUNICATI ATT: BPH-901214MJ ET AL
LAW FIRM: STANLEY G. EMERT, JR. EMERT, STANLEY G.
RELEASE/DENIED: FCC/DA#:
RM#: VIEWING STATUS: 0 EXPARTE:

05/20/92 DOC TYPE: REPORT
APPL : CRYSTAL CLEAR COMMUNICATI ATT: BPH-901214MJ ET AL
LAW FIRM: STANLEY G. EMERT, JR. EMERT, STANLEY G.
RELEASE/DENIED: FCC/DA#:
RM#: VIEWING STATUS: 0 EXPARTE:

05/18/92 DOC TYPE: APPEARANCE
APPL : CRYSTAL CLEAR COMMUNICATI ATT:
LAW FIRM: STANLEY G. EMERT, JR. EMERT, STANLEY G.
RELEASE/DENIED: FCC/DA#:
RM#: VIEWING STATUS: 0 EXPARTE:

::::: *** DKT/RM: 92-62 *** :::::

05/12/92 DOC TYPE: STATEMENT
APPL : CRYSTAL CLEAR COMMUNICAT ATT: BPH-901214MJ ET AL
LAW FIRM: STANLEY G. EMERT, JR. EMERT, STANLEY G.
RELEASE/DENIED: FCC/DA#:
RM#: VIEWING STATUS: 0 EXPARTE:

05/12/92 DOC TYPE: LEAVE AMEND
APPL : RADIO MINISTRIES BOARD ATT: BPH-901217MJ ET AL
LAW FIRM: REDDY, BEGLEY & MARTIN KENNY, CHERYL A.
RELEASE/DENIED: FCC/DA#:
RM#: VIEWING STATUS: 0 EXPARTE:

05/12/92 DOC TYPE: MOTION
APPL : RADIO MINISTRIES BOARD ATT: BPH-901217MJ ET AL

LAW FIRM: REDDY, BEGLEY & MARTIN KENNY, CHERYL A.
RELEASE/DENIED: FCC/DA#:
RM#: VIEWING STATUS: 0 EXPARTE:

05/11/92 DOC TYPE: MOTION
APPL : RADIO BOARD ATT: BPH-901217MJ
LAW FIRM: REDDY, BEGLEY & MARTIN KENNY, CHERYL A.
RELEASE/DENIED: FCC/DA#:
RM#: VIEWING STATUS: 0 EXPARTE:

05/11/92 DOC TYPE: LEAVE AMEND
APPL : RADIO BOARD ATT: BPH-901217MJ
LAW FIRM: REDDY, BEGLEY & MARTIN KENNY, CHERYL A.
RELEASE/DENIED: FCC/DA#:
RM#: VIEWING STATUS: 0 EXPARTE:

05/11/92 DOC TYPE: STATEMENT
APPL : RADIO BOARD ATT: BPH-901217MJ
LAW FIRM: REDDY, BEGLEY & MARTIN KENNY, CHERYL A.
RELEASE/DENIED: FCC/DA#:
RM#: VIEWING STATUS: 0 EXPARTE:

05/04/92 DOC TYPE: APPEARANCE
APPL : RADIO MINISTRIES BOARD ATT: BPH-901217MJ
LAW FIRM: REDDY, BEGLEY & MARTIN KENNEY, CHERYL A.
RELEASE/DENIED: FCC/DA#:
RM#: VIEWING STATUS: 0 EXPARTE:

04/14/92 DOC TYPE: ORDER
APPL : ALJ ATT: BPH-901214MA ET AL
LAW FIRM: FCC STIRMER, JOSEPH
RELEASE/DENIED: 04/16/92 FCC/DA#: 92M-464
RM#: VIEWING STATUS: 0 EXPARTE:

::::: *** DKT/RM: 92-62 *** :::::

03/23/92 DOC TYPE: HDO
APPL : AUDIO SERVICES DIV. ATT: BPH-901214MA ET AL
LAW FIRM: FCC GAY, W. JAN
RELEASE/DENIED: 04/13/92 FCC/DA#: DA 92-3
RM#: VIEWING STATUS: 0 EXPARTE:

12/17/90 DOC TYPE: APPLICATION
APPL : THE RADIO MINISTRIES BOAR ATT: BPH-901217MJ
LAW FIRM: REDDY, BEGLEY & MARTIN KENNY, CHERYL A.
RELEASE/DENIED: FCC/DA#:
RM#: VIEWING STATUS: 0 EXPARTE:

12/14/90 DOC TYPE: APPLICATION
APPL : CRYSTAL CLEAR COMMUNICAT ATT: BPH-901214MA
LAW FIRM: EMERT, STANLEY G.
RELEASE/DENIED: FCC/DA#:
RM#: VIEWING STATUS: 0 EXPARTE:

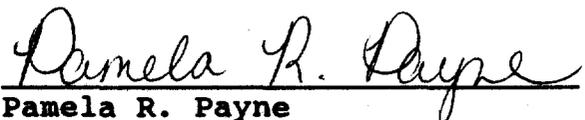
CERTIFICATION OF SERVICE

I, Pamela R. Payne, hereby certify that on this 4th day of June, 1992, copies of the foregoing **REPLY TO OPPOSITION TO MOTION TO DISMISS APPLICATION OF CRYSTAL CLEAR COMMUNICATIONS, INC.** were hand delivered or mailed, first class, postage prepaid, to the following:

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Pamela R. Payne

* HAND DELIVERED