

ORIGINAL  
FILE

BEFORE THE

**Federal Communications Commission**

WASHINGTON, D. C. 20554

RECEIVED

JUL - 7 1992

Federal Communications Commission  
Office of the Secretary

In re Applications of )  
 )  
CRYSTAL CLEAR COMMUNICATIONS, INC. )  
 )  
THE RADIO MINISTRIES BOARD OF )  
VICTORY CHRISTIAN CENTER )  
ASSEMBLY OF GOD, INC. )  
 )  
For a Construction Permit for )  
a New FM Station on Channel 240A )  
Seelyville, Indiana )

MM Docket No. 92-62

File No. BPH-901214MA

File No. BPH-901217MJ

To: The Review Board

**OPPOSITION TO REQUEST FOR LEAVE TO FILE APPEAL OUT OF TIME**

The Radio Ministries Board of Victory Christian Center Assembly of God, Inc. (the "Radio Board"), by counsel, herein submits its opposition to the "Request for Leave to File Appeal Out of Time" ("Request") filed July 1, 1992 by Crystal Clear Communications, Inc. ("Crystal").<sup>1</sup> In opposition, the following is stated:

Crystal concedes that its appeal of Administrative Law Judge Frysiak's dismissal of its application was required to be filed within five days of the release of Judge Frysiak's June 11, 1992 Memorandum Opinion and Order, FCC 92M-657 ("MO&O"). Thus, Crystal's appeal

No. of Copies rec'd \_\_\_\_\_  
List A B C D E

04/11

<sup>1</sup> The Certificate of Service attached to Crystal's Request does not include counsel for the Mass Media Bureau, in violation of Section 1.211 of the rules.

-- and not simply a notice of appeal -- was due to be filed by June 18, 1992. As it now stands, the earliest that Crystal's appeal will be filed is July 12, 1992 and likely even later.<sup>2</sup>

In its "Opposition to Motion to Dismiss Notices of Appeal" ("Opposition"), filed concurrently with, and referenced in, its Request, Crystal maintains that the McFadden Evans & Sill law firm, which apparently now represents it,<sup>3</sup> was not retained until the afternoon of June 22, 1992. Based upon that counsel's "incorrect assumption" that this proceeding was terminated through the dismissal of Crystal's application, it filed a notice of appeal that day. These facts, Crystal suggests, justify its late filing.

As an initial matter, the fact Crystal's counsel chose to act on an "assumption" rather than facts -- facts which could have been readily ascertained through a telephone call or visit to the FCC's Docket Branch or the Presiding Judge's office, or even through review of the MO&O<sup>4</sup> -- does not justify Crystal's failure to follow the correct procedural rules. Moreover, Crystal apparently chose to sit on its "assumption" rather than to confirm it during the week

---

<sup>2</sup> Rather than promptly file its substantive appeal with a request for leave to file late, thereby shortening the delay, Crystal chose to file only a request leave to file late. Crystal asks that it be given until July 7, 1992, or five days after the Review Board acts on its Request, whichever is later, to file its substantive appeal. Since, as of today, Crystal's Request remains pending and the earliest that Request would be granted is July 7, 1992, after review of Radio Board's opposition being filed today, Crystal's appeal would not be due until July 12, 1992, at the earliest, if its Request were granted as proposed. Indeed, since Crystal did not send a courtesy copy of its Request to the Review Board, the Board had not even received a copy of that pleading as of noon, July 6.

<sup>3</sup> As noted below, attorney Stanley Emert also has filed a Notice of Appeal on behalf of Crystal. Crystal has not filed any notice stating that Mr. Emert has withdrawn as its counsel.

<sup>4</sup> The MO&O did not say that Radio Board's application had been granted or that the proceeding had been terminated.

3.

between the time new counsel was retained and the June 29, 1992 filing of Radio Board's motion to dismiss Crystal's late-filed notice of appeals.

But more importantly, it is not the actions of Crystal's new counsel which are at issue, but the actions of Crystal, the applicant. And there is no explanation in Crystal's Opposition or in its Request as to why it did not take any steps to file or seek to file an appeal prior to June 22, 1992.<sup>5</sup> Indeed, it is apparent that up to the time the appeal was due and continuing until at least June 22, 1992, Crystal was represented by its original counsel, Stanley Emert, who also filed a late Notice of Appeal on Crystal's behalf.<sup>6</sup> Crystal, therefore, simply has not demonstrated good cause for missing the filing deadline.

Unable to justify its latest in a string of failures to comply with the Commission's rules, Crystal, in its Opposition, resorts to the argument that no one would be hurt by its dilatory actions. That simply is not the case. The fact is Crystal's failure to meet the appeal deadline has eliminated the possibility that, if the ALJ's MO&O were reversed and Crystal reinstated, the August 26, 1992 date set for hearing could be met. Specifically, if it had been timely, Crystal's appeal would have been filed on June 18, 1992, and the Radio Board's

---

<sup>5</sup> Crystal's Opposition makes a general reference to the shortness of the 5-day appeal time and notes that the "problem" was exacerbated by the fact Crystal's prior counsel had recently relocated to Seattle and is extremely difficult to reach by phone. However, Crystal does not claim that the MO&O dismissing its application was received too late for a timely appeal to have been filed.

<sup>6</sup> In its Request, note 1, Crystal notes that new counsel is attempting to obtain the appropriate files from previous counsel "to avoid any further confusion." However, all Commission directives and orders issued in this proceeding, as well as the applications and all pleadings filed by the Bureau, Radio Board and Crystal, are readily available from the Commission's files. Crystal has not made any showing that its actions, or lack thereof, were dependent upon receipt of files from Mr. Emert.

4.

opposition would have been filed five days later, on June 25.<sup>7</sup> Thus, the Review Board would have had before it all of the pleadings necessary to make a decision on Crystal's appeal as of June 25, 1992. With prompt action on the appeal, and in the event that appeal were successful,<sup>8</sup> it would have been possible to have held a new prehearing conference, conducted discovery and prepared for hearing in time to meet the August 26, 1992 hearing date. However, by filing its appeal nearly a month late, Crystal will render the August 26 hearing date infeasible. Thus, Crystal's failure to follow the Commission's rules will have disrupted the proceeding, nullifying the current procedural dates to the potential prejudice (if Crystal's application were reinstated) of the Radio Board, the integrity of the Commission's processes, and the Seelyville public, which would then face an even longer wait for initiation of a new FM service.<sup>9</sup>

Moreover, when applicants enter the FCC's administrative arena, they do so on the assumption that all applicants are bound by the same rules, procedural and substantive. When an applicant such as Crystal is allowed to flaunt those rules, repeatedly, the integrity of the administrative process is damaged. Dismissal of Crystal's Notices of Appeal and denial of its Request is therefore not only justifiable, it is called for.

---

<sup>7</sup> This date is based upon Crystal making hand delivery of its appeal, as it did with its Opposition and its Request. Otherwise, the deadline would have been June 30, 1992. (Replies are not permitted unless requested.)

<sup>8</sup> Radio Board, of course, rigorously opposes overturn of that dismissal.

<sup>9</sup> Thus, Crystal's reliance, in its Opposition, upon Burwood Broadcasting of Memphis, Ltd., 60 RR 2d 123 (Rev. Bd. 1986), is misplaced. Citing Burwood, Crystal urges that the five-day rule of Section 1.301(c)(2) is only to avoid disruption to ongoing proceedings, suggesting that its failure to follow that rule is a minor matter. In fact, Burwood, wherein the Review Board denied an appeal which was late-filed and, even if not untimely, without merit, does not discuss the basis of Section 1.301(c)(2). Moreover, Crystal's late filing would, in fact, disrupt the proceeding if the ALJ's MO&O dismissing its application were reversed.

In its Opposition, Crystal notes that the Review Board has "historically been loathe" to reject appeals because of late filing, citing CSJ Investments, Inc., 67 RR 2d 1648 (Rev. Bd. 1991), rev denied, FCC 90-406 (released December 7, 1990). In CSJ, an appeal was late-filed by three business days<sup>10</sup> where an applicant believed it had an extra three days for mailing.<sup>11</sup> Although the Board reviewed and then denied the applicant's appeal, it also noted that, as a procedurally defective pleading, that appeal properly was subject to immediate dismissal. Here, if Crystal's Request is granted, its appeal will be filed three or four weeks late. Crystal's failure to file by June 18 was not caused by a misinterpretation of the rules but by its own (unexplained) inaction. Thus, no good cause for its late filing has been demonstrated, rendering Crystal's appeal "subject to immediate dismissal."

In SBM Communications, Inc., FCC 92-229 (released June 3, 1992), ¶ 2, the Commission warned applicants of the consequences of late filings, noting that lack of timeliness would provide a "sound reason for denial" of an appeal without further consideration. While affirming the Review Board's decision to address the merits of the untimely appeal at issue there, the Commission admonished other applicants that "we wish to make clear that we will not hesitate to summarily dispose of such procedurally deficient matters where circumstances warrant

---

<sup>10</sup> The appeal was filed 12 days after release of the dismissal order, not 12 days late, as Crystal maintains in its Opposition.

<sup>11</sup> WMID, Inc., 14 RR 2d 769 (Rev. Bd. 1968), also cited by Crystal in its Opposition, also involved an appeal filed three days late because of a misinterpretation of the three-day mailing rule.

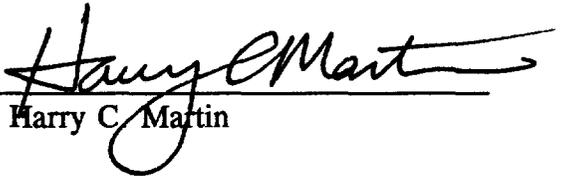
6.

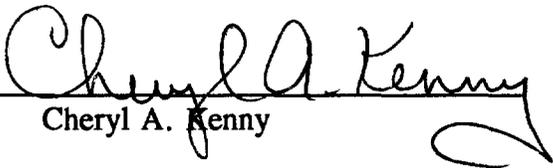
such actions in the future." Crystal's request to file a procedurally deficient appeal, therefore, should be summarily rejected.<sup>12</sup>

WHEREFORE, In light of the foregoing, the Request for Leave to File Appeal Out of Time, filed July 1, 1992 by Crystal Clear Communications, Inc. should be DENIED.

Respectfully submitted,

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

By   
Harry C. Martin

By   
Cheryl A. Kenny  
Its Counsel

Reddy, Begley & Martin  
1001 22nd Street, N.W.  
Suite 350  
Washington, D.C. 20037

July 6, 1992

---

<sup>12</sup> And, correspondingly, Radio Board's Motion to Dismiss Crystal's late-filed notices of appeal should be granted.

**CERTIFICATION OF SERVICE**

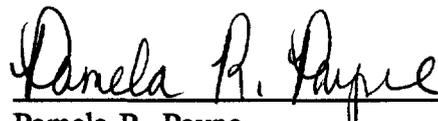
I, Pamela R. Payne, hereby certify that on this 6 day of July, 1992, copies of the foregoing **OPPOSITION TO REQUEST FOR LEAVE TO FILE APPEAL OUT OF TIME** were hand delivered or mailed, first class, postage prepaid, to the following:

Joseph A. Marino \*  
The Review Board  
Federal Communications Commission  
2000 L Street, N.W., Room 211  
Washington, D.C. 20054

Robert Zauner, Esquire \*  
Hearing Branch, Mass Media Bureau  
Federal Communications Commission  
2025 M Street, N.W., Room 7212  
Washington, D.C. 20554

Stanley G. Emert, Jr., Esquire  
Law Office of Stanley G. Emert, Jr.  
2318 Second Avenue, Suite 845  
Seattle, Washington 98121  
Counsel for Crystal Clear Communications, Inc.

Donald J. Evans, Esquire  
McFadden, Evans & Sill  
1627 Eye Street, N.W.  
Suite 810  
Washington, D.C. 20036  
Counsel for Crystal Clear Communications, Inc.

  
\_\_\_\_\_  
Pamela R. Payne

\* HAND DELIVERED