

ORIGINAL

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C.

ORIGINAL
FILE

In re)
)
Amendment of Section 73.202(b),)
Table of Allotments,)
FM Broadcast Stations)
(Prineville and Sisters, Oregon))

MM Docket No. 92-3
RM-7874, RM-7958

To: The Chief, Mass Media Bureau

RECEIVED

NOV 20 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

OPPOSITION TO MOTION TO STRIKE

Various radio licensees serving Central Oregon communities (collectively, the "Licensees")^{1/} oppose Schuyler H. Martin's November 18 Motion to Strike their Petition for Reconsideration of the Report and Order, 57 Fed. Reg. 47006 (October 14, 1992).

1. Martin incorrectly claims that the Licensees' reconsideration request was untimely. He wrongly argues: that this proceeding is one "of particular applicability;" that 47 C.F.R. § 1.4(b)(3) (1991), not § 1.4(b)(1), has therefore set the deadline for seeking reconsideration of the Report and Order; that the text of that document did not mandate its appearance in the Federal Register; and thus, that the Licensee's Petition for

1/ Central Oregon Broadcasting, Inc. (KBND, Bend, and KLRR, Redmond); Redmond Broadcast Group, Inc. (KPRB and KSJJ, Redmond); Highlakes Broadcasting Company ("Highlakes") (KRCO and KIJK-FM, Prineville); JJP Broadcasting, Inc. (KQAK, Bend); Oak Broadcasting, Inc. (KGRL and KXIQ, Bend); Sequoia Communications (KICE, Bend); and The Confederated Tribes of the Warm Springs Reservation of Oregon (KTWS, Bend, and KTWI, Warm Springs).

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

0+10

Reconsideration was untimely.^{2/} The Licensees will show herein that Martin's Motion to Strike utterly lacks merit.

2. Section 1.4, which governs computing filing deadlines, distinguishes between two types of rule makings: "notice and comment rule makings" governed by § 1.4(b)(1); and "rule makings of particular applicability" controlled by § 1.4(b)(3). Martin says that this docket is one "of particular applicability" because only he may apply for the upgraded Sisters allotment (if the Report and Order in this proceeding becomes final),^{3/} and because the "Report and Order in this proceeding did not allot any new channels which would be made available for application by interested members of the public."

3. Simply put, Martin is wrong. Administrative agencies conduct rule makings "of particular applicability [to adopt] rules addressed to and served upon named persons in accordance with law." American Broadcasting Companies, Inc. v. FCC, 682 F.2d 25, 32 (2nd Cir. 1982). Contrast such rule makings with those promulgating "substantive rules adopted as authorized by law and statements of general policy or interpretations

^{2/} Under § 1.4(b)(3), the deadline for seeking reconsideration would have been Friday, November 6 (30 days from the FCC's release of the text), because the Report and Order did not mandate Federal Register publication. (Under § 1.4(b)(3), if the Report and Order had specified Federal Register publication, the date of such publication -- and not the FCC release date -- would have set the deadline. In that case, the deadline would have been one week later, the day the Licensees sought reconsideration.) However, under § 1.4(b)(1), the applicable rule, the deadline was Friday, November 13, and the Report and Order's failure to explicitly mandate Federal Register publication was and is immaterial.

^{3/} See 47 C.F.R. § 1.420(g)(3) (1991).

formulated and adopted by the agency for the guidance of the public...." Id. Agencies need not publish rules adopted in the former proceedings in the Federal Register, but must arrange for Federal Register publication in the latter. Id.; Declaratory Ruling, 51 Fed. Reg. 23059 (1986).

4. The Courts and the FCC have held that rule makings "of particular applicability" are those which govern tariffs, schedules of rates, etc. American Broadcasting Companies, supra; Declaratory Ruling, supra. By contrast, the FCC has consistently held that the Federal Register appearance of an FM allotment Report and Order triggers the reconsideration deadline. See, e.g., Knoxville, Tennessee et al., 78 FCC 2d 1208, 1210 (1980); Clinton, North Carolina et al., 6 FCC Rcd 5866 (M.M. Bur. 1991); Randolph, Vermont et al., (M.M. Bur. 1992) (Exhibit A hereto). In each of those cases, the Report and Order did not mandate Federal Register publication. That omission was immaterial and not even discussed -- obviously because § 1.4(b)(1), not § 1.4(b)(3), controls.

5. Allotment proceedings are obviously notice-and-comment rule makings to adopt "substantive rules... as authorized by law" to implement statutory policy. The statutory policy involved is the mandate of Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 307(b), to "the Commission... to provide for the fair, efficient, and equitable distribution of radio service [among the several States and communities]...."

6. Also, allotment proceedings are of interest and applicable to the public at large -- and not merely to the petitioner. This is equally true of rule makings proposing new

allotments and those proposing an FM permittee's or licensee's cochannel or adjacent-channel upgrade or community change. Even though no one may file a competing expression of interest in an upgraded or transplanted channel, a citizen might desire to file a Counterproposal, or to file Comments or a Petition for Reconsideration arguing: that the proposed allotment would be technically defective; or that for some other reason the allotment would not serve the public interest.

7. Furthermore, the allotment of an upgraded channel entails greater protection requirements that every FM allotment petitioner, applicant, permittee, and licensee must observe. See 47 C.F.R. §§ 73.207, 73.215 (1991). An upgrade proceeding such as Sisters/Prineville is thus of direct and general applicability to all other users and would-be users of FM broadcast spectrum within a considerable radius of the reference point of the upgraded allotment.

8. For all these reasons, the Commission properly treats such proceedings as § 1.4(b)(1) rule makings, not § 1.4(b)(3) cases, and arranges for Federal Register publication of both Notices of Proposed Rule Making and Reports and Orders.

9. Alternatively, even if the FCC were to change its consistent stance and hold that § 1.4(b)(3) controls the reconsideration deadline in this proceeding, the FCC may not enforce that new policy against the licensees. "[W]hen the sanction is as drastic as dismissal without any consideration whatsoever of the merits, elementary fairness compels clarity in the notice of material required as a condition for consideration [footnote omitted]." Salzer v. FCC, 778 F.2d 869, 875 (D.C. Cir.

1985). There has been no prior notice of any change in policy as Salzer would require. Therefore, the FCC must treat the Licensees' Petition for Reconsideration just as it has treated the petitions of innumerable similarly situated parties -- by considering it on the merits. Melody Music, Inc. v. FCC, 345 F.2d 730, 733 (D.C. Cir. 1965).

10. Finally, and also alternatively, even were the FCC to rule that the Licensee's petition was untimely, that would still not bar consideration of their pleading. Martin's Motion to Strike obliquely refers to "certain contentions" that the Licensees have made in their Reply Comments, and which they have reiterated in their Petition for Reconsideration. The Licensees have contended that an evident abuse of the FCC's processes has transpired in this allotment rule making.^{4/} A mere finality argument may not abort an inquiry in such a case:

The courts have noted a strong policy in favor of administrative finality, and have held that proceedings that have become final will not be reopened unless there has been fraud on the agency's or the court's processes, or unless the result would be manifestly unconscionable [emphasis added]. Hazel-Atlas Co. v Hartford Co., 322 U.S. 238, 64 S Ct. 997 (1944); Greater Boston Television Corporation v. FCC, 463 F.2d 268 (D.C. Cir. 1971); KIRO, Inc. v. FCC, 438 F.2d 141 (D.C. Cir. 1970).

Radio Para La Raza, 40 FCC 2d 1102, 1104 (1976).

11. Martin's untimeliness claim is wrong on the facts and the law. His Motion to Strike, which he based on that entirely

^{4/} It is directly due to that evident abuse of process that the "Report and Order in this proceeding did not allot any new channels which would be made available for application by interested members of the public." This gives a particular cheek to Martin's invocation of the allotment of only the Sisters upgrade as evidence that this is a proceeding "of particular applicability."

false premise, is thus fatally flawed. The Bureau should reject Martin's defective Motion forthwith.

Respectfully submitted,

THE LICENSEES

By



John Joseph McVeigh
Their Counsel

Fisher, Wayland, Cooper and Leader
1255 Twenty-third Street Northwest,
Suite 800
Washington, D.C. 20037-1170
(202) 659-3494

Date: November 20, 1992

EXHIBIT A

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

JUN 5 1992

IN REPLY REFER TO:

Donald E. Martin, Esq.
2000 L Street, N.W.
Suite 200
Washington, D.C. 20036

Re: MM Docket No. 89-487
(Brandon and Randolph, VT)

Dear Mr. Martin:

This letter is in response to the petition for reconsideration filed by the Mirkwood Group ("Mirkwood") of the Report and Order ("R&O") in MM Docket No. 89-487, 6 FCC Rcd 1760, released March 28, 1991, and the Commission's staff letter of August 23, 1991, to Mirkwood regarding the timeliness of Mirkwood's petition. This letter also refers to the petition for leave to accept a late filed application for review ("petition for leave") and the application for review which you submitted on September 27, 1991, on behalf of Mirkwood.

In the R&O, the Commission upgraded Station WCVR-FM, in Randolph, Vermont, from Channel 272A to Channel 271C3. To accommodate this upgrade, the Commission also directed applicants for Channel 270A at Brandon, Vermont, to amend their pending applications to specify operation on Channel 268A in lieu of Channel 270A. The Commission further required the applicant for Channel 268A at Marlboro, Vermont, to amend its pending application to specify a non-conflicting site.

Subsequently, we received an original and four copies of a petition for reconsideration of the R&O and an emergency request for stay submitted by the Mirkwood Group in this proceeding. Although Mirkwood stated in its certificate of service that the petition was sent by "certified mail" on May 2, 1991, there was no indication when the petition or the request for stay was actually received at the Commission. As a result, the Chief, Allocations Branch, sent a letter to Mirkwood on August 23, 1991, inquiring into this matter. Specifically, Mirkwood was given an opportunity to show how the petition was filed, where it was filed, and on what date. Rather than responding to the letter by September 16, 1991, as requested, you submitted on behalf of Mirkwood a late-filed application for review and a request for late acceptance on September 27, 1991.

As justification for the late filed petition for reconsideration and the application for review, you state that the R&O was not sent to Mirkwood until April 29, 1991, and was not delivered by personal service to Mirkwood until May 3, 1991, the same day that the time for filing petitions for reconsideration or applications for review expired. You concede, however, that the petition for reconsideration was not received at the Commission until May 4, 1991, one day late pursuant to Section 1.429 of the Commission's Rules and Section 405 of the Communications Act. Finally, you state that Mirkwood was not aware of the late delivery of the petition until August 23, 1991, when it received a letter from

the Commission staff inquiring about the date the petition was received at the Commission.

In its opposition to Mirkwood's request for late acceptance of its application for review, Stokes Communications Corp., licensee of the Randolph station, contends that both the petition for reconsideration and the application for review must be dismissed because they were filed after the deadlines set forth under Section 405 of the Communications Act and Sections 1.429 and 1.115 of the Commission's Rules. Stokes also contends that Mirkwood has not provided sufficient justification for late acceptance of the application for review because proper notice of the Commission's decision was printed in the Federal Register and because the Commission is not obligated to serve parties personally in rulemaking proceedings.

After carefully considering the petition for reconsideration, we believe that it should be dismissed. Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, states that petitions for reconsideration must be filed within thirty days after the date of public notice of the Commission's action in the Federal Register. The Report and Order in the Brandon proceeding in MM Docket No. 89-487 was published in the Federal Register on April 2, 1991, 54 FR 47689. Thus, the petition for reconsideration was due May 3, 1991. The Commission does not have authority to waive the 30-day period in Section 405 for filing petitions for reconsideration except in limited situations where there has not been notice to the parties as required by the Commission's Rules. See, e.g., Reuters Ltd. v. FCC, 781 F.2d 946, 951-52 (D.C. Cir. 1986); Gardner v. FCC, 530 F.2d 1086 (D.C. Cir. 1976); and Richardson Independent School District, 5 FCC Rcd. 3135 (1990). Since there is no evidence that the petition for reconsideration was timely filed within the 30-day statutory period and since the Report and Order was properly printed in the Federal Register, as required by the Commission's Rules, the petition for reconsideration is unacceptable for consideration and is dismissed.

Likewise, the application for review that you filed is technically deficient and must be dismissed for the following reasons. First, you filed both a petition for reconsideration and an application for review. Section 1.104(b) of the Commission's Rules prohibits the filing of both a petition for reconsideration and an application for review of the same action. See 47 C.F.R. § 1.104(b). Second, the application for review was also late-filed. It was filed on September 27, 1991, while the deadline for filing applications for review expired on May 3, 1991. Moreover, we do not believe that the petition for leave to file the application for review provides sufficient reasons for acceptance. Although you claim that Commission delay in mailing the Report and Order justifies acceptance of the late-filed application for review, we do not agree because proper notice of the Report and Order was given. Specifically, the text of the Report and Order was released to the public on March 28, 1991, and was summarized in the Federal Register on April 2, 1991. This constitutes constructive notice of the decision, and by exercising due diligence, Mirkwood could have prepared a timely application for review. Furthermore, the Commission is not obligated to serve copies of its decisions to parties in rulemaking proceedings but does so merely as a courtesy. Finally, it appears from Mirkwood's request for late acceptance that it had actual notice of the release of the text of the Report and Order before

it received a copy of the text from the Commission and that Mirkwood had prepared and delivered a petition for reconsideration to a mail courier on May 2, 1991, which was not delivered timely to the Commission. Therefore, for all of the above reasons, the petition for leave to file an application for review is denied, and Mirkwood's application for review is hereby dismissed.

Sincerely,

Douglas W. Webbink

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

cc: John M. Pelkey, Esq.
(Counsel to Bach 'n Roll Radio
of Brandon, Inc.)
Richard R. Zaragoza, Esq.
(Counsel to Stokes Communications
Corporation)

CERTIFICATE OF SERVICE

I, Susan R. Fisenne, a secretary to the law firm of Fisher, Wayland, Cooper and Leader, hereby certify that I have sent by hand delivery this Twentieth day of November, 1992, copies of the foregoing "OPPOSITION TO MOTION TO STRIKE" to:

Roy J. Stewart, Esq.
Chief, Mass Media Bureau
Federal Communications Commission
1919 M Street Northwest, Room 314
Washington, D.C. 20554

Michael J. Ruger, Esq.
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2025 M Street Northwest, Room 8322
Washington, D.C. 20554

Irving Gastfreund, Esq.
Kaye, Scholer et al.
901 Fifteenth Street Northwest,
Suite 1100
Washington, D.C. 20005
Counsel to Schuyler H. Martin

Shelton M. Binstock, Esq.
1140 Connecticut Avenue Northwest,
Suite 703
Washington, D.C. 20036
Counsel to and Principal of
Danjon, Inc.


Susan R. Fisenne