

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

THE MCPHERSON BUILDING
901 FIFTEENTH STREET, N.W., SUITE 1100

WASHINGTON, D.C. 20005

(202) 682-3500

TELECOPY NUMBER
(202) 682-3580

425 PARK AVENUE
NEW YORK, N.Y. 10022
(212) 836-8000

1999 AVENUE OF THE STARS
SUITE 1600
LOS ANGELES, CA 90067
(213) 788-1000

WRITER'S DIRECT DIAL NUMBER

ADMIRALTY CENTRE
TOWER 1, 32ND FLOOR
18 HARDCOURT ROAD
HONG KONG
(852) 865-7676

SQUARE DE MEEÛS 30
1040 BRUSSELS, BELGIUM
(322) 514-4300

(202) 682-3526

December 11, 1992

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DEC 11 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: MM Docket No. 92-3
RM-7874 and RM-7958

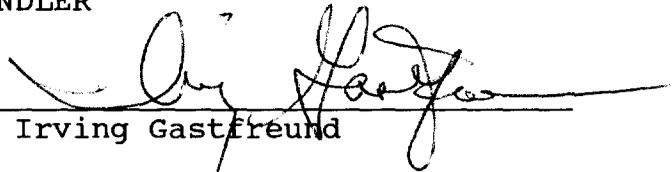
Dear Ms. Searcy:

Submitted herewith for filing, on behalf of our client, Schuyler H. Martin, permittee of Radio Station KPXA(FM), Sisters, Oregon, are an original and four copies of his Petition For Reconsideration in the above-referenced proceeding.

Please direct any inquiries concerning this submission to the undersigned.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS &
HANDLER

By: 
Irving Gastfreund

Enclosures

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BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.203(b)) MM Docket No. 92-3
Of The Commission's Rules) RM-7874 and
Table of Allotments) RM-7958
FM Broadcast Stations)
(Prineville and Sisters, Oregon))

TO: Chief, Mass Media Bureau

Petition For Reconsideration

SCHUYLER H. MARTIN ("Martin"), permittee of Radio Station KPXA(FM), Sisters, Oregon, by his attorneys, pursuant to Section 1.106 of the Commission's Rules, hereby respectfully requests reconsideration and vacating of the November 24, 1992 action of the Mass Media Bureau in issuing a Public Notice (Report No. 1920, Mimeo No. 30707, released November 24, 1992), announcing the filing with the Commission on November 13, 1992 of a Petition For Reconsideration in this proceeding, submitted on behalf of the licensees of certain radio stations operating in the Bend, Oregon area (hereinafter collectively referred to as "Petitioners").¹ In support whereof, it is shown as follows:

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

I. Introduction

On November 18, 1992, Martin filed with the Commission a Motion to Strike, in which he demonstrated that the Petitioners' November 13, 1992 Petition For Reconsideration in this proceeding was untimely and therefore not cognizable by the Commission on its purported "merits". In his Motion To Strike, Martin requested that the Bureau summarily strike the Petition For Reconsideration without consideration.

On November 19, 1992, Martin filed with the Commission his Petition For Declaratory Ruling in this proceeding, in which he requested that the Bureau expeditiously issue a declaratory ruling that the effectiveness of the Mass Media Bureau's October 7, 1992 Report and Order in this proceeding has not been automatically stayed, pursuant to Section 1.420(f) of the Commission's Rules, by the filing of the Petitioners' Petition For Reconsideration, in light of the untimely filing of the latter Petition.

On November 20, 1992, the Petitioners filed their joint Opposition to Martin's Motion To Strike. On November 25, 1992, Martin filed with the Commission his Reply To Opposition To Motion To Strike.

To date, no formal ruling or opinion has been issued by the Mass Media Bureau with respect to Martin's Motion To Strike or his Petition For Declaratory Ruling. Nonetheless, on November 24, 1992 -- i.e., one day prior to the filing of Martin's Reply pleadings in this proceeding and prior to the close of the pleading cycle regarding Martin's Motion To Strike and his Petition For Declaratory Ruling -- the Mass Media Bureau released a Public Notice (Report No. 1920, Mimeo No. 30707) announcing the filing of the Petitioners' November 13, 1992 Petition For Reconsideration in this proceeding. The Public Notice was published in the Federal Register on December 2, 1992. 57 Fed. Reg. 57066 (December 2, 1992). The Public Notice stated that it was being issued pursuant to Section 1.429(e) of the Commission's Rules, and the Public Notice established a pleading cycle for a substantive response to the Petitioners' Petition For Reconsideration in this proceeding.

Section 1.429(e) of the Commission's Rules provides, in pertinent part, as follows:

"When a petition for reconsideration is timely filed in proper form, public notice of its filing is published in the Federal Register. [Emphasis added.]"

In light of the foregoing provision, the Mass Media Bureau's action of November 24, 1992 in issuing its aforementioned Public Notice of that date, in reliance on the provisions of Section 1.429(e) of the Commission's Rules, could be viewed, in essence,

as a determination by the Bureau that the Petitioners' Petition For Reconsideration in this proceeding was timely filed. To the extent that this is the import of the issuance by the Bureau of its November 24, 1992 Public Notice, such action by the Bureau is unreasoned, violates provisions of the Administrative Procedure Act and applicable Commission Rules and policies and constitutes agency action which is arbitrary, capricious and an abuse of discretion. In addition, the Bureau's action constitutes prejudicial procedural error, as well as an erroneous finding as to an important and material question of fact -- i.e., whether the Petitioners' Petition For Reconsideration was timely filed. Accordingly, the Bureau's action of November 24, 1992 should be reconsidered, reversed and vacated. The November 24, 1992 Public Notice should be expeditiously rescinded as improvidently issued, and Martin's Motion To Strike and his Petition For Declaratory Ruling should be expeditiously granted for the reasons set forth therein.

II. Argument

A. The Mass Media Bureau Erred in Completely Ignoring the Showings And Legal Arguments Contained In Martin's Motion To Strike And In His Petition For Declaratory Ruling

As shown above, the Bureau's November 24, 1992 action completely ignored all of the factual showings and legal arguments presented by Martin in his November 18, 1992 Motion To Strike, in his November 25, 1992 Reply To Opposition To Motion To Strike, and in his November 19, 1992 Petition For Declaratory

Ruling. Indeed, the Bureau's action on November 24, 1992 took place before the pleading cycle on Martin's Motion To Strike had even been concluded. The Bureau's Public Notice of November 24, 1992 was thus an unreasoned determination: not a single factual showing or legal argument raised by Martin in his Motion To Strike or in his Reply To Opposition To Motion To Strike was dealt with on its merits by the Bureau's action.

The manifest failure by the Mass Media Bureau to expressly consider the merits of Martin's factual showings and legal arguments constitutes administrative action which is arbitrary, capricious and an abuse of discretion. In this regard, it is well-established that the Commission is required to give reasoned consideration to all material facts and issues. Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970, cert. denied, 403 U.S. 923 (1971)). The U.S. Court of Appeals has emphasized the requirement that the Commission engage in reasoned decisionmaking:

"Much of our evolving body of administrative procedure rests upon the cornerstone requirement of reasoned decision making. 2 K. Davis, Administrative Law Treatise §16.12 (1958). Without such a requirement, effective judicial review would be impractical if not impossible, and administrative litigants and the public generally would be set adrift on a potential sea of unconscious preference and irrelevant prejudice.... The Commission 'must explain its reasons and do more than enumerate factual differences, if any, between ... [similar] cases; it must explain the relevance of those differences to the purposes of the Federal Communications Act.' [Footnote omitted.]"

Columbia Broadcasting System, Inc. v. FCC, 454 F.2d 1018, 1025-26 (D.C. Cir. 1971).

As shown above, in this case, the Mass Media Bureau failed, in its November 24, 1992 action, to meet its obligations to engage in reasoned decisionmaking; rather, the Bureau merely recited, in its November 24, 1992 Public Notice, reliance on Section 1.429(e) of the Commission's Rules, as the basis for publication in the Federal Register. However, as shown above, that provision of the Rules provides, in pertinent part, that Federal Register publication is required only for Public Notices of the filing of timely-filed petitions for reconsideration. Here, however, for the reasons set forth in Martin's November 18, 1992 Motion To strike and in his November 25, 1992 Reply To Opposition To Motion To Strike, the Petitioners' Petition For Reconsideration was late-filed and therefore not cognizable under Section 405 of the Communications Act. Martin hereby incorporates by reference his November 18, 1992 Motion To Strike and his November 25, 1992 Reply To Opposition To Motion To Strike. The Bureau's failure to consider the merits of Martin's showings as to the untimely nature of the Petitioners' Petition For Reconsideration, coupled with the Bureau's failure even to await the completion of the pleading cycle relating to Martin's Motion To Strike, and the Bureau's failure to expressly address and resolve, in a reasoned decision, the merits of Martin's showing as to the untimeliness of the Petitioners' Petition For Reconsideration, constitutes arbitrary and capricious agency

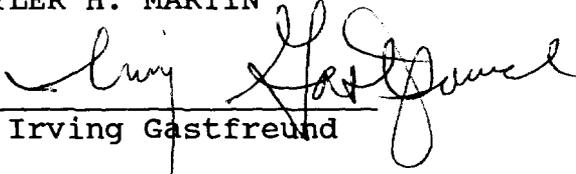
action, a lack of reasoned decisionmaking, and a consequent abuse of discretion.

III. Conclusion

For all of the foregoing reasons, the Bureau's action of November 24, 1992 should be expeditiously reconsidered and vacated. The November 24, 1992 Public Notice should be expeditiously rescinded as improvidently issued, and Martin's Motion To Strike and his Petition For Declaratory Ruling should be expeditiously granted for the reasons set forth therein.

Respectfully submitted,

SCHUYLER H. MARTIN

By: 

Irving Gastfreund

Kaye, Scholer, Fierman, Hays & Handler
901 15th Street, N.W.
Suite 1100
Washington, D.C. 20005
(202) 682-3526

His Attorneys

December 11, 1992

CERTIFICATE OF SERVICE

I, Mary Odder, a secretary with the law firm of Kaye, Scholer, Fierman, Hays & Handler, hereby certify that I have on this 11th day of December, 1992, sent copies of the foregoing "Petition For Reconsideration" by First-Class U.S. Mail, postage prepaid, or via hand-delivery, as indicated below, to the following:

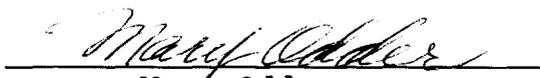
Roy J. Stewart, Esq. *
Chief, Mass Media Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 8322
Washington, D.C. 20554

Robert H. Ratcliffe, Esq. *
Assistant Chief (Law)
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 314
Washington, D.C. 20554

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

John J. McVeigh, Esq. *
Fisher, Wayland, Cooper & Leader
1255 23rd Street, N.W.
Suite 800
Washington, D.C. 20037-1170
Counsel to Petitioners

Shelton M. Binstock, Esq.
1140 Connecticut Avenue, N.W.
Suite 703
Washington, D.C. 20036
Counsel to Danjon, Inc.



Mary Odder

*/ Via Hand-Delivery