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In re: WKDB(FM), Laurel, DE
Facility ID No. 16661

Application File No.
BPH-20010208AAT

Petition for Reconsideration

Dear Counsel:

This letter concerns the Petition for Reconsideration filed by Great Scott Broadcasting ("Great Scott") on September 30, 2004 (the "Petition") of the dismissal by the Media Bureau (the "Bureau") of its captioned application for a minor modification of its facilities for Station WKDB(FM), Laurel, Delaware (the "Application"). For the reasons set forth below, we dismiss Great Scott's Petition.

Background. On February 8, 2001, Great Scott filed the Application, seeking to relocate the WKDB(FM)¹ transmitter and increase its antenna height. The proposed modification required clearance by the Federal Aviation Administration ("FAA").² Commencing on October 22, 2001, the Bureau staff repeatedly contacted Great Scott, its consulting engineer, and its counsel, to attempt to obtain documentation of the FAA clearance that would enable completion of the processing of the Application.³ Ultimately, having received no responsive submission, the Bureau staff requested an update on Great Scott's efforts to obtain FAA clearance for the tower by letter dated July 17, 2003.⁴ Great Scott responded on July 29, 2003, advising that the FAA study remained pending and that it should be

¹ At the time of filing, the station's call sign was WQJH(FM). The call sign was changed to WKDB(FM) on September 24, 2003.

² On May 15, 2001, the FAA had issued a letter stating that the proposed structure was presumed to be a hazard to air navigation.

³ The staff contacted Great Scott's consulting engineer on October 22, 2001. It then contacted its counsel on October 8, 2002, and spoke with its engineer again on March 13, 2004, who advised that the staff would be regularly apprised of Great Scott's progress with the FAA.

⁴ Letter from Dale E. Bickel, Senior Electronic Engineer, Audio Division to Ross G. Greenberg, Esquire, dated July 17, 2003.

completed in the near term.⁵ When, nearly ten months later, the Commission had received no further communications updating the status of the FAA's review, on April 13, 2004, the Bureau dismissed the Application for Great Scott's failure to prosecute under Section 73.3568(a)(1) of the Commission's Rules.⁶ On May 17, 2004, Great Scott filed a Petition for Reconsideration of the dismissal of its Application. That Petition was denied by the Bureau in a decision dated August 26, 2004.⁷ On September 30, 2004, Great Scott filed the subject Petition, seeking reconsideration of the Bureau's denial of the earlier Petition for Reconsideration.

In its Petition, Great Scott argues that a factual change since its previous reconsideration request – the grant of a subsequently filed conflicting application for minor change of the facilities of WOSC(FM), Bethany Beach, Delaware, filed by Capstar TX Limited Partnership (“Capstar”) – has violated Great Scott's right to seek reconsideration of the dismissal of its Application. Great Scott claims that the Bureau “improperly plucked Capstar's conflicting minor modification application...from the queue and granted it”⁸ extinguishing Great Scott's asserted right to seek reconsideration of the April 13, 2004, decision dismissing its Application. This, it claims, violated Great Scott's right to seek reconsideration under Section 405 of the Communications Act of 1934, as amended (the “Act”),⁹ and the application processing provisions of Section 73.3573(f)(i) of the Commission's Rules.¹⁰ It contends that the grant of the Capstar application renders impossible a fair and impartial consideration of Great Scott's reconsideration Petition. It claims that it was the “lead applicant” with a right to pursue its Application to a “final determination” before the Capstar application could even be considered. Additionally, it contends that the Commission has recently acknowledged that an applicant's failure to provide required items within an application is not fatal to that application.¹¹ This precedent, it asserts, required the Bureau to request further information from Great Scott before dismissing its Application. The Petition claims that Great Scott's technical consultant had been in contact with the Commission and the FAA concerning the matter and, thus, it had diligently prosecuted its Application. Finally, Great Scott contends that, contrary to the ruling on its first reconsideration petition, its Application did identify an existing tower at the

⁵ Letter from Christopher J. Sova, Esquire to Marlene H. Dortch, Secretary, Federal Communications Commission, dated July 29, 2003.

⁶ 47 C.F.R. § 73.3568(a)(1). See Letter to Christopher J. Sova, Esquire, from Dale E. Bickel, Senior Electronics Engineer, Audio Division, Media Bureau, dated April 13, 2004.

⁷ See Letter to Dennis P. Corbett, Esquire and Christopher J. Sova, Esquire from Dale E. Bickel, Senior Electronics Engineer, Audio Division, Media Bureau, dated August 26, 2004. Public notice of the denial of reconsideration was given on August 31, 2004; *Broadcast Applications*, Public Notice, Report No. 25810 (Aug. 31, 2004).

⁸ Petition at 4.

⁹ 47 U.S.C. § 405.

¹⁰ 47 C.F.R. § 73.3573(f)(i). Great Scott claims that the Bureau violated this rule by failing to reach a “final determination” with respect to the Great Scott Application before it turned to consider the Capstar application. Under that rule, Great Scott argues, “the right of an applicant [for minor modifications for non-reserved channel FM broadcast stations] ripens only upon a *final* determination that the lead applicant is unacceptable.” Petition at 8, citing 47 C.F.R. § 73.3573(f)(1).

¹¹ In this regard, Great Scott cites *Mester's TV*, Memorandum Opinion and Order, 18 FCC Rcd 13453 (2003), *recon. denied*, 19 FCC Rcd 18507 (2004) (“*Mester's TV*”).

proposed location. It contends that this negated any need for FAA approval, as it could side-mount an antenna on that pre-existing and operational tower.¹²

Discussion. As an initial matter, “[r]econsideration will not be granted to debate matters upon which the Commission has already deliberated and spoken.”¹³ Moreover, “[a] petition for reconsideration of an order which has previously been denied on reconsideration may be dismissed by the staff as repetitious.”¹⁴ Accordingly, it would be appropriate for us to dismiss the instant Petition as repetitious.¹⁵ Nevertheless, we will address the merits.

It is clear from the Commission’s Rules that actions taken under delegated authority are effective on release of the decision and that the filing of a petition for reconsideration does not automatically stay the decision of which reconsideration is being sought.¹⁶ Capstar’s application was not “plucked out of the queue and given precedence” over a longer-pending Great Scott Application. Instead, at the time action was taken on the Capstar application, Great Scott’s Application was no longer in that queue, having been dismissed more than two months earlier.¹⁷ Great Scott’s submission of the Petition, however, prevented the dismissal of its Application from becoming a final action, and it is clear – whether or not the WOSC(FM) grant contained an express condition to this effect – that any construction by Capstar pursuant to the WOSC(FM) construction permit prior to the finality of the Application’s dismissal is at Capstar’s sole risk.¹⁸ Accordingly, contrary to Great Scott’s assertion,¹⁹ our grant of the Capstar application did not make it impossible for the Commission to grant the relief requested by Great Scott in its first Petition for Reconsideration.

¹² Great Scott attaches to its Petition an amendment to its Application proposing this arrangement.

¹³ *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff’d sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966). *See also William L. Carroll*, Memorandum Opinion and Order, 8 FCC Rcd 6279 (1993).

¹⁴ *See Application of A.G.P., Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 4628, 4629 (1996); *see also Iola Broadcasting Co.*, Memorandum Opinion and Order, 2 FCC 2d 439 (1966) *citing Brainerd Broadcasting Co.*, Memorandum Opinion and Order, 25 RR 297 (1963) (repeated petitions for reconsideration not permitted).

¹⁵ *See Application of A.G.P., Inc.*, 11 FCC Rcd at 4629.

¹⁶ *See* 47 C.F.R. §1.102(b)(1) and (2). The designated authority *may*, in its discretion, stay the effect of its action pending the disposition of the petition for reconsideration. It is not required to do so and, in the instant case, such a stay was neither requested by Great Scott nor granted by the Bureau on its own motion.

¹⁷ Although the Petition does not so specify, we assume that Great Scott is referring to Capstar’s minor change application for WOSC(FM), Bethany Beach, Delaware (File No. BPH-20010306ABC), which was granted on June 23, 2004.

¹⁸ *See, e.g., Las Americas Communications, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 1507, 1510 (1991) (an applicant opting to construct before the grant of its application becomes final does so at its own risk). *See also Improvement Leasing Co.*, Memorandum Opinion and Order, 73 FCC 2d 676, 684 (1979), *aff’d sub nom. Washington Association for Television and Children v. FCC*, 665 F.2d 1264 (D.C.Cir.1981) (parties who consummate a sale transaction before its approval becomes final assume the risk that the sale may later be set aside by the Commission or the courts).

¹⁹ Petition at 6.

In this regard, notwithstanding Great Scott's argument, the grant of the Capstar application does not impede its right to seek reconsideration pursuant to Section 405 of the Act.²⁰ It is well established that an applicant, such as Capstar in the instant case, that proceeds in reliance on a Commission action prior to final administrative or judicial review of the agency's decision exercises its own independent business judgment and proceeds at its own risk with the full understanding that it may ultimately be required to undo the act.²¹ Such action by the applicant in no way prejudices the Commission's ability to take any remedial action it may consider necessary at a future date nor prejudices the rights of petitioners or other objecting parties to seek administrative review or judicial appeal of the Commission's action.²² Any action an applicant, in this case Capstar, takes before a Commission order is final for all purposes, including reconsideration and judicial review, is taken at the risk that it will have to be undone.²³ Accordingly, Great Scott's ability to seek review and, if successful, to have its application reinstated, was not prejudiced by the grant of the Capstar application.

Great Scott argues that *Mester's TV* establishes that an applicant's failure to provide required items within an application does not require dismissal of that application.²⁴ We disagree. In *Mester's TV*, Multipoint Distribution Service applications were reinstated, notwithstanding the applicant's failure to have provided site leases with its applications. The Commission's reasoning for the reinstatement, however, does not apply to the instant case. In *Mester's TV*, the Commission had previously articulated a policy that documentary evidence of site availability, including site leases, were not required to be provided when the application was filed but, rather, had to be produced before the application was granted. Accordingly, the Commission concluded that the application dismissals, because the applicant had not provided site leases with its applications, were unwarranted. In the instant case, Great Scott's Application was dismissed because Great Scott had failed to produce an FAA "no hazard" determination over the more than three years that its Application was pending, despite repeated staff appeals to it and its technical and legal representatives to do so and, more particularly, over the nearly ten-month period following the Bureau staff's written request. As a consequence of this failure, the Bureau determined that Great Scott had failed to prosecute the application, pursuant to Section 73.3568(a)(1) of the Commission's Rules,²⁵ and dismissed it. We find no error in this action on the facts presented here.

Finally, we reject Great Scott's proffered "amendment" to its application. As discussed above, its application was dismissed because of its failure to provide information repeatedly requested by the staff. A stay was neither sought nor granted and the staff previously determined that there was no error in dismissing the application when it denied Great Scott's first Petition for Reconsideration. Accordingly,

²⁰ 47 U.S.C. § 405.

²¹ *Improvement Leasing Co.*, 73 FCC 2d at 684.

²² *Id.*

²³ *Id.* at note 16.

²⁴ See note 9 *supra*.

²⁵ 47 C.F.R. § 73.3568(a)(1).

Great Scott cannot, at this late date, proffer the requested information and claim that it is entitled to the reinstatement *nunc pro tunc* of its application.²⁶

Conclusion/Actions. Accordingly, IT IS ORDERED, that Great Scott Broadcasting's Petition for Reconsideration filed on September 30, 2004, IS DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

²⁶ Great Scott's claim that its original Application identified another tower at the proposed location is irrelevant. In its Application, it proposed a tower location and height that required FAA approval. After study, the FAA issued a "Presumed Hazard" declaration with regard to that site. Great Scott did not amend its Application or propose a different location or lower antenna height. Instead, on June 25, 2001, it requested further study. It notified Bureau staff of this decision and represented that it was working to resolve the matter expeditiously. When, three years later, the matter had still not been resolved, its Application was appropriately dismissed. Whether Great Scott identified another licensee's tower in its Application had no relevance to any of these events and it has none now, nor does its grossly untimely attempt to change its proposal to now side-mount its antenna.