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In Re: Holy Family Oratory of
St. Philip Neri
Bedford, Michigan
Facility ID No. 172329
File No. BNPED-20071022AXL

**Emergency Petition to Rescind
Construction Permit**

Dear Counsel:

We have before us a June 23, 2008, Emergency Petition to Rescind Construction Permit Grant ("Petition") filed by First Pentecostal Church of God in Christ ("FPC"), seeking rescission of the staff's May 14, 2008, action granting Holy Family Oratory of St. Philip Neri's ("HFO") captioned application (the "HFO Application") for a construction permit for a new noncommercial education ("NCE") station at Bedford, Michigan (the "Station"). Also before the staff are an Opposition to Emergency Petition to Rescind Construction Permit ("Opposition") filed June 25, 2008, by HFO, and a Reply to Opposition to Emergency Petition to Rescind Construction Permit Grant ("Reply") filed on June 26, 2008, by FPC.

We also have before us FPC's October 22, 2007, request for waiver of the requirements that applications for new NCE stations filed during the pertinent filing window be filed electronically and by 2:00 p.m. on October 22, 2007 ("Waiver Request"). For the reasons set forth below, we dismiss the Petition and deny the Waiver Request.

Background. By Public Notice,¹ the Commission announced an application filing window from October 12 to October 19, 2007, for both new NCE stations and major changes to existing NCE stations. The Public Notice barred all but electronic applications tendered for filing via CDBS, the Commission's electronic database and filing system. On October 19, 2007, CDBS suffered an outage lasting from approximately 1:30 a.m. until 8:00 a.m. Consequently, the Commission extended the filing deadline until

¹ See *NCE FM New Station and Major Change Filing Procedures*, Public Notice, 22 FCC Rcd 15050 (MB 2007).

2:00 p.m. on October 22, 2007.² FPC states that, through counsel, it attempted to submit an electronic application for a construction permit for a new NCE station at Battle Creek, Michigan (the “FPC Submission”), to CDBS at 1:56 p.m., in advance of the October 22, 2007, 2:00 p.m. deadline.³ FPC claims, however, that CDBS apparently failed to properly process the submission.⁴ FPC states that later that same day: (1) it immediately alerted the Media Bureau’s Audio Division; (2) it filed both the Waiver Request and a paper version of the FPC Submission; and (3) it requested expedited action to remedy the technical difficulty it encountered.⁵ Had the FPC Submission been accepted for filing, FPC claims, there would have been a resulting mutual exclusivity between the HFO Application and FPC Submission. On January 11, 2008, the Media Bureau accepted the HFO Application.⁶ FPC did not file a petition to deny or informal objection to the HFO Application. On May 14, 2008, the staff granted the unopposed HFO Application.⁷ FPC did not seek reconsideration of this action within the 30-day period permitted under the Commission’s Rules (the “Rules”).⁸

In its Petition, FPC asserts that its October 22, 2007, filing continued the pendency of the FPC Submission as well as a resultant mutual exclusivity with the HFO Application.⁹ Therefore, FPC argues that the staff’s grant of the HFO Application is contrary to the comparative procedures demanded by the U.S. Supreme Court in *Ashbacker Radio Corp. v. FCC*.¹⁰ FPC urges the Commission, on its own motion, to rescind the grant of the HFO Application.¹¹

In its Opposition, HFO argues that the Petition should be dismissed because FPC has not shown good cause for failing to participate in the HFO Application proceeding. It notes that FPC has failed to show that it took any steps to safeguard its interests.¹² For instance, the Petition, HFO notes, makes no mention of any engineering study commissioned by FPC that might have identified applications mutually exclusive with its proposal.¹³ In addition, HFO asserts that the Petition fails to indicate any reason why the Commission’s public notices did not alert FPC as to its obligation to file a petition to deny or petition

² See *Media Bureau to Extend Window*, Public Notice, 22 FCC Rcd 18680 (MB 2007).

³ Petition at 2.

⁴ *Id.*

⁵ *Id.*

⁶ See *Broadcast Applications*, Public Notice, Report No. 26653 (MB rel. Jan. 16, 2008).

⁷ See *Broadcast Actions*, Public Notice, Report No. 46739 (MB rel. May 19, 2008).

⁸ See 47 C.F.R. § 1.106.

⁹ Petition at 3.

¹⁰ *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 330 (1945) (“*Ashbacker*”).

¹¹ Petition at 3.

¹² Opposition at 3.

¹³ *Id.*

for reconsideration.¹⁴ Noting that the FPC Petition was filed on June 23, 2008, HFO indicates that petitions for reconsideration of the grant of the HFO Application “became untimely as of 7 p.m. on June 18, 2008.”¹⁵ Because FPC failed to timely file a petition to deny the HFO Application, HFO asserts that absent any allegations of good cause for failing to participate earlier in the process, even a timely petition for reconsideration would not have been acceptable in this case.¹⁶ HFO concludes that the Commission should dismiss the Petition as an untimely petition for reconsideration.¹⁷

In its Reply, FPC argues that the reconsideration process is irrelevant in that FPC’s *Ashbacker* rights attached when it submitted its application and pleading on paper after CDBS failed to accept its timely, electronically-filed application.¹⁸ Finally, FPC restates its view that rescinding HFO’s construction permit and restoring the *status quo* is in the public interest.¹⁹

Discussion. Initially, we note that neither the Communications Act of 1934, as amended (the “Act”), nor Section 1.113(a) of the Rules create a right for third parties to file petitions to rescind an authorization. Rather, such filings are treated as petitions for reconsideration when timely filed.²⁰

When treated as a petition for reconsideration, however, FPC’s pleading is untimely. Section 405 of the Act²¹ and Section 1.106(f) of the Rules²² mandate that petitions for reconsideration must be filed no later than 30 days after public notice of the action for which reconsideration is sought. Public notice of the grant the HFO Application was issued on May 19, 2008, yet FPC did not file its Petition until 35 days after the public notice was released. The Commission generally lacks the authority to extend or waive the statutory 30-day filing period for petitions for reconsideration set forth in Section 405 of the Act. Although the Commission may not refuse to consider a late-filed petition for reconsideration if the petitioner shows that its failure to file for reconsideration in a timely manner resulted from “extraordinary circumstances,”²³ no such showing has been made here. Because the Petition was untimely, it is procedurally defective and will be dismissed.

¹⁴ *Id.*

¹⁵ Opposition at 2.

¹⁶ Opposition at 3, citing 47 C.F.R. § 1.106(b)(1).

¹⁷ Opposition at 4.

¹⁸ Reply at 3.

¹⁹ Reply at 4.

²⁰ See, e.g., *Anderson Radio Broadcasting, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 578 n.8 (2008) (petition to rescind treated as timely petition for reconsideration).

²¹ 47 U.S.C. § 405.

²² 47 C.F.R. § 1.106(f).

²³ *Gardner v. FCC*, 530 F.2d 1085, 1091-92 (D.C. Cir. 1976); *Richardson Independent School District*, Memorandum Opinion and Order, 5 FCC Rcd 3135, 3136 (1990); *Pueblo Radio Broadcasting Service*, Memorandum Opinion and Order, 6 FCC Rcd 1416 (1991) (the fact that petition for reconsideration was filed only one day late does not constitute “extraordinary circumstances” for which filing deadline may be extended).

Even if we were to consider FPC's Petition on its merits, we would deny it. FPC states that the staff's grant of the HFO Application violates *Ashbacker*. FPC is incorrect.²⁴ The *Ashbacker* decision holds that "where two *bona fide* applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity [to a hearing] which Congress chose to give him."²⁵ The decision does not prevent the Commission from establishing eligibility requirements, including filing deadlines. All potential applicants had an equal opportunity during the filing window to file NCE FM new station applications, and no party was deprived of the right to consideration of a timely-filed application subject to the acceptability criteria that we adopted.²⁶ FPC had an opportunity to timely file its application in the window. It did not do so, and as discussed in more detail below, FPC did not present good cause why it could not do so. Accordingly, the FPC Submission is not a "*bona fide* application" and, accordingly, is not entitled to comparative consideration.

Waiver Request. A waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.²⁷ Moreover, when the Commission waives a filing requirement rule, as with any rule, it must explain why the waiver would not undermine the policy served by the rule.²⁸

The Commission announced the October filing window six months in advance, affording applicants considerable time to prepare their applications and supporting documents. Applicants were free to initiate and complete applications during this six-month period. The filing window was to remain open for seven days, from Friday, October 12, 2007 through 11:59 p.m., Friday, October 19, 2007. The electronic filing system became temporarily unavailable, however, between approximately 1:30 a.m. and 8:00 a.m. on October 19. The Commission responded to this outage by extending the filing window until Monday, October 22, 2007, at 2 p.m., *i.e.*, for a period substantially longer than the outage itself. FPC first tried to file an electronic application in the final minutes of the last day of the extended 10-day filing window and states that it failed to complete the filing process because it experienced stoppage problems with the Commission's electronic filing system,²⁹ which was uploading information from many applications filed that day.

We determine that the additional two and one-half days that we extended the filing window, amply compensated for any time FPC lost to the less than seven-hour, early-morning outage on October

²⁴ Statutory right to a hearing applies to "mutually exclusive applications." See *Ashbacker*, 326 U.S. at 330 (1945). After the October 2007 filing window closed, HFO submitted a minor amendment on January 8, 2008 (that appeared on Public Notice on January 11, 2008), indicating that the HFO Application was, in fact, a singleton. FPC received ample notice of the HFO Application's "singleton" status and did not timely contest it.

²⁵ See *Ashbacker*, 326 U.S. at 333 (1945).

²⁶ See *Glazer v. FCC*, 20 F.3d 1184, 1186 (D.C. Cir. 1994) ("There can be no doubt of the FCC's authority to impose strict procedural rules in order to cope with the flood of applications it receives or expects to receive.").

²⁷ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969); see also *Industrial Broadcasting Co. v. FCC*, 437 F.2d 680 (D.C. Cir. 1970).

²⁸ See *WAIT Radio v. FCC*, 418 F.2d at 1157.

²⁹ See Petition at 2.

19, and the alleged stoppage problems minutes from the 2:00 p.m. deadline on October 22. Applicants that wait until the last minute before submitting their applications risk untimely filing.³⁰ Applicants were specifically cautioned not to wait until the end of the window to file applications.³¹ Here, FPC fails to show good cause why it could not timely file the FPC Submission. Moreover, acceptance of late-filed applications, such as the FPC Submission, would prejudice timely applicants.³² For these reasons, we find unpersuasive the arguments set forth in FPC's Waiver Request.

Conclusions/Actions. Accordingly, IT IS ORDERED that the Emergency Petition to Rescind Construction Permit Grant filed by First Pentecostal Church of God in Christ on June 23, 2008, IS DISMISSED. IT IS FURTHER ORDERED that the Waiver Request filed by First Pentecostal Church of God in Christ on October 22, 2007, IS DISMISSED as moot.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: First Pentecostal Church of God in Christ
Holy Family Oratory of St. Philip Neri

³⁰ See, e.g., *Scottsdale Horizons School*, Order, 17 FCC Rcd 16872, 16874-75 (WCB 2002).

³¹ See *Media Bureau Announces NCE FM New Station and Major Change Filing Procedures for October 12 – October 19, 2007 Window; Limited Applications Filing Freeze to Commence on September 8, 2007*, Public Notice, 22 FCC Rcd 15050, 15054 (2007) (“Applicants are also encouraged to submit their applications early during the window to ensure proper submission.”).

³² See, e.g., *Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 22 FCC Rcd 6101, 6107 (2007) (Commission rejects waiver request argument that no one would be prejudiced by acceptance of late-filed supplements).