



**Federal Communications Commission
Washington, D.C. 20554**

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DA 09-1161

In Reply Refer to:

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In re: **DWOLY(AM), Battle Creek, MI**
Christian Family Network, Inc.
Facility ID No. 11032
File No. BR-20090115AEU
File No. BLSTA-20090115AEL

Application for Renewal of License

**Request for Special Temporary
Authorization**

Motion for Stay

Petition for Reconsideration

Dear Counsel:

This letter concerns: (1) the January 15, 2009, application (the "Application") filed by Christian Family Network, Inc. ("CFN") to renew the expired license of Station DWOLY(AM), Battle Creek, Michigan (the "Station"); (2) CFN's concurrently filed request for special temporary authorization ("STA Request") to continue operation pending consideration of the Application; (3) a Motion for Stay¹ ("Motion") filed by CFN on March 10, 2009, requesting that the staff's February 23, 2009, letter² treating the Application as a petition for reconsideration and dismissing it as untimely and dismissing the STA Request, be stayed pending further disposition of the case; and (4) a Petition for Reconsideration (the

¹ Spring Arbor University ("SAU") filed an Opposition to the STA Request on February 11, 2009, and an Opposition to the Motion on March 12, 2009. We note that on March 4, 2009, CFN filed an Informal Objection to SAU's minor change application (File No. BP-20060627ACB) to WJKN(AM), Jackson, Michigan, requesting that final action on SAU's application be held in abeyance until the resolution of this case.

² Letter to Lewis J. Paper, Esq., DA 09-424 (MB Feb. 23, 2009) ("Staff Decision").

“Petition”) of the *Staff Decision* filed by CFN on March 24, 2009.³ For the reasons set forth below, we deny the Motion and the Petition.

Background. Section 73.3539(a) of the Commission’s Rules (the “Rules”)⁴ requires that an application for renewal of a broadcast license must be filed “not later than the first day of the fourth full calendar month prior to the expiration date of the license sought to be renewed.” An application for renewal of the Station’s license should have been filed by June 1, 2004, four months prior to the Station’s October 1, 2004, license expiration date, but was not. Accordingly, on June 13, 2006, the staff wrote CFN, indicating that the Station’s license had expired and that: (1) all authority to operate the Station was terminated; and (2) the Station’s call letters were deleted from the Commission’s data base. CFN was also advised that any further operation of the Station was unauthorized and must cease immediately.⁵ Public notice of these actions was released on June 16, 2006.⁶ CFN did not respond to the *License Expiration Letter*. Subsequently, more than two and one-half years later, on January 15, 2009, CFN filed the Application and the STA Request which sought authorization to continue broadcasting, pending action on the Application. CFN provided an Exhibit detailing its attempts to file a license renewal application and its attempts to contact Commission staff when it was unable to do so.⁷

On February 23, 2009, the *Staff Decision* treated the Application as a petition for reconsideration of the *License Expiration Letter*. Section 405 of the Communications Act of 1934, as amended (the “Act”),⁸ and Section 1.106(f) of the Rules,⁹ require that petitions for reconsideration must be filed no later than 30 days after Public Notice of the action for which reconsideration is sought. As a result of CFN’s failure to respond to the *Staff Decision* for more than two years, the staff found that the expiration of the Station’s license was final. Accordingly, it also dismissed the STA Request, as CFN held no authorization to operate the Station. On

³ SAU filed an Opposition to the Petition on March 30, 2009 (the “Opposition”), to which CFN replied on April 15, 2009 (“Reply”).

⁴ 47 C.F.R. § 73.3539(a).

⁵ *Letter to Christian Family Network, Inc.* (MB rel. Jun. 13, 2006) (“*License Expiration Letter*”). Despite these explicit directions, CFN did not cease station operations, and was issued a \$10,000 Notice of Apparent Liability by the Commission’s Enforcement Bureau for unauthorized operations on August 16, 2007. *Christian Family Network, Inc.*, Notice of Apparent Liability, NAL/Acct. No. 200732360001 (EB, Detroit Office, rel. Aug. 16, 2007). The \$10,000 amount was affirmed in July 2008, *Christian Family Network, Inc.*, Forfeiture Order, 23 FCC Rcd 10898 (EB 2008) (“*Forfeiture Order*”), but subsequently reduced to \$5,000 based on CFN’s inability to pay. *Christian Family Network, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 18369 (EB 2008) (“*EB MO&O*”).

⁶ See *Broadcast Actions*, Public Notice, Report No. 46258 at 16 (rel. Jun. 16, 2006).

⁷ STA Request, Exhibits 1, 2. The Exhibits consist of two letters from CFN President James Leonard Elsmann, Esq., to the Commission dated September 27, 2004, and December 10, 2006. The letters bear no date stamp from the Office of the Secretary. In addition, CFN submits an illegible copy of a cancelled check it states it allegedly used for paying the filing fee for an FCC Form 303-S. See Petition at Exhibit C.

⁸ 47 U.S.C. § 405. See *Reuters Limited v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986). See also *Pueblo Radio Broadcasting Service*, Memorandum Opinion and Order, 6 FCC Rcd 1416 (1991); *Panola Broadcasting Co.*, Memorandum Opinion and Order, 68 FCC 2d 533 (1978).

⁹ 47 C.F.R. § 1.106(f).

March 24, 2009, CFN filed the pleading entitled, “Petition for Reconsideration,” in response to the *Staff Decision*.

In its Petition, CFN takes issue with the staff’s treatment of the Application as a late-filed petition for reconsideration. Rather, CFN argues that the Application constitutes a new proposal and should be evaluated on its merits in accordance with the statutory requirements of Section 309(k) of the Act.¹⁰ In Opposition, SAU argues that the Petition should be dismissed on procedural grounds because it contains no new facts or legal arguments that were not considered in the *Staff Decision*. In the alternative, SAU argues that the Petition should be denied on its merits because CFN has continued to operate the Station for more than four and one-half years in violation of the Rules and has no authority to remain on the air.

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission’s original order, or raises additional facts, not known or existing at the time of petitioner’s last opportunity to present such matters.¹¹ Petitions for reconsideration which rely on facts not previously presented to the Commission may be granted if the Commission determines that consideration of the facts relied on is required in the public interest.¹² As set forth below, CFN has not met these standards.

CFN argues that the *Staff Decision* does not cite to any judicial authority supporting its decision to treat the Application as a “late-filed petition for reconsideration.”¹³ CFN also argues that in a case with a similar fact pattern as here, the Media Bureau (“Bureau”) reinstated a station’s license and granted the renewal application even though the licensee failed to file its request for reinstatement and renewal application for more than 90 days after the date of the Bureau letter cancelling the license and deleting the call sign.¹⁴

First, we find that the staff’s treatment of the Application as a “petition for reconsideration” is consistent with published precedent.¹⁵ Indeed, there appears to be no other characterization of the Application that would enable the staff to consider the filing, given that the staff had previously announced the cancellation of the Station’s license. Stated simply, there was no outstanding license to renew at the time the Application was filed.

¹⁰ CFN reiterates these claims in its Motion.

¹¹ See 47 C.F.R. § 1.106(c) and (d). See also *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff’d sum nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966) (“*WWIZ, Inc.*”).

¹² See 47 C.F.R. § 1.106(c)(2). See also *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Scranton and Surfside Beach, South Carolina)*, Memorandum Opinion and Order, 4 FCC Rcd 2366 (MB 1989).

¹³ Petition at 6.

¹⁴ See Petition at 7, citing *Grinnell College Trustees of Iowa*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 2762 (MB 2007) (“*Grinnell College*”); see also Reply at 2.

¹⁵ See *Henry Cotton*, Letter, 22 FCC Rcd 18610 (MB 2007), and *Donald E. Martin, Esq.*, Letter, 22 FCC Rcd 18608 (MB 2007) (late-filed renewal application treated as petition for reconsideration and dismissed as untimely in the absence of a showing of “extraordinary circumstances” that would warrant its consideration).

Second, we find that there is one critical distinction between the case CFN discusses at length, *Grinnell College*, and the situation here. In *Grinnell College*, upon receipt of a license expiration letter, the licensee tendered a late-filed license renewal application, an STA request, and a timely-filed petition for reconsideration.¹⁶ Although this petition for reconsideration was not referenced in the *Grinnell College* decision, the fact remains that the licensee in that case did file a timely petition for reconsideration of the staff's cancellation letter. Here, CFN did not. Accordingly, *Grinnell College* is inapposite.

CFN also cites ten other renewal cases where, it argues, the staff granted the late-filed renewal applications and STA requests of licensees engaging in unauthorized operation of their stations after the licenses had expired.¹⁷ CFN argues that it is entitled to the "same treatment" as these licensees.¹⁸ Specifically, CFN argues that if it had been accorded the "same treatment" as similarly situated licensees, the facts would show that CFN meets the statutory standards¹⁹ to warrant a renewal of the Station's license.²⁰

We reject CFN's claim that the *Staff Decision* is inconsistent with precedent. We have reviewed each of these cases and find them distinguishable. Specifically, while not referenced in the decisions, in four of the cases CFN cites, the licensees filed timely petitions for reconsideration of staff license cancellation letters.²¹ Hence, these cases, like *Grinnell College* discussed above, are inapposite. In five additional cited cases, the licensees failed, as here, to file a pleading denominated "petition for reconsideration." However, each of the licensees filed license renewal applications or STA requests within 30 days of public notice of the license expiration letters.²² As noted above, CFN filed nothing within the statutory period for seeking

¹⁶ See *Letter to Federal Communications Commission from Michael D. Sims, Associate Dean for Student Life, Grinnell College* (dated July 14, 2005), filed "to formally Petition for Reconsideration" of the license cancellation letter issued to the College; see also *Letter to Marlene H. Dortch, Secretary, FCC*, filed Sept. 18, 2005, by Grinnell College ("Upon receipt of the Commission's . . . letter, and after contacting Commission staff, Grinnell . . . filed a Petition for Reconsideration."); see also *Letter to Grinnell College*, Ref. 1800B3 (Chief, Audio Division, Media Bureau, Sept. 22, 2006) ("Upon receipt of the [license expiration] letter, Grinnell tendered a petition for reconsideration . . .").

¹⁷ Petition at 7, n.7.

¹⁸ Petition at 8, citing *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965) (holding that the Commission must explain its disparate treatment of contemporaneous cases with similar underlying facts).

¹⁹ See 47 U.S.C. § 309(k)(1). This section of the Act instructs the Commission to grant an application for renewal if its finds that "(A) the station has served the public interest, convenience, and necessity; (B) there have been no serious violations by the licensee of this Act or the rules and regulations of the Commission; and (C) there have been no other violations by the licensee of this Act or the rules and regulations of the Commission which, taken together, would constitute a pattern of abuse."

²⁰ Petition at 9.

²¹ See *Wennes Communication Stations, Inc.*, Memorandum Opinion & Order and Notice of Apparent Liability for Forfeiture ("MO&O and NALF"), 22 FCC Rcd 2752, 22 FCC Rcd 2767, 22 FCC Rcd 2772 (MB 2007); *Faith Bible College*, MO&O and NALF, 22 FCC Rcd 5322 (MB 2007).

²² See *Davis & Elkins College*, MO&O and NALF, 21 FCC Rcd 10654 (MB 2006) (Public Notice of staff license expiration letter issued December 8, 2003; license renewal application filed January 7, 2004) *Jack W. Ivy, Sr.*, MO&O and NALF, 22 FCC Rcd 2312 (MB 2007) (Public Notice of staff license cancellation letter issued March 22, 2005, license renewal expiration filed April 21, 2005); *Piedmont Radio Co.*, MO&O and NALF, 22 FCC Rcd 3879 (MB 2007) (Public Notice of staff license expiration letter issued March 22, 2005, license renewal application filed April 7, 2005); *The University of Georgia*, MO&O and (continued . . .)

reconsideration of the *License Expiration Letter*. Although not explicitly discussed in the dispositions of those cases, the staff's processing each of the renewal applications in those cases can only be characterized as a reconsideration of its prior determination that the particular station license had expired. Even in the absence of a petition for reconsideration, had CFN properly filed a license renewal application for DWOLY(AM) within 30 days of public notice of the *License Expiration Letter*, it would have received similar treatment. It did not. These cases, therefore, are also distinguishable.

With respect to the remaining cited case, the licensee filed a license renewal application following the expiration of the station's license but prior to the issuance of a staff letter advising the former licensee that the station license had expired.²³ Because there was no staff action, the thirty-day period for the filing of a petition for reconsideration had not begun to run. Hence, this case is inapposite to the situation here where the staff issued the *License Expiration Letter*, providing public notice that the license had expired and initiating the thirty-day petition for reconsideration filing period.

Furthermore, we reject CFN's purported explanation for the late filing.²⁴ Specifically, CFN claims that in 2004 its president could not electronically file a renewal application because he was "completely befuddled by the electronic filing requirements of the FCC . . . [and that his] Internet Service Provider was not compatible with the FCC's electronic filing system."²⁵ CFN also claims that despite numerous telephone calls to Commission staff, "no staff member advised [the president] that a paper renewal application could be filed if accompanied by a request for waiver of the mandatory electronic filing requirement."²⁶ We reject CFN's attempt to shift responsibility for its nonfeasance to the staff. Although the Commission must give a hard look to all waiver requests, the staff is not required to advise or instruct applicants on filing strategies, particularly on options to submit filings that do not conform to Commission requirements.²⁷ Therefore, we find that CFN's explanation for its late filing is unpersuasive.²⁸

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NALF, 22 FCC Rcd 3893 (MB 2007) (Public Notice of staff license expiration letter issued March 22, 2005, license renewal application filed March 25, 2005); *Heidelberg College*, MO&O and NALF, 22 FCC Rcd 2395 (MB 2007) (Public Notice of staff license expiration letter issued June 16, 2006, STA request filed June 22, 2006).

²³ See *Snow College*, 23 FCC Rcd 7662 (MB 2008) (no license cancellation letter issued by staff).

²⁴ See *Elsman Declaration* at Petition, Exhibit A.

²⁵ *Id.*

²⁶ Petition at 3.

²⁷ Even if we were to consider CFN's arguments, it is clear that its errors do not excuse the violations of Section 73.3539 or the fact that the Station has operated without authorization for nearly three years. See, e.g., *Hemmingford Media, Inc.*, Forfeiture Order, 14 FCC Rcd 2940, 2941-2 (CIB 1999) (responsibility for complying with terms of station license "rests solely and exclusively with the licensee") (citing *Empire Broadcasting Corp.*, Memorandum Opinion and Order, 25 FCC 2d 68 (1970)).

²⁸ See, e.g., *UTV of San Francisco, Inc. (KBHK-TV)*, Letter, 10 FCC Rcd 10986, 10987 and note 1 (MMB 1995); *Le Sea Broadcasting Corp. (WHKE-TV)*, Letter, 10 FCC Rcd 4977, 4978 (MMB 1995); *Buffalo Management Enterprises Corp. (WIVB-TV)*, Letter, 10 FCC Rcd 4959, 4960 (MMB 1995); *Gannett Massachusetts Broadcasting, Inc. (WLVI-TV)*, Letter, 9 FCC Rcd 1555 (MMB 1994); *Ramar Communications, Inc. (KJTV-TV)*, Letter, 9 FCC Rcd 1831 (MMB 1994).

We find that CFN has not demonstrated material error or omission in the *Staff Decision* and has presented no new facts or changed circumstances that would otherwise warrant reconsideration.

Motion for Stay. To prevail in a motion for stay, the moving party generally must demonstrate that: (1) it is likely to prevail on the merits of its pending appeal; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay.²⁹

We find that CFN has not made the required showing. First, regarding CFN's likelihood of success on appeal, we find that to the contrary, CFN has not proffered a persuasive case. Its arguments on the merits, which echo those raised in the Petition, have been carefully considered and found meritless. CFN failed to file a timely petition for reconsideration of the *License Expiration Letter*, and it has neither justified that failure³⁰ nor proffered convincing arguments that the staff erred in declaring the expiration of the Station's license to be final.³¹

Second, CFN has failed to show that it will suffer irreparable injury if it is required to comply with the Commission's decisions, the first of which was issued nearly three years ago. We find it somewhat disingenuous for CFN to argue that "loss of on-air broadcast service" will cause it to suffer "irreparable harm due to the cancellation of existing contracts that would deprive CFN of needed income in the near future and would make it difficult to restore the Station to any profitability" when it has been operating the Station without authority and in violation of direct Commission orders for nearly three years.³²

Third, granting the Motion here would not be in the public interest because it would, in effect, reward CFN for its continued flaunting of the Act by its continued operation of the Station without authority -- despite several Commission orders to cease operation. For these reasons, we deny CFN's stay request.

Conclusion/Actions. For the reasons set forth above, IT IS ORDERED that the Motion for Stay filed March 10, 2009, by Christian Family Network, Inc., IS DENIED. IT IS FURTHER

²⁹ See, e.g., *Storer Communications, Inc.*, 101 FCC2d 434 (1985); *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669 (D.C. Cir.1985); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir.1977); *Virginia Petroleum Jobbers Ass'n v. F.P.C.*, 259 F.2d 921 (1958); and *Charter Communications Entertainment I, LLC*, Memorandum Opinion and Order, 22 FCC Rcd 13890, 13892, ¶ 4 (MB 2007).

³⁰ Generally, the Commission may waive the Section 405 filing deadline where an applicant demonstrates a defect in the notice of the challenged action. See *Emmis Radio License Corp.*, Memorandum Opinion and Order, 17 FCC Rcd 14733 n.4 (2002) and *Adelphia Communications Corporation*, Memorandum Opinion and Order, 12 FCC Rcd 10759, 10760 n.9 (1997) (both citing *Gardner v. FCC*, 530 F.2d 1086, 1091-92 (D.C. Cir. 1976) and dismissing petitions for reconsideration where in each case the petitioner did not allege that there was defective notice that made it impossible to meet the filing deadline for requesting reconsideration).

³¹ We note that CFN filed a "Response" to the *EB MO&O*, and it was denied in part with the matter of CFN's license cancellation not under review. See *EB MO&O*, DA 08-2815, 2008 WL 5423111 at n.3 ("Although Christian Family Network captioned its pleading as a 'Response to Forfeiture Order,' we treat it as a petition for reconsideration The cancellation of Christian Family Network's authorization to operate station WOLY and the cancellation of its call sign has become a final Commission order that is no longer subject to review.").

³² Motion at 6.

ORDERED that the Petition for Reconsideration filed March 24, 2009, by Christian Family Network, Inc., IS DENIED.

Any operation of the DWOLY(AM) facilities is unauthorized and must cease IMMEDIATELY. Finally, it is imperative to the safety of air navigation that any prescribed painting and illumination of the station's tower be maintained until the tower is dismantled. Accordingly, the owner of the towers supporting the referenced stations' transmitting antennas must maintain the tower in the manner prescribed by the Rules and the terms of the expired license.³³

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Christian Family Network, Inc.
Spring Arbor University

³³ See 47 U.S.C. § 303(q) and 47 C.F.R. § 17.6.