

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of)
)
LAWRENCE BEHR) File No. 0001332167
For a Modification to Station WPWR222)

ORDER ON RECONSIDERATION

Adopted: May 27, 2009

Released: May 27, 2009

By the Chief, Mobility Division, Wireless Telecommunications Bureau:

1. *Introduction.* In this *Order on Reconsideration*, we address a petition (Petition)¹ filed on February 13, 2007 by Lawrence Behr (Behr), seeking reconsideration of a January 31, 2007 letter order² of the Mobility Division (Division), which dismissed Behr's request for a hearing pursuant to Section 1.110 of the Commission's Rules.³ For the reasons stated below, we deny the Petition.

2. *Background.* In 1993, the Commission conducted a lottery for a Phase I 220 MHz license in Denver,⁴ and Behr was the tentative selectee. However, the Commission subsequently requested that Behr resubmit a corrected application with additional technical information.⁵ Behr did so in a timely manner, but the Commission misplaced the application and, believing that Behr had not responded, granted a Phase I 220 MHz license in Denver to the second tentative selectee. To correct this administrative error, the Commission, on its own motion, set aside the grant, and reinstated Behr's application, which was granted on January 8, 2003 under Call Sign WPWR222.⁶ On June 2, 2003, Behr filed an application to modify the license by updating the contact information for the license and changing the station class from FB6 to FB6C.⁷ Along with the application, Behr filed a request for a waiver of the construction requirements in Rule 90.725.⁸ The Commission denied the waiver request on November 12,

¹ Petition for Reconsideration (filed February 13, 2007) (Petition).

² Letter dated January 31, 2007, from Lloyd W. Coward, Deputy Chief, Mobility Division, Wireless Telecommunications Bureau, to Lawrence V. Behr, 22 FCC Rcd 1798 (WTB MD 2007) (*Division Order*).

³ 47 C.F.R. § 1.110 (requiring the Commission, in case of a partial grant of an application or grant with terms or conditions other than those requested, to vacate its original action and set the application for a hearing, if the applicant files within 30 days a written request rejecting the grant as made).

⁴ See Commission Announces Tentative Selectees for 220-222 MHz Nationwide Commercial Private Land Mobile Channels, *Public Notice*, 58 Fed. Reg. 26322 (May 3, 1993).

⁵ See Application Return Notice for the Private Land Mobile Radio Services, dated January 28, 1993. See also former rule section 90.141, 47 C.F.R. § 90.141 (1993) (applicant must supply requested information within sixty days of application return notice date in order to retain place in application processing line).

⁶ See Lawrence Behr, Net Radio Communications Group, LLC, *Order*, 17 FCC Rcd 19025 (WTB CWD 2002).

⁷ See FCC File No. 0001332167.

⁸ See *id.*, attached Waiver Request; see also 47 C.F.R. § 90.725.

2003,⁹ but granted the underlying modification application on November 17, 2003.¹⁰

3. On December 17, 2003, Behr filed a petition, pursuant to Section 1.110 of the Commission's Rules,¹¹ rejecting the grant of the application, and requesting a hearing.¹² The Mobility Division dismissed the hearing request, stating that Section 1.110 applies only to instances where the Commission "grants any application in part or with privileges, terms, or conditions other than those requested."¹³ The Division explained that a petition for reconsideration and/or application for review were the two appropriate vehicles for challenging its denial of the waiver request.¹⁴

4. On February 13, 2007, Behr filed the instant Petition. Behr claims that the Division erred in dismissing his Section 1.110 petition because it was the Commission's action of denying the waiver request but granting the underlying application that "left Behr with no choice but to reject the grant and request a hearing."¹⁵ Behr states that had the Commission denied the application, he would have sought reconsideration of that denial or filed an application for review.¹⁶ Because the application was granted, Behr asserts that, in order to exercise his right to contest the denial of the waiver request, he had to reject the grant, as required by Section 1.110, otherwise he would have been deemed to have forfeited that right.¹⁷

5. *Discussion.* We find Behr's request for reconsideration without merit.¹⁸ At the outset, we find Behr's recitation of the facts in this case to be factually inaccurate. Behr's argument is based entirely on his contention that "[t]he application sought no modification to the license other than the change in the build-out deadline" encompassed in the waiver request attached to the application.¹⁹ Behr states that "the application as granted effected no modification whatsoever to the original license since the Commission denied the only change which has been requested."²⁰ A review of the Commission's publicly available Universal Licensing System database reflects that the Commission granted in full Behr's application seeking authority to modify call sign WPWR222 to change the contact information and add interconnected service. Specifically, the transaction log for File No. 0001332167 in ULS shows that on June 2, 2003, the licensee requested the following modification to his license for Station WPWR222: (1) adding Donald J. Evans, Esq. of the law firm Fletcher, Heald & Hildreth in Arlington, Virginia, as a contact person for the licensee; (2) adding answers to questions concerning alien ownership; and (3)

⁹ Letter dated November 12, 2003 from Ronald B. Fuhrman, Deputy Chief, Technical Analysis Section, Commercial Wireless Division, Wireless Telecommunications Bureau, to Donald J. Evans, Esq., Counsel to Lawrence V. Behr.

¹⁰ See FCC File No. 0001332167.

¹¹ 47 C.F.R. § 1.110.

¹² Letter dated December 17, 2003, from Lawrence V. Behr, to Marlene H. Dortch, Secretary, Federal Communications Commission.

¹³ *Division Order*, 22 FCC Rcd at 1798 (quoting Section 1.110).

¹⁴ See *id.* at 1799.

¹⁵ Petition at 1.

¹⁶ *Id.*

¹⁷ *Id.* at 1-2.

¹⁸ We note that Behr states that he "would not object to the Bureau revisiting its 2003 action on the application at issue" and that he "requests that the Bureau simply grant the relief requested by Behr in the application." Petition at 4. However, Behr presents no arguments in support of his request, including arguments that the Bureau erred in its 2003 denial of Behr's waiver request.

¹⁹ *Id.* at 1, 3.

²⁰ *Id.* at 3.

changing the station class for Location 1, Antenna 1, Frequencies 220.0875, 220.2375, 220.3875, 220.5375, and 220.6875 MHz from FB6 to FB6C (the code for interconnection).²¹ ULS procedures require applicants filing modification application to use a password in association with that licensee's FRN. Behr does not argue or provide evidence that the referenced modification was requested in error by the licensee or counsel; rather, Behr argues that no such modification was requested. Contrary to Behr's assertion, we find that the record reflects that an application seeking modification of call sign WPRW222, independent of Behr's attached request for waiver of construction requirements, was filed and was granted.

6. Given the facts presented, we agree that the Division correctly concluded that the United States Court of the District of Columbia Circuit case of *Buckley-Jaeger Broadcasting Corporation of California v. FCC* is on point.²² *Buckley-Jaeger* concerned a renewal application, which the Commission granted, with an attached request for exemption from the rules, which the Commission denied.²³ The court expressly noted that the relief under Section 1.110 was inapplicable because the Commission granted the license renewal application in full, and denied only the request for exemption that was filed together with the application.²⁴ Similarly, the instant matter concerns a fully-granted modification application and a separately-attached request for a waiver of the Commission's construction requirements that was denied. Accordingly, the Division correctly concluded that Section 1.110 does not apply, and properly dismissed Behr's reconsideration petition.

7. We also disagree with Behr's contention that the Commission's 1993 decision in the *Murray Hill Order*²⁵ stands for the proposition that a licensee may not seek remedy through a petition for reconsideration or application for review when the Commission grants the licensee's application, but denies an accompanying waiver request,²⁶ as such an interpretation would be inconsistent with *Buckley-Jaeger*. Rather, we find that the *Murray Hill Order* clarifies the procedural limitations on an applicant seeking alternative relief. In the *Murray Hill Order*, the Commission dismissed a licensee's application to relocate the antenna of a broadcast station because it would violate then-applicable power limit restrictions.²⁷ The licensee filed a petition for reconsideration of the dismissal, claiming that the application was in compliance with the technical rules, or that a waiver of that requirement would be justified.²⁸ The licensee also filed a contingent amendment to its application that complied with the power limit.²⁹ Commission staff then rejected the originally filed application, but granted the alternative

²¹ See FCC File No. 0001332167. The November 17, 2003 entries in the transaction logs were added by the Commission staff to indicate that a temporary condition (entry "T") in the form of text (entry "80") stating that "the associated waiver was denied" was added to the license.

²² *Buckley-Jaeger Broadcasting Corporation of California v. FCC*, 397 F.2d 651 (D.C. Cir. 1968); see also *Decision*, 22 FCC Rcd at 1799.

²³ See *Buckley-Jaeger*, 397 F.2d at 652-3.

²⁴ *Id.* at 656 ("It is also clear that section 1.110 of the Commission's rules has no application here. The rule concerns situations where the applicant receives less than a full authorization. But here Appellant received the full authorization to which it was entitled under the statute and rules. In these circumstances we do not believe the rule can reasonably be interpreted as making a hearing mandatory.").

²⁵ *Murray Hill Broadcasting Company, Memorandum Opinion and Order*, 8 FCC Rcd 325 (1993) ("*Murray Hill Order*").

²⁶ See Petition at 2.

²⁷ See *Murray Hill Order*, 8 FCC Rcd at 325; see also 47 C.F.R. § 73.213(a) (1987).

²⁸ See *Murray Hill Order*, 8 FCC Rcd at 325.

²⁹ See *id.*

application, as amended.³⁰ The licensee filed an application for review of that staff action (rejecting the initial application, and granting the amended application), but actually made the authorized modifications while its application for review was pending and was operating pursuant to the granted parameters during the pendency of that appeal.³¹ The Commission denied the application for review substantively, finding that the staff's interpretation of the technical rules to be correct and agreeing that a waiver was not warranted, and found, as an independent procedural basis for rejecting the application for review, that the licensee had failed to challenge the terms of the grant according to Section 1.110.³² The Commission found that Section 1.110 was triggered because the staff granted the licensee's application with terms to which the licensee objects by granting its amended proposal, rather than its initial proposal, and that the licensee failed to challenge the terms of the grant according to the Section 1.110 procedures.³³ The Commission also found that the licensee effectively accepted the grant when it subsequently modified its license as authorized.³⁴ The Commission stated that "an applicant may not, on the one hand, accept a [C]ommission grant and, on the other hand seek an administrative appeal of the authorization."³⁵ Contrary to Behr's assertion, the Commission's denial of the accompanying waiver request in *Murray Hill* had no bearing on the licensee's procedural options.

8. In contrast, Behr's request for waiver of the construction requirements was separate from his application that was granted with the requested modifications (*i.e.*, change of contact information, update of answers to alien ownership questions, and change of the station class from FB6 to FB6C). Unlike the facts in the *Murray Hill Order*, Behr filed no application or amendment seeking relief in the alternative that was granted and which required Section 1.110 action. As Behr's underlying modification application was granted in full and not on terms with which Behr disagreed, the only substantive denial was the request for waiver. Under *Buckley-Jaeger*, a challenge to the denial of the waiver request must be made through the filing of a petition for reconsideration and/or application for review, pursuant to Sections 1.106 and 1.115 of the Commission's Rules, rather than through the request of a hearing under Section 1.110.³⁶ Therefore, we agree with the Division's decision in this matter.

9. Accordingly, IT IS ORDERED pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Sections 0.131, 0.331, and 1.106 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331, and 1.106, that the Petition for Reconsideration filed by Lawrence V. Behr on February 13, 2007 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Roger S. Noel, Chief
Mobility Division
Wireless Telecommunications Bureau

³⁰ See *id.* at 326.

³¹ See *id.*

³² See *id.*

³³ *Id.* at 327.

³⁴ *Id.*

³⁵ *Id.*

³⁶ 47 C.F.R. §§ 1.106, 1.115.