



Federal Communications Commission
Washington, D.C. 20554

March 23, 2010

DA 10-483

In Reply Refer to:

1800B3-MFW

Released: March 23, 2010

Lee G. Petro, Esq.
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1300 N. 17th Street
Arlington, VA 22209

In re: NEW(NCE-FM), Wytheville, Virginia
New Beginning World Outreach, Inc.
Facility ID No. 172942
BNPED-20071017ADK

Petition for Reconsideration

Dear Mr. Petro:

This letter concerns the August 11, 2008, Petition for Reconsideration ("Petition") regarding the referenced application of New Beginning World Outreach, Inc. ("New Beginning"), for a new noncommercial educational ("NCE") FM station at Wytheville, Virginia (the "Application"). For the reasons set forth below, we dismiss the Petition.

Background. New Beginning filed the Application during the 2007 NCE filing window.¹ By letter dated November 15, 2007, the staff dismissed the Application because the proposed 1.0 mV/m (60 dB μ) contour failed to cover at least 50 percent of the community of license, Wytheville, Virginia, in violation of Section 73.515 of the Commission's Rules (the "Rules").² On November 23, 2007, New Beginning submitted a petition for reconsideration, requesting reinstatement *nunc pro tunc* and acceptance of a minor curative amendment to the Application. In a letter dated November 26, 2007, the staff confirmed that that amended Application complied with Section 73.515 of the Rules, granted New Beginning's petition for reconsideration and reinstated the amended Application *nunc pro tunc*.³

In the *Staff Reconsideration Letter*, the staff also determined that the amended Application now violated Section 73.509 of the Rules⁴ by creating impermissible overlap with co-channel licensed Station

¹ The filing window opened on Friday, October 12, 2007. See *Media Bureau Announces NCE FM New Station and Major Modification Application Filing Window for New and Certain Pending Proposals; Window to Open on October 12, 2007*, Public Notice, 22 FCC Rcd 2726 (MB 2007); *Media Bureau to Extend Window for NCE FM New Station and Major Change Applications; Window Will Close on October 22, 2007*, Public Notice, 22 FCC Rcd 18680 (MB 2007).

² 47 C.F.R. § 73.515. See *Letter to New Beginning World Outreach, Inc.*, Reference 1800B3 (MB Nov. 8, 2007).

³ *Letter to New Beginning World Outreach, Inc.*, reference 1800B3 (MB Nov. 26, 2007) ("*Staff Reconsideration Letter*") at 1.

⁴ 47 C.F.R. § 73.509.

WCQR-FM, Kingsport, Tennessee.⁵ This violation constituted an acceptability defect in the Application. The staff therefore dismissed the Application once again.⁶ The Commission released a *Public Notice* announcing this action on November 29, 2007.⁷ New Beginning filed the Petition on August 11, 2008, nearly nine months after release of the *Public Notice*. In the Petition, New Beginning requests a waiver of the 30-day filing period for petitions for reconsideration⁸ and tenders another amendment that it avers would eliminate the overlap received from WCQR-FM.

Discussion. Section 405(a) of the Communications Act of 1934, as amended (the “Act”) provides that “petitions for reconsideration must be filed within thirty days from the date upon which public notice is given of the action . . . complained of.” Notwithstanding New Beginning’s request that it do so, the Commission generally lacks authority to extend or waive the statutory 30-day filing period for petitions for reconsideration set forth in Section 405(a) of the Act.⁹ Thus, the Commission will only accept late-filed petitions for reconsideration if the petitioner shows that extraordinary circumstances warrant overriding the statutory filing deadline. As the D.C. Circuit has explained, “[a]lthough section 405 does not absolutely prohibit FCC consideration of untimely petitions for reconsideration, we have discouraged the Commission from accepting such petitions in the absence of extremely unusual circumstances.”¹⁰ Consistent with the D.C. Circuit’s decisions, the Commission in applying that standard has focused on whether the Commission has failed to adhere to its procedural rules for providing notice of its decisions.¹¹

New Beginning does not claim that it did not have actual notice of the *Staff Reconsideration Letter*. Rather, New Beginning argues that, although under *Gardner*, the Commission can only waive the statutory petition period in “extraordinary circumstances,” the Court of Appeals for the District of Columbia Circuit subsequently in *Reuters* limited the reach of *Gardner* to situations in which the petitioner was a “sophisticated business concern . . . represented by distinguished Washington counsel.”¹² New

⁵ Specifically, the staff found that the Application’s proposed protected (60 dB μ) contour would receive overlap from the interfering (40 dB μ) contour of WCQR-FM by as much as 1.5 kilometers between the azimuths from 261° T to 318° T.

⁶ *Staff Reconsideration Letter* at 2.

⁷ See *Broadcast Actions*, Public Notice, Report No. 46622 at 1 (rel. Nov. 27, 2007).

⁸ In the Petition, New World also requests waiver of Section 1.106 of the Rules to permit it to file a second petition for reconsideration containing a corrective amendment to the Application. In light of our action here, we need not address this argument.

⁹ See, e.g., *Reuters Limited v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986) (“*Reuters*”); *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).

¹⁰ *Virgin Islands Telephone Corp. v. FCC*, 989 F.2d 1231, 1237 (D.C. Cir. 1993), citing *Reuters*, 781 F.2d at 951-52. See *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 199-200 (D.C. Cir. 2003).

¹¹ See *Emmis Radio License Corp.*, Memorandum Opinion and Order, 17 FCC Rcd 14733 n.4 (2002) and *Adelphia Communications Corporation*, 12 FCC Rcd 10759, 10760 n.9 (1997) (both citing *Gardner v. FCC*, 530 F.2d 1086, 1091-92 (D. C. Cir.) (1976) (“*Gardner*”) 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). In *Gardner*, where late filing of a petition for reconsideration was substantially due to the Commission's failure to follow its own rules requiring personal notice of its decision, the court held that the Commission abused its discretion in rejecting the petition as untimely.

¹² Petition at 3, citing *Reuters*, 781 F.2d at 951.

Beginning, it observes, is not an international business concern and had no Washington counsel when considering whether it was possible to seek reconsideration of the second dismissal. It was only upon further investigation, which lasted longer than the statutory 30-day period, that it determined that it could file a simple amendment that would result in a grantable application.¹³

We reject New Beginning's attempt to "restrict" *Gardner* to only large and sophisticated filers represented by Washington counsel and expand the scope of "extraordinary circumstances" under which the Commission can accept late-filed petitions for reconsideration to include any *pro se* submission. There is no indication that the court in *Reuters* intended to limit *Gardner*, and subsequent cases have affirmed that the Commission should accept untimely petitions for reconsideration only in "extremely unusual circumstances," *i.e.*, where the Commission has failed to adhere to its procedural rules for providing notice of its decisions.¹⁴ Prosecuting an application without communications counsel and without a clear understanding of the Commission's Rules are simply not "extremely unusual circumstances" and, therefore, they are an insufficient justification for waiving the statutory time limit for seeking reconsideration of a *second* dismissal of the Application.

We conclude that New Beginning has failed to demonstrate that it falls within the exception to Section 405 established by *Gardner* because it has failed to specifically allege a defect in the notice provided to it of the Application's dismissal and has failed to demonstrate that such defect made it impossible for New Beginning to comply with the statutory deadline. In the absence of such a showing, we conclude that New Beginning's petition must be dismissed as untimely pursuant to Section 405 of the Act.¹⁵

Conclusion/Action. Accordingly, in light of the above discussion, the August 11, 2008, Petition for Reconsideration filed on behalf of New Beginning World Outreach, Inc. IS DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: New Beginning World Outreach, Inc.

¹³ Petition at 3. New Beginning also cites two Court of Appeals cases for the proposition that the Commission will grant a waiver of its rules upon a showing of special circumstances warranting deviation from the Rules, and finding that the public interest would be served by waiver. Petition at 3, citing *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990), and *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969). Petition at 4. These cases are inapposite when, as here, an applicant seeks Commission "waiver" of a statutory provision not a Commission rule.

¹⁴ See nn.10, 11, *supra*.

¹⁵ See, e.g., *MDC Nucentrix Trust*, Order on Reconsideration, 20 FCC Rcd 1909, 1912-12 (WTB 2000), citing *Gardner*, 530 F.2d at 1092 n.24 (requiring petitioner to move for reconsideration promptly on receiving actual notice); *Roy M. Speer, Memorandum Opinion and Order*, 16 FCC Rcd 3993 (1999) (accepting late-filed petition for reconsideration that was filed within thirty days of petitioner receiving actual notice of Commission action); and *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 199 (D.C. Cir. 2003) (affirming rejection of petition where petitioner failed to offer any explanation for its failure to meet the deadline).