



Federal Communications Commission
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In Reply Refer to:

1800B3-CEG

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In re: **WURB(FM), Cross City, FL**
Facility ID No. 189555
File Nos. BMPH-20140519ABG
BNPH-20110524AHQ

Petitions for Reconsideration

Dear Petitioner:

We have before us two petitions for reconsideration (“Petitions”) filed by Urban One Broadcasting Network, LLC (“Urban One”). The first (the “Tolling Petition”) was filed on July 24, 2014, under File No. BMPH-20140519ABG (“Modification Application”), and then again on July 25, 2014, under File No. BNPH-20110524AHQ (“Construction Permit”). In the Tolling Petition, Urban One seeks reconsideration of a June 25, 2014, decision by the Audio Division, Media Bureau (“Bureau”) (“*Tolling Decision*”)¹ denying its June 23, 2014, request to toll the construction period authorized in the Construction Permit.² The second petition for reconsideration (the “Modification Petition”) was filed on August 4, 2014, and amended on August 5, 2014. In the Modification Petition, Urban One seeks reconsideration of a July 17, 2014, letter decision (“*Modification Decision*”)³ by the Bureau granting in part and denying in part an informal objection (“*Informal Objection*”) filed by Suncoast Radio, Inc. (“Suncoast”) on June 16, 2014, to the Modification Application.⁴ For the reasons stated below, we deny the Petitions.

¹ See Email from Victoria McCauley to William Johnson (June 25, 2014).

² The tolling request was filed in an amendment to the Modification Application.

³ *Mr. William Johnson*, Letter, Ref. No. 1800B3-AED (July 17, 2014).

⁴ On June 20, 2014, Urban One filed an Opposition to the Informal Objection. On June 30, 2014, Urban One filed a “Supplemental Motion for the Dismissal of the Objector’s Informal Objection with Prejudice.” On July 14, 2014, Suncoast filed a Supplement to the Informal Objection (“IO Supplement”). On July 15, 2014, Urban One filed a Reply to the IO Supplement. On November 24, 2014, Urban One filed a Supplement to the Modification Petition (“Supplement”). The Supplement is an unauthorized pleading and as such will not be considered here. Suncoast did not file any responsive pleadings to the Petitions. On July 18, 2014, Urban One submitted a request for special temporary authority (“STA Request”), and on July 21, 2014, it completed a license to cover application in CDBS,

Background. Alex Media, Inc. (“Alex Media”) was the winning bidder for a new FM station on Channel 249 at Cross City, Florida (“Station”), in FM Auction 91.⁵ The Construction Permit for the Station was granted on July 21, 2011, and set to expire on July 21, 2014. On March 1, 2013, Urban One acquired the Construction Permit from Alex Media.⁶ On May 19, 2014, Urban One filed the Modification Application, proposing to change the Station’s class, antenna location, effective radiated power, antenna height and tower height because of “difficulties obtaining access to its current site, which access was controlled directly by the tower site owner.”⁷ On June 16, 2014, Suncoast filed the Informal Objection, arguing that the Modification Application should be denied for failure to comply with the Commission’s environmental rules, in particular, the procedure set out in Section 1.1307(a)(4) of the Rules and Section 106 of the National Historic Preservation Act (“Section 106 Review”).⁸ Urban One claims that it is exempt from Section 106 Review due to an exclusion established in the 2004 National Programmatic Agreement for “temporary” antenna structures, which are defined as those erected “for no more than twenty-four months duration”⁹ Urban One states that the duration of the antenna structure proposed in the Modification Application will be 24 months or less.¹⁰

On June 23, 2014, Urban One requested tolling of the Construction Permit deadline, claiming that the filing of the Informal Objection made the Construction Permit the subject of administrative review and thus entitled to tolling under Section 73.3598(b)(2) of the Rules.¹¹ On June 25, 2014, Bureau staff rejected Urban One’s tolling request, explaining that difficulties at an alternative site cannot provide the basis for tolling and that an informal objection filed against a modification application does not render the original construction permit the subject of administrative review.¹²

On June 24, 2014, the Bureau notified Urban One by letter (“*Deficiency Letter*”) that the Modification Application could not be processed because the proposed facility failed the slope requirement (for an antenna structure near an airport) set out in Section 17.7(b) of the Rules.¹³ Therefore, Urban One was required to notify the Federal Aviation Administration (“FAA”) of the proposed tower,

including program test authority (“License Application”). Filing fees were not paid for the STA Request and License Application; therefore, they were never accepted for filing or reviewed by Commission staff.

⁵ See *Auction of FM Broadcast Construction Permits Closes; Winning Bidders Announced for Auction 91*, Public Notice, 26 FCC Rcd 7541, Attachment A (2011).

⁶ File No. BAPH-20120917AGZ (assignment approved December 26, 2012, and consummated March 1, 2013).

⁷ Tolling Petition at 1.

⁸ 47 C.F.R. § 1.1307(a)(4); *National Historic Preservation Act of 1966*, as amended, 16 U.S.C. § 470f (“NHPA”); *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act*, 47 C.F.R. Pt. 1, App. C, § III.C (“NPA”); *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, Report and Order, 20 FCC Rcd 1073, Appendix B, Section III.C (2004) (“*NPA Report and Order*”).

⁹ Modification Application, Exhibit 35, “Permittee’s Documentation of Exclusions from Section 106 Review and FCC Form 620” (“Exclusion Request”) (citing the NPA).

¹⁰ Exclusion Request at 1.

¹¹ 47 C.F.R. § 73.3598(b)(2).

¹² See *Christopher Imlay et al.*, Letter, 24 FCC Rcd 11809 (2009).

¹³ 47 C.F.R. § 17.7(b); *Mr. William Johnson*, Letter, Ref. No. 1800B3-AED (June 24, 2014).

obtain an FAA “no hazard” determination, and register the tower with the Commission before the Modification Application could be processed.¹⁴ On June 30, 2014, Urban One amended the Modification Application to reduce the proposed tower height to 14 meters, thus obviating the need to notify the FAA or register the tower with the Commission.

In the *Modification Decision*, dated July 17, 2014, the Bureau found that Urban One did not qualify for the “temporary” exclusion to Section 106 Review. The Bureau contrasted the standard licensing term at issue here with the Commission’s proposed exclusion from environmental notice requirements of certain types of facilities deployed on a short-term basis.¹⁵ The Bureau also noted that licensing a temporary facility would undermine the Commission’s longstanding policy of requiring full construction of permanent facilities prior to the commencement of broadcast operations.¹⁶

In the Modification Petition, Urban One challenges the *Modification Decision* on a number of grounds. Procedurally, Urban One argues that the Informal Objection should have been dismissed because it was interposed for the sole purpose of causing delay and failed to provide evidence that the proposed facility was not excluded from Section 106 Review.¹⁷ Urban One also argues that an informal objection does not lie against the Modification Application because Section XI of the NPA provides an alternative forum for public comments on Section 106 Review issues.¹⁸ On the merits, Urban One reiterates that it qualifies for the “temporary” exclusion and asserts that William Johnson, as an “authorized individual within the Applicant’s organization”¹⁹ is exclusively entitled to make that determination.²⁰

Urban One also argues that the *Modification Decision* was impermissibly based on a policy—i.e., that a “temporary” facility is not licensable—that has no precedent in case law and was not raised or argued in the pleadings.²¹ Moreover, Urban One contends, such a policy was either implicitly waived when the Commission agreed in the NPA to exclude temporary facilities from Section 106 Review or should have been waived *sua sponte* in this case to allow the Station to begin operation without delay.²²

¹⁴ *Deficiency Letter* at 1; *see also* 47 C.F.R. § 17.4.

¹⁵ *Modification Decision* at 2 (citing *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Notice of Proposed Rulemaking, 28 FCC Rcd 14238, 14267-68 (2013)).

¹⁶ *Id.*

¹⁷ Modification Petition at 3,6.

¹⁸ *Id.* at 5.

¹⁹ 47 C.F.R. at III (Introduction).

²⁰ Modification Petition at 4.

²¹ *Id.* at 7-8, 10.

²² Modification Petition at 7-8. According to Urban One, the special circumstances warranting waiver of the “temporary” policy were: (1) lack of access to the permitted site due to circumstances beyond the applicant’s control; (2) timely filing of the Modification Application and payment of the filing fee; (3) technical acceptability of the Modification Application; (4) processing delay due to filing of the Informal Objection; and (5) closeness of the Construction Permit expiration date. Modification Petition at 11-12. Urban One also cites to a case in which the Commission granted a waiver of the construction deadline where a modification application had been filed near the expiration date but the Commission was unable to process that application due to agency administrative matters beyond the control of the applicant. *Four Corners Broadcasting L.L.C.*, Letter, Ref. No. 1800B3-GDG (MB July 18, 2003).

Finally, Urban One notes that it would have been eligible for an extension of the Construction Permit deadline under the now-defunct “eligible entity” policy.²³ For these reasons, Urban One requests that the Modification Application be granted *nunc pro tunc* as of July 7, 2014.

In the Tolling Petition, Urban One acknowledges that its situation does not satisfy the strict tolling requirements of Section 73.3598(b) of the Rules, but nonetheless argues that the processing delay caused by the filing of the Informal Objection constitutes “exceptional circumstances” warranting *sua sponte* waiver of its construction deadline.²⁴ Urban One also argues that it would be in the public interest to waive the construction deadline, as the Station will “offer a diversity of voices in [Cross City] to be placed into operation.”²⁵

Discussion. Reconsideration is warranted only if the petitioner shows an error of fact or law in the Commission’s original order, or raises additional facts not known or existing at the time of the petitioner’s last opportunity to present such matters.²⁶ Urban One has failed to meet this burden.

Modification Petition. Although after its June 30, 2014, amendment Urban One had lowered its proposed tower height to the point that it was no longer required to register its proposed antenna structure with the Commission, the Modification Application remained subject to the Commission’s environmental rules, including the Section 106 Review process codified in Section 1.1307(a)(4) of the Rules.²⁷ This process requires applicants to provide notice and opportunity for public comment, as well as to consult with the relevant State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) to determine whether the proposed facility may have an adverse effect on an eligible or listed historic property.²⁸ Urban One acknowledges that it did not follow this procedure; however, it argues that it was exempt from doing so under an exclusion established in the NPA for “temporary” facilities.²⁹

We disagree with Urban One that it falls within the NPA exclusion for “temporary” facilities. The NPA states that construction of a temporary facility that involves no excavation may be excluded from Section 106 Review, including, but not limited to: (1) a facility built under special temporary authority (“STA”) or emergency Commission authorization; (2) a cell on wheels (COW) transmission

²³ The “eligible entity” policy permitted certain entities acquiring a construction permit additional time to construct. *Promoting Diversification of Ownership in the Broadcast Services*, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922 (2008). The policy was vacated in 2011 by the U.S. Court of Appeals for the Third Circuit. *Prometheus Radio Project v. FCC*, 652 F.3d 431, 465-71 (3rd Cir. 2011) (“*Prometheus*”). Following the *Prometheus* decision, the Media Bureau suspended the eligible entity policy. See *Media Bureau Provides Notice of Suspension of Eligible Entity Rule Changes and Guidance on the Assignment of Broadcast Station Construction Permits to Eligible Entities*, Public Notice, 26 FCC Rcd 10370 (MB 2011).

²⁴ Tolling Petition at 1-2.

²⁵ *Id.* at 2.

²⁶ See 47 C.F.R. § 1.106(c) and (d); *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).

²⁷ 47 C.F.R. § 1.1307(a)(4); see *National Environmental Policy Act Compliance for Proposed Tower Registration/Effects of Communications Towers On Migratory Birds*, Order on Remand, 26 FCC Rcd 16700, 16723 (WTB 2012) (“*Migratory Bird Order*”).

²⁸ See *NPA Report and Order*, 20 FCC Rcd at 1116 *et seq.*

²⁹ *NPA Report and Order*, 20 FCC Rcd, Appendix B, Section III.C.

facility, (3) a broadcast auxiliary services truck, TV pickup station, electronic newsgathering (ENG) vehicle, or certain satellite earth stations; (4) a temporary ballast mount tower; or (5) any facility authorized by the Commission under an experimental authorization.³⁰ The NPA defines “temporary” as “for no more than twenty-four months duration” (except for facilities associated with national security).³¹

The examples listed in the NPA of “temporary” facilities all either involve a short-term Commission authorization (STA, emergency, or experimental license) or manifest specific technical characteristics that indicate impermanent deployment (vehicular mount, ballast mount, etc.). No such condition is present here—Urban One seeks a full-term authorization for an apparently unexceptional new FM radio antenna structure. Given the Commission’s core statutory responsibility to facilitate public involvement in agency decision-making that may affect the environment or historical properties, we find that a minor modification applicant may not circumvent the Section 106 Review process merely by asserting that its proposed facilities will be temporary, without any licensing or technical grounds to support that pronouncement. Without such an NPA exclusion, Urban One was required to follow the Section 106 Review process, including written public notice and notification to the relevant SHPO/THPO. Because it did not do so, the Modification Application was not grantable and the Construction Permit was forfeited when Urban One failed to construct the originally-authorized facility by the July 21, 2014, expiration date.

We also confirm that the Informal Objection was properly filed under Sections 73.3587 and 1.1313(b) of the Rules.³² We reject Urban One’s suggestion that Section XI of the NPA precludes or replaces these rule provisions. Section XI provides that any member of the public may notify the Commission of concerns it has regarding the application of the NPA with regard to an individual undertaking.³³ Sections 73.3587 and 1.1313(b) allow any person to file informal objections to the grant of an application before the Commission acts on it. Not only are these provisions not mutually exclusive, but since Urban One never provided written notice to the public regarding the Modification Application, we find it disingenuous to suggest that members of the public had the opportunity to comment on Urban One’s proposed facility under Section XI of the NPA. Likewise, we do not agree with Urban One that the Informal Objection should have been “stricken” as interposed for delay. This claim regarding Suncoast’s motivations is speculative, and, in any case, we find Suncoast’s substantive arguments to have merit.

Although Urban One is correct that William Johnson, as an authorized individual within the organization, was permitted to make the initial determination that the Application was eligible for a Section 106 Review exclusion, the Commission unquestionably has the authority to review the applicant’s initial determination. Compliance with the statutory requirements of Section 106 is ultimately the Commission’s responsibility.³⁴ Moreover, the Commission has exclusive authority to grant radio

³⁰ *Id.*

³¹ *Id.*

³² 47 C.F.R. § 73.3587, 1.1313(b); see *Migratory Bird Order*, 26 FCC Rcd at 16723 (“We will also continue to entertain informal objections to such [non-ASR] construction based on environmental considerations pursuant to Section 1.1313(b)”).

³³ See *NPA Report and Order*, 20 FCC Rcd, Appendix B, Section XI.

³⁴ NHPA, 16 U.S.C. 470f (“The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the

licenses and to promulgate regulations based on the “public convenience, interest, and necessity.”³⁵ Because Urban One has failed to follow the procedure mandated by Section 1.1307(a)(4) of the Rules, we confirm the staff’s determination that the Modification Application was not grantable at any point before the Construction Permit expired.

Tolling Petition. The Tolling Petition is procedurally defective. It does not allege an error of fact or law in the *Tolling Decision*, nor does it raise additional facts not known or existing at the time of Urban One’s last opportunity to present such matters. Rather, the Tolling Petition argues that, on the basis of the same facts that were before the Bureau when it denied Urban One’s tolling request, the Bureau should have exercised its discretion to *sua sponte* grant a waiver of the construction deadline. The Rules provide for summary dismissal of such new arguments that do not rely on changed facts or circumstances.³⁶ Accordingly, we dismiss the Tolling Petition for relying entirely on arguments that could have been presented previously to Bureau staff but were not.

Even if we were to consider Urban One’s waiver request on the merits, we would deny it. The Commission’s Rules may be waived only for good cause shown.³⁷ The Commission must give waiver requests “a hard look,” but an applicant for waiver “faces a high hurdle even at the starting gate”³⁸ and must support its waiver request with a compelling showing.³⁹ Waiver is appropriate only if both (1) special circumstances warrant a deviation from the general rule, and (2) such deviation better serves the public interest.⁴⁰ The Commission’s rules provide specific grounds and procedures for obtaining tolling of the construction deadline,⁴¹ and it will entertain waiver requests of these strict tolling rules only in “rare and exceptional circumstances beyond the permittee’s control.”⁴² In deciding waiver requests on a case-by-case basis, the Commission has broad discretion in determining whether the circumstances alleged to have prevented timely construction were beyond the permittee’s control.⁴³

undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.”).

³⁵ See 47 U.S.C. §§ 151, 301, 303, 307, 309.

³⁶ 47 C.F.R. § 1.106(p)(2).

³⁷ 47 C.F.R. § 1.3.

³⁸ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (subsequent history omitted).

³⁹ *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999) (citing *Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974)).

⁴⁰ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

⁴¹ 47 C.F.R. § 73.3598(b).

⁴² *Streamlining of Mass Media Applications, Rules, and Processes*, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17541 (1999).

⁴³ See *Mary V. Harris Found. v. FCC*, 776 F.3d 21, 28 (D.C. Cir. 2015) (“Our review of the Commission’s denial of a waiver is ‘extremely limited’ . . . because the agency, as the author of the policy embodied in its rule, is the appropriate body to determine whether a situation presents unanticipated circumstances that make it more appropriate to create an exception than to apply the rule.”) (internal citation omitted); *New Orleans Channel 20, Inc., v. FCC*, 830 F.2d 361, 365-66 (D.C. Cir. 1987) (stating that “so long as the agency does not display evident disregard for its precedents, no violation occurs” when the agency refuses to exercise its discretion and denies a waiver request).

Urban One's request fails to meet this stringent standard. Urban One's decision to purchase the Construction Permit with sixteen months remaining before expiration was the result of its own business calculations. Moreover, the filing of a petition to deny or informal objection is a common, predictable occurrence and does not constitute "rare and exceptional" circumstances that would justify a waiver of the three-year construction deadline set out in Section 73.3598(a) of the Rules.⁴⁴ Granting a waiver of Section 73.3598(a) in these commonplace circumstances would undermine the public interest in enforcing a rule that promotes rapid construction of stations and introduction of new and expanded service.

Conclusion. The Communications Act of 1934, as amended, provides for automatic forfeiture of a construction permit if the station is not ready for operation within the construction period, unless prevented by causes not under the control of the permittee.⁴⁵ Here, Urban One failed to construct as authorized by the Construction Permit. Furthermore, its Modification Application was not grantable because it failed to comply with the Section 106 Review procedure set out in Section 1.1307(a)(4) of the Rules.⁴⁶ Therefore, we uphold the Bureau staff's determination that the Construction Permit automatically expired and was forfeit by its own terms and Section 73.3598(e) of the Rules on July 21, 2014.⁴⁷ We also uphold the denial of Urban One's tolling request and dismiss the Tolling Petition for failure to comply with Section 1.106(p)(2) of the Rules.⁴⁸

Conclusion/Actions. For the reasons stated above, IT IS ORDERED that the petition for reconsideration filed by Urban One Broadcasting Network, LLC, on July 24, 2014, IS DISMISSED and the petition for reconsideration filed by Urban One Broadcasting Network, LLC, on August 4, 2014, IS DENIED. The Construction Permit automatically expired on July 21, 2014. Therefore, IT IS FURTHER ORDERED that the Modification Application IS DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

⁴⁴ 47 C.F.R. § 73.3598(a).

⁴⁵ 47 U.S.C § 319(b).

⁴⁶ 47 C.F.R. § 1.1307(a)(4).

⁴⁷ 47 C.F.R. § 73.3598(e). Because we uphold the Bureau's decision on the basis that the Modification Application does not fall within the "temporary" exclusion of the NPA, we do not reach the issue of whether a "temporary" facility is licensable or address Urban One's related waiver arguments.

⁴⁸ 47 C.F.R. § 1.106(p)(2).