

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

In the Matter of
NCE Reserved Allotment Group 14
Florida Community Radio, Inc.
and
Citrus County Association for Retarded Citizens, Inc.
Applications to Construct a New Noncommercial Educational FM Station at Otter Creek, Florida
File No. BNPED-20100226AGX
Facility ID No. 185126
File No. BNPED-20100226AGR
Facility ID No. 185070

MEMORANDUM OPINION AND ORDER

Adopted: August 16, 2017

Released: August 16, 2017

By the Chief, Media Bureau:

1. We have before us the "Petition for Reconsideration by the Full Commission En Banc of the Erroneous Dismissal of Petitioner's April 13, 2017, Petition for Reconsideration by the Commission's Delegated Authority," (Second Petition) filed on May 15, 2017, by Florida Community Radio (FCR). The pleading seeks reconsideration of the April 18, 2017, Media Bureau (Bureau) order¹ dismissing as untimely pursuant to Section 1.106(p) of the Commission's Rules (Rules)² FCR's Petition for Reconsideration (Petition) of the Commission's Memorandum Opinion and Order affirming the Bureau's determinations in noncommercial educational (NCE) Reserved Allotment Mutually Exclusive Group 14.³

1 NCE Reserved Allotment Group 14, Memorandum Opinion and Order, 32 FCC Rcd 3093 (MB 2017) (Bureau Order).

2 47 CFR § 1.106(p).

3 See NCE Reserved Allotment Group 14, Memorandum Opinion and Order, 32 FCC Rcd 2285 (2017) (AFR Order). The Commission initially determined that the applications of FCR (FCR Application) and Citrus County Association for Retarded Citizens (CCARC Application) for a construction permit for a new noncommercial educational station at Otter Creek, Florida, were mutually exclusive, and identified the FCR Application as the tentative selectee of NCE Reserved Allotment Group 14. See Comparative Consideration of 37 Groups of Mutually Exclusive Applications, Memorandum Opinion and Order, 26 FCC Rcd 7008, 7024, paras. 42-43 (2011). CCARC filed a Petition to Deny the FCR Application, and the Commission rescinded its tentative selection of that application and identified the CCARC Application as the new tentative selectee. Comparative Consideration of Seven Groups of Mutually Exclusive Applications, Memorandum Opinion and Order, 30 FCC Rcd 5135, 5142-44, paras. 19-23 (2015). FCR twice challenged this action and additionally attempted to modify its proposed frequency from Channel 240 to Channel 216 to eliminate its mutual exclusivity with the CCARC Application. The Media Bureau denied both challenges, granted the CCARC Application, and dismissed the FCR Application and

2. As an initial matter, the relief that FCR seeks is difficult to discern. The Second Petition is styled as a “petition for reconsideration.” In this case, that would require the Bureau to act on the Second Petition.⁴ However, FCR contradictorily seeks action by “the full Commission *en banc*.” Complicating matters further, the Second Petition raises arguments upon which the Bureau has not previously had the opportunity to pass. Such a pleading would be subject to dismissal by the Commission.⁵ Accordingly, to ensure full consideration of FCR’s arguments, we will treat the Second Petition as a petition for reconsideration of the *Bureau Order*.⁶

3. In its Second Petition, FCR challenges the Bureau’s dismissal of its Petition, which it claims was based on the “wrongful assumption that it was one day late.”⁷ FCR argues that “due process” and the Commission’s Rules required that the Commission furnish it a copy of the *AFR Order*, and FCR alleges that it did not receive a copy of the *AFR Order* at the address listed in its pleadings.⁸ FCR asserts that this “constituted extenuating circumstances that [were] contrary to § 0.445(a), which states that adjudicatory opinions and orders of the Commission or staff on delegated authority must be sent to the parties by mail.”⁹ FCR requests that the Commission find that FCR’s Petition was timely, reverse the Bureau’s action and find that dismissing the Petition was arbitrary and capricious and an abuse of discretion.¹⁰

4. As the *Bureau Order* noted, the 30-day period for filing such a petition for reconsideration is statutory and generally may not be waived.¹¹ Although the Commission’s failure to promptly serve a party with a copy of an order can be grounds for a waiver of this filing deadline if the

(Continued from previous page) _____

amendment. *See NCE Reserved Allotment Group 14*, Letter Order, Ref. 1800B3-ALV (MB Feb. 29, 2016) (affirming the tentative selection of the CCARC Application and requesting verification of FAA approval); *NCE Reserved Allotment Group 14*, Letter Order, Ref. 1800B3-ATS (MB Oct. 26, 2016) (granting the CCARC Application). FCR sought Commission review of the Bureau’s decision; the Commission upheld both Bureau actions in the *AFR Order*.

⁴ *See* 47 CFR § 1.106(a)(1) (petitions requesting reconsideration of final actions taken pursuant to delegated authority are acted on by the delegated authority).

⁵ *See* 47 CFR § 1.115(c) (“No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.”)

⁶ 47 CFR § 1.106(a)(1).

⁷ Second Petition at 1.

⁸ Second Petition at 2. The Petition provides no explanation of how due process was violated here beyond its bare assertion.

⁹ Second Petition at 3 (citing 47 CFR § 0.445) (external quotations omitted).

¹⁰ Second Petition 2-4.

¹¹ *Bureau Order* 32 FCC Rcd at 3094, para. 2, citing 47 U.S.C. § 405(a) and *Reuters Ltd. v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986). Given this posture, FCR’s arguments about agencies’ inherent authority to reconsider decisions absent express statutory authority are inapplicable here. *See* Second Petition at 3 (citing *Tokyo Kirai Seisakusho, LTD. v. United States*, 529 F.3d 1352, 1360 (Fed. Cir. 2008)); *see also Tokyo Kirai Seisakusho*, 529 F.3d at 1360 (“An agency cannot, for example, exercise its inherent authority in a manner that is contrary to a statute” and “where a statute does expressly provide for reconsideration of decisions, the agency is obligated to follow the procedures for reconsideration set forth in the statute.”).

Commission's failure made it impossible for the party to meet the deadline,¹² FCR has neither requested nor argued facts warranting such a waiver. A party seeking waiver of the filing deadline has the burden to show: (1) when and how it received notice in fact; (2) that the time remaining was inadequate to allow it reasonably to timely file; and (3) that it acted promptly on receiving actual notice.¹³ Because "persons directly affected typically become aware of rulings and decisions, through items in the general or trade press, . . . it will be an extraordinary case . . . where a petitioner can meet this burden."¹⁴ FCR fails to satisfy any part of this three-part test.¹⁵ Accordingly, we find that the action was not arbitrary, capricious, or an abuse of discretion and affirm the Bureau's dismissal of FCR's Petition as untimely.

5. For the reasons set forth above, IT IS ORDERED that, pursuant to Section 1.106 of the Commission's rules, 47 CFR § 1.106, the Second Petition filed by Florida Community Radio, Inc. on May 14, 2017, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Michelle M. Carey
Chief, Media Bureau

¹² See *Gardner v. FCC*, 530 F.2d 1086, 1091-92 (D.C. Cir. 1976) (*Gardner*).

¹³ *Gardner*, 530 F.2d at 1092 n.24.

¹⁴ *Id.*

¹⁵ We note that the full text of the *AFR Order* was published on the Commission's website on March 13, 2017, the day it was released. FCC Daily Digest, vol. 36, No. 48 (Mar. 14, 2017) (listing texts released March 13, 2017).