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Washington, D.C. 20554**

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In Reply Refer to:
1800B3-VMR

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In re: WRBD(FM), Horseshoe Beach, FL
Facility ID No. 185158
File No. BMPED-20180926ABN

**Florida Community Radio, Inc.
Petition for Reconsideration**

Dear Counsel:

We have before us the Petition for Reconsideration (Petition)¹ of Florida Community Radio, Inc. (FCR), the permittee of WRBD(FM), Horseshoe Beach, Florida (Station), seeking reconsideration of the Media Bureau (Bureau) *Letter Decision*² denying further tolling of the expiration date for the Station's Construction Permit (Permit). For the reasons set forth below, we dismiss the Petition in part and otherwise deny it.

Background. The Permit was granted on May 13, 2015, for a three-year term expiring on May 13, 2018. On April 10, 2018, FCR filed its first request for tolling, arguing that construction was delayed due to the lack of available commercial space for its studio and other facilities because of Hurricane Irma, which made landfall in Florida on September 10, 2017.³ FCR further noted that because of the elimination of the Commission's main studio rule,⁴ FCR no longer would be required to build a main studio in Horseshoe Beach, and instead required time to apply for a studio-to-transmitter link (STL) license to deliver its content from "its new community main studio location to its transmitter site, which is located just outside of Horseshoe Beach, Florida."⁵ On May 2, 2018, based on the elimination of the

¹ Petition of Florida Community Radio, Inc. for Request for Additional Tolling of Construction Permit Expiration, File No. BMPED-20180926ABN (filed July 15, 2019).

² *Florida Community Radio, Inc.*, Letter Order, Ref. 1800BS-VM (June 14, 2019) (*Letter Decision*).

³ *Letter from Sylvia Watson to FCC Audio Division* (Apr. 10, 2018) (*First Tolling Request*).

⁴ *See Elimination of Main Studio Rule*, Report and Order, 32 FCC Rcd 8158 (2017).

⁵ *First Tolling Request* at 1-2.

main studio rule, the Bureau extended by waiver the construction term of the Permit by six months to November 13, 2018.⁶

On October 24, 2018, FCR requested tolling for a second time, based on construction delays caused by Hurricane Michael, which made landfall near Horseshoe Beach on October 10, 2018.⁷ The Bureau granted the request for tolling on November 29, 2018, and the Permit was scheduled to expire on May 15, 2019.⁸

As noted in the *Letter Decision*, on April 16, 2019, FCR filed a Request for Extension for Tolling, asking for additional construction time in which it could perform an analysis to determine whether to place its power lines underground instead of on a power pole and a structural analysis to assess the potential impact of a future Category 5 storm on the Station's antenna.⁹ Bureau staff asked FCR to give more specific information regarding the construction delays to show a direct nexus between Hurricane Michael and the inability to construct the Station.¹⁰ No response was forthcoming, so staff contacted FCR by telephone to ask for a response.¹¹ On June 11, 2019, a response was sent by email essentially repeating the request made on April 16, 2019, without further elaboration.¹²

In the *Letter Decision*, the Bureau denied additional tolling for FCR to conduct studies of above-ground power service versus below-ground power service and the impact of a future storm on the Station's antenna.¹³ The *Letter Decision* noted that FCR failed to demonstrate that delay in construction was directly related to the prior storm, Hurricane Michael.¹⁴ Further, the Bureau stated that studies of electrical service to the Station's transmitter site and potential storm impact on the antenna could (and should) have taken place at any time in the extended construction term, which allowed FCR an additional twelve months on top of the original three years.¹⁵ Timing of any studies was a business decision within FCR's control. Lastly, the Bureau noted that Act of God encumbrances are to be narrowly construed and

⁶ *Florida Community Radio, Inc.*, Letter Order, Ref. 1800B3-VM (May 2, 2018) (*First Extension Letter*). FCR claims that the *First Extension Letter* did not explicitly deny tolling based on FCR's claims relating to Hurricane Irma, and therefore those claims remain pending. Petition at 2, n.3. This is a mischaracterization of the *First Extension Letter*. The Bureau specifically held that "FCR's situation does not qualify for tolling of the Station's construction permit." *First Extension Letter* at 2. A petition for reconsideration of the *First Extension Letter* was required to be filed within 30 days of May 2, 2018, and was not. See 47 U.S.C. § 405. Thus, this action has now been final for more than a year and is not subject to reconsideration.

⁷ *Letter from Sylvia Watson to FCC Audio Division* (Oct. 24, 2018) (*Second Tolling Request*).

⁸ *Florida Community Radio, Inc.*, Letter Order, Ref. 1800BS-VM (November 29, 2019) (tolling the expiration date based on construction delays caused by Hurricane Michael) (*Second Extension Letter*).

⁹ Email from Sylvia Watson, President, Florida Community Radio to Marlene H. Dortch, Secretary, Office of the Secretary, FCC, April 16, 2019 (*Third Extension Request*).

¹⁰ Email from Victoria McCauley, Attorney, Audio Division, Media Bureau, FCC to Sylvia Watson, President, Florida Community Radio, Apr. 25, 2019 at 18:55 EDT.

¹¹ *Letter Decision* at 1, n.4.

¹² *Id.*

¹³ *Id.* at 1.

¹⁴ *Id.* at 2.

¹⁵ *Id.* (citing 47 CFR §73.3598(d)) (Tolling resulting from an act of God will automatically cease six months from the date of the notification described in paragraph (c) of this section, unless the permittee submits additional notifications at six-month intervals detailing how the act of God continues to cause delays in construction, any construction progress, and the steps it has taken and proposes to take to resolve any remaining impediments).

include only those periods where the permittee demonstrates that the construction progress was impossible, notwithstanding its diligent efforts.¹⁶ Accordingly, the Bureau denied FCR's request for additional tolling under section 73.3598 of the Commission's rules (Rules).¹⁷

In the Petition, FCR does not challenge the holding in the *Letter Decision* that it was not entitled to additional construction time based on its studies of the Station's electrical system, but instead presents new arguments previously not presented to the Bureau. FCR explains that it originally relied on self-help and its recently retained counsel identified unreported facts that more clearly demonstrate the nexus between Hurricane Michael and FCR's inability to complete construction on the Station.¹⁸ Specifically, FCR now asserts, for the first time, that Hurricanes Irma and Michael have prevented construction of the Station because they created long wait times for contractors to construct the facility, construction is backlogged, there are a limited number of qualified antenna installers, and although FCR tried to request referrals for other installers and is on a waitlist, recent flooding in Texas has caused further delays, and the only other recommended antenna installers are from Latin America.¹⁹ FCR further asserts that an extension of tolling by six months would support the public interest.²⁰ FCR asks the Commission use discretion in excusing FCR from failing to comply with "all the procedural requirements," citing to a previous decision where the Commission excused late filing of certain children's television programming reports because they had a *de minimis* effect.²¹

Discussion. When a petition for reconsideration relies on facts or arguments not previously presented to the Commission, it may be dismissed or denied.²² It may be granted under limited circumstances only if the Commission determines the consideration of the facts or arguments relied on is required in the public interest.²³ We dismiss the Petition to the extent it relies on new arguments not previously presented to the Bureau.²⁴ We reject FCR's explanation that its failure to present these

¹⁶ *Letter Decision* at 2 (citing 1998 Biennial Regulatory Review – Streamlining of Mass Media Application Rules and Processes, Report and Order, 13 FCC Rcd 23056, 23090 (1998) (*Streamlining R&O*), *recon. granted in part and denied in part*, Memorandum Opinion and Order, 14 FCC Rcd 17525 (1999) (*Streamlining MO&O*)).

¹⁷ *Letter Decision* at 2.

¹⁸ Petition at 2.

¹⁹ Petition at 3-4.

²⁰ Petition at 5.

²¹ Petition at 4 (citing *Campbellsville Univ.*, Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 12649 n.4 (MB 2013) (*Campbell University*)). FCR does not identify which procedural requirements it previously failed to meet, but we interpret this to mean it is attempting to introduce new facts for the first time on reconsideration in violation of section 1.106 of the Rules.

²² 47 CFR § 1.106(p)(2).

²³ 47 CFR § 1.106(c)(2).

²⁴ See *Daytona Beach Broad. Ass'n*, Order on Reconsideration, 33 FCC Rcd 11852, 11853 n.10, (2018) (finding the dismissal of the petition also appropriate under 47 CFR § 1.106(p)(2) for relying on facts or arguments not previously presented). We note that FCR recognizes this deficiency and requests that the Commission either explicitly waive the rule or implicitly waive the rule by accepting the new information as if it had been submitted with the original tolling request. Petition at 3. The basis for the waiver request is that FCR, having been denied a further tolling extension, now regrets proceeding without counsel and has retained counsel who has identified previously unreported relevant information. *Id.* at 2-3. However, a rule 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. *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-28 (D.C. Cir. 2008) (citing *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990)). FCR has failed to satisfy either prong of the waiver standard. FCR's decisions on how to prosecute this matter, including whether and when to retain counsel and how to respond to the

arguments is attributable to the fact that it was not represented by counsel earlier in the proceeding. It is well settled that an applicant's failure to obtain counsel does not excuse it from complying with our Rules.²⁵

Additionally, were we to consider the arguments raised in the Petition, we would deny it. The Bureau will consider a petition for reconsideration only when the petitioner shows either a material error in the original order or raises additional facts not known or existing at the time of the petitioner's last opportunity to present such matters.²⁶ Here, FCR has neither demonstrated that the *Letter Decision* erred in denying tolling to conduct studies on the effect of future storms, nor provided additional facts that were not known at the time of FCR's *Third Extension Request*.²⁷

The only other decision FCR cites involved a contractor's failure to finish construction because of the ongoing impact of weather events.²⁸ However, in *Cranesville*, the Bureau specifically noted that "[p]otential applicants are advised that the action here is limited to the unique circumstances of [the permittee's] situation."²⁹ Further, the Bureau stated that had the permittee in that case actually explained its unique circumstances in a timely matter, the Bureau would have granted tolling.³⁰

The decision to conduct studies prior to construction to determine the appropriate technical facilities for the Station is a business decision and something that should have taken place during the four-year construction term.³¹ Further, nowhere in the Petition or any previous requests does FCR delineate

Bureau's specific and repeated requests for relevant information, are completely routine decisions that have never been accepted as special circumstances. Likewise, the public interest would be disserved by accepting such decisions as a basis for overriding the Commission's procedural rules. See *Canyon Area Residents*, Memorandum Opinion and Order, 14 FCC Rcd 8152, 8154, para. 7 (1999) ("We cannot allow a party to 'sit back and hope that a decision will be in its favor and, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.'") (quoting *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941)).

²⁵ *Eagle Broad. Group, Ltd.*, Memorandum Opinion and Order, 23 FCC Rcd 588, 595 (2008) (applicant's pro se status did not exempt it from complying with Commission rules or statutory provisions); *Mandeville Broad. Corp.*, Memorandum Opinion and Order, 2 FCC Rcd 2523, 2524 (1987) ("[P]ro se parties do assume the responsibility of conforming with the Commission's Rules and policies."). We also reject FCR's reliance on *Campbellsville University* when arguing that the Commission has discretion in excusing FCR from procedural requirements. Petition at 5. That decision merely excused a delay in compliance with a new advertising disclosure standard and late filing of a biennial ownership report for their *de minimis* effects and is inapposite here. See *supra* note 25.

²⁶ 47 CFR § 1.106(c); *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686, para. 2 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 397 U.S. 967 (1966); *Davis & Elkins Coll.*, Memorandum and Order, 26 FCC Rcd 15555, 15556, para. 5 (MB 2011).

²⁷ Email from Sylvia Watson, President, Florida Community Radio to Marlene H. Dortch, Secretary, Office of the Secretary, FCC, April 16, 2019.

²⁸ Petition at 6 (citing *Cranesville Block Co.*, Letter Order, Ref. 1800B3-IB (MB Jan. 11, 2013) (*Cranesville*)).

²⁹ *Cranesville* at 3-4. Among the unique factors, the Bureau noted that the permittee had been affected by four natural disasters in a month, the damage in some areas appeared comparable to damage by Hurricane Katrina, the permittee had not received the additional six-month period afforded to applicant's affected by natural disasters, the permittee only required one additional month of construction time, and the permittee actually showed a nexus between the contractor problems and the storms. Moreover, *Cranesville* is an unpublished decision and therefore is neither binding nor precedent. See 47 CFR § 0.445(e).

³⁰ *Cranesville* at 4.

³¹ See, e.g., *Royce International Broad. Co.*, Memorandum Opinion and Order, 23 FCC Rcd 9010, 9016, para. 15 (2008); *JNE Investments, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 623 (2008) (citing *Streamlining*

which specific steps it took to actually build the Station. Accordingly, we deny reconsideration of the *Letter Decision*.

Conclusion/Actions. For the reasons set forth above, IT IS ORDERED, that the Petition for Reconsideration filed by Florida Community Radio, Inc. on July 15, 2019 IS DISMISSED to the extent discussed above and otherwise IS DENIED.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau

MO&O, 14 FCC Rcd 17541, n. 56) (“We reiterate that we will afford no additional time to permittees who make a business decision not to use the site approved in the construction permit”); *Koor Comm’cns, Inc.*, Letter Order, 23 FCC Rcd 13246, 13250 (MB 2008) (affirming expiration on construction permit where permittee’s decision to pursue a new site was a “voluntary, and speculative, business decision”).