

**DISSENTING STATEMENT OF
COMMISSIONER KEVIN J. MARTIN**

RE: Applications of Savannah College of Art and Design and Diocese of Savannah for Construction Permit and License in the Instructional Television Fixed Service on the G-Group Channels at Bloomington, Georgia and the A-Groups Channels at Savannah, Georgia

I respectfully dissent from this decision to dismiss the applications of the Diocese of Savannah and the Savannah College of Art and Design. In this instance, the spectrum designated for educational and religious broadcasting is lying fallow – a wasting resource that can never be recaptured. Meanwhile, the majority dismisses the applications of the Diocese of Savannah and the Savannah College of Art and Design – the only parties which have ever applied to make good use of that spectrum. I cannot agree that their real operations would somehow interfere with the *imaginary* operation of certain “Pembroke Permittees,”¹ whose permits already expired and have been forfeited. Neither the letter nor the spirit of the Commission’s regulations dictate such a result.

1. Here is the unfortunate history of these licenses:

a. The Pembroke Permittees never constructed, let their licenses expire without explanation, and yet the Media Bureau reinstated those licenses without those permittees ever even filing a reinstatement request. In 1992 the Commission awarded these channels to the Pembroke Permittees – parties which *never* constructed or made use of their permits. First, the Pembroke Permittees allowed their permits to expire on September 17, 1995 without requesting an extension of time. The rules required any such request to be filed at least 30 days *prior* to the end of the construction deadline.² Furthermore, applications filed later than 30 days prior to the expiration may be accepted only “upon a showing satisfactory to the FCC of sufficient reasons for filing within less than 30 days prior to the expiration date.”³ Not only did the Pembroke Permittees file for an extension of time 31 days late – on September 18, 1995 – but also after expiration and without any explanation for the late filing. The Media Bureau did not act on this late-filed request for one full year. Then, on September 18, 1996, the Media Bureau simply granted the request, without any explanation as to why such an improper request should be granted. The Bureau also failed to address how the request could be granted without any showing, as required by our rules.

In 1999, in response to a petition for reconsideration filed by the Diocese and SCAD, the Media Bureau, on its own, recharacterized the 1996 late-filed extension of time request (which could not have been granted under the rules) as a request for “reinstatement,” (which could be filed after a license had lapsed). In a bold act of revisionist history, the Media Bureau declared that although the Pembroke licenses had expired on September 17, 1995, they were still entitled to interference protection from any subsequent applicant *because* the Pembroke Permittees “filed timely applications to *reinstate* the expired permits on September 18, 1995, as permitted by section 73.3534(e)” (emphasis supplied).⁴ No matter that the application itself made no mention of “reinstatement.” Indeed, FCC Form 307, the form the Pembroke Permittees used to file their request for an extension of time, contains two places where they

¹ The Pembroke Permittees are Effingham County Middle School and Statesboro High School, in Pembroke, Georgia, and were represented before the FCC by Washington counsel.

² 47 C.F.R. § 73.3534(a) (1995).

³ *Id.*

⁴ February 5, 1999 letter from Mass Media Bureau, Video Services Division, to Savannah applicants rejecting their petition for reconsideration.

could have indicated their intent to request a reinstatement. Box 3, “purpose of application” allows the applicant to check either 3a (additional time) or 3b (construction permit to replace expired permit). The Pembroke permittees checked box 3a (additional time) and left box 3b (replace expired permit) blank. Box 7 likewise allows the applicant to choose between 7a (an “extension of time”) and 7b (an “application to replace an expired permit.”) The Pembroke Permittees chose 7a (extension of time) and specifically rejected 7b (request for reinstatement, which, by the way, also required an explanation of the applicant’s failure to submit a timely extension application) as “not applicable.” Still the Media Bureau chose to characterize the post-expiration extension of time request as a “reinstatement” request, even though a “reinstatement” was never requested, and indeed, was specifically rejected by the applicants themselves.

Between the time of the Bureau’s 1996 grant of the Pembroke Permittees’ extension of time request and the Bureau’s 1999 declaration turning the extension of time grant into a “reinstatement” grant, the Media Bureau had also granted the Pembroke Permittees various other extensions of time finally expiring on March 18, 1997. After 1997, the Pembroke Permittees did not bother to ask for any more extensions. Finally, in 2002, ten years after the permits were first awarded, the Wireless Bureau declared those same Pembroke permits forfeited, and cancelled the licenses retroactively to 1997 when the original extensions expired.

b. In 1998, the Media Bureau rejected the applications by the Diocese/SCAD to construct ITFS stations because their proposal would cause interference to the Pembroke Permittees, whose licenses had expired in 1997 and who had not requested a reinstatement or any extension of time. In October of 1995, during a five-day filing window open for ITFS applications (the one and only opportunity available to apply for these channels) the Diocese and SCAD filed applications to use these channels for educational and religious programming. In conjunction with their applications, they provided an analysis candidly declaring that their operation would cause interference to the planned Pembroke operations. The Diocese and SCAD also indicated that they were attempting to secure consent regarding interference for the proposed operations. The Media Bureau did not act on the Savannah applications for three years.

On May 12, 1998, the Diocese/SCAD applications were finally accepted for filing, and then, strangely, two months after the acceptance, they were dismissed.⁵ The reason for the dismissal? Failure to protect the Pembroke Permittees from interference. This dismissal was particularly strange given that the Pembroke permits had already expired one year earlier without any further request for an extension of time or reinstatement, and thus lacked any indication that there ever had been or ever would be any operation on the Pembroke licenses with which to interfere.

2. I would have chosen to reverse the Media Bureau’s 1998 dismissal of the Diocese/SCAD applications or, alternatively, reverse the Media Bureau’s improper grant of an extension of time in 1996 and grant the Savannah applications.

It is within this Commission’s complete discretion to reverse the Bureau’s 1998 dismissal of the Diocese/SCAD applications. The dismissal was based solely on potential interference with the nonexistent facilities of the expired Pembroke Permits. As such, the dismissal was not valid in 1998, and is now also incompatible with the Wireless Bureau’s later forfeiture and cancellation of the Pembroke Permits retroactive to 1997. Similarly, it is within this Commission’s discretion to reverse the Media

⁵ Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau, FCC, to Diocese of Savannah and Savannah College of Art and Design (dated July 15, 1998).

Bureau's 1996 improper grant of an extension of time to the Pembroke Permittees and to cancel those licenses *nunc pro tunc*, effective September 18, 1995, when the licenses expired.⁶

The majority concludes that as a technical matter, the Savannah applications were improper at the time they were filed because they interfered with the proposed Pembroke operations. The majority further concludes that although the Pembroke licenses had expired, they had not yet been "cancelled" by the Bureau, and accordingly the Diocese and SCAD should not ever have filed. I respectfully disagree. First, the Diocese/SCAD applications were not immediately rejected, and were, ultimately, accepted for filing, an indication that they were properly filed. Second, the rules in place only required an interference analysis, which the Diocese/SCAD provided.⁷ Their interference analysis candidly declared that their operations would cause harmful interference to the proposed Pembroke operations. The rules, importantly, do not require immediate dismissal in the face of interference.⁸ Third, when the Savannah applicants filed, they included a "statement regarding interference" indicating that they were in the process of negotiating interference consents. It is my understanding that the Mass Media Bureau sometimes accepted for filing such applications where interference negotiations were underway but not yet finalized. Accordingly, it would have been reasonable for any applicant in the process of negotiating an interference consent to apply. Fourth, at the time they applied, the Diocese/SCAD were aware that the Pembroke licenses had already expired, and that the Pembroke licensees had neither timely requested an extension of time, nor requested a reinstatement. Fifth, the Media Bureau's 1998 dismissal was not based on the rationale that the expired Pembroke licenses had not yet been separately "cancelled" by the Bureau, but instead was based only on the rationale that the Savannah operations would cause interference to the Pembroke operations on a going forward basis. Accordingly, in my view it was reasonable and proper for the Diocese/SCAD to apply during the only five-day filing window ever available to them.

Alternatively, the majority states that the Savannah applications violate the rule prohibiting contingent applications. This argument is based on a sentence in the cover letter accompanying the Savannah applications which states that "it is the applicant's understanding that acceptance of this application is contingent upon the outcome of a petition to deny" filed against the Pembroke Permittees by a commercial provider that had intended to lease the Diocese/SCAD proposed facilities. In my view, this argument is a red herring. It seems unusual to deny this application based on a sentence in the cover letter. I believe it would be more appropriate to base the decision on the actual application itself, which to me appears to have been appropriately filed, and does not indicate that it is somehow contingent on another proceeding. Furthermore, this rationale was never used previously by the Bureau to reject the Savannah applications.

Finally, the majority states that to cancel the Pembroke Permits *nunc pro tunc* to September 18, 1995, the date they expired, would require a change in policy. The majority also states that this would be unfair to other potential applicants who may have applied but failed to file because they relied on the

⁶ The rules require that such a cancellation be effective "as of the expiration date." 47 C.F.R. § 73.3599 (1995) ("a construction permit *shall be declared forfeited* if the station is not ready for operation within the time specified therein or within such further time as the FCC may have allowed for completion, and a notation of the forfeiture of any construction permit under this provision will be placed in the records of the FCC *as of the expiration date*") (emphasis supplied).

⁷ 47 C.F.R. § 74.903(b) (1995).

⁸ Furthermore, prospective applicants and existing licensees were "required to cooperate fully in attempting to resolve problems of potential interference before bringing the matter to the attention of the Commission." 47 C.F.R. § 74.903(c). This further suggests that any interference issues would ultimately be resolved by the Commission, and not result in an automatic dismissal of the prospective applicant's application.

Commission's licensing records (which showed the Pembroke Permits as expired but not cancelled). I respectfully disagree with both rationales. First, the Commission's rules *require* a permit to be declared forfeited *as of the expiration date* if the station is not ready for operation in the required timeframe.⁹ Here, the Pembroke stations were not ready in the required timeframe and as a result, the Commission's rules require the forfeiture to have been effective as of the expiration date. Accordingly, a *nunc pro tunc* cancellation effective September 18, 1995, which in turn would allow the Savannah applications to be processed, would not reflect any change in policy. Indeed, it would require a change in our rules to cancel the permits as of any other date.

I also disagree that granting the Savannah applications would be unfair to potential applicants who may otherwise have filed applications but for the Pembroke Permits which were still reflected in the Commission's records. No other party other than the Diocese/SCAD have come forward at any time requesting to make use of those ITFS channels, and no other party has ever protested the Savannah applications, even during the period where they went on public notice as "accepted for filing." Also, at the time the ITFS filing window was open, any party could have seen that the Pembroke permits had expired without a request for a reinstatement and without a timely request for an extension of time. Given the unique facts of this case, the majority's suggestion that such an approach would only encourage the filing of speculative applications is, I believe, speculative itself. Indeed, under such circumstances I would encourage applicants to apply to make productive use of resources that are otherwise lying fallow.

I believe that as a matter of policy and under our rules, it would have been better to reverse the prior decision of the Media Bureau and grant the application of the Diocese and SCAD. Accordingly, I dissent.

⁹ 47 C.F.R. § 73.3599 (1995) ("a construction permit *shall be declared forfeited* if the station is not ready for operation within the time specified therein or within such further time as the FCC may have allowed for completion, and a notation of the forfeiture of any construction permit under this provision will be placed in the records of the FCC *as of the expiration date*") (emphasis supplied).