

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

In the Matter of)	
)	
JET FUEL BROADCASTING)	File No. BNP-20041028AGI
)	Facility ID No. 161455
Application for a New AM Broadcast Station)	
at Anchorage, Alaska)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: September 1, 2010

Released: September 2, 2010

By the Commission:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we dismiss the Application for Review (“AFR”) filed April 28, 2008, by Jet Fuel Broadcasting (“JFB”), a sole proprietorship of Mr. Dave Garey (“Garey”).¹ As discussed below, because we have already rejected the premise underlying the AFR, we find that the AFR is moot, and affirm the Media Bureau’s decision denying JFB’s request for tolling of the construction permit awarded to JFB pursuant to grant of the above-captioned application.

II. BACKGROUND

2. JFB filed a short-form application (FCC Form 175) in the January 2004 filing window for AM Broadcast Auction 84 (“Auction 84”).² JFB proposed several different new AM facilities, filing separate “tech box” applications for each new AM facility referenced in Form 175. As the tech box proposing a new AM broadcast station at Anchorage, Alaska,³ was not mutually exclusive with AM facilities or modifications proposed by other Auction 84 window applicants, JFB was directed to file the above-captioned complete long-form application (FCC Form 301) (the “Application”).⁴ The Application was granted on December 8, 2005, and JFB was awarded a construction permit for the new AM station at

¹ Because JFB and Fireside Media, Inc. (“Fireside”) are sole proprietorships, those terms and “Garey” will be used interchangeably herein, as appropriate.

² See *AM New Station and Major Modification Auction Filing Window; Minor Modification Application Freeze*, Public Notice, 18 FCC Rcd 23016 (MB/WTB 2003).

³ File No. BNP-20040130BCD.

⁴ File No. BNP-20041028AGI.

Anchorage (the “Anchorage Permit”).⁵ The three-year construction permit had an expiration date of December 8, 2008.⁶

3. On March 7, 2008, nine months before the Anchorage Permit was to expire, JFB filed with the Media Bureau (“Bureau”) a request for tolling of the Anchorage Permit (“JFB Tolling Request”). JFB’s request was based on difficulties Garey allegedly encountered in securing financing for the Anchorage station, a problem that was created when he was “improperly classified with federal debtor status by the Commission.”⁷ Specifically, following established auction procedure,⁸ the Bureau and the Wireless Telecommunications Bureau imposed penalties for bids withdrawn by Garey d/b/a Fireside in FM Broadcast Auction 37, held in November 2004. A withdrawal penalty of \$8,250 was satisfied from Fireside’s Auction 37 upfront payment, and additional withdrawal penalties totaling \$108,892 were established after two other permits, for which Fireside had withdrawn high bids in Auction 37, were sold for lesser amounts in Auction 62.⁹ Garey insisted that he withdrew his Auction 37 bids for reasons beyond his control, and that the penalties were assessed improperly and without due process.¹⁰

4. On March 27, 2008, the Bureau released its decision denying JFB’s tolling request.¹¹ The Bureau found that the tolling request was untimely,¹² as Garey traced his financial difficulties to the February 8, 2006, release of the Auction 62 Closing Public Notice announcing the \$108,892 withdrawal penalties for two of his withdrawn Auction 37 bids.¹³ The JFB Tolling Request was not filed until over two years later. The Bureau also found that the financial problems that Garey linked to the withdrawal

⁵ See *Broadcast Actions*, Public Notice, Report No. 46130 (MB Dec. 13, 2005).

⁶ 47 C.F.R. § 73.3598(a).

⁷ AFR at 1.

⁸ On withdrawal penalties generally, see 47 C.F.R. §§ 1.2104(g), 73.3568(a)(3). Bidding procedures for Auction 37, including the penalties for bid withdrawal, were announced in *Auction of FM Broadcast Construction Permits Scheduled for November 3, 2004, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures*, Public Notice, 19 FCC Rcd 10570, 10603-04 (WTB/MB 2004).

⁹ The specific penalties imposed on Fireside are set forth in *FM Broadcast Construction Permits Auction Closes – Auction No. 37 Winning Bidders Announced; Payment and Application Deadlines Established*, Public Notice, 20 FCC Rcd 1021 (MB/WTB 2004) (announcing an \$8,250 penalty for withdrawing a high bid for the Eureka, Montana, permit, which was sold for a lesser amount in Auction 37; penalty satisfied from Fireside’s upfront payment), and *Auction of FM Broadcast Construction Permits Closes – Winning Bidders Announced for Auction No. 62*, Public Notice, 21 FCC Rcd 1071, 1100 (MB/WTB 2006) (“Auction 62 Closing Public Notice”) (after re-auction of Breckenridge, Texas, and Manville, Wyoming, permits in FM Auction 62, high bids for both of which were withdrawn by Fireside in Auction 37, withdrawal penalties were established at \$41,137 and \$67,755, respectively).

¹⁰ JFB Tolling Request at 2-4. See also AFR at 2-3.

¹¹ *Dave Garey, Jet Fuel Broadcasting*, Letter, Ref. No. 1800B3-IB (MB Mar. 27, 2008) (“Staff Decision”).

¹² Staff Decision at 3.

¹³ Auction 62 Closing Public Notice, 21 FCC Rcd at 1100.

penalties were not grounds for grant of additional construction time.¹⁴ Moreover, the Bureau rejected Garey's claim that the withdrawal penalties announced in the Auction 62 Closing Public Notice – which were the result of his voluntary decision to submit and then withdraw bids – were beyond his control.¹⁵ The Bureau found that Garey was “sole[ly] responsib[le] for his decisions regarding whether and how much to bid for the FM permits, and whether to withdraw bids in the face of auction instructions announcing the potential consequences of such action,” concluding that “[t]here would have been no bid withdrawal payments at issue, but for Garey's own actions.”¹⁶

5. At the time the Staff Decision was released, there were pending petitions, filed by Garey, for reconsideration of the withdrawal penalties assessed against him, including a request to compromise the penalties.¹⁷ On August 22, 2008, the Commission released an order which, while not reaching the merits of Garey's petitions for reconsideration, nevertheless compromised the withdrawal penalties in full, based solely on Garey's showing that he lacked funds with which to pay the penalties.¹⁸ Thus, he ceased being a “federal debtor” as of that date. On October 6, 2008, Garey filed a Petition for Partial Reconsideration of the *Fireside Media Order* (“Fireside Petition”), seeking, among other things, amendment of the order's language to include affirmative statements that Garey would continue to be allowed to prosecute other applications before the Commission,¹⁹ that the “irreparable debtor status” was imposed upon him illegally and without due process,²⁰ and that Garey “committed absolutely no illegal activity or misconduct inherent to withdrawing from Auction 37 without purchase.”²¹ We denied the Fireside Petition by order dated February 22, 2010.²² With regard to Garey's claim that the Auction 37 withdrawal penalties were imposed improperly or without due process, we stated that “the Commission did *not* predicate compromise upon any finding that the bid withdrawal payment was erroneous or

¹⁴ Staff Decision at 3, citing *Texas Grace Communications*, Memorandum Opinion and Order, 16 FCC Rcd 19167, 19173 n.11 (2001) (“*Texas Grace*”) (“To the extent that Texas Grace [also a sole proprietorship of Garey's] argues that the staff's actions made it difficult for it to obtain financing, we note that Texas Grace certified when it first applied for its permit that sufficient liquid funds were available from committed sources to construct the proposed facility and to operate it for three months without revenue.”). The Commission in *Texas Grace* also noted that while the current Form 301 does not contain a financial certification, we continue to require reasonable assurance of committed financing sufficient to construct and operate without revenue for three months. Additionally, the Bureau noted that the Form 175 application Garey filed in order to participate in Auction 37 included a certification, under penalty of perjury, that Garey was financially qualified. Staff Decision at 3.

¹⁵ *Id.*

¹⁶ *Id.* at 4.

¹⁷ See *Petition for Reconsideration of Bidder Withdrawal Payment Penalties Assessed against Fireside Media upon Conclusion of FM Auction 37*, filed Jan. 3, 2005; *Urgent Petition for Reconsideration of DA 06-252*, filed Mar. 10, 2006.

¹⁸ *Fireside Media*, Order, 23 FCC Rcd 13138, 13139 and n.6 (2008) (“*Fireside Media Order*”).

¹⁹ *Fireside Petition* at 4.

²⁰ *Id.* at 6-8.

²¹ *Id.* at 13.

²² *Fireside Media*, Memorandum Opinion and Order, 25 FCC Rcd 2453 (2010) (“*Fireside Reconsideration Order*”).

undeserved,” concluding that “none of the amendments Fireside Media seeks are justified in light of the soundness of the underlying determination that it owed a bid withdrawal payment as a result of its withdrawn bids.”²³

6. Although Garey / JFB makes a variety of arguments in the AFR, all of them appear to be premised on the theory that his failure to complete construction in a timely manner is due to unlawful or improper treatment by the Commission in imposing penalties for his withdrawn Auction 37 bids.²⁴ JFB thus requests that we toll the Anchorage Permit “for the period of time corresponding to the debtor status designation – so that this vital radio service can be brought to fruition.”²⁵

III. DISCUSSION

7. As noted above, while JFB attacks the Staff Decision in certain respects, the gravamen of the AFR is JFB’s contention that the withdrawal penalties were wrongly imposed, and that as a result it has been unable to construct facilities authorized by the Anchorage Permit.²⁶ Because we categorically rejected that premise in the *Fireside Reconsideration Order*, the AFR is therefore moot and is dismissed.²⁷

8. Moreover, even were we to consider the AFR on its merits, we would reject JFB’s claims.²⁸ We concur in the Bureau’s reasoning in treating the tolling request as one for waiver of the

²³ *Id.* at 2458 (emphasis in original).

²⁴ In particular, Garey/JFB argues, first, that the Staff Decision ignored verbal assurances Garey had allegedly received from the Commission’s Chairman that the withdrawal penalties, and Garey’s “accompanying debtor status designation,” were to be eliminated. Garey thus contends that the Staff Decision constituted an “unfounded personal attack” on him contradicting those alleged verbal assurances. AFR at 3-4. JFB also questions whether the “due process violation inherent to the FCC’s federal debtor designation” of Garey could be viewed as the result of Garey’s own actions, as stated in the Staff Decision. *Id.* at 4. JFB further states that the duration of the “debtor status,” and its effect on his ability to construct pursuant to the Anchorage Permit, could not have been anticipated by Garey. *Id.* at 5. Finally, JFB contends that tolling of the Anchorage Permit is mandated because Garey’s “debtor status” has been the subject of administrative review. *Id.* at 4-5.

²⁵ *Id.* at 5.

²⁶ See, e.g., AFR at 4 (“Unfortunately, the [Staff Decision] fails to address the due process violation inherent to the FCC’s federal debtor designation of JFB’s proprietor two months into the lifespan of the permit – a due process violation that was certainly not of the proprietor’s ‘own doing,’ but rather, an action initiated by the FCC that was clearly ‘beyond the permittee’s control’ given the pending Appeal against any such action.”).

²⁷ See, e.g., *Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas is Subject to Regulation as Local Exchange Service*, Memorandum Opinion and Order, 25 FCC Rcd 1576, 1577 (2010) (“Agency decisions become moot when no live controversy remains for review,” citing *Tenn. Gas Pipeline Co. v. Fed. Power Comm’n*, 606 F.2d 1373, 1379 (D.C. Cir. 1979)).

²⁸ We agree with the Bureau that the original tolling request was untimely, as it was not made within 30 days of the event forming the basis of the request, i.e., the February 8, 2006, assessment of withdrawal penalties against Garey. See Staff Decision at 3; 47 C.F.R. § 73.3598(c). The requirement of prompt notification is designed to ensure permittee construction diligence and to avoid *post hoc* permittee temporizing. This time frame generally applies to waiver requests as well. *Birach Broadcasting Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 1414, 1416 (2003), *recon. denied*, 20 FCC Rcd 5764 (2005).

three-year construction deadline, and agree with the Bureau that JFB does not plead any of the grounds for tolling set forth in Section 73.3598(b) of our Rules,²⁹ nor does he set forth “special circumstances” justifying waiver of the three-year construction period.³⁰ Moreover, as noted above, events subsequent to JFB’s filing the AFR have only underscored the correctness of the Staff Decision. For the reasons set forth in both the Staff Decision and the *Fireside Reconsideration Order*, we reject the major premises underlying JFB’s claim for relief in the AFR, namely, that Garey’s withdrawal penalties were somehow the result of unfair treatment by the Commission or its staff, that the Commission’s compromise of those penalties was an admission of culpability on its part, and that the Commission is ultimately responsible for Garey’s failure to construct facilities and must therefore provide him with indefinite extensions of time in which to do so.³¹ Garey, like any other broadcast radio permittee, is expected to construct facilities in a timely manner and commence broadcast service to the public. Because Garey has failed to do so, and because he presents no valid reason for that failure, we find that the Anchorage Permit expired by its terms on December 8, 2008, and was therefore forfeited on that date.³² To the extent that JFB has constructed its tower, it is imperative to the safety of air navigation that any prescribed painting and illumination of the station’s tower be maintained until dismantled. Accordingly, the owner of the tower where JFB’s transmitting antenna is located is required, pursuant to Section 303(q) of the Communications Act of 1934, as amended,³³ to maintain the tower in the manner prescribed by our rules and the terms of the expired Anchorage Permit until it is dismantled.³⁴

²⁹ Tolling of the construction period for a radio station occurs only when construction is prevented due to an act of God, defined in terms of natural disasters, or when grant of the construction permit is the subject of administrative or judicial review or construction is delayed by any cause of action pending before any court of competent jurisdiction relating to any necessary local, state, or federal requirement for construction or operation of the station. 47 C.F.R. § 73.3598(b). While Garey argues that his pending appeals of the withdrawal penalties should toll the construction period (AFR at 4-5), these appeals do not qualify as administrative review for purposes of the rule. *See, e.g., Birch Broadcasting Corp.*, Memorandum Opinion and Order, 23 FCC Rcd 3141, 3146 (2008) (citing *Texas Grace*, 16 FCC Rcd at 19172).

³⁰ *See Northeast Cellular Telephone Co. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“*Northeast Cellular*”) (“[A] waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest,” citing *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969)). *See also Requests for Extension of the Commission’s Initial Non-Delinquency Period for C and F Block Installment Payments*, Order, 13 FCC Rcd 22071, 22072 (1998), *recon. denied*, 14 FCC Rcd 6080 (1999), *aff’d sub nom. SouthEast Telephone, Inc. v. F.C.C.*, No. 99-1164 (D.C. Cir. Nov. 24, 1999) (“The challenge of raising capital . . . exists in varying degrees for all licensees and does not constitute ‘unique facts and circumstances.’”).

³¹ Likewise, based on the unequivocal statements in the *Fireside Reconsideration Order* (*see supra* n.22), we find no merit in JFB / Garey’s contention that the Staff Decision contradicted alleged verbal assurances from the Commission’s Chairman and, thus, constituted an “unfounded personal attack” on him.

³² 47 C.F.R. § 73.3598(e) (“Any construction permit for which construction has not been completed and for which an application for license has not been filed, shall be automatically forfeited upon expiration without any further affirmative cancellation by the Commission.”).

³³ 47 U.S.C. § 303(q).

³⁴ *See* 47 C.F.R. §§ 17.1, *et seq.*, and 73.1213. *See also Streamlining the Commission’s Antenna Structure Clearance Procedure*, Report and Order, 11 FCC Rcd 4272 (1996).

IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, that the Application for Review filed by Jet Fuel Broadcasting IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary