

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

In the Matter of
Fireside Media

MEMORANDUM OPINION AND ORDER

Adopted: February 22, 2010

Released: February 24, 2010

By the Commission:

I. INTRODUCTION AND BACKGROUND

1. In this Order, we address a petition for reconsideration of the Fireside Media Order, in which the Commission compromised Fireside Media's debts with respect to bid withdrawal payments and refunded \$8,659 of Fireside's upfront payment on deposit with the Commission. Fireside participated in the Commission's Auction No. 37, submitted high bids on four FM construction permits, and subsequently withdrew its high bids. Under the Commission's Rules, a bidder

1 Fireside Media, Order, 23 FCC Rcd 13138 (2008). The Fireside Media Order was released on August 22, 2008. As we discuss below, the last day for filing a petition for reconsideration was September 22, 2008.

2 See 47 C.F.R. § 1.1915, "Exploration of compromise":

The Commission may attempt to effect compromise, preferably during the course of personal interviews, in accordance with the standards set forth in Part 902 of the Federal Claims Collection Standards (31 CFR Part 902). The Commission will also consider a request submitted by the debtor to compromise the debt. Such requests should be submitted in writing with full justification of the offer and addressing the bases for compromise at 31 CFR 902.2. Debtors will provide full financial information to support any request for compromise based on the debtor's inability to pay the debt. Unless otherwise provided by law, when the principal balance of a debt, exclusive of interest, penalties, and administrative costs, exceeds \$100,000 or any higher amount authorized by the Attorney General, the authority to accept the compromise rests with the Department of Justice. The Commission will evaluate an offer, using the factors set forth in 31 CFR 902.2 and, as appropriate, refer the offer with the appropriate financial information to the Department of Justice. Department of Justice approval is not required if the Commission rejects a compromise offer.

The Fireside Media Order stated that it superseded the Commission's previous determinations in DA 04-3694 and DA 06-252 regarding Mr. Garey/Fireside Media and as a result, there was no corresponding debtor status applicable to Fireside or Mr. Garey as a result of Fireside's bid withdrawals in Auction No. 37. See 23 FCC Rcd at 13138 n.3; see also id. at 13140 (stating that there is "no corresponding debtor status applicable to Fireside or Mr. Garey as a result of his bid withdrawals during Auction 37").

3 Prior to the auction, which began on November 3, 2004 and concluded on November 23, 2004, the Wireless Telecommunications Bureau and the Media Bureau released a Public Notice outlining the terms, conditions, and procedures for the auction. See "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 (WTB/MB 2004) ("Auction No. 37 Procedures Public Notice").

4 Whitehall, MT (FM 185), Breckenridge, TX (FM 277), Manville, WY (FM 352), and Eureka, MT (FM 171).

that withdraws a provisionally winning bid during the course of an auction is subject to a bid withdrawal payment equal to any difference between the amount of the withdrawn bid and the amount of the subsequent winning bid.<sup>6</sup> The final withdrawal payment for the Eureka permit was calculated and paid out of Fireside's upfront payment after Auction 37. After Auction 62, the Commission calculated Fireside's final withdrawal payments with respect to the two licenses that received winning bids in that auction as \$41,137 (for Breckenridge) and \$67,755 (for Manville), for a total amount due of \$108,892.<sup>7</sup> Fireside subsequently notified the Commission that due to financial hardship, it was unable to pay the withdrawal payments.<sup>8</sup> In the *Fireside Media Order*, we compromised these debts solely due to Fireside's inability to pay the full amount of the debts within a reasonable time.<sup>9</sup> The Commission concluded that Fireside had shown an inability to pay any portion of the debts, and therefore resolved the two debts of \$41,137 and \$67,755 that had been pending at the Commission for several years.

2. On October 6, 2008, Dave Garey, the owner of Fireside Media,<sup>10</sup> filed a Petition for Partial Reconsideration,<sup>11</sup> seeking: (i) amendment of the *Fireside Media Order* to include omitted vital material facts,<sup>12</sup> primarily relating to Fireside Media's status under the Commission's debt collection rules; (ii) return of the outstanding balance on deposit with the Commission;<sup>13</sup> (iii) clarification of the *Fireside Media Order* to include language that Fireside is permitted to prosecute applications and permits before the Commission;<sup>14</sup> (iv) amendment of the *Fireside Media Order* to state that Fireside "committed absolutely no illegal activity or misconduct inherent to withdrawing from Auction 37 in 2004 without

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<sup>5</sup> The Eureka, MT construction permit received a subsequent winning bid in Auction No. 37; the unsold Breckenridge, TX, and Manville, WY construction permits on which Fireside had withdrawn high bids were subsequently offered and won in Auction No. 62; and the Whitehall, MT construction permit was offered and not won in both Auction 62 and Auction 79, .

<sup>6</sup> 47 C.F.R. § 1.2104(g)(1).

<sup>7</sup> See FM Broadcast Construction Permits Auction Closes; Auction No. 37 Winning Bidders Announced; Payment and Application Deadlines Established, *Public Notice*, DA 04-3694, 20 FCC Rcd 1021 (WTB/MB 2004); Auction of FM Broadcast Construction Permits Closes; Winning Bidders Announced for Auction No. 62, *Public Notice*, DA 06-252 (WTB/MB Feb. 8, 2006).

<sup>8</sup> Fireside filed two petitions for reconsideration of the public notices announcing the closing of Auctions 37 and 62, disputing, *inter alia*, the withdrawal payment obligations. 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. We did not reach the merits of Fireside's pending petitions for reconsideration in the *Fireside Media Order*.

<sup>9</sup> The scope of compromise is limited to four situations: (a) inability to pay; (b) inability of the Government to collect within a reasonable time using enforced collection proceedings; (c) diminishing returns; and (d) "significant doubt" concerning the Government's ability to prove its case in court. 31 C.F.R. § 902.2(a). See also 47 C.F.R § 1.1915.

<sup>10</sup> For purposes of this Memorandum Opinion and Order, we use the names Dave Garey (the sole proprietor of Fireside Media), Fireside Media, and Fireside interchangeably.

<sup>11</sup> "Petition for Partial Reconsideration, FCC 08-191, Resubmission of lost original, with request for acceptance out of time," filed Oct. 6, 2008 ("Petition"). Garey asserts that this petition is a resubmission of a petition for reconsideration which, he claims, he originally filed in an unsecured area after Commission business hours on the evening of September 22, 2008. We address the timeliness of both the asserted and actual petitions herein. See *infra* para. 4.

<sup>12</sup> *Id.* at 2.

<sup>13</sup> *Id.* at 3.

<sup>14</sup> *Id.* at 4.

purchase”;<sup>15</sup> (v) acceptance of the late filing;<sup>16</sup> and (vi) an opportunity to present oral argument to the Commissioners and their advisors.<sup>17</sup> We dismiss the petition as untimely filed. We nonetheless review the arguments raised by Fireside and conclude that were we required to address them in the absence of the petition’s procedural infirmity, we would find that the arguments for reconsideration lack merit.<sup>18</sup>

## II. DISCUSSION

### A. The Petition for Reconsideration Was Untimely

3. As an initial matter, we conclude that Mr. Garey’s petition was not timely filed, and even construing the pleading and assertions in the light most favorable to the filer, no good cause has been shown to waive the time limit for a petition. Section 405 of the Communications Act of 1934 (the “Act”) and the Commission’s Rules require any petition for reconsideration to be filed within thirty days from the date upon which public notice is given of an action or decision for which reconsideration is sought.<sup>19</sup> The Commission’s Rules provide that the date of public notice of a non-rulemaking document is the date of the document’s release.<sup>20</sup> In the case at hand, public notice occurred when the Commission released the *Fireside Media Order* on August 22, 2008. Accordingly, the last day for filing a petition for reconsideration was September 22, 2008.<sup>21</sup> Mr. Garey claims that he filed two petitions for reconsideration with respect to the *Order*, the first of which he alleges to have filed on September 22, 2008 and the second of which was filed on October 6, 2008. We consider the timeliness of each in turn.

4. Mr. Garey contends that he left the original petition at an unsecured area on Massachusetts Avenue in Washington, DC on the evening of September 22, 2008 after the “document filing contractor had closed for business,” which was after the end of official Commission hours.<sup>22</sup> As Mr. Garey describes the events of the delivery, he was “running a bit late” so he left the “filing in an unsecured area,” knowing that the contractor was closed and it would “look for the filing in the morning [of September 23, 2008],”<sup>23</sup> the day after the time permitted for a filing. The Commission has no record of receiving the document Mr. Garey alleges he left in the unsecured area. The Commission’s Rules require that hand-delivered documents must be tendered before 7:00 PM at its Massachusetts Avenue

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<sup>15</sup> *Id.* at 13.

<sup>16</sup> *Id.* at 14.

<sup>17</sup> *Id.* at 15.

<sup>18</sup> On June 25, 2009, representatives of the Office of Acting Chairman Copps, the Office of General Counsel, and the Office of Legislative Affairs discussed these arguments with Mr. Garey over the course of an hour-long telephone conversation. Staff for U.S. Senator John Kerry also participated in the conversation.

<sup>19</sup> 47 U.S.C. § 405(a) provides that a “petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of.” Section 1.106 (f) of the Commission’s Rules implements this statutory mandate and provides that the “petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of public notice of the final Commission action . . . .” 47 C.F.R. § 1.106(f).

<sup>20</sup> 47 C.F.R. § 1.4(b)(2).

<sup>21</sup> *See* 47 C.F.R. § 0.403.

<sup>22</sup> Petition at 14. We construe this portion of Mr. Garey’s Petition that he captions as a “[r]equest for acceptance of this resubmission filing out of time” as seeking a waiver of the statutory thirty-day filing period for petitions for reconsideration.

<sup>23</sup> *Id.*

receipt location.<sup>24</sup> Mr. Garey has failed to explain why he filed late and to show good cause why we should waive the statutory deadline for filing in this case.

5. The U.S. Court of Appeals for the D.C. Circuit has held that the Commission lacks authority to waive or extend the statutory thirty-day filing period for petitions for reconsideration unless the petitioner can show that its failure to file in a timely manner resulted from “extraordinary circumstances indicating that justice would thus be served.”<sup>25</sup> The Commission has held consistently that it does not have authority to waive or extend, *even by as little as one day*, the statutory 30-day filing period for petitions for reconsideration, absent extraordinary circumstances which are not present in the instant case.<sup>26</sup> In addition, courts have long discouraged the Commission from accepting late-filed petitions and supplements.<sup>27</sup> Indeed, in *Reuters, Ltd. v. FCC*, the D.C. Circuit concluded that the Commission acted beyond its lawful authority when it entertained a belated petition for reconsideration.<sup>28</sup> Fireside does not allege that the delay in its filing is attributable to any error or omission by the Commission in giving Fireside notice of the *Fireside Media Order*, as required by *Gardner*.<sup>29</sup> Nor does Fireside demonstrate that its delay otherwise resulted from extraordinary circumstances. We therefore find that Fireside has not met the heavy burden for a waiver of the statutory filing deadline.

6. Mr. Garey filed another petition for reconsideration on October 6, 2008.<sup>30</sup> Even under the circumstances as described by Mr. Garey – *e.g.*, the petition’s titular “request for acceptance out of time” – this version of the petition was filed late under the standards enunciated above. The circumstances surrounding Fireside’s late filing are neither extraordinary nor unique and we cannot conclude that fairness considerations require us to overlook its failure to meet the statutory deadline and consider its

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<sup>24</sup> 47 C.F.R. §§ 0.401, 1.4(f) (“hand-delivered [documents] must be tendered for filing in complete form . . . with the Office of the Secretary before 7 p.m., at 236 Massachusetts Ave, NE., Washington, DC 20002.”).

<sup>25</sup> See *Gardner v. FCC*, 530 F.2d 1086, 1091-92 (D.C. Cir. 1976) (“*Gardner*”) (where late filing of petition seeking reconsideration of Commission decision finding radio station had not violated personal attack rule was substantially due to the Commission’s failure to follow its own rules requiring personal notice of its decision, the Commission abused its discretion in rejecting petition as untimely).

<sup>26</sup> See, *e.g.*, *Virgin Islands Telephone Corporation v. FCC*, 989 F.2d 1231 (D.C. Cir. 1993); *Metromedia, Inc.*, 56 FCC 2d 909 (1975) (distinguishing *Gardner* and finding that the Commission may not waive the thirty day filing period to accept a petition for reconsideration filed one day late); *Ole Brook Broadcasting, Inc., Memorandum Opinion and Order*, 15 FCC Rcd 20644 (2000); Letter from Peter Doyle, Chief, Audio Division, Media Bureau to Henry Cotton, Jamie Patrick Broadcasting, Ltd., 22 FCC Rcd 18610 (2007); Letter from Peter Doyle, Chief, Audio Division, Media Bureau to Martin L. Hensley, 22 FCC Rcd 8377 (2007).

<sup>27</sup> See *Reuters, Ltd. v. FCC*, 781 F.2d 946 (D.C. Cir. 1986) (“*Reuters*”) (express statutory limitations barred the Commission from acting on a petition for reconsideration that was filed after the due date); *Virgin Islands Telephone Corporation v. FCC*, 989 F.2d 1231 (D.C. Cir. 1993) (upholding the Commission’s refusal to entertain a petition for reconsideration, where the petition had been filed one day late, and extenuating circumstances did not prohibit the petitioner from filing within the prescribed time limits); *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192 (D.C. Cir. 2003) (affirming the Commission’s decision not to exercise its discretion to hear late-filed supplements when the petitioner offered no plausible explanation as to why supplemental arguments were not made in its initial petition); see also *Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (1988).

<sup>28</sup> *Reuters*, 781 F.2d at 952.

<sup>29</sup> *Gardner*, 530 F.2d at 1091-92 n.24.

<sup>30</sup> We consider only the content of the petition received on October 6, 2008. Because Mr. Garey did not provide the Commission with a copy of his first late pleading, which he alleges was “left in an unsecured area,” we are unable to discern the difference, if any, between the two documents.

Petition.<sup>31</sup>

**B. The Petition's Arguments Provide No Basis for Reconsideration**

7. Even if we were to address the merits of the arguments presented in the later petition (the only one in the Commission's possession), we see no basis for reconsidering the determination made in the *Fireside Media Order*. Reconsideration is appropriate only where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters.<sup>32</sup> The *Fireside Media Order* concluded that Fireside, as a debtor, demonstrated limited grounds for compromise by showing that its financial condition at the time of the request for compromise left it unable to pay the amounts owed. Moreover, the *Order* twice explicitly stated that the Commission removed the debtor status applicable to Fireside or Mr. Garey.<sup>33</sup> Nothing in the petition for reconsideration persuades us to revisit the *Order's* essential elements, namely, that (1) Fireside owed the funds because it participated in the auction and withdrew high bids; and (2) the Commission properly imposed a bid withdrawal payment pursuant to section 1.2104(g) of its rules.

**1. Fireside's request to amend the *Fireside Media Order*.**

8. The petition contains several requests to amend the *Fireside Media Order* to include additional language. For the reasons we discuss below, Fireside's requests lack merit. As a general matter, we find that the "omitted vital facts"<sup>34</sup> Fireside seeks to add to the *Fireside Media Order* are not relevant to the merits of the Commission's decision; rather, they appear designed to disparage the Commission's Rules and procedures. For example, Fireside asks the Commission to add the following language to the *Fireside Media Order*: "[Fireside Media] has sustained the undeserved, tangible punishment of being placed in a dire holding pattern as a result of this debtor status designation."<sup>35</sup> This request ignores the well-established purpose and operation of our auction rules. We note, first, that the Commission properly established the bid withdrawal payment pursuant to its unquestioned rulemaking authority in establishing a competitive bidding methodology.<sup>36</sup> This particular proceeding arose because Fireside Media bid at auction and, due to its withdrawal of high bids, a bid withdrawal payment was assessed. Based upon the straightforward application of its Rules,<sup>37</sup> the Commission simply imposed upon Fireside Media the same requirement for a bid withdrawal payment as it has imposed upon other similarly-situated bidders who have withdrawn high bids at auctions.

9. Fireside seeks to change certain facts in the *Fireside Media Order*, namely that Fireside incurred a bid withdrawal payment obligation pursuant to our auction rules. In addition, Fireside asserts that the Commission imposed "federal debtor status" upon it, and asks us to "remove this . . . punishment" by amending the *Fireside Media Order* to include a statement to the effect that Fireside had

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<sup>31</sup> This disposition renders moot the balance of the procedural relief sought within the petition, *e.g.*, the request to present oral argument to the Commission. Furthermore, for the reasons explained below, we do not believe that oral argument would materially benefit the Commission's consideration of the issues raised in the petition.

<sup>32</sup> See *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom., Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 C.F.R. § 1.106.

<sup>33</sup> See 23 FCC Rcd at 13138 n.3 (stating that "there is no corresponding debtor status applicable to Fireside or Mr. Garey as a result of Fireside's bid withdrawals in Auction No. 37"); *id.* at 13140 (same).

<sup>34</sup> Petition at 2.

<sup>35</sup> *Id.* at 4.

<sup>36</sup> 47 U.S.C. § 309(j).

<sup>37</sup> 47 C.F.R. § 1.2104(g).

incurred harm as a result of the Commission's application of its bid withdrawal payment rule. There is no basis for any such statement. Assessment of a bid withdrawal payment was neither an "illegal imposition of the debtor status"<sup>38</sup> nor an unconstitutional "due process violation,"<sup>39</sup> as the petition contends. In the *Order*, the Commission found that Fireside made a showing that it was financially unable to pay the debt, so it compromised the debt. Notably, the Commission did *not* predicate compromise upon any finding that the bid withdrawal payment was erroneous or undeserved. We also reject Fireside's requested amendment that the bid withdrawal payment "was imposed by the FCC illegally, in violation of [Fireside's] constitutional right to due process."<sup>40</sup> Those issues were not before the Commission when it considered Fireside's request to compromise the debt, and even if they had been raised, they were not relevant to the decision that was reached.<sup>41</sup> In sum, 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. We therefore conclude that Fireside Media has failed to show that the facts in the *Fireside Media Order* were incorrect or that we should change any language in that *Order*.<sup>42</sup>

## 2. Fireside Media's request for the remaining downpayment.

10. Fireside Media requests a refund of \$8,659 but has failed to make a showing that it is entitled to this refund. In the *Fireside Media Order*, the Commission stated that "Fireside may make a showing, under the Commission's rules, that it is entitled to an additional portion of the \$17,318."<sup>43</sup> Instead of making such a showing, Fireside alleges that its debtor status was "illegally imposed by the FCC absent due process"<sup>44</sup>; that the Commission was denied an opportunity to vote for "complete return of the \$17,318 penalty"<sup>45</sup>; and that the full return of the payment is "just and proper."<sup>46</sup> These allegations are unsupported by a factual showing that Fireside was entitled to the additional portion of the \$17,318. We therefore would deny Fireside's request for a refund if it were properly before us.

## III. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that, pursuant to the authority granted in Sections 4(i) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 309(j), the Petition for Partial Reconsideration filed by Fireside Media on October 6, 2008 is DISMISSED.

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<sup>38</sup> Petition at 5.

<sup>39</sup> *Id.* at 5.

<sup>40</sup> *Id.* at 7.

<sup>41</sup> 47 C.F.R. § 1.106(c).

<sup>42</sup> 47 C.F.R. § 1.106(d).

<sup>43</sup> *Fireside Media Order* at para. 6.

<sup>44</sup> Petition at 9.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

12. IT IS FURTHER ORDERED that the Request for Acceptance Out of Time filed by Fireside Media is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary