

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

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| In the Matter of |) | |
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| DALLAS INGEMUNSON, ASSIGNOR |) | |
| |) | |
| and |) | Facility ID No. 129580 |
| |) | |
| JENNIFER BECKMAN, ASSIGNEE |) | File No. BAP-20110510ADS |
| |) | Permit No. BNP-20001023ADB |
| Application for Assignment of Permit for New |) | |
| (AM) Broadcast Station at Casa Grande, Arizona |) | |

MEMORANDUM OPINION AND ORDER

Adopted: October 16, 2014

Released: October 17, 2014

By the Commission:

1. The Commission has before it a November 3, 2011, Application for Review (“AFR”) filed by Jennifer Beckman (“Beckman”). Beckman seeks review of the Media Bureau’s (“Bureau”) September 30, 2011, decision¹ denying Beckman’s July 30, 2011, “Petition for Partial Reconsideration” (“Petition”) of the Bureau’s conditional grant of the captioned application for consent to the assignment of a new AM station construction permit in Casa Grande, Arizona (the “Permit”), from Dallas Ingemunson (“Ingemunson”) to Beckman (“Assignment Application”). The *Staff Decision* also denied Beckman’s July 5, 2011, request that the Permit be tolled (“Tolling Request”)² and found that the Permit had expired on July 6, 2011. For the reasons set forth below, we dismiss in part and deny in part the Application for Review.³

2. *Background.* Section 73.3598(a) requires that broadcast construction permits specify a period of three years from the date of issuance within which construction shall be completed and an application for license filed.⁴ On March 5, 2008, the Commission adopted changes to the Rules to

¹ *New(AM), Casa Grande, AZ*, Letter, Ref. 1800B3-SS (MB Sep. 30, 2011) (“*Staff Decision*”). See *Broadcast Actions*, Public Notice, Report No. 47586 (rel. Oct. 5, 2011).

² *Letter from John S. Neely, Esq.* (Jul. 5, 2011).

³ We reject as procedurally improper the incorporation by reference and attachment to the AFR of the Petition and the “Supplement to Petition for Partial Reconsideration” (“Supplement”). See AFR at 6 n.5 and Exhibit. The Commission’s rules (“Rules”) do not allow incorporation by reference. Rather an application for review must set forth fully the applicant’s arguments and all underlying facts. See 47 C.F.R §1.115(b). See e.g. *Tamara Radio Licenses of Tampa, Florida, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 7588, 7589 (2010) (“The Commission is not required to sift through an applicant’s prior pleadings to supply the reasoning that our rules require to be provided in the application for review.”); and *Red Hot Radio*, Memorandum Opinion and Order, 19 FCC Rcd 6737, 6746 n.63 (2004) (“Such incorporation by reference is not allowed under our rules.”). Therefore, we will dismiss this portion of the AFR.

⁴ 47 C.F.R. § 73.3598(a).

facilitate broadcast ownership diversity.⁵ These included a provision allowing “eligible entities,” who acquired outstanding construction permits up to an additional “eighteen months from the consummation of the assignment or transfer on control . . . to complete construction”⁶

3. On July 8, 2005, the staff granted the Permit with an expiration date of July 8, 2008, to Green Valley Broadcasters, Inc. (“Green Valley”).⁷ The Permit was then assigned twice, with each assignee receiving an additional 18 months from consummation to complete construction,⁸ culminating in a revised expiration date of July 6, 2011.

4. On May 10, 2011, Ingemunson and Beckman filed the Assignment Application. In it, Beckman claimed to be an eligible entity entitled to a full 18 months to construct the station.⁹ On June 24, 2011, the Bureau staff granted the application,¹⁰ but stipulated that “[C]onsummation of the assignment . . . will not extend the [July 6, 2011] expiration date of the permit.”¹¹

5. On July 7, 2011, the United States Court of Appeals for the Third Circuit vacated the Commission’s “eligible entity” definition and remanded those provisions of the *Diversity Order* that rely on the “eligible entity” definition.¹² On July 25, 2011, in response to *Prometheus Radio*, the Bureau “suspended application of the eligible entity rule provisions and policies in all contexts.”¹³ In so doing, the Bureau established the following processing policy for assignments that were granted, but not final,¹⁴ when the court issued its *Prometheus Radio* mandate:

In all cases in which construction was not completed prior to the original construction permit expiration date, the construction permit is automatically forfeited upon expiration without any further affirmative cancellation by the Commission.¹⁵ . . . The prior extension of a permit pursuant to a non-final application grant will not provide the basis for any additional construction time.¹⁶

⁵ See *In the Matter of Promoting Diversification of Ownership in the Broadcast Services*, Report and Order and Third Notice of Proposed Rulemaking, 23 FCC Rcd 5922 (2008). (“*Diversity Order*”).

⁶ *Id.* at 5963. See also 47 C.F.R. § 73.3598(a).

⁷ File No. BNP-20001023ADB. See *Broadcast Actions*, Public Notice, Report No. 46025 (rel. Jul 13, 2005).

⁸ On June 25, 2008, the staff granted Green Valley’s application for consent to assignment of Permit to Everything Groundwave (“EG”), File No. BAP-20080522ABG, which was consummated on July 7, 2008. On January 5, 2010, the staff granted an application for consent to assignment of the Permit from EG to Ingemunson, File No. BAP-20091118AGH, which was consummated on January 6, 2010.

⁹ Assignment Application, Exhibit 20.

¹⁰ See *Broadcast Actions*, Public Notice, Report No. 47518 (rel. Jun. 29, 2011).

¹¹ On July 1, 2011, Ingemunson and Beckman consummated the assignment.

¹² See *Prometheus Radio Project v. FCC*, 652 F.3d 431, 465-471 (3rd Cir. 2011). (“*Prometheus Radio*”).

¹³ See *Media Bureau Provides Notice of Suspension of Eligible Entity Rule Changes and Guidance on the Assignment of Broadcast Station Construction Permits to Eligible Entities*, Public Notice, 26 FCC Rcd 10370 (MB 2011). (“*Eligible Entity Suspension Public Notice*”).

¹⁴ A granted application becomes final 40 days after public notice of the grant unless a petition for reconsideration or application for review is timely filed, or the Commission otherwise sets aside the grant. See 47 C.F.R. §§ 1.106, 1.115, 1.117. The Bureau indicated in the *Eligible Entity Suspension Public Notice* that, if the grant of an assignment application was final when the Court issues its *Prometheus Radio* mandate, “an assignment of a construction permit to an eligible entity is unaffected” by the court decision.

¹⁵ 47 C.F.R. § 73.3598(e).

¹⁶ *Eligible Entity Suspension Public Notice*, 26 FCC Rcd at 10371.

6. On July 5, 2011, one day prior to the Permit's expiration date, Beckman filed the Tolling Request, indicating that her "counsel is preparing and will file a timely petition for reconsideration of the action withholding the CP extension."¹⁷ She requested that the Bureau "toll the construction period . . . until the petition for reconsideration is resolved as a final order."¹⁸ Subsequently, on July 30, 2011, Beckman filed her Petition, arguing that the Bureau erred in specifying that the Permit would not be extended upon consummation, because Section 73.3598 of the Rules did not bar 18-month extensions to successor eligible entities.

7. On September 15, 2011, the court issued its mandate ("Eligible Entity Mandate") in *Prometheus Radio*. In the September 30, 2011, *Staff Decision*, the Bureau denied Beckman's Petition¹⁹ and Tolling Request, holding that, in light of the *Eligible Entity Suspension Public Notice*, Beckman's reading of Section 73.3598(a) of the Rules was "immaterial" and that the Permit expired on July 6, 2011. The Bureau also rejected Beckman's Tolling Request based on "administrative review"²⁰ because the Petition did not "question the grant of the Permit, but rather the denial of an eligible entity extension."²¹

8. On review, Beckman argues that the grant of the Assignment Application became final on August 8, 2011, prior to the issuance of the Eligible Entity Mandate. She contends that her Petition for Partial Reconsideration did not affect the finality of the assignment because it "did not challenge the Commission's grant as made with regard to finding the parties qualified in all respects concerning the assignment of the CP." Rather, Beckman claims that she sought reconsideration only of "a separate and distinct action of the Bureau withholding an eligible entity extension, which issue is not required to consummate the assignment . . ."²² Thus, Beckman concludes that the *Staff Decision* erroneously applied "non-final application grant or pending application processing standards to Beckman."²³

9. Beckman also contends that the Bureau erred in denying her Tolling Request, stating that "the denial of the eligible entity extension, a matter now under administrative review, is beyond the permittee's control . . ."²⁴ Beckman further argues that the Bureau also erred in rejecting her interpretation of and reliance on the language of Section 73.3598(a) to extend the Permit's construction deadline.²⁵

¹⁷ Tolling Request at 1.

¹⁸ *Id.*

¹⁹ On August 18, 2011, Beckman, without a motion for leave to amend, filed an untimely Supplement to the Petition, arguing that the *Public Notice* did not apply because the Assignment Application reached finality before the mandate was issued. Section 1.106(f) provides that: "No supplement . . . to a petition for reconsideration . . . filed after expiration of the 30 day period [[for filing such a petition], will be considered except upon leave granted upon a separate pleading for leave to file, which shall state the grounds therefor." 47 C.F.R. § 1.106(f) The Bureau did not consider this untimely Supplement in the *Staff Decision*. Because the Supplement was unaccompanied by a motion seeking leave to file, and therefore was procedurally defective, we find the Bureau's failure to dispose of this unauthorized pleading was "harmless error." See also *e.g.*, *Smile FM*, Memorandum Opinion and Order, 29 FCC Rcd 6467 (2014) (affirming the dismissal of a supplement to a petition for reconsideration filed without a motion for leave to amend). Moreover, even if we were to consider the defective Supplement we find Beckman's argument regarding finality of the Assignment Application is without merit, as discussed in Paragraph 10 below.

²⁰ 47 C.F.R. § 73.3598(b)(2) provides that a permit's expiration date may be tolled when "the grant of the permit is the subject of administrative or judicial review."

²¹ *Staff Decision*. at 3.

²² AFR at 5.

²³ *Id.*

²⁴ *Id.* at 8.

²⁵ *Id.* at 9.

10. *Discussion.* We find Beckman's arguments to be meritless.²⁶ In this case, it is undisputed that the Permit was not constructed by its July 6, 2011, expiration date.²⁷ Additionally, the grant of the Assignment Application was non-final as of the issuance of the Eligible Entity Mandate on September 15, 2011, because the Petition remained pending on that date. Therefore, the Bureau correctly rejected Beckman's Petition. We specifically deny Beckman's claim that she accepted in full the grant of assignment, which, she claims, subsequently became a final order, but merely challenged a separate matter, the "ancillary application" of Section 73.3598(a) to her as a qualified eligible entity. Beckman provides no support for this novel contention. Here, grant of the Assignment Application explicitly contained the condition that "consummation of the assignment consented to herein will not extend the expiration date of the permit." Accordingly, the conditional grant could not become final while the Petition challenging it remained pending.²⁸

11. With respect to Beckman's request for tolling of the Permit due to "administrative review,"²⁹ Beckman filed the Tolling Request on July 5, 2011, but did not file the Petition, seeking reconsideration of the denial of the Bureau's refusal to extend the Permit until July 30, 2011. Assuming *arguendo* that we would treat the Petition as falling within the scope of the "administrative review" tolling standard, that filing did not occur until well after the Permit's July 6, 2011, expiration date. Thus, the grounds upon which Beckman seeks relief in the Tolling Request cannot be granted.

12. *Conclusion/Actions.* Upon review of the AFR and the entire record, we affirm the Bureau's action for the reasons stated herein. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended,³⁰ and Sections 1.115(c) and (g) of the Commission's rules,³¹ the Application for Review IS DISMISSED for the reasons stated herein and IS otherwise DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁶ Contrary to Beckman's speculation, in denying her Petition in the *Staff Decision*, the Bureau did not rely on Section 1.110 of the Rules, 47 C.F.R. § 1.110. AFR at 4. Accordingly, we need not respond to her discussion of the Rule. *Id.* at 4-6.

²⁷ 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.). See also *Jet Fuel Broadcasting*, Memorandum Opinion and Order, 25 FCC Rcd 12935, 12939 (2010).

²⁸ There is no "Petition for Partial Reconsideration" authorized in the Rules. The Commission, and the staff, are not swayed by pleading titles and typically treat such filings as Petitions for Reconsideration under 47 C.F.R. § 1.106. See, e.g., *Fireside Media*, 225 FCC Rcd 2453, 2455-56 (2010) (dismissing "Petition for Partial Reconsideration" as untimely under 47 U.S.C. §405 and 47 C.F.R. § 1.106); *WHNR(AM), Cypress Gardens, Florida*, Letter, 28 FCC Rcd 16653, 16656 (MB 2013) (treating "Petition for Partial Reconsideration" under 47 C.F.R. §1.106 and denying it.)

²⁹ See 47 C.F.R. §73.3598(b)(2).

³⁰ 47 U.S.C. §155(c)(5).

³¹ 47 C.F.R. §§1.115(c) and (g).