

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

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| In the Matter of)) Centro Cultural de Mexico en el Condado de) Orange)) Application for a Construction Permit for a New) LPFM Station at Santa Ana, California)) Latino Center for Prevention & Action in Health &) Welfare)) Application for a Construction Permit for a New) LPFM Station at Santa Ana, California) |)) File No. BNPL-20131114BFE Facility ID No. 192477))) File No. BNPL-20131114BNB Facility ID No. 196543))) |
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MEMORANDUM OPINION AND ORDER

Adopted: January 27, 2016

Released: January 28, 2016

By the Commission:

1. We have before us the Application for Review jointly filed on October 13, 2015 (“October AFR”) by LC Media LP and Point Four, LLC (“Petitioners”) seeking review of a Media Bureau (“Bureau”) decision that dismissed the Application for Review filed by Petitioners on August 20, 2015 (“August AFR”)¹ as untimely pursuant to Section 1.115(d) of the Commission’s Rules (“Rules”).² The Bureau rejected Petitioners’ request to waive the filing deadline for the untimely August AFR because Petitioners failed to meet the requirements for a waiver of the Rules.³ The October AFR argues that the Bureau erred in dismissing the August AFR, and also argues that, for the reasons articulated in the August AFR, the Commission should overturn the *Staff Decision*.

2. Petitioners did not state in the August AFR why it was tardy, but now state, without further explanation, that the August AFR was untimely “due to administrative oversight.”⁴ Petitioners

¹ See *LPFM MX Group 34*, Letter, 1800B3-ATS (MB Sep. 14, 2015) (“*Dismissal Letter*”). The untimely August AFR sought Commission review of a Bureau decision that granted the captioned applications of Centro Cultural de Mexico en el Condado de Orange and Latino Center for Prevention & Action in Health & Welfare (collectively, “Applicants”). See *LPFM MX Group 34*, Letter, 30 FCC Rcd 7343 (MB Jul. 20, 2015) (“*Staff Decision*”). The *Staff Decision* also dismissed the mutually-exclusive application filed by Calvary Chapel Huntington Beach d/b/a Refuge Calvary Chapel (“Calvary”). See File No. BNPL-20131112ANS. On August 19, 2015, Applicants and Calvary filed a Settlement Agreement in which Calvary agreed not to seek reconsideration of the *Staff Decision* in exchange for \$2,000 in reimbursement of its application expenses. The Bureau approved the Settlement Agreement on September 1, 2015, and gave public notice of that action on September 11, 2015. See *Broadcast Applications*, Report No. 28568 (MB Sep. 11, 2015).

² 47 C.F.R. § 1.115(d).

³ *Dismissal Letter* at 2-3 (“waiver is only appropriate when: (1) special circumstances warrant a deviation from the general rule; and (2) such deviation better serves the public interest”), citing *NetworkIP v. FCC*, 548 F.3d 116, 125-28 (D.C. Cir. 2008) (“*NetworkIP*”); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“*Northeast*”); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

⁴ October AFR at 2.

also argue for the first time in the October AFR that the untimely August AFR should have been considered because: 1) the Applicants would not have been prejudiced by consideration of a one-day tardy filing; and 2) counsel for Petitioners were not served with a copy of the *Staff Decision* until August 20, 2015.⁵ Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(c) of the Rules bar applications for review that rely “on questions of fact or law upon which the [designated authority issuing the decision] has been afforded no opportunity to pass.”⁶ Accordingly, we will dismiss the October AFR to the extent it relies on these arguments not previously presented to the Bureau.⁷

3. We affirm the dismissal of the August AFR as untimely for the reasons stated in the *Dismissal Letter*. The Bureau correctly determined that Petitioners’ public interest argument alone did not warrant a waiver of Section 1.115(d) because they had not presented any special circumstances which caused Petitioners to miss the filing deadline.⁸ As stated in *NetworkIP*, a public interest argument alone is

⁵ October AFR at 6-7. Petitioners further argue that the October AFR could be considered a Petition for Reconsideration of the Bureau’s approval of the Settlement Agreement and argue that the Settlement Agreement should have been served on them but was not. October AFR at 6. We reject these arguments. The Bureau’s approval of the Settlement Agreement involved no action of any kind with respect to the applications that are the subject of Petitioners’ arguments in the August AFR. There is no basis whatsoever for treating the October AFR as Petitioners suggest, given that it: (a) is titled as an “Application for Review,” without any reference to alternative relief; (b) lacks any substantive objection to the Bureau’s approval of the Settlement Agreement, as required by 47 C.F.R. § 1.106(d)(2); and (c) fails to assert, much less show, that either Petitioner was adversely affected by the Bureau’s approval of the Settlement Agreement, as required by 47 U.S.C. § 405(a) and 47 C.F.R. § 1.106(b)(1). We would also decline to treat this portion of the October AFR as an “alternative request” relating to the Settlement Agreement because the October AFR fails to specify the form of relief sought with respect to the Settlement Agreement, as required by 47 C.F.R. § 1.115(b)(4). Moreover, Petitioners do not cite to any *ex parte* rule that required the Settlement Agreement to be served on them, nor do they demonstrate how they were prejudiced by any failure of service.

⁶ See 47 U.S.C. § 155(c)(5); 47 C.F.R. § 1.115(c); *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003) (upholding Commission’s order dismissing arguments under Section 1.115(c) because that rule does not allow the Commission to grant an application for review if it relies upon arguments that were not presented below).

⁷ As an independent and alternative basis for our action, were we to consider these arguments, we would reject them. Petitioner’s vague claim about “administrative oversight” is patently insufficient to support a waiver of the filing deadline. See *Meredith/New Heritage Strategic Partners, L.P.*, Memorandum Opinion and Consolidated Order, 9 FCC Rcd 6841, 6843 (1994) (Commission will strictly apply the good cause standard for late-filed pleadings that initiate adjudicatory proceedings, including applications for review). *NetworkIP* also rejected the argument that lack of prejudice to a party is an excuse to waive a filing deadline. *Network IP*, 548 F.2d at 128 (“Very few are that prejudiced when a filing occurs a day after a deadline (or a week, or a month, or maybe even a year), as opposed to the day of.”) (emphasis in original). Additionally, the Commission’s failure to promptly serve a party with a copy of an order can be grounds for a waiver of a filing deadline if the Commission’s late service made it impossible for the party to meet a filing deadline. See *Gardner v. FCC*, 530 F.2d 1086, 1091-1092 (D.C. Cir. 1976) (“*Gardner*”). Under *Gardner*, a party seeking such a waiver has the burden to show: (a) when and how it received notice in fact; (b) that the time remaining was inadequate to allow it reasonably to timely file; and (3) that it acted promptly on receiving actual notice. *Id.* at 1092 n.24. Parties typically become aware of the release of decisions in various ways prior to mail receipt. Accordingly, “it will be an extraordinary case . . . where a petitioner can meet this burden.” *Id.* Petitioners fail to satisfy any part of this three-part test, and in fact avoid stating how and when they or their counsel first learned of the *Staff Decision*. We note that the full text of the Bureau’s letter was published on July 20, 2015. See Daily Digest, Vol. 34, No. 136 (rel. July 20, 2015).

⁸ *Dismissal Letter* at 2-3, citing *NetworkIP*, 548 F.3d at 127. Petitioners quote language from a Commission decision predating *NetworkIP* to suggest that a public interest argument alone is sufficient to support consideration of a late-filed application for review. October AFR at 3-4 (citing *Amendment of the Commission’s Rules Regarding the 37.0-38.6 and 38.6-40.0 GHz Bands*, Memorandum Opinion and Order, 15 FCC Rcd 10579, 10580 (2000)). However, in that case the Commission merely rejected a late-filed application for review on both procedural and substantive grounds, and the procedural holding was that a courier’s breakdown did not provide good cause for waiving a one-day delay. See 15 FCC Rcd at 10580. Petitioners also cite to two decisions where the Commission accepted untimely applications for review. See October AFR at 4 n.7, citing *The Polite Society*, Memorandum

(continued....)

not sufficient to support a waiver of a filing deadline; rather, the Commission “*both* ‘must explain why deviation better serves the public interest, *and* articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation.’”⁹ In so holding, the court observed, if an agency only considers the public interest prong, without examining whether special circumstances exist, “we are left with ‘nothing more than a ‘we-know-it-when-we-see-it’ standard,’ and ‘future [parties] – and this court – have no ability to evaluate the applicability and reasonableness of the Commission’s waiver policy.’”¹⁰ Petitioners ignore the core teaching of *NetworkIP* – that satisfying the “special circumstances” waiver prong is the “additional restraint” necessary to ensure “the orderliness and predictability which are the hallmarks of lawful administrative action.”¹¹

4. The *NetworkIP* decision acknowledges that “[w]hen an agency imposes a strict deadline for filings, as the FCC has done, many meritorious claims are not considered; that is the nature of a strict deadline.”¹² We reject Petitioners’ attempt to distinguish the *NetworkIP* decision based on its facts.¹³ As noted in the *Dismissal Letter*, the Court of Appeals stated in *NetworkIP* that the Commission should not accept untimely pleadings in the absence of extremely unusual circumstances, and did not limit its holding to the factual context presented there.¹⁴ Petitioners have failed to show that special circumstances warranting a waiver of Section 1.115(d) existed, and we thus affirm the Bureau’s dismissal of the August AFR as untimely.

5. ACCORDINGLY, IT IS ORDERED that the Application for Review filed by LC Media LP and Point Four, LLC, on October 13, 2015, (1) IS DISMISSED, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(c) of the Commission’s Rules, to the extent that it relies on questions of fact or law not previously presented to the Media Bureau; and (2) otherwise IS DENIED, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(g) of the Commission’s Rules.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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Opinion and Order, 55 FCC 2d 810 (1975), and *High Country Broadcasting Corporation*, Memorandum Opinion and Order, 4 FCC Rcd 1528 (1988). The Bureau correctly declined to follow those cases because they predate *NetworkIP*. See *Dismissal Letter* at 3.

⁹ *NetworkIP*, 548 F.3d at 127, citing *Northeast*, 897 F.2d at 1166 (emphasis in original).

¹⁰ *NetworkIP*, 548 F.3d at 127, citing *Northeast*, 897 F.2d at 1167.

¹¹ *NetworkIP*, 548 F.3d at 127.

¹² *Id.* In this case, we need not address the alleged merits of Petitioners’ public interest arguments due to their failure to demonstrate special circumstances warranting such consideration. See *id.*, 548 F.3d at 126 (noting that the FCC’s Enforcement Bureau characterized counsel’s errors in *NetworkIP* as “difficult to excuse, given that they were easily avoidable, and APCC’s law firm is highly experienced, resourceful, and knowledgeable in communications law”). The same considerations apply here.

¹³ October AFR at 8-10.

¹⁴ *Dismissal Letter* at 2, citing *NetworkIP*, 548 F.3d at 127 (“We have repeatedly “discourage[d] the Commission from entertaining late-filed pleadings ‘in the absence of extremely unusual circumstances.’ . . . this warning . . . applies to *any* FCC decision to accept late pleadings.”) (emphasis in original, internal citations omitted).