

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

In the Matter of)
)
NCE Reserved Allotment Group 14)
)
Florida Community Radio, Inc.)
)
Application to Construct a New Noncommercial) File No. BNPED-20100226AGX
Educational FM Station at Otter Creek, Florida) Facility ID No. 185126
)
and)
)
Citrus County Association for Retarded Citizens,)
Inc.)
)
Application to Construct a New Noncommercial) File No. BNPED-20100226AGR
Educational FM Station at Otter Creek, Florida) Facility ID No. 185070

MEMORANDUM OPINION AND ORDER

Adopted: January 3, 2018

Released: January 4, 2018

By the Commission:

1. We have before us the second application for review (Second AFR) filed by Florida Community Radio, Inc. (FCR),1 attempting to challenge the Commission’s decision declining to award it a construction permit for a new noncommercial education station at Otter Creek, Florida. We dismiss the Second AFR insofar as it raises new arguments that were not previously presented to the Media Bureau (Bureau), and otherwise deny the Second AFR as without merit.

2. As discussed extensively in the AFR Order2, FCR and Citrus County Association for Retarded Citizens (CCARC) filed mutually exclusive applications for construction permits for a new noncommercial educational (NCE) station at Otter Creek, Florida, during the February 2010 NCE filing window.3 After a series of decisions, the construction permit ultimately was awarded to CCARC.4 FCR

1 The Second AFR was filed on September 18, 2017.

2 NCE Reserved Allotment Group 14, Memorandum Opinion and Order, 32 FCC Rcd 2285 (2017) (AFR Order).

3 The February 2010 NCE filing window accepted applications to build construction stations at certain vacant allotments reserved for NCE use. See Media Bureau Announces Filing Window for Vacant FM Allotments Reserved for Noncommercial Educational Use, Public Notice, 24 FCC Rcd 12621 (MB 2009) (Filing Window Public Notice).

4 Comparative Consideration of 37 Groups of Mutually Exclusive Applications, Memorandum Opinion and Order, 26 FCC Rcd 7008, 7024, paras. 42-43 (2011); Comparative Consideration of Seven Groups of Mutually Exclusive Applications, Memorandum Opinion and Order, 30 FCC Rcd 5135, 5142-44, paras. 19-23 (2015) (Second Comparative Order); NCE Reserved Allotment Group 14, Letter Order, Ref. 1800B3-ALV (MB Feb. 29, 2016) (First Staff Decision) (dismissing FCR’s June 15, 2015, petition for reconsideration (First Petition) and denying FCR’s June 15, 2015, petition to deny); Letter Order, Ref. 1800B3-ATS (MB Oct. 26, 2016) (Second Staff Decision) (dismissing in part and denying in part FCR’s March 28, 2016, petition for reconsideration (Second Petition); dismissing amendment to FCR’s application because it impermissibly proposed to serve an allotment that was not available in the 2010 NCE Filings Window; and dismissing FCR’s application as a non-tentative selectee); Order,

(continued....)

filed a petition for reconsideration (Third Petition)⁵ claiming that in the *AFR Order* the Commission failed to address its argument that the Bureau improperly rejected an amendment to its application that sought to enable FCR to receive a construction permit, as well.⁶ In the *First Bureau Order*, the Bureau dismissed the Third Petition as untimely.⁷ In response, FCR filed another petition for reconsideration (Fourth Petition)⁸ arguing—for the first time—that the tardiness of the Third Petition should be excused because the Commission allegedly failed to serve FCR with a copy of the *AFR Order* in violation of Section 0.445(a) of the Rules.⁹ In the *Second Bureau Order*, the Bureau rejected this argument, finding that FCR had not met the requirement for waiving filing deadlines on notice grounds set forth in *Gardner v. FCC*.¹⁰

3. In the Second AFR, FCR repeats its argument that it was entitled to receive a copy of the *AFR Order* under Section 0.445(a); argues, for the first time on review, that it became aware of the *AFR Order* on April 12, 2017;¹¹ and also argues, again, for the first time on review, that Section 1.47(a) of the Rules, and Section 6(d) of the Administrative Procedure Act required that the Commission serve it with a copy of the *AFR Order*, and that two Supreme Court cases compel the FCC to follow its own rules.¹² Also for the first time on review, FCR raises undeveloped claims that dismissal of the Third Petition as untimely infringed its right to equal protection under the U.S. Constitution and reflected an unlawful delegation of authority to the Bureau.¹³ We dismiss the Second AFR to the extent it relies on these arguments which were not previously presented to the Bureau.¹⁴

4. We affirm the dismissal of the Third Petition as untimely for the reasons stated in the *First Bureau Order* and the *Second Bureau Order*, as discussed above, *i.e.*, the Third Petition was untimely filed, and FCR failed to satisfy the requirements for waiving a filing deadline stated in *Gardner*

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32 FCC Rcd at 2287-89, paras. 6-8 (affirming *Second Comparative Order* and *First Staff Decision*); *AFR Order* (dismissing in part and denying in part FCR's November 30, 2016, application for review (First AFR)).

⁵ The Third Petition was filed on April 13, 2017.

⁶ Third Petition at 1-5. *See also Second Staff Decision* at 5.

⁷ *NCE Reserved Allotment Group 14*, Memorandum Opinion and Order, 32 FCC Rcd 3093 (MB 2017).

⁸ The Fourth Petition was filed on May 15, 2017.

⁹ Fourth Petition at 1-4 (citing 47 CFR § 0.445(a) (“Adjudicatory opinions and orders of the Commission, or its staff acting on delegated authority, are mailed or delivered by electronic means to the parties, and as part of the record, are available for inspection in accordance with § 0.453.”)).

¹⁰ *NCE Reserved Allotment Group 14*, Memorandum Opinion and Order, 32 FCC Rcd 6950, 6951, para. 4 (MB 2017) (“a party seeking waiver of the filing deadline has the burden to show: (1) when and how it received notice in fact; (2) that the time remaining was inadequate to allow it reasonably to timely file; and (3) that it acted promptly on receiving actual notice,” citing *Gardner v. FCC*, 530 F.2d 1086, 1092, n.24 (D.C. Cir. 1976)). The Bureau correctly noted that FCR failed to meet any of these requirements. *Second Bureau Order*, 33 FCC Rcd at 6591, para. 4.

¹¹ Second AFR at 2-3.

¹² *Id.* at 3-7 (citing 47 CFR § 1.47(a), 5 U.S.C. § 556(d), and *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954)). FCR fails to provide either a case name or full citation for the other Supreme Court case.

¹³ Second AFR at 2-3, 6.

¹⁴ Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(c) of the FCC's 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.” *See* 47 U.S.C. § 155(c)(5); 47 CFR § 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). Accordingly, we will dismiss this part of the Second AFR pursuant to Section 1.115(c).

based on the arguments properly before us.¹⁵ Accordingly, we deny the Second AFR with respect to those claims not already dismissed.¹⁶

5. Accordingly, IT IS ORDERED that the Application for Review filed on September 18, 2017, by Florida Community Radio, Inc.: (1) IS DISMISSED, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(c) of the FCC'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 FCC's Rules.¹⁷

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁵ Notably, the Third Petition did not acknowledge that it was untimely or argue that FCR had not been served with a copy of the *AFR Order*. FCR also failed to meet the requirements of *Gardner* in the Fourth Petition. It only sought to satisfy *Gardner* in the Second AFR, its third bite at the apple.

¹⁶ In the interest of administrative finality, and as a separate and independent basis for denying the Second AFR, we will briefly address the merits of the arguments raised in the Third Petition, which focused entirely on the Bureau's alleged error in not allowing FCR to amend its application to resolve the mutual exclusivities with CCARC's application, and the Commission's alleged error in not addressing this issue in the *AFR Order*. FCR's entire discussion of this issue in the First AFR consisted of two sentences in its prayer for relief: "The delegated authority also erroneously dismissed FCR amended NCE 340 application to operate on an available reserved NCE channel. FCR's window filed application had been accepted for filing and was still pending when the delegated authority dismissed its amended singleton NCE 340 application without a substantial legal reason for doing so." First AFR at 12. This statement contains no discussion of why the Bureau erred in dismissing the amendment. The burden is on the party seeking review to set forth fully its argument and all underlying relevant facts in the application for review. 47 CFR § 1.115(b)(2). FCR's statement fails to meet that burden because it fails to explain how the Bureau's finding was erroneous, and cites to no authority. Accordingly, there was no error on the part of the Commission in failing to address this argument in the *Order*. See, e.g., *Sprint Corp. v. FCC*, 331 F.3d 952, 960 (D.C. Cir. 2003) (the "FCC need not address every comment, but need only respond in a reasoned manner to those comments that raise significant problems"). In addition, the *Second Staff Decision* clearly explained the reasons for rejecting the amendment and dismissing FCR's application. We hereby affirm the Bureau's determination for the reasons stated therein, specifically that the 2010 NCE Filing Window was solely for applications proposing service on the identified vacant reserved allotments, and the amendment did not propose service on one of those allotments. *Second Staff Decision* at 5 (citing to *Filing Window Public Notice*, 24 FCC Rcd at 1261). Finally, to the extent that FCR again argues that staff or the Commission displayed bias against it (Third Petition at 3), we reaffirm our holding in the *AFR Order*, where we rejected "FCR's allegations [of bias] as without basis in fact." *AFR Order*, 32 FCC Rcd at 2289, para. 9.

¹⁷ 47 U.S.C. § 155(c)(5); 47 CFR § 1.115(c), (g).