

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 Educational FM Station at Otter Creek, Florida) File No. BNPED-20100226AGX Facility ID No. 185126
and)
Citrus County Association for Retarded Citizens, Inc.)
Application to Construct a New Noncommercial Educational FM Station at Otter Creek, Florida) File No. BNPED-20100226AGR Facility ID No. 185070

ORDER ON RECONSIDERATION

Adopted: April 30, 2018

Released: April 30, 2018

By the Commission:

1. We have before us a Petition for Reconsideration (Fifth Petition) filed by Florida Community Radio, Inc. (FCR), seeking reconsideration of the Commission’s order that dismissed in part and otherwise denied the second application for review FCR filed in this proceeding.1 For the reasons stated below, we dismiss the Fifth Petition.

1 NCE Reserved Allotment Group 14, Memorandum Opinion and Order, 33 FCC Rcd 849 (2018) (Second AFR Order) (dismissing in part and denying in part application for review filed by FCR on September 18, 2017 (Second AFR); affirming the denial of FCR’s application for a construction permit for a new noncommercial education (NCE) station at Otter Creek, Florida (FCR Application); and affirming the grant of the mutually exclusive application of Citrus County Association for Retarded Citizens (CCARC) for a construction permit for a new NCE station at Otter Creek, Florida (CCARC Application)); see also Comparative Consideration of 37 Groups of Mutually Exclusive Applications, Memorandum Opinion and Order, 26 FCC Rcd 7008, 7024, paras. 42-43 (2011) (tentatively awarding FCR construction permit); 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) (rescinding tentative selection of FCR Application and tentatively awarding CCARC construction permit); 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) of Second Comparative Order 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) of First Staff Decision; dismissing amendment to FCR Application because it impermissibly proposed to serve an allotment that was not available in the 2010 NCE Filing Window; granting CCARC Application; and dismissing FCR Application as a non-tentative selectee); Memorandum Opinion and Order, 32 FCC Rcd 2285 (2017) (First AFR Order) (dismissing in part and denying in part FCR’s November 30, 2016, application for review (First AFR); affirming Second Comparative Order, First Staff Decision, and Second Staff Decision); Memorandum Opinion and Order, 32 FCC Rcd 3093 (MB 2017) (First Bureau Order) (dismissing as untimely petition for reconsideration filed on April 13, 2017 (Third Petition) of First AFR Order); Memorandum Opinion and Order, 32 FCC Rcd 6950, 6951, para. 4 (MB 2017) (Second Bureau Order) (denying FCR’s petition

(continued....)

2. As an initial matter, the Fifth Petition is untimely. Section 405 of the Communications Act of 1934, as amended, and the FCC's rules (Rules) require any petition for reconsideration to be filed within thirty days of the date upon which the Commission gives public notice of the decision.² In this case, the *Second AFR Order* was released on January 4, 2018, and any petition for reconsideration of that order was due on Monday, February 5, 2018.³ However, the Commission's broadcast database, CDBS, shows that the Fifth Petition was filed on Tuesday, February 6, 2018.⁴ The Commission generally lacks the authority to extend or waive the statutory 30-day filing period for petitions for reconsideration.⁵ Accordingly, we dismiss the Fifth Petition as untimely.

3. Additionally, as a separate and independent basis for dismissal, we conclude that the Fifth Petition fails to satisfy Section 1.106(b)(2) of the Rules, which provides that where the Commission has denied an application for review, a petition for reconsideration will be entertained only if one or more of the following circumstances is present: (1) the petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters, or (2) the petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not—through the exercise of ordinary diligence—have been learned prior to such opportunity.⁶ In the Fifth Petition, FCR fails to advance any reason why the *Second AFR Order* was in error. Instead, FCR introduces arguments that it did not raise in the Third Petition, Fourth Petition, or Second AFR—that the Bureau erred in not requiring CCARC to demonstrate compliance with Section 106 of the National Historic Preservation Act (NHPA), and that the Bureau displayed bias against minority applicants by forcing a different permittee, Urban One Broadcasting Network, LLC (Urban

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for reconsideration filed on May 17, 2017 (Fourth Petition) of *First Bureau Order*). The *Second AFR Order* held that the Bureau correctly dismissed the Third Petition as untimely in the *First Bureau Order*, and correctly affirmed that dismissal in the *Second Bureau Order*. *Second AFR Order*, 33 FCC Rcd at 850-51, para. 4.

² 47 U.S.C. § 405(a); 47 CFR § 1.106(f); 47 CFR § 1.4(b)(2) (“For non-rulemaking documents released by the Commission or staff . . . the release date” is the date of public notice).

³ The thirty-day deadline from the release date fell on Saturday, February 3, 2018, which is considered a holiday. Any petition for reconsideration was therefore due on the next business day, Monday, February 5, 2018. See 47 CFR § 1.4(e)(1) (“The term holiday means Saturday, Sunday, officially recognized Federal legal holidays and any other day on which the Commission’s Headquarters are closed and not reopened prior to 5:30 p.m.”); 47 CFR § 1.4(j) (“Unless otherwise provided . . . if, after making all the computations provided for in this section, the filing date falls on a holiday, the document shall be filed on the next business day.”).

⁴ The Fifth Petition was electronically filed in CDBS. See https://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/forms/prod/cdbsmenu.hts?context=25&appn=101778452&formid=917&fac_num=0. Although the Fifth Petition was dated February 5, 2018 by FCR, the electronic date stamp shows that it was in fact not filed until the next day, February 6, 2018. See http://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/pubacc/prod/leg_det.pl?Application_id=1739277&File_number=BNPED-20100226AGR; see also *R&M Broadcasting Company and Miracle Radio, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability, 26 FCC Rcd 10336, 10339 n.26 (MB 2011) (date on Commission Mail Room date-stamp controls for determining filing date of a pleading).

⁵ See *Reuters Limited v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986) (express statutory limitations barred the Commission from acting on a petition for reconsideration that was filed after the due date); *Virgin Islands Tel. Corp. v. FCC*, 989 F.2d 1231, 1237 (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). See also *Pueblo Radio Broad. Service*, Memorandum Opinion and Order, 6 FCC Rcd 1416 (1991) (dismissing petition for reconsideration that was filed one day late); *Metromedia, Inc.*, Memorandum Opinion and Order, 56 FCC 2d 909 (1975) (same); *Panola Broad. Co.*, Memorandum Opinion and Order, 68 FCC 2d 533 (1978) (same).

⁶ 47 CFR § 1.106(b)(2). See *Fireside Media and Jet Fuel Broad.*, Memorandum Opinion and Order, 27 FCC Rcd 10694, 10696, para 4 (2012).

One), to complete the Section 106 review process.⁷ FCR provides no explanation for why these arguments were not properly presented earlier in the proceeding.⁸ Accordingly, we dismiss the Fifth Petition to the extent it relies on these arguments.⁹

4. Finally, we find that dismissal of the Fifth Petition by the Bureau would have been appropriate under Sections 1.106(p)(1), (2), (3) and (9) of the Rules, which permit the Bureau to act on petitions for reconsideration that “plainly do not warrant consideration by the Commission.”¹⁰ The Commission has decided to act on the Fifth Petition in order to make clear the full Commission’s position on any further requests for reconsideration filed by FCR. The Commission and Bureau have spoken clearly and uniformly with regard to the matters FCR raised in this proceeding and determined that CCARC was properly awarded a construction permit, while FCR’s mutually exclusive application was properly dismissed. FCR has failed to provide any evidence of material error or set forth any valid basis for dismissing the CCARC Application or granting the FCR Application. Accordingly, we hereby direct the staff to dismiss summarily by public notice, citing this *Order on Reconsideration*, any subsequent

⁷ Fifth Petition at 2-3. See *Urban One Broad. Network, LLC*, Letter Order, 30 FCC Rcd 2015 (MB 2015) (permittee acknowledged it did not complete the Section 106 review process and Bureau rejected its argument that permittee’s facilities were “temporary” and thus exempt from Section 106 review), *aff’d* Memorandum Opinion and Order, 31 FCC Rcd 4186 (2016); *recon. dismissed*, Order on Reconsideration, 31 FCC Rcd 31860 (MB 2016), *app. dismissed*, *Urban One Broad. Network v. FCC*, No. 16-1296 (D.C. Cir. Aug. 11, 2017).

⁸ FCR raised this argument regarding the NHPA improperly for the first time in the First AFR. *First AFR Order*, 32 FCC Rcd at 2289, n.31 (dismissing argument because it was not previously presented to the Bureau). FCR did not previously discuss the Urban One proceeding, even though the Commission concluded that proceeding in July 2016, well before the filing of the First AFR, and the D.C. Circuit dismissed the appeal before the filing of the Second AFR. We also note that FCR did raise other bias issues earlier in the proceeding, although the *First AFR Order* and *Second AFR Order* found that those “allegations [of bias] are without basis in fact.” *First AFR Order*, 32 FCC Rcd at 2289, para. 9; *Second AFR Order*, 33 FCC at 851, n.16. It is well settled that in making a claim of bias, a litigant must overcome a presumption of honesty and integrity which accompanies administrative adjudicators. See *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *Riggins v. Goodman*, 572 F.3d 1101 (10th Cir. 2009). Here, FCR has failed to present any indicia of bias on the part of the Bureau or the Commission. This would serve as a separate and independent basis for denying the Fifth Petition were we to consider its merits.

⁹ FCR also states that “it did not receive timely notice of the delegated authority’s adjudicatory decision at all.” Fifth Petition at 3-4. FCR does not specify to which decision it is referring and its reference to “the delegated authority” simply adds to the confusion. In the Fourth Petition and the Second AFR, FCR argued that it was not served with a copy of the *First AFR Order*, which was issued by the Commission. (FCR stated it became aware of the *First AFR Order* on April 12, 2017, the day a petition for reconsideration of that order was due. See *Second AFR Order*, 33 FCC Rcd at 850, para. 3.) FCR never alleged that it was not served with copies of the *First Bureau Order* or the *Second Bureau Order*, which were issued by the Bureau on delegated authority. Moreover, the *Second AFR Order* thoroughly addressed and rejected FCR’s notice argument. *Second AFR Order*, 33 FCC Rcd at 850-51, para. 4. To the extent that FCR is merely repeating this rejected argument, we dismiss the Fifth Petition as repetitious. See 47 CFR § 1.106(b)(3) (“A petition for reconsideration of an order denying an application for review which fails to rely on new facts or changed circumstances may be dismissed by the staff as repetitious”). To the extent FCR is attempting to raise a new argument involving service of another decision on FCR, it is improper to do so without presenting a showing required by 47 CFR § 1.106(b)(2). Finally, to the extent that FCR may be suggesting that it was not served with a copy of the *Second AFR Order*, we note that FCR fails to meet the requirements for a waiver of the filing deadline for a petition for reconsideration. See *Gardner v. FCC*, 530 F.2d 1086, 1092, n.24 (D.C. Cir. 1976) (“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”). Thus, if FCR is arguing that it was not properly served with a copy of the *Second AFR Order*, we would reject its argument.

¹⁰ 47 CFR §§ 1.106(p)(1) (failure to identify any material error, omission or reason warranting reconsideration), 1.106(p)(2) (relying on facts or arguments not previously presented and failure to meet the requirements of Section 1.106(b)(2) or 1.106(b)(3) of the Rules), 1.106(p)(3) (relying on arguments that have been fully considered and rejected by the Commission within the same proceeding), and 1.106(p)(9) (untimely filing).

pleadings filed by FCR with respect to the Commission's decisions declining to award FCR a construction permit for a new noncommercial education station at Otter Creek, Florida.¹¹

5. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 405(a), and Section 1.106 of the Commission's rules, 47 CFR § 1.106, the Petition for Reconsideration filed by Florida Community Radio IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹¹ See, e.g., *Kingdom of God*, Order on Reconsideration, 32 FCC Rcd 3654, 3655, para. 4 and n.14 (2017); *Texas Grace Commc'n*, Memorandum Opinion and Order, 30 FCC Rcd 10545, 10547, para. 4. (2015); *Warren C. Havens*, Order on Reconsideration, 25 FCC Rcd 511, 513 n.22 (2010); *Central Mobile Radio Phone Service, Inc.*, Memorandum Opinion and Order, FCC 86-88, 1986 WL 292748, para. 3 (1986).