

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

In the Matter of)	
)	
Florida Community Radio, Inc.)	File Nos. BNPED-20100226AIK and
)	BMPED-20180926ABN
Construction Permit for Proposed NCE)	
Station DWRBD(FM), Horseshoe Beach, Florida)	Facility ID No. 185158

MEMORANDUM OPINION AND ORDER

Adopted: June 20, 2020

Released: June 22, 2020

By the Commission:

I. INTRODUCTION

1. We have before us an Application for Review (AFR)¹ filed by Florida Community Radio, Inc. (FCR), seeking Commission review of a Media Bureau (Bureau) decision² that denied an extension of tolling of the construction period for FCR’s construction permit (Permit) for a proposed new noncommercial educational (NCE) FM station at Horseshoe Beach, Florida (Station). That denial was based on FCR’s failure to demonstrate that further tolling was appropriate under section 73.3598(d)³ of the Commission’s rules (Rules).⁴ We dismiss the AFR insofar as it raises new arguments that were not previously presented to the Bureau or it attempts to appeal a final order on an untimely basis, and otherwise deny the AFR.

II. BACKGROUND

2. The Bureau issued the Permit on May 13, 2015, for a three-year term ending on May 13, 2018. On April 10, 2018, FCR requested tolling of the construction deadline based on (a) the effects of Hurricane Irma, which allegedly created a lack of commercial space in Horseshoe Beach, and (b) the Commission’s decision to eliminate the main studio rule for radio stations, which altered FCR’s plans for the Station and required further engineering analysis. By letter dated May 2, 2018, the Bureau found that FCR had not shown that the impact of Hurricane Irma on FCR’s plans supported tolling under the Tolling Rule, but that a waiver of the Tolling Rule was warranted based on the Commission’s elimination of the

¹ Application for Review by the Full Commission En Banc (Dec. 4, 2019).

² *Florida Community Radio, Inc.*, Letter Order, 34 FCC Rcd 10278 (MB 2019) (MB 2019) (*Staff Decision*).

³ Section 73.3598 (Tolling Rule) specifies time limits for broadcast stations’ construction permits, but provides that the period allowed for construction will toll when “Construction is prevented due to an act of God, defined in terms of natural disasters (e.g., floods, tornados, hurricanes, or earthquakes).” 47 CFR § 73.3598(b)(1). The Tolling Rule further provides that tolling resulting from an act of God “will automatically cease six months from [the tolling request] unless the permittee submits additional notifications at six month intervals detailing how the act of God continues to cause delays in construction, any construction progress, and the steps it has taken and proposes to take to resolve any remaining impediments.” *Id.* § 73.3598(d).

⁴ *Staff Decision*, 34 FCC Rcd at 10281-82. FCR primarily argued that Hurricanes Irma and Michael had created construction backlogs for contractors qualified to construct the Station, but the *Staff Decision* dismissed that argument as improperly raised for the first time on reconsideration. *Id.* at 10280-81. The AFR does not attempt to raise that argument again.

main studio rule late in the Permit's term, resulting in changes in FCR's construction plans.⁵ Accordingly, the Bureau granted a six-month extension of the Permit ending on November 13, 2018.⁶

3. On September 26, 2018, FCR applied to modify the Permit by specifying operation from an existing tower owned by Alltel Corporation (Alltel Tower).⁷ FCR requested expedited processing, and the Bureau granted the Modification Application on September 28, 2018.⁸

4. On October 11, 2018, Hurricane Michael reached land, causing extensive damage to the Florida panhandle (northwest of Horseshoe Beach – particularly Bay County and Gulf County), but also resulting in a storm surge and flooding in Horseshoe Beach and other parts of Dixie County.⁹ On November 14, 2018, FCR requested tolling based on the impact of the hurricane on its ability to construct the Station, and the Bureau granted that request on November 29, 2018, specifying a new construction deadline ending on May 15, 2019.¹⁰

5. On April 16, 2019, FCR submitted another tolling request, seeking additional time so that it could perform an analysis of whether the Station's power lines should be underground rather than placed on a power pole, as well as a structural analysis of the potential impact of a future Category 5 storm on the Station's antenna.¹¹ Bureau staff asked FCR to provide more specific information to show a direct nexus between Hurricane Michael and FCR's inability to construct the Station within the deadline, but FCR did not provide such information.¹² On June 14, 2019, the Bureau denied FCR's request for further tolling, finding that FCR had not met the standard in the Tolling Rule and that the studies described by FCR were not matters beyond FCR's control, but rather could have been done within the extended construction term.¹³ FCR filed a petition for reconsideration of this denial on July 15, 2019 (Petition), and on November 4, 2019, the Bureau released the *Staff Decision*, dismissing in part and otherwise denying the Petition.¹⁴

⁵ Letter from Albert Shuldiner, Audio Division, Media Bureau to Sylvia Watson, Florida Community Radio (May 2, 2018) (*2018 Staff Letter*).

⁶ *Id.* FCR did not seek reconsideration or review of the *2018 Staff Letter* to the extent it denied tolling based on the effects of Hurricane Irma.

⁷ File No. BMPED-20180926ABN (Modification Application), proposing operation on Antenna Structure Reg. No. 1292874 (Section VII, Question 5 of the application).

⁸ File No. BMPED-20180926ABN. In Exhibit 1 to the Modification Application, titled "Expedited Handling Requested," FCR noted the upcoming Permit deadline and stated, "Applicant ready to start antenna construction" on "pre-existing" tower.

⁹ *See* AFR, Exh. D; Letter from Sylvia Watson, Florida Community Radio, to FCC Secretary Marlene Dortch (Nov. 14, 2018).

¹⁰ Letter from Albert Shuldiner, Audio Division, Media Bureau to Sylvia Watson, Florida Community Radio (Nov. 29, 2018) (noting that the tolling request was submitted by email on October 24, 2018, but not officially filed until the letter was received by the Secretary of the FCC on November 14, 2018).

¹¹ Email from Sylvia Watson, President, Florida Community Radio, Inc. to Marlene H. Dortch, Secretary, Office of the Secretary, FCC, April 16, 2019 (2019 Request).

¹² *Staff Decision*, 34 FCC Rcd at 10279 (FCR did not respond to a Bureau email sent on April 25, 2019, and ultimately responded to a Bureau follow-up telephone call by essentially repeating its original request in an email sent on June 11, 2019).

¹³ Letter from Albert Shuldiner, Audio Division, Media Bureau to Sylvia Watson, Florida Community Radio, Ref. 1800B3-VM (June 14, 2019).

¹⁴ *Id.* at 2-3.

6. In its AFR filed on December 4, 2019, FCR for the first time claims that further tolling is warranted because the Alltel Tower site is “located inside a FEMA designated floodplain area”¹⁵ and, pursuant to Executive Order 11988,¹⁶ “the FCC is required as a matter of law to encourage and provide appropriate guidance to a permittee, which includes evaluating the effects of the permittee proposals in floodplains, especially when such alternative steps being proposed by the permittee are meant to reduce or mitigate the risk of damage in anticipation of an act of God.”¹⁷ FCR also argues that the Bureau erred in the *2018 Staff Letter* when it denied tolling based on FCR’s claims involving Hurricane Irma.¹⁸ Finally, FCR argues that the Bureau interpreted the Tolling Rule too narrowly and requests that the Commission waive the Tolling Rule to allow FCR more time to plan how to “reduce or mitigate the risk of damage in a FEMA designated floodplain area in anticipation of an act of God,” consistent with Executive Order 11988.¹⁹

III. DISCUSSION

7. We reject the AFR’s attempt to raise new matters that the Bureau never had the opportunity to address – specifically, the claims that the Alltel Tower is in a floodplain and that Executive Order 11988 is therefore controlling.²⁰ This includes FCR’s new request for a waiver set forth in its AFR, which differs from its prior waiver requests because it is based on the new argument involving the floodplain claim and Executive Order 11988.²¹ We dismiss this new argument as procedurally barred

¹⁵ AFR at 4.

¹⁶ Executive Order 11988, 42 Fed. Reg. 26951 (May 25, 1977) (requiring executive agencies take action to reduce the risk of flood loss, minimize the impact of floods on human safety, health and welfare, and restore and preserve the benefits of floodplains to the environment).

¹⁷ AFR at 4. FCR notes that the Commission’s Rules “require[] the submission of an [environmental assessment] for facilities that are being constructed in a FEMA designated floodplain area.” AFR at 4-5.

¹⁸ See *supra* para. 2 and AFR at 5 (“the delegated authority never granted FCR a tolling extension . . . during the period of time that hurricane Irma hit . . . Horseshoe Beach, Florida in September of 2017. . . . [This] was a qualifying tolling event . . .”).

¹⁹ AFR at 6.

²⁰ On alternative and independent grounds, we reject these arguments on the merits. FCR never showed that the Alltel Tower is in a floodplain, and our review of FEMA flood maps indicates that the Alltel Tower is in an “Area of Minimal Flood Hazard.” See FEMA flood map 12029C0295D (Jan. 18, 2019), accessed through FEMA Flood Map Service Center: Search By Address, <https://msc.fema.gov/portal/search?AddressQuery> (coordinates -83.182917, 29.549258) (May 14, 2020). The relevant guidelines for interpreting Executive Order 11988 recommend use of existing resources, including FEMA flood maps, when assessing whether a proposed action is in a floodplain. FEMA, *Guidelines for Implementing Executive Order 11988, Floodplain Management, and Executive Order 13690, Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input* at 49 (Oct. 8, 2015), accessed at <https://www.fema.gov/media-library/assets/documents/110377> (May 14, 2020). We also reject FCR’s claim that an environmental assessment was required for its proposed facilities because (a) the Alltel Tower is not in a floodplain, (b) FCR certified in the Modification Application (Section VII, Question 18) that an environmental assessment was not needed for that application, and (c) adding a new antenna and related wiring to an existing tower (even if it were located in a floodplain) normally would not require an environmental assessment, assuming the configuration complied with the FCC’s limits for human exposure to RF radiation, as FCR certified was the case. See 47 CFR § 1.1306, Note 1; Modification Application, Exh. 24. For all of these reasons, the Tolling Rule is the only relevant standard here, and the Bureau correctly followed that standard in this case.

²¹ On alternative and independent grounds, we reject FCR’s new request for a waiver set forth in its AFR. As shown in the preceding footnote, FCR’s claims are factually and legally incorrect, as well as inconsistent with FCR’s certifications in the Modification Application. Even if the tower site had been in a floodplain, FCR has made no demonstration why it should not have been required to account for the requirements applicable under the Commission’s rules to floodplain sites in planning for timely construction. The Tolling Rule was designed “to establish an incentive for all potential applicants to plan construction carefully even prior to applying for a permit

(continued....)

under section 5(c)(5) of the Communications Act of 1934, as amended, and section 1.115(c) of the Rules.²²

8. We also dismiss the AFR to the extent it attempts to re-introduce as an issue for Commission review the Bureau's decision in the *2018 Staff Letter* to deny tolling for Hurricane Irma.²³ As the *Staff Decision* noted, the *2018 Staff Letter* has been a final order since June of 2018.²⁴ Thus, FCR's attempt to address that order in its AFR is untimely.²⁵

9. We deny the remainder of the AFR, which claims that the Bureau erred in deciding that FCR failed to demonstrate that additional tolling was warranted under the Tolling Rule.²⁶ FCR's arguments about its plans to undertake studies about how best to proceed with construction do not satisfy section 73.3598(d) because they involve future potential acts of God, not an act of God that has impeded construction.²⁷ Specifically, subsection (d) of the Tolling Rule, which applied to any potential extension of tolling beyond the original six months of tolling due to Hurricane Michael, required a showing by FCR detailing how the hurricane "continues to cause delays in construction, any construction progress, and the steps it has taken and proposes to take to resolve any remaining impediments."²⁸ FCR made no showing in its request for a tolling extension that Hurricane Michael continued to cause delays in construction,²⁹ and in fact has never claimed that Hurricane Michael caused the Alltel Tower to lose power, be flooded, or sustain any type of damage. Also, as noted in the *Staff Decision*, FCR also has not shown that it ever

(Continued from previous page) _____

and, once the permit is received, to bring to the construction process the same degree of urgency brought to other business endeavors." *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes*, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17539, para. 36 (1999). FCR has failed to show special circumstances warranting further relief than the additional time allowed for the Station's construction after the initial three-year construction deadline passed. Based on our review of the record, we find that applying the Tolling Rule as the Bureau did in this case is consistent with the fundamental public interest in expediting new broadcast service and preventing the warehousing of spectrum. *Id.*, para. 35. For these reasons, a waiver of the Tolling Rule would not be warranted. *See NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-28 (D.C. Cir. 2008) (citing *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990)) (a rule waiver is appropriate only if both (a) special circumstances warrant a deviation from the general rule, and (b) such deviation better serves the public interest).

²² 5 U.S.C. § 155(c)(5) ("No such application for review shall rely on questions of fact or law upon which the panel of commissioners, individual commissioner, employee board, or individual employee has been afforded no opportunity to pass."), and 47 CFR § 1.115(c) ("No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.").

²³ *See* AFR at 5 and *supra* para. 2.

²⁴ *Staff Decision*, 34 FCC Rcd at 10279 n.6. FCR does not address the fact that the *Staff Decision* found this argument was untimely raised in the Petition. However, as a separate and independent basis for denying the AFR, we affirm the Bureau's refusal to consider this argument because it was untimely and deny the AFR to extent it relies on this argument. *See NCE Reserved Allotment Group 14*, Memorandum Opinion and Order, 33 FCC Rcd 849, 850-51, para. 4 (2018) (affirming Media Bureau dismissal of untimely petition for reconsideration and denying application for review raising arguments raised in untimely petition); *Continental Media Group, LLC*, Memorandum Opinion and Order, 32 FCC Rcd 4187 (2017) (affirming Media Bureau dismissal of procedurally defective petition for reconsideration and denying application for review of dismissal decision).

²⁵ 47 CFR § 1.115(d).

²⁶ *See, e.g.*, AFR at 6 ("47 CFR § 73.3578(d) [was] too narrowly interpreted by the delegated authority").

²⁷ *Staff Decision*, 34 FCC Rcd at 10281-82.

²⁸ *See supra* note 3.

²⁹ *See supra* note 4 (explaining that FCR improperly raised for the first time on reconsideration the argument that Hurricanes Irma and Michael created construction backlogs for contractors and that FCR did not attempt to raise that argument again in its AFR).

made any construction progress.³⁰ Finally, FCR has not shown any impediments caused by Hurricane Michael that need to be resolved, but instead now predicates its argument on potential future acts of God. For these reasons, we find that the Bureau properly interpreted and applied the Tolling Rule to FCR's request for additional tolling.

IV. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED** that the Application for Review filed on December 4, 2019, 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; (2) **IS DISMISSED**, pursuant to section 1.115(d) of the FCC's Rules, to the extent it is untimely; and (3) 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.³¹

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁰ *Staff Decision*, 34 FCC Rcd at 10281-81.

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