



Federal Communications Commission
Washington, D.C. 20554

July 26, 2011

In Reply Refer to:
1800B3-DEB

Mr. Daniel Everett
15 Boardman Place, Suite 2
San Francisco, CA 94103

Dawn M. Sciarrino, Esq.
Sciarrino & Shubert, PLLC
5425 Tree Line Drive
Centreville, VA 20120

In re: KUSF (FM), San Francisco, CA
University of San Francisco
Facility ID No. 69143
BPED-20110318AFJ

Petition for Reconsideration

Dear Mr. Everett and Ms. Sciarrino:

This letter is in response to the Mr. Daniel Everett's ("Everett") May 19, 2011, Petition for Reconsideration (the "Petition") of the staff's April 12, 2011, grant of minor change application BPED-20110318AFJ (the "Application") for KUSF(FM), San Francisco, California (the "Station"). For the reasons set forth below, we dismiss the Petition.

Background. On March 18, 2011, the University of San Francisco (the "Licensee") filed the Application seeking to modify the Station's transmitter site and technical facilities. The Application was unopposed and was granted by the staff on April 12, 2011.¹ On May 19, 2011, Everett filed the Petition, arguing that the Licensee breached a contract it had entered into with him to broadcast on the Station in conjunction with his graduate school studies.² He requests that the Commission order a hearing based on his breach of contract claim.³ Everett acknowledges that the Petition is untimely, but indicates in a "Petition for Leave from Filing Deadline and Motion for Consideration of Circumstances Prohibiting Petitioner's Involvement in Previous Filing" ("Extension Petition") that he attempted to file the Petition by courier on May 16, 2011, the last day for filing petitions for reconsideration.⁴ Everett claims that he was prevented

¹ *Public Notice* of the grant was released on April 15, 2011. See *Broadcast Actions*, Public Notice, Report No. 47466 (Apr. 15, 2011).

² According to Everett, the Licensee agreed to provide him a time slot from 7:30-8:00 p.m. on Monday nights. He argues that the change in transmitter location will cut off his ability to use the station and airtime as an educational resource. Petition at 4. However, Everett also indicates that he received a letter on January 19, 2011, indicating that his contract had been terminated. Petition at 16.

³ The Petition contains no certificate of service, and it does not appear that a copy of the Petition was served on the University, as required by 47 C.F.R. § 1.106(f).

⁴ See 47 U.S.C. § 405 and 47 C.F.R. § 1.106(f) (petitions for reconsideration must be filed within 30 days of the release of Public Notice of the action challenged).

from doing so because the Office of the Secretary's telephone voice message provided incorrect filing information.⁵ Everett also indicates that he did not participate in this proceeding previously because he initially sought to enjoin the proposed site relocation in a local court. That filing, however, was dismissed for lack of jurisdiction.⁶

Discussion. A petition for reconsideration must be filed within thirty days of the date upon which the Bureau gives public notice of the decision complained of.⁷ This thirty day filing period is statutory and the Commission has consistently held that it is without authority to extend or waive the thirty-day filing period for filing petitions for reconsideration⁸ except in "extraordinary circumstances."⁹ Here, the Bureau gave public notice of the grant of the Application on April 15, 2011; any petition for reconsideration of that action, therefore, was due on Monday, May 16, 2011. Everett did not file the Petition until May 19, 2011.

Everett argues that there is good cause for accepting the late-filed Petition because the Commission was responsible for the late-filing by providing an incorrect location for hand-delivered filings. We disagree. It is true that in *Gardner*, the Court of Appeals for the District of Columbia Circuit¹⁰ fashioned a limited exception to the thirty day filing period for the "extraordinary circumstance" where the late-filing is due to the Commission's failure to give a party timely notice of the action for which reconsideration is sought.¹¹ However, *Gardner* is limited to situations where the late-filing is "substantially due to the Commission's failure to follow its own rules requiring personal notice of the decision."¹² Everett was not entitled to personal notice of the grant of the Application, and he alleges no procedural errors committed by the Bureau. Moreover, the correct filing location for hand-carried documents is clearly set forth in Section 0.401(a)(1)(ii) of the Commission's Rules (the "Rules").¹³ That the Office of the Secretary might have listed erroneous

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⁵ Extension Petition at 2. Everett claims that, on May 16, 2011, when attempting to locate the proper location for filing the Petition, he "called the Office of the Secretary's telephone voice message," which "indicated that th place for hand-delivered filings was on Massachusetts Avenue . . . This information is incorrect and Petitioner attempted to file at that address on the filing deadline date but was unable to do so because the address was actually on 445 12th Street. *Id.*

⁶ *Id.*

⁷ 47 U.S.C. § 405; 47 C.F.R. § 1.106(f).

⁸ *See Reuters Ltd. v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986); *Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976).

⁹ *Gardner v. FCC*, 530 F.2d 1086, 1091 (D.C. Cir. 1976).

¹⁰ 530 F.2d at 1090-91.

¹¹ *See, e.g., Letter to Amy Meredith*, 25 FCC Rcd 4714, 4715 (MB 2010).

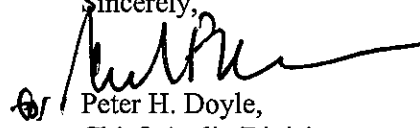
¹² *Letter to Lee G. Petro, Esq. from Peter Doyle*, 25 FCC Rcd 2759, 2761 (MB 2010); *see also Fireside Media*, 25 FCC Rcd 2453, 2456 (2010) (not excusing licensee for filing petition for reconsideration after thirty day filing period because, in part, licensee did not demonstrate that "the delay in its filing is attributable to any error or omission by the Commission in giving [licensee] notice of the [Order]").

¹³ *See* 47 C.F.R. § 0.401(a)(1)(ii) ("Hand-carried documents should be delivered to the Secretary's Office at 445 12th Street, SW., Washington, DC 20554.") The Massachusetts Avenue location for hand deliveries was permanently closed in December of 2009. *See FCC Announces Change in Filing Location for Paper Documents* Public Notice, 74 FR 68543 (Dec. 28, 2009).

information in a recorded message cannot override the requirements promulgated in the Rules.¹⁴ Consequently, the Petition will be dismissed.¹⁵

Additionally, were we to consider the merits of the Petition, we would deny it. The Petition alleges that the licensee breached a contract for airtime with Everett. Reconsideration is warranted only if the Petitioner sets forth an error of fact or law, or presents new facts or changed circumstances which raise substantial and material questions of fact that otherwise warrant reconsideration of the prior action.¹⁶ None of the allegations made therein pertain to the facilities or location proposed in the Application; Everett does not allege that the Commission erred in granting the Application, nor does he show new facts or changed circumstances that otherwise warrant reconsideration. Moreover, the Commission has consistently held that parties should seek redress for private contractual disputes in courts of competent jurisdiction.¹⁷ Everett has not provided evidence of an injunction or a stay issued by any court against the relocation of the Station's transmission facilities. In the absence of such a court order, the Commission has routinely acted favorably on facility modification applications pending resolution of private disputes.¹⁸ We note, however, that Commission grant of a minor modification application merely finds that the proposal does not violate the Communications Act of 1934, as amended (the "Act"), and the Commission's Rules and policies. As such, it is permissive only and does not prejudice any relief to which Everett may ultimately obtain in State court.¹⁹

Conclusion/Action. Accordingly, for the reasons set forth above, Daniel Everett's May 19, 2011, Petition for Reconsideration IS DISMISSED.

Sincerely,

Peter H. Doyle,
Chief, Audio Division
Media Bureau

cc: The University of San Francisco

¹⁴ See, e.g., *Malkan FM Associates v. FCC*, 935 F.2d 1313 (D.C. Cir 1991); *Schweiker v. Hansen*, 450 U.S. 785, 790 (1981) (petitioner's reliance on erroneous staff advice does not estop agency from requiring compliance with valid regulation).

¹⁵ In light of this action, we need not address the argument regarding Everett's failure to participate in the prior stage of this proceeding.

¹⁶ See 47 C.F.R. § 1.106.

¹⁷ See *John F. Runner, Receiver (KBIF)*, Memorandum Opinion and Order, 36 RR 2d 773, 778 (1976); *Decatur Telecasting, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 8622 (1992).

¹⁸ See, e.g., *H. Edward Dillon*, Memorandum Opinion and Order, 94 FCC 2d 203 (1973) (Commission will not delay action on an involuntary assignment application where state appellate court refused to grant stay of receiver's appointment and specifically authorized the receiver to close the sale).

¹⁹ See *Lifeline Ministries, Inc.*, Letter, 25 FCC Rcd 8405, 8406 (MB 2010) (affirming staff decision denying informal objection to minor modification application on grounds that the Commission is not the proper forum for the resolution of private contractual disputes and that action on the application would not impede the parties from seeking redress in a local court of competent jurisdiction).