



Federal Communications Commission
Washington, D.C. 20554

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In Reply Refer to:
1800B3-AJR

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In re: **WGBH(FM), Boston, MA**
Facility ID No. 70510
File No. BRED-20131202BIA

WCRB(FM), Lowell, MA
Facility ID No. 23441
File No. BRH-20131202BIR

Petition for Reconsideration

Dear Counsel:

We have before us a Petition for Reconsideration (“Petition”) filed September 19, 2014, by the Committee for Community Access (“CCA”). The Petition seeks reconsideration of the Media Bureau’s (“Bureau”) grant of the referenced applications (“Applications”) filed by WGBH Educational Foundation (“Foundation”) to renew the licenses for noncommercial educational (“NCE”) Stations WGBH(FM), Boston, Massachusetts, and WCRB(FM), Lowell, Massachusetts (the “Stations”),¹ over the objection of CCA.² For the reasons set forth below, we deny in part and dismiss in part the Petition.³

Background. On December 2, 2013, the Foundation filed the Applications to renew the Stations’ licenses. Under Section 309(d)(1) of the Communications Act of 1934, as amended (the “Act”), petitions to deny must “be supported by affidavit of a person or persons with personal knowledge” of the factual allegations made in the Petition,⁴ and, in this case, had to be filed, complete with any supporting affidavits, by March 4, 2014.⁵ CCA filed a Petition to Deny the Applications on March 4, 2014, but did

¹ The Foundation acquired Station WCRB(FM) on November 30, 2009, pursuant to the grant of an assignment application. See File No. BALH-20090928AHR. Although WCRB(FM) is licensed on a nonreserved FM band channel, the Foundation operates WCRB(FM) as an NCE station. See File No. BRH-20131202BIR at Exhibit 8.

² Philip R. Olenick, Esq., and Eve Pogoriler, Esq., Letter, Ref. 1800B3-JFS (Aug. 20, 2014) (“Letter Decision”).

³ The Foundation filed an Opposition to Petition for Reconsideration on September 29, 2014. CCA filed a Reply to the Opposition on October 6, 2014.

⁴ 47 U.S.C. § 309(d)(1).

⁵ See 47 C.F.R. §§ 73.3516(e) and 73.3584(a) (providing that petitions to deny an application for renewal of license must be filed “by the end of the first day of the last full calendar month of the expiring license term”). Because the Stations’ licenses were set to expire on April 1, 2014, the filing deadline would have been March 1, 2014. However,

not submit a supporting affidavit until March 6, 2014. CCA requested that the Commission excuse its error because the untimely filing would not cause any prejudice to the Foundation.

In the *Letter Decision*, the Bureau declined to excuse CCA's late filing⁶ but treated the Petition to Deny as an informal objection under Section 73.3587 of the Rules.⁷ It then denied the objection and granted the Applications, finding that: (1) the Foundation's change of program format for WGBH(FM) should not be examined in this case; (2) the Foundation did not delegate station programming decisions to an extent that is inconsistent with its licensee obligation; and (3) whether WGBH(FM) solicited membership fees for programming that was subsequently discarded is a private dispute that is beyond the Commission's regulatory jurisdiction.

In its Petition, CCA alleges that the Bureau erred by: (1) not recognizing that it had discretion to accept a late-filed affidavit and abusing this discretion by treating CCA's Petition to Deny as an informal objection; (2) incorrectly summarizing CCA's format-related complaints; and (3) relieving the Foundation of the burden of proof on whether or not it had abdicated responsibility for its programming. Accordingly, CCA requests that the Bureau reconsider the grant of the renewals in this proceeding and designate the Applications for hearing.

In its Opposition, the Foundation argues that CCA does not have standing to file a petition for reconsideration because CCA does not have status as a formal party in this proceeding and has not shown that its interests are "adversely affected" by the *Letter Decision*. In its Reply, CCA reiterates that it has made a sufficient showing to justify acceptance of its late-filed supporting affidavit and designation of the Applications for hearing.

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order, or raises additional facts, not known or existing at the time of the petitioner's last opportunity to present such matters.⁸ CCA has not met this burden.

Section 405(a) of the Act states that any party to an order, decision, report, or action, or any other person aggrieved or whose interests are adversely affected, may petition for reconsideration.⁹ To qualify

that date was a Saturday. Under these circumstances, the filing deadline became the next day when the Commission's headquarters were open. *See* 47 C.F.R. § 1.4(j). In this case, the next day when the Commission was open was Tuesday, March 4, 2014, because the federal government was closed on Monday, March 3, 2014, due to inclement weather.

⁶ *See Letter Decision* at 3, citing *NetworkIP, LLC v. FCC*, 548 F.3d, 116, 127 (D.C. Cir. 2008) ("*NetworkIP*") (finding that waiver of a filing deadline was arbitrary and capricious because the Commission had not shown that (1) special circumstances warrant a deviation from the general rule and (2) such deviation would better serve the public interest).

⁷ 47 C.F.R. § 73.3587.

⁸ 47 C.F.R. § 1.106(c)-(d). *See also WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966) ("*WWIZ*").

⁹ 47 U.S.C. § 405(a).

as a party, a petitioner for reconsideration of the grant of a renewal application must have filed a valid petition to deny against the application.¹⁰

Although CCA claims that the Bureau erred by not recognizing that it had the discretion to accept a late-filed affidavit and abused this discretion by treating the Petition to Deny as an informal objection, we disagree. We find that it was not an abuse of discretion and was in fact consistent with precedent¹¹ to treat the Petition to Deny as an informal objection because CCA had not demonstrated that special circumstances warranted deviation from Section 73.3584(a) of the Rules.¹² CCA has not shown a good reason why it was not possible to participate as a formal party earlier in the proceeding by filing a complete and timely petition to deny by the filing deadline. Instead, CCA waited until the last day to file the Petition to Deny and did not cure the deficiency until after the deadline had passed. We therefore will deny the Petition to the extent that it challenges the Bureau's characterization of the March 4, 2014, filing as an informal objection.

However, with respect to the other substantive issues raised in the Petition, CCA lacks standing because, as an informal objector, it is not a "party to the proceeding" within the meaning of Section 405 of the Act and Section 1.106 of the Rules.¹³ Accordingly, we dismiss the Petition to the extent that it challenges the Bureau's substantive findings.¹⁴

Moreover, even if we were to consider CCA's arguments on the merits, we would still deny the Petition. With respect to CCA's contention that the Bureau misstated some factual details regarding the format-related complaints, we agree. Specifically, the Bureau stated in the *Letter Decision* that the Foundation had moved jazz programming from WGBH(FM) to WRCB(FM)¹⁵ when in fact the

¹⁰ See *University of North Carolina*, Memorandum Opinion and Order, 4 FCC Rcd 2780 (1989); *Montgomery County Broadcasting Corporation*, Memorandum Opinion and Order, 65 FCC 2d 876 (1977).

¹¹ See *Dick Broadcasting Company, Inc.*, Memorandum Opinion and Order 8 FCC Rcd 3897 (1993) (finding that the staff properly treated a petition to deny a renewal application as an informal objection because the petition did not include a timely filed affidavit from a listener or resident of the station's service area and dismissing a petition for reconsideration filed by the same entity for lack of standing).

¹² While CCA claimed that it was unfamiliar with the Commission's procedural requirements because it had not participated in Commission proceedings in a number of years, this does not constitute special circumstances that would warrant a waiver of Section 73.3584(a) of the Rules. See, e.g., *APCC Services, Inc. v. CCI Communications, LLC*, Order on Review, 28 FCC Rcd 564, 571 (2013), citing *Profit Enterprises, Inc.*, Forfeiture Order, 8 FCC Rcd 2846 (1993) ("parties appearing before the Commission . . . are charged with knowledge of its rules").

¹³ See *David Ryder*, Letter, 24 FCC Rcd 10874, 10875 (MB 2009) (stating that "a 'nonparty' participating earlier in the proceeding as an informal objector is without standing to seek reconsideration").

¹⁴ As a related matter, CCA argues that *NetworkIP* is an outlier from general procedural law and should be limited to its facts. See CCA Reply at 1-3. We disagree. *NetworkIP* follows *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990), and together the cases establish the standard for waiver of Commission rules that has been applied in numerous cases. See, e.g., *Columbia, Missouri*, Memorandum Opinion and Order, 29 FCC Rcd 6406 (2014) (finding that waiver of the rule for reserving a nonreserved band FM channel for noncommercial educational use is not warranted because of a lack of special circumstances); *Totally Jesus Network, Inc.*, Memorandum Opinion and Order, 29 FCC Rcd 6414 (2014) (determining that request for waiver of deadline for electronically filing applications for new noncommercial educational FM stations was properly rejected in spite of an over-night outage of the Commission's website because the filing deadline had been extended and the petitioner's circumstances were not unique).

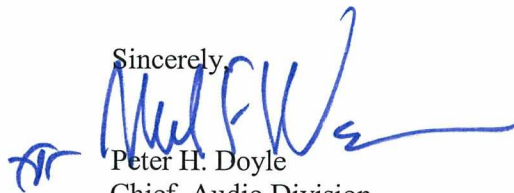
¹⁵ See *Letter Decision* at 2.

Foundation had moved classical music programming from WGBH(FM) to WRCB(FM). However, we find that this misstatement of fact is a “harmless error” because the Bureau was correct that listener disagreements regarding changes in program format do not provide a basis for denying a license renewal application.¹⁶

Finally, regarding CCA’s contention that the Bureau improperly placed the burden on CCA to show that the Foundation had improperly delegated programming responsibility to the Stations’ management, we disagree. Consistent with well-established precedent, the initial burden was on CCA to raise a “substantial and material question of fact.”¹⁷ CCA simply did not meet this burden because the Bureau found that the Foundation had sufficiently explained that the evidence relied upon was taken out of context and did not reflect an improper delegation of control of the Station’s programming. To the extent that CCA believes that it was improper of the Bureau to accept the Foundation’s explanation, CCA is rearguing what the Bureau previously rejected without presenting any new evidence or changed circumstances that would otherwise warrant reconsideration.¹⁸

Conclusion/Actions. Accordingly, the Petition for Reconsideration filed by the Committee for Community Access IS DENIED to the extent indicated and IS DISMISSED in all other respects.

Sincerely,



Peter H. Doyle
Chief, Audio Division
Media Bureau

¹⁶ See *WNCN Listeners Guild v. FCC*, 450 U.S. 582 (1981) (upholding Commission reliance on market forces, rather than licensing procedures, to influence licensee format and programming decisions); *Mr. Rod Kovel and John W. Zucker, Esq.*, Letter, 23 FCC Rcd 1884 (MB 2008) (rejecting license renewal objections based on program format issues).

¹⁷ See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (providing that informal objections must “allege properly supported specific facts that, if true, would establish a substantial and material question of fact that grant of the application would be inconsistent with the public interest”).

¹⁸ See *WWIZ*, 37 FCC at 686 (reconsideration need not be granted merely to reargue matters previously considered and resolved).