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In re: **WCAI(FM), Woods Hole, Massachusetts**
Facility ID No. 8566
File No. BPED-20130809ABZ

Petition for Reconsideration

Dear Applicant and Counsel:

We have before us a Petition for Reconsideration ("Petition") filed by Cape Cod Regional Technical High School ("WCCT") on October 18, 2013, seeking reconsideration of the September 13, 2013, grant of the above-referenced application for a minor change to a licensed facility ("Application") of WGBH Educational Foundation ("WGBH").¹ We also have before us an Opposition to the Petition filed by WGBH on October 30, 2013 ("Opposition"). For the reasons stated below, we deny the Petition.

Background. On October 27, 2009, WGBH filed an application to modify noncommercial educational station WCAI(FM), Woods Hole, Massachusetts, to increase its ERP to 12.5 kW, with circular polarization and a different directional antenna pattern.² This minor change application was granted on January 5, 2010 ("Construction Permit").³ The Construction Permit was set to expire on August 17, 2013.⁴ On August 8, 2013, WGBH surrendered the Construction Permit and filed the Application, specifying facilities that were "nearly identical" to those in the Construction Permit.⁵ The Application went on public notice as accepted for filing on August 14, 2013.⁶ On September 13, 2013, Bureau staff granted the Application. Also on September 13, WCCT filed an informal objection to the Application ("Informal Objection").⁷ On October 18, 2013, WCCT filed the Petition.

In the Petition, WCCT claims standing to file the Petition because it timely participated in the proceeding below by filing the Informal Objection within 30 days of public notice of acceptance for filing of the Application and because grant of the Application "prevented WCCT from evaluating this

¹ Grant of the Application was announced by public notice released September 18, 2013. *Broadcast Actions*, Public Notice, Report No. 48076 (Sept. 18, 2013).

² File No. BPED-20091027ABU.

³ *Broadcast Actions*, Public Notice, Report No. 47148 (Jan. 8, 2010).

⁴ The Construction Permit period was tolled from July 3, 2012, to February 15, 2013, due to litigation in the Massachusetts Superior Court.

⁵ Application, Attachment 17, "WCAI Engineering Exhibits 07-19-2013."

⁶ *Broadcast Applications*, Public Notice, Report No. 28052 (Aug. 14, 2013).

⁷ On October 18, 2013, WGBH filed an Opposition to the Informal Objection.

opportunity for expansion [upgrading to a Class B1 station] for another three years.”⁸ WCCT argues that “[t]his combined six-year construction permit has allowed WGBH to warehouse spectrum in a competitive environment, the result of which is a loss of coverage by WCCT of between 14,730 and 15,060 people.”⁹ The Application should be dismissed, according to WCCT, because WGBH “seeks to do what the Commission has expressly stated licensees cannot, namely extend the deadline of a construction permit beyond the uniform three-year period.”¹⁰ The impediments to construction cited by WGBH, WCCT argues, do not meet the Commission’s stringent tolling requirements or otherwise excuse WGBH from constructing its facilities in a timely manner.¹¹

In its Opposition, WGBH argues that WCCT lacks standing to file a petition for reconsideration due to its failure to explain why it could not have participated in the proceeding prior to grant of the Application.¹² WGBH disputes that it is warehousing spectrum, asserting that it has made “substantial investments and concrete steps . . . to bring the modified WCAI facilities to the verge of completion.”¹³

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.¹⁴ WCCT has failed to meet this burden.

Procedural issue. Section 1.106(b)(1) of the Commission's Rules allows a petition for reconsideration to be filed by any party to the original proceeding or any party whose interests will be adversely affected by the action taken by the Commission.¹⁵ If the petitioner was not a party to the original proceeding, it must show good reason for why it was unable to participate in the earlier proceeding. While Section 73.3587 of the Rules does not contain a filing deadline for informal objections, it states that informal objections must be filed before Commission action on the application.¹⁶

The Commission has afforded reconsideration to petitioners where the grant of an application occurred shortly after the application was filed.¹⁷ In these instances, the Commission found that expedient grant had effectively precluded participation during the initial consideration of an application. However, in each case, the time period between the filing of the application and the grant was less than a week. In contrast, when the grant of an application occurred 31 days from public notice of the filing, the Commission found that the objector had adequate time to participate in the proceeding but failed to do so.¹⁸ Here, the Bureau granted WGBH’s Application 30 days after public notice of acceptance for filing.

⁸ Petition at 4.

⁹ *Id.*

¹⁰ Informal Objection at 2-3.

¹¹ *Id.* at 4-5.

¹² Opposition at 2-3.

¹³ *Id.* at 5.

¹⁴ See 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).

¹⁵ 47 C.F.R. § 1.106(b)(1).

¹⁶ 47 C.F.R. § 73.3587.

¹⁷ See *Ted and Jana Tucker*, Memorandum Opinion and Order, 4 FCC Rcd 2816, 2816 (1989) (standing to file a petition for reconsideration found when application granted four days after public notice issued); *Aspen FM, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 17852, 17854-55 (1997) (standing to file a petition for reconsideration found when application granted five days after acceptance).

¹⁸ See *Association for Community Education*, Memorandum Opinion and Order, 19 FCC Rcd 12682, 12684 (2004).

Therefore, we find that WCCT had ample opportunity to object to WGBH's Application prior to grant. Indeed, to find otherwise would be essentially to establish a formal 30-day filing window for informal objections, contravening the plain language of Section 73.3587 and in many cases delaying processing on minor modification applications. As a result, we find that WCCT does not have standing to file a petition for reconsideration in this proceeding. However, we will not dismiss the Petition, because we believe that the public interest would be best served by exercising our discretion to address WCCT's claims.¹⁹

Substantive issue. As we have recently affirmed, the Bureau's longstanding policy and practice is to accept competing applications on the first business day *after* the date on which a construction permit expires.²⁰ Our first-come, first-served processing system thus preserves a window—albeit a brief window—in which competing applications may be filed after a construction permit has expired even when the existing permittee has also filed a replacement minor modification application.²¹ This policy is designed to deter spectrum warehousing and preserve the *Ashbacker* rights of potentially competing applicants.²² It therefore applies regardless of what measures the permittee may have taken toward completion of construction.

In practice, this opportunity would be materially circumscribed if we allowed the existing permittee to preclude the filing of competing applications merely by surrendering its construction permit prior to expiration—without notice—and then immediately filing a replacement application. Moreover, applicants subject to cut-off procedures (such as the first-come, first-served procedure in effect here) must be given notice of the due dates for their applications.²³ Therefore, in order to provide notice and afford potential applicants a meaningful opportunity to file competing applications, we treat any application filed on the first business day after the date on which a competing construction permit expires as mutually exclusive with an earlier-filed “replacement” modification application.²⁴ In such cases, we expect the applicants to use engineering solutions and good faith negotiation to resolve their mutual exclusivity.²⁵

¹⁹ See, e.g., *New York Telephone Co.*, Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd 3303, 3304 (1991), *aff'd sub nom. New York State Department of Law v. FCC*, 984 F.2d 1209 (D.C. Cir. 1993) (declining to dismiss a petition for reconsideration that did not satisfy the requirements of Section 1.106(b)(1) because the public interest would be best served by “exercising our discretion to address petitioners' claims and clarify our action in this proceeding”); see generally 47 C.F.R. § 1.106(c)(2) (A procedurally-defective petition for reconsideration may be granted “if the Commission or the designated authority determines that consideration of the facts or arguments relied on is required in the public interest”).

²⁰ *Board of Trustees of Eastern Mennonite University*, Letter, 29 FCC Rcd 5925, 5928 (2014) (“*Harrisonburg*”).

²¹ *Id.*

²² See *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 332-33 (1945) (“*Ashbacker*”) (holding that where two applications are mutually exclusive, the grant of one without considering the other violates the statutory right of the second applicant to comparative consideration); *Bachow v. FCC*, 237 F.3d 683, 689-90 (D.C. Cir. 2001) (“*Bachow*”) (holding that *Ashbacker* rights inhere in potential applicants whose right to file a timely competing application is frustrated by a Commission freeze order).

²³ See, e.g., *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1555 (D.C. Cir. 1987) (“The *Ashbacker* decision . . . held that the Commission must use the same set of procedures to process the applications of all similarly situated persons who come before it seeking the same license”); *Processing of FM and TV Broadcast Applications*, Report and Order, 50 FR 19936-01, 19939 (1985) (“[T]he use of cut-off procedures has been acknowledged by the Court as a reasonable and necessary limitation on the statutory right to a comparative hearing. However, any regulations limiting the right to a hearing must give fair notice to the public of what is being cut-off. Therefore, although the Commission can be flexible in establishing “housekeeping” rules, applicants must be treated equally and fairly by giving them notice of the due dates for their applications.”) (internal citations omitted).

²⁴ See *Harrisonburg*, 29 FCC Rcd at 5928.

²⁵ *Streamlining Radio Technical Rules*, First Report and Order, 14 FCC Rcd 5272, 5273 n.2 (1999) (stating that mutually exclusive applications must be disposed of through “technical amendment, settlement between the applicants, auction or other means”); see generally 47 U.S.C. § 309(j)(6)(E).

Here, WCCT did not file a competing application when the Construction Permit expired. Without such an application on file, WCCT cannot object to WGBH's Application on the grounds that it prevented WCCT from filing a competing modification application. Our policy does not create a blanket prohibition on permittees re-filing applications; it merely provides an opportunity for others to file competing applications. We will not dismiss or deny WGBH's Application just to allow WCCT to further contemplate its "opportunity for expansion." More concrete action is needed to activate the protections afforded by *Ashbacker* and *Bachow*.

Conclusion/Actions. We find that WCCT has not shown a material error in the Bureau's grant of the WGBH Application. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Cape Cod Regional Technical High School on October 18, 2013, IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau