

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

In re Applications of)	
)	
FIRESIDE MEDIA)	File No. BNP-20040130APE
)	Facility ID No. 161371
For a New AM Broadcast Station)	
at Larga Vista, Texas)	
)	
and)	
)	
For a New AM Broadcast Station)	File No. BNP-20040130APU
at Pass Christian, Mississippi)	Facility ID No. 161128
)	
and)	
)	
JET FUEL BROADCASTING)	File No. BNP-20040130AQL
)	Facility ID No. 161328
For a New AM Broadcast Station)	
at Winooski, Vermont)	

ORDER ON RECONSIDERATION

Released: October 3, 2011

By the Chief, Media Bureau:

I. INTRODUCTION AND BACKGROUND

1. In this *Order on Reconsideration*, we dismiss the “Petition for Reconsideration of FCC 10-108 MO&O, with Request for its Immediate Rescinding – and Reissuance of the Previously-Encumbered 60-Day Construction Permit Filing Windows for the New AM Radio Stations at Larga Vista, TX, Pass Christian, MS and Winooski, VT – and Request to Make Oral Arguments Before the Chairman and Commissioners Prior to Any Ruling, as Previously Denied” (“Petition”) filed by Fireside Media (“Fireside”) and Jet Fuel Broadcasting (“JFB”).¹ Both Fireside and JFB are sole proprietorships of Mr. Dave Garey (“Garey”).² We dismiss the Petition pursuant to Section 1.106(p) of the Commission’s Rules.³

¹ The Petition seeks reconsideration of the Commission’s order in Fireside Media and Jet Fuel Broadcasting, Memorandum Opinion and Order, 25 FCC Rcd 7754 (2010) (“*Fireside/JFB Order*”).

² Because Fireside and JFB are sole proprietorships, those terms and “Garey” will be used interchangeably herein.

³ 47 C.F.R. § 1.106(p).

2. In the *Fireside/JFB Order*, the Commission dismissed Fireside's applications for review ("AFRs") seeking extensions of time in which to file Form 301 applications for new AM facilities at Larga Vista, Texas, and Pass Christian, Mississippi, and JFB's AFR seeking an extension of time to file a Form 301 application for a new AM station at Winooski, Vermont. The Commission concurrently dismissed Fireside's "tech box" applications for new AM broadcast stations at Larga Vista and Pass Christian, as well as JFB's "tech box" application for a new AM broadcast station at Winooski. Fireside and JFB each filed a short-form (FCC Form 175) application in the January 2004 filing window for AM Broadcast Auction 84 ("Auction 84").⁴ Both proposed several different new AM facilities, for which Fireside and JFB filed separate tech box applications referenced in their Forms 175. All of the facilities at issue here were originally mutually exclusive with AM facilities or modifications proposed by other Auction 84 window applicants.⁵ Through various means, the three captioned applications – Fireside's applications for new AM stations at Larga Vista⁶ and Pass Christian,⁷ and JFB's application for a new AM station at Winooski⁸ – became "singletons," that is, they were no longer mutually exclusive with other proposals also filed in the January 2004 window. Accordingly, Fireside and JFB were directed, by staff letters, to file long-form (FCC Form 301) applications for the respective proposed facilities within 60 days of the date of each letter.⁹

3. Fireside and JFB did not file Form 301 applications within the prescribed periods. In the case of the Winooski application, JFB filed with the Media Bureau ("Bureau") an April 25, 2008, "Request for Extension of Time to File 301 Application for Construction Permit Due to Special Circumstances" ("JFB Request"), seeking to delay filing Form 301 until 60 days after "the date when the Commission implements a final order eliminating the crippling debtor status currently in force against [JFB]."¹⁰ The Bureau denied the JFB Request in part by staff decision dated May 8, 2009.¹¹ Rather than file Form 301 within the additional 30 days granted by the Winooski Staff Decision, JFB timely filed the Winooski AFR on June 8, 2009. Upon being directed by the staff to file Form 301 applications for Larga Vista and Pass Christian, Fireside did not seek extensions of time from Bureau staff, but instead filed the Larga Vista and Pass Christian AFRs, seeking immediate Commission review. All three of the Garey

⁴ See *AM New Station and Major Modification Auction Filing Window; Minor Modification Application Freeze*, Public Notice, 18 FCC Rcd 23016 (MB/WTB 2003).

⁵ See *AM Auction No. 84 Mutually Exclusive Applicants Subject to Auction*, Public Notice, 20 FCC Rcd 10563 (2005).

⁶ File No. BNP-20040130APE.

⁷ File No. BNP-20040130APU.

⁸ File No. BNP-20040130AQL.

⁹ See *La Vida Catolica, Fireside Media, Trade Media Corporation, and RAMS III*, Letter, Ref. No. 1800B3-BSH/LAS (MB July 30, 2009); *GHB of Augusta, Inc. and Fireside Media*, Letter, Ref. No. 1800B3-LAS/JP (MB May 1, 2008); *RAMS, IV and Jet Fuel Broadcasting*, Letter, Ref. No. 1800B3-LAS/JP (MB Feb. 25, 2008).

¹⁰ JFB Request at 1.

¹¹ *Jet Fuel Broadcasting*, Letter, Ref. No. 1800B3-LAS (MB May 8, 2009) ("Winooski Staff Decision"). In the Winooski Staff Decision, the Bureau noted that because the Commission had recently released an order resolving Garey's debtor status, it would grant JFB an additional 30 days in which to file Form 301. Winooski Staff Decision at 3. See *infra* nn.17-20 and accompanying text.

AFRs were based on claims that Fireside and JFB should not be required to file long-form applications until the Commission eliminated what Garey contends were fatal encumbrances to his status as an applicant and potential Commission licensee. Specifically, Garey argued that payment obligations imposed on him for withdrawing high bids in FM Broadcast Auction 37 (“Auction 37”) caused him to suffer “irreparable federal debtor status”¹² which made it impossible for him to obtain financing for the Larga Vista, Pass Christian, and Winooski stations. Garey further contended that the withdrawal payment obligations were imposed against him without due process,¹³ and demanded that he be given an unencumbered 60-day period in which to file Forms 301 for the three stations.

4. The Commission dismissed the Garey AFRs on the ground that they were procedurally improper. In the case of the Larga Vista and Pass Christian applications, Garey did not give the Bureau the opportunity to consider his arguments before presenting them to the Commission, thus violating Section 1.115(c) of the Rules.¹⁴ Moreover, the Commission stated that, because it had earlier rejected the premise underlying the Garey AFRs, namely, that the withdrawal payments (and therefore the allegedly “illegal” federal debtor status) were imposed on him improperly and without due process, the Garey AFRs were to be dismissed.¹⁵ The Commission also stated that, even if it were to consider the merits of Garey’s arguments, his characterization of the payment obligations assessed against him did not constitute special circumstances sufficient to waive the deadlines for filing his complete Form 301 applications. The Larga Vista, Pass Christian, and Winooski tech box applications were therefore dismissed, as were the Garey AFRs.¹⁶

5. Garey timely filed the Petition on July 6, 2010. In it, Garey renews his contentions regarding the allegedly illegal nature of the bid withdrawal payments assessed against him and the consequent “illegal federal debtor status” he allegedly suffered. In addition, Garey argues that he was denied due process because he was denied the opportunity to conduct oral argument of his (unopposed) AFRs before the Commissioners, and because two of the Commissioners’ legal advisors allegedly have conflicts of interest due to prior employment with a law firm that represented clients with interests adverse to Garey’s.

II. DISCUSSION

6. We dismiss the Petition under the delegated authority granted us by the Commission under Section 1.106(p) of the Rules.¹⁷ The majority of the 24-page Petition is devoted to re-argument,¹⁸

¹² Winooski AFR at 2.

¹³ Larga Vista AFR at 3.

¹⁴ 47 C.F.R. § 1.115(c); *see Fireside/JFB Order*, 25 FCC Rcd at 7757.

¹⁵ *Id.*

¹⁶ *Id.* at 7757-59.

¹⁷ 47 C.F.R. § 1.106(p). *See Amendment of Certain of the Commission’s Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organizations*, Report and Order, 26 FCC Rcd 1594, 1606-08 (2011).

¹⁸ *See* Petition at 6-11.

re-characterization,¹⁹ or extension²⁰ of Garey's basic contention that (1) his bid withdrawals in Auction 37 were "innocent;" (2) the payment obligations assessed against him because of those bid withdrawals were therefore applied illegally and without due process of law; (3) the fact that he owed the government bid withdrawal payments constituted "illegal federal debtor status" which hindered his ability to obtain funds to construct or even pay the application filing fees for the Larga Vista, Pass Christian, and Winooski Form 301 applications; and, therefore (4) he was entitled to reinstatement of the tech box applications and a new 60-day period in which to file the Form 301 applications that he did not file when first directed to do so.²¹ The Commission rejected the factual predicate of this argument in the *Fireside/JFB Order*, based on its prior rejection of the same argument in the *Fireside Reconsideration Order*.²² We also note that Garey has not appealed the *Fireside Reconsideration Order* and that his time to do so has expired. That order is thus final, and it is improper for Garey to attempt to resurrect it by re-stating the same arguments here.

7. Moreover, to the extent that Garey introduces new contentions in his Petition, these contentions fail to identify any material error, omission, or reason warranting reconsideration.²³ Garey argues that he was denied the opportunity to "conference" with the Chairman and Commissioners regarding his contentions, asserting the importance of preserving Garey's "livelihood as an independent broadcaster" *vis-à-vis* the claims of unnamed "hundreds" of parties whom Garey alleges are granted conferences with the Commissioners.²⁴ He does not, however, cite to any rule or statute granting him any right to oral argument, especially where, as here, his written pleadings are unopposed. He further accuses the legal advisors to Commissioners McDowell and Baker of having a "gross conflict of interest," because of their former employment by "the powerful Wiley Rein law firm," which represented parties that, at one time, filed applications mutually exclusive with Garey's Larga Vista, Pass Christian, and Winooski applications.²⁵ Again, however, Garey fails to cite any statute, rule, or precedent requiring reversal of a Commission decision based on alleged conflict of interest of, not the Commissioners who

¹⁹ See *id.* at 15-18 (contending that the *Fireside/JFB Order* "conceals" the "due process violation" against Garey of imposing the withdrawal penalties).

²⁰ See *id.* at 19-20, 21-22 (arguing that the Commission "acknowledged" that the federal debtor status was an encumbrance on the prosecution of a construction permit; contending that the "debtor status" was beyond Garey's control because it was imposed without due process).

²¹ The Commission completely compromised the auction bid withdrawal payments Garey owed, and returned half of the funds Garey had previously paid toward withdrawal obligations assessed after Auction 37 that remained in the Commission's possession, based on Garey's inability to pay. *Fireside Media*, Order, 23 FCC Rcd 13138 (2008) (*"Fireside Media Order"*). Garey filed a Petition for Partial Reconsideration of the *Fireside Media Order*, seeking among other things amendment of that order to state that the imposition of withdrawal payments was "undeserved," arguing that the bid withdrawal payment obligations were imposed illegally and without due process. The Commission categorically rejected those arguments, citing the "soundness of the underlying determination that [Fireside] owed a bid withdrawal payment as a result of its withdrawn bids." *Fireside Media*, Memorandum Opinion and Order, 25 FCC Rcd 2453, 2457-58 (2010) (*"Fireside Reconsideration Order"*).

²² *Id.* See 47 C.F.R. § 1.106(p)(3).

²³ See 47 C.F.R. § 1.106(p)(1).

²⁴ Petition at 11-14.

²⁵ *Id.* at 14-15.

voted the decision, but the Commissioners' staff members.²⁶ Moreover, even assuming *arguendo* that such a hypothetical conflict existed, Garey neglects to mention that all of the applicants represented by Wiley Rein in the three mutually exclusive groups at issue had already requested that their applications be dismissed before Fireside and Jet Fuel were directed to file Forms 301 as singleton applications.²⁷ In short, Garey again fails to identify any material error, omission, or reason warranting reconsideration in this case.

8. Garey tenders additional arguments that likewise fail to present any grounds for reconsideration. For example, he appears to argue that the Commission "admitted" that it issued the *Fireside Reconsideration Order* specifically for the purpose of dismissing the Larga Vista, Pass Christian, and Winooski applications, and that therefore the Administrative Procedure Act obliged the Commission "to notice [Fireside and JFB], the public, and the three communities that stood to lose their pending first local radio services, that the prior ruling was actually the seed by which the Commission intended to kill the subject radio stations."²⁸ This argument plainly mischaracterizes the Commission's decision in the *Fireside/JFB Order*, which in no way stated or implied that the *Fireside Reconsideration Order* was designed to deprive Garey of any specific pending applications. In fact, neither the *Fireside Media Order* nor the *Fireside Reconsideration Order* contains any references to applications filed by Garey other than those submitted in Auction 37 for which he withdrew high bids. The Commission's *Fireside/JFB Order* was based on its rejection, in the *Fireside Reconsideration Decision*, of Garey's claim that the bid withdrawal payments assessed against him were erroneous or contrary to law. However, it was Garey who chose to make the same rejected claim the basis of his AFRs in the instant case, without introducing any new facts in support, and his continued assertion of this claim amounts to an unauthorized petition for reconsideration of the now-final *Fireside Reconsideration Order*.

9. Garey also argues that he was penalized based on the "titling" of his pleadings, presumably taking issue with the Commission's citation of Section 1.115(c) of the Rules, which prohibits granting an application for review of a question on which the Bureau was not afforded an opportunity to pass. Garey appears to argue that the Bureau should have decided the Larga Vista and Pass Christian extension requests on its own motion, despite the fact that both were styled as applications for full Commission review. In fact, had there been any confusion regarding the review Fireside was seeking, Garey provided cover letters to the Commission's Secretary in each case, requesting that the Secretary "[p]lease direct this Application for Review to the honorable FCC Commissioners" (Pass Christian),²⁹ and "[p]lease direct this filing to the honorable Chairman and Commissioners...." (Larga Vista).³⁰ Fireside thus specifically sought an extension of time from the full Commission, rather than the staff, and as such the Fireside AFRs were properly dismissed pursuant to Section 1.115(c). In any event, all three AFRs

²⁶ Cf. *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 590-91 (D.C. Cir. 1970) (in an adjudicatory proceeding, recusal of a decisionmaker is required only where a disinterested observer may conclude that the decisionmaker has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it).

²⁷ See *Fireside/JFB Order* at 2 and n.7.

²⁸ Petition at 18.

²⁹ Letter from Dave Garey, Fireside Media, to Marlene H. Dortch, Secretary, Federal Communications Commission (June 28, 2008).

³⁰ Letter from Dave Garey, Fireside Media, to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 29, 2009).

were also dismissed on the alternative ground that they were based on the already-adjudicated issue of the propriety of the withdrawal payments imposed on Garey, as discussed above.

10. Finally, Garey takes issue with the Commission's observation that well over 60 days had elapsed since JFB and Fireside were directed to file Forms 301, stating that the Commission had never "granted replenishment" of the 60-day period.³¹ This argument is disingenuous. The fact is that neither the Bureau nor the Commission had dismissed any of the three applications prior to release of the *Fireside/JFB Order*, but nonetheless Garey did not attempt at any time prior to dismissal either to file the applications or request leave to do so. Instead, he pursued open-ended extensions of time linked to a condition – the Commission's admission of culpability for allegedly imposing "debtor status" without due process – that would never occur because the Commission had already considered and denied Garey's claims that the withdrawal payment obligations were wrongfully imposed.

11. In summary, the Petition is based on arguments and facts already considered and rejected by the Commission, or on claims that fail to identify any material error, omission, or reason warranting reconsideration. The Petition is thus subject to dismissal on delegated authority.

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, that the Petition filed by Dave Garey d/b/a Fireside Media and Jet Fuel Broadcasting IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief, Media Bureau

³¹ Petition at 22-23.