

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

In re Applications of
FIRESIDE MEDIA
For a New AM Broadcast Station
at Kirbyville, Missouri
and
COLLEEN R. MCKINNEY
For a New AM Broadcast Station
at Braham, Minnesota
File No. BNP-20040130APQ
Facility ID No. 161135
File No. BNP-20040130AUA
File No. BNP-20091023ABH
Facility ID No. 160612

ORDER ON RECONSIDERATION

Adopted: December 4, 2013

Released: December 5, 2013

By the Chief, Media Bureau:

I. INTRODUCTION AND BACKGROUND

1. We have before us the "Request for Reconsideration and Favorable Reversal of FCC 13-49, to Allow Establishment of a First Local Radio Service at Kirbyville, MO" ("Petition") filed by Fireside Media ("Fireside").

2. In the Fireside Order, the Commission denied Fireside's Application for Review ("AFR") of the Media Bureau's ("Bureau") August 26, 2009, decision awarding a dispositive preference to Colleen McKinney's ("McKinney") mutually exclusive ("MX") application for a new AM broadcast station at Braham, Minnesota.

1 Fireside is a sole proprietorship of Mr. Dave Garey.

2 Fireside Media and Colleen R. McKinney, Memorandum Opinion and Order, 28 FCC Rcd 4992 (2013) ("Fireside Order").

3 47 C.F.R. § 1.106(p).

4 Fireside Order, 28 FCC Rcd at 4992-93.

5 Fireside Media and Colleen R. McKinney, Letter, Ref. No. 1800B3-TSN (MB Aug. 26, 2009) ("Staff Decision").

established precedent, found a dispositive preference under Section 307(b) of the Communications Act, as amended (“Act”),⁶ for Braham as the larger community.⁷

3. In the AFR, Fireside raised the same contentions as in a previous pleading regarding another mutually exclusive applicant.⁸ However, because Fireside failed to seek reconsideration after that pleading was dismissed as moot,⁹ the Bureau had not been afforded the opportunity to pass on the merits of Fireside’s arguments, and the Commission accordingly denied the AFR pursuant to Section 1.115(c) of the Rules.¹⁰ The Commission further stated that, even if it were to consider Fireside’s arguments on the merits, the Fireside and McKinney proposals would cause nighttime interference to each other under well-established Commission engineering standards, precluding the grant of both applications.¹¹ Moreover, the Commission stated that the Rules prohibit auction filing window applicants from discussing or negotiating settlement agreements, as Fireside requested.¹²

4. Fireside timely filed the Petition on May 13, 2013.¹³ In the Petition, Fireside renews its three main contentions: (1) Section 307(b) mandates that the Commission should grant both McKinney’s Braham, Minnesota, proposal and Fireside’s Kirbyville, Missouri, proposal;¹⁴ (2) if the Commission cannot grant both proposals, it should grant Fireside’s proposal;¹⁵ and (3) the Commission should allow Fireside and McKinney the opportunity to “compromise” and resolve their proposals’ mutual exclusivity.¹⁶

II. DISCUSSION

5. We dismiss the Petition under the delegated authority granted us by the Commission under Section 1.106(p) of the Rules.¹⁷ The bulk of Fireside’s Petition reiterates arguments from the AFR that the Commission has already fully considered and rejected. For example, Fireside contends again that the Commission should not grant the proposal of only one of the two communities because “allocation of two or more first local radio services is always beneficial to the public interest.”¹⁸ Fireside also repeats and extends its argument that the Commission should allow it and McKinney to “compromise” and file

⁶ 47 U.S.C. § 307(b) (“Section 307(b)”).

⁷ *Staff Decision* at 3.

⁸ *Fireside Order*, 28 FCC Rcd at 4992–93.

⁹ RAMS II, another applicant previously in MX Group 84-149, requested dismissal of its application for a new AM broadcast station at Wyoming, Minnesota (File No. BNP-20040130BCQ).

¹⁰ *Id.* See 47 C.F.R. § 1.115(c).

¹¹ *Id.* at 4993.

¹² *Id.*

¹³ On June 3, 2013, McKinney filed the Opposition of Colleen McKinney to “Request fo [sic] Reconsideration and Favorable Reversal of FCC 13-49 to Allow Establishment of a First Local Radio Service at Kirbyville, MO.”

¹⁴ Petition at 1.

¹⁵ *Id.*

¹⁶ *Id.* at 7–9.

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 Petition at 2.

Form 175 technical amendments to resolve mutual exclusivity.¹⁹ The Commission already addressed these arguments in the *Fireside Order*.²⁰ Thus, pursuant to Section 1.106(p)(3) of the Rules, we will not consider Fireside's prior arguments simply restated in a new pleading.²¹

6. Moreover, to the extent that Fireside offers new contentions, those contentions introduce no new facts or circumstances that have changed since the last opportunity to present such matters to the Commission.²² Fireside now argues that "McKinney's Braham proposal is clearly *not an 'efficient' use of spectrum*, if it causes 'high-level' interference *more than 700 miles* from . . . Braham."²³ Fireside also disputes the applicability of Commission precedent preferring the community with a larger population.²⁴ Fireside next contends that the Rules could not allow McKinney's proposal to cause interference to a proposed station in Kirbyville, Missouri.²⁵ Finally, Fireside accuses McKinney of contradicting her earlier position opposing RAMS II's Wyoming, Minnesota, application, and insists that McKinney "can't have it both ways."²⁶ Because Fireside could have presented these arguments to the Commission earlier in the proceeding, we need not consider its new arguments.²⁷

¹⁹ *Id.* at 7–9. Fireside additionally contends that many applicants "make necessary engineering alterations" in their Form 301 filings and, consequently, the Commission should allow Form 175 technical amendments to "harmoniz[e] . . . the Braham application to eliminate the interference ahead of this scenario [which] would therefore serve the public interest." *Id.* at 8–9. However, again, "the Commission and the courts have determined that the public interest and the integrity of the auction process do not require us to allow unilateral post-Form 175 filing deadline technical amendments designed merely to resolve mutual exclusivity, even if doing so would result in multiple awards of construction permits." *Fireside Order*, 28 FCC Rcd at 4993 n.13 (citations omitted). See *Orion Communications Ltd. v. FCC*, 213 F.3d 761, 763–64 (D.C. Cir. 2000) (affirming that Section 309(j) of the Act permitted the Commission to prohibit applicants from negotiating settlement agreements after their short-form applications have been filed).

²⁰ *Fireside Order*, 28 FCC Rcd at 4993. The Commission emphasized that well-established engineering standards precluded grant of both applications, and noted that prohibiting Fireside and McKinney from discussing or negotiating settlement agreements "was not arbitrary and capricious . . . [and] is based on the Commission's due consideration of the policies underlying our congressionally mandated broadcast auction authority."

²¹ See 47 C.F.R. § 1.106(p)(3); *Shaw Communications, Inc.*, Order on Reconsideration, 27 FCC Rcd 6995, 6997 (MB 2012).

²² See 47 C.F.R. § 1.106(p)(2).

²³ Petition at 3 (emphasis in original).

²⁴ *Id.* Fireside contends that the Commission should not award a dispositive Section 307(b) preference "on the mere premise" that Braham has a larger population. Instead, Fireside argues, this comparison should only be dispositive for communities within "the same market or geographic region, or even in different areas where signals for local AM radio services would even remotely be expected to overlap and thus conflict with one another."

²⁵ *Id.* at 4. According to Fireside, McKinney's Braham proposal therefore includes a "glaring technical defect."

²⁶ *Id.* at 6.

²⁷ See 47 C.F.R. § 1.106(p)(2); *Minority Television Project, Inc.*, Memorandum Opinion and Order, 20 FCC Rcd 16923, 16925 (2005) (Commission would not consider on reconsideration facts and argument that petitioner could have raised in a timely fashion "through the exercise of ordinary diligence"); *Royce International Broadcasting Co.*, Memorandum Opinion and Order, 26 FCC Rcd 9249, 9249 (MB 2011) (Commission's "[r]ules and precedent clearly provide that [the agency] will not consider petitions for reconsideration which rely on facts or theories that could have been presented earlier in the proceeding"). Fireside also requests "that it please be allowed to make oral arguments," citing "the protracted length of this case, the importance of the matter at stake, and the petitioner's desire to effectuate a compromise solution beneficial to all parties, and the public interest." Petition at 10. However, Fireside cites no relevant rule or statute granting it a right to oral argument.

7. Even were we to consider Fireside's new arguments on the merits, we would deny the Petition. The staff correctly determined, and the Commission confirmed, that the proposals were mutually exclusive and that Braham merited a dispositive Section 307(b) preference based on its greater population. Fireside cites no legal basis for challenging the applicability of Commission precedent in this regard.²⁸ Furthermore, we reject Fireside's argument that the Braham proposal has a "technical defect" because it would enter the 50 percent exclusion root sum square nighttime limit of Fireside's proposal.²⁹ Rather, that determination merely establishes the mutual exclusivity of the Fireside and McKinney applications.³⁰ Finally, with respect to Fireside's arguments regarding McKinney's allegedly contradictory pleadings at different stages of the proceeding, Fireside cites no legal basis for granting it a dispositive preference over McKinney's proposal.³¹ Thus, McKinney's contentions are immaterial.

8. In summary, the Petition is based on arguments and facts already considered and rejected by the Commission, or on claims that fail to rely on new facts or changed circumstances. The Petition is thus subject to dismissal on delegated authority.

III. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, that the Petition filed by Dave Garey d/b/a Fireside Media IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief, Media Bureau

²⁸ See, e.g., *Cameron and Hackberry, Louisiana*, Report and Order, 20 FCC Rcd 16267 (MB 2005) (decision based on population difference of 266 people); *Rose Hill, North Carolina*, Memorandum Opinion and Order, 15 FCC Rcd 10739 (MMB 2000) (decision based on population difference of 370 people); *Blanchard, Louisiana and Stephens, Arkansas*, Memorandum Opinion and Order, 10 FCC Rcd 9828 (1995) (decision based on population difference of 38 people).

²⁹ See Note to 47 C.F.R. § 73.3571; *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rule Making, 26 FCC Rcd 2556, 2580–84 (2011). The *Second Report and Order* codified the standard first enunciated in *Nelson Enterprises, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 3414, 3417–19 (2003) (nighttime interference protection standards codified in 47 C.F.R. § 73.182 do not apply only to existing AM stations, but are properly used to make mutual exclusivity determinations among new AM auction window proposals).

³⁰ See *supra* note 28. Fireside also appears to argue that McKinney's proposal was not technically acceptable or grantable, and thus should not have been considered. Petition at 4. Under the rules applicable to AM Auction 84, however, the staff properly deferred that technical review until the post-auction submission of McKinney's long-form application. See *Powell Meredith Communications Co.*, Memorandum Opinion and Order, 19 FCC Rcd 12672, 12674–75 (2004); *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses*, First Report and Order, 13 FCC Rcd 15920, 15979 (1998), *recon. denied*, 14 FCC Rcd 8724 (1999), *modified*, 14 FCC Rcd 12541 (1999).

³¹ See Petition at 6, 10.