

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

In the Matter of)
Urban One Broadcasting Network, LLC)
Application for Construction Permit for) File No. BNPH-20110524AHQ
New FM Station WURB(FM), at) Facility ID No. 189555
Cross City, Florida)
Application for Construction Permit for) File No. BMPH-20140519ABG
Minor Modification to WURB(FM),) Facility ID No. 189555
Cross City, Florida)

MEMORANDUM OPINION AND ORDER

Adopted: April 5, 2016

Released: April 5, 2016

By the Commission: Commissioner Clyburn concurring and issuing a statement.

1. In this Memorandum Opinion and Order, we dismiss in part and otherwise deny the Application for Review filed by Urban One Broadcasting Network, LLC ("Urban One") on April 1, 2015 ("Application for Review"). Urban One seeks review of a March 3, 2015, Media Bureau ("Bureau") decision¹ that: (1) dismissed a Petition for Reconsideration ("Tolling Petition") filed by Urban One on July 24, 2014, of a June 25, 2014, Bureau decision denying Urban One's June 22, 2014, request to toll its construction period for former Station WURB(FM), Cross City, Florida (the "Station") ("Tolling Request");² and (2) denied a second Petition for Reconsideration ("Modification Petition") filed by Urban One on August 4, 2014, of a July 17, 2014, Bureau decision³ granting in part an informal objection to Urban One's Modification Application ("Informal Objection") filed by Suncoast Radio, Inc. ("Suncoast") on June 16, 2014.⁴

2. On review, Urban One argues that the Informal Objection was defective because it lacked an affidavit of a person with personal knowledge of the facts alleged and was improperly signed by Suncoast's attorney rather than an officer or director of the company.⁵ Urban One also disagrees with the Bureau's "untruthful and incorrect" finding in the Reconsideration Decision that it did not pay the filing fees for: (1) a request for engineering special temporary authority ("STA Request") submitted in the Media Bureau's Consolidated Database System ("CDBS") online electronic filing system on July 18, 2014 (amended July 21, 2014); and (2) a license to cover application submitted in CDBS on July 21, 2014 ("License Application").⁶ This finding, Urban One claims, violated Section 1.17 of the Rules, which

¹ William Johnson, Letter, 30 FCC Rcd 2015 (MB 2015) ("Reconsideration Decision").

² This Petition for Reconsideration was filed on July 24, 2014, under File No. BMPH-20140519ABG ("Modification Application"), and then again on July 25, 2014, under File No. BNPH-20110524AHQ (the file number for the 2011 construction permit for the Station).

³ Mr. William Johnson, Letter, Ref. No. 1800B3-AED (MB July 17, 2014) ("Modification Decision").

⁴ The Modification Decision did not dismiss the Modification Application, but gave Urban One 30 days to respond to the issues raised. The Modification Application was ultimately dismissed in the Reconsideration Decision.

⁵ Application for Review at 1-2, 9.

⁶ See Reconsideration Decision at 2015 n.4. Application for Review at 4-8, 10. The License Application does not specify the original facilities authorized by the Construction Permit, but purports to "cover" the facilities specified in

requires “truthful and accurate statements to the Commission.”⁷ If the Bureau was unable to find that the License Application was grantable, according to Urban One, it was required to designate the matter for a hearing under Section 1.68(b) of the Rules.⁸ Urban One also claims that, in the *Reconsideration Decision*, the Bureau erroneously dismissed as a new argument its claim in the Tolling Petition that the tolling rules should have been waived to afford Urban One an extension of its construction deadline (“Waiver Request”).⁹

3. Had the STA Request been accepted and granted, Urban One contends, it could have operated “from its modification site” without following the public notice procedure set out in Section 1.1307(a)(4) of the Rules and Section 106 of the National Historic Preservation Act (“Section 106 Review”).¹⁰ Urban One also argues that if the Bureau had accepted and granted the License Application predicated on such temporary operation, the “requested program tests would have extended [Urban One’s] construction permit deadline beyond July 21, 2014.”¹¹ Finally, Urban One alleges that the Bureau’s failure to waive the construction deadline was discriminatory.¹²

4. Upon review of the Application for Review and the entire record, we affirm the Bureau’s conclusion that the construction permit automatically expired on July 21, 2014, and therefore was forfeited, and we dismiss in part and otherwise deny Urban One’s Application for Review. We uphold the Bureau’s dismissal of the Tolling Petition on procedural grounds, for the reasons stated in the *Reconsideration Decision*.¹³ As an alternative and independent basis for affirming the Bureau’s decision not to grant reconsideration on the tolling issue, we find, for the reasons stated by the Bureau in the *Reconsideration Decision*, that the Tolling Petition failed to demonstrate on the merits that the Commission’s rules should be waived to permit the extension of Urban One’s construction deadline.¹⁴ We find Urban One’s assertion that the Bureau treated it differently from other applicants to be unfounded. Urban One’s Application for Review cites no case law in support of its claim that the Commission has treated other applicants more favorably, and the only case cited below is inapplicable for the reasons stated in the *Reconsideration Decision*.¹⁵

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the STA Request, which are identical to those specified in the Modification Application, which Bureau staff rejected. License Application, File No. []-20140721ABZ, Exhibits 1, 8, 9, and 10.

⁷ Application for Review at 4; *see* 47 C.F.R. § 1.17 (“Section 1.17”).

⁸ *Id.* at 6; 47 C.F.R. § 1.68(b) (“Section 1.68”).

⁹ Application for Review at 11. Urban One concedes that its Tolling Request did not meet the requirements of the applicable rule. Tolling Petition at 2 (“petitioner’s unique circumstances do not satisfy the strict tolling requirements of 47 C.F.R. [§] 73.3895(b). . .”).

¹⁰ Application for Review at 11.

¹¹ Application for Review at 8.

¹² *Id.* at 10.

¹³ *Reconsideration Decision*, 30 FCC Rcd at 2020-21, *citing Christopher Imlay, et al.*, Letter, 24 FCC Rcd 11809 (2009) (dismissing Tolling Petition for failure to allege error of fact or law or to raise new or previously unknown facts).

¹⁴ *Reconsideration Decision* at 2020-21. We also note that Urban One alleges that the *Modification Decision* “contained a thirty (30) day stay,” Application for Review at 5. To the extent Urban One believes the Bureau extended the construction deadline, the Bureau clearly stated to the contrary. *Modification Decision* at 2 (“This letter does not extend the expiration date of [the] construction permit or provide any additional time to construct.”).

¹⁵ *See* Tolling Petition at 2-3 & Ex. A (citing and appending a copy of *Four Corners Broadcasting L.L.C.*, Letter, Ref. No. 1800B3-CDG (MB July 18, 2003); *Reconsideration Decision*, 30 FCC Rcd at 2017 n.22 (noting that in *Four Corners*, the Bureau was temporarily unable to process the applicant’s modification due to “agency administrative matters beyond the control of the applicant”). The waiver in *Four Corners* was necessitated by the need to await OMB approval of relevant ownership rule changes. In contrast, as the Bureau noted, there were no

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5. The remainder of Urban One's arguments are impermissibly raised for the first time on review, and accordingly are dismissed.¹⁶ In any case, all of the new arguments are meritless, and as a separate and independent basis for denying the Application for Review, we reject them for the following reasons. With regard to the adequacy of the Suncoast Informal Objection, the Rules permit an attorney to sign a pleading for the party represented.¹⁷ Moreover, the Informal Objection relied solely on facts of which the Commission can take official notice, and a supporting affidavit therefore was unnecessary.¹⁸ Urban One is not entitled to a hearing regarding its License Application under Section 1.68 of the Rules. This is because the License Application proposes to cover different facilities at a different site under different terms.¹⁹ In other words, the license application did not cover the construction permit held by Urban One at all, but, as Urban One self-describes, is actually an application for "license to cover . . . STA operations."²⁰

6. Finally, we note that the outcome of this case would not change even if the STA Request and License Application had been promptly accepted for filing.²¹ Neither special temporary authority nor program test authority typically associated with a "license to cover" application would modify the terms of the Construction Permit or extend its expiration date. While the Bureau does grant STAs under

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similar unique circumstances here warranting a waiver of the Station's construction deadline. *Reconsideration Decision*, 30 FCC Rcd at 2020.

¹⁶ 47 C.F.R. § 1.115(c) ("No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.").

¹⁷ 47 C.F.R. § 1.23 (providing that an attorney may represent others before the Commission and that the signature of such attorney "constitute[s] a representation to the Commission that . . . he is authorized and qualified to represent the particular party in whose behalf he acts").

¹⁸ See Informal Objection (discussing contents of Modification Application on file with the Commission and applicable legal authority); *Public Media of New England, Inc.*, BNPL-20131113AKZ, 2015 WL 9260705 at 2 (Dec. 17, 2015) ("Pursuant to Sections 309(d) of the Act, informal objections, like petitions to deny, must provide properly supported allegations of fact that, if true, would establish . . . that grant of the application would be *prima facie* inconsistent with the public interest."); 47 U.S.C. § 309(d)(1) (petitions to deny shall contain specific allegations of fact, which must be supported by an affidavit of a person with personal knowledge of the facts alleged, *except with respect to facts of which official notice may be taken*) (emphasis added).

¹⁹ See 47 U.S.C. § 319(c) (license covering construction permit "shall conform generally to the terms of [the] construction permit").

²⁰ See Application for Review at 3; 47 C.F.R. § 1.68 ("Action on application for license to cover construction permit. (a) An *application for license* by the lawful holder of a *construction permit* will be granted without hearing where the Commission, upon examination of such application, finds that all the terms, conditions, and obligations set forth in the application *and permit* have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest. (b) In the event the Commission is unable to make the findings in paragraph (a) of this section, the Commission will designate the application for hearing upon specified issues.") (emphasis added). Urban One responded "no" to the Section III, Item 7 certification as to whether the "facility was constructed as authorized in the underlying construction permit or complies with 47 C.F.R. Section 73.1690." Urban One included an explanatory exhibit that references the applied-for STA facilities "at a specified variance from the terms of the station authorization or requirement of the FCC rules applicable to the particular class of station." See License Application, Exhibit 8.

²¹ See Application for Review at 4-8 (alleging that the Bureau knowingly made material false statements when it claimed that the Commission did not receive the filing fees for those submissions and that it erred by not accepting them for filing). Urban One's claim that the Bureau violated Section 1.17 when it stated in the *Reconsideration Decision* that the Commission had not received the fees is misplaced. See Application for Review at 4. Apart from the underlying factual question, Section 1.17, by its terms, applies only to statements made *to* the Commission, not statements made *by* the Commission. 47 C.F.R. § 1.17 (prohibiting applicants, licensees, and other specified Commission regulatees from intentionally providing incorrect material factual information to the Commission).

appropriate circumstances, it does not do so to allow a permittee that fails to timely construct as authorized to keep its permit alive past the unmet construction deadline, as Urban One proposes here.²² Urban One's reliance on 47 C.F.R. § 73.1620 is misplaced because that rule requires that facilities be constructed "in accordance with the terms of the construction permit," and Urban One's STA Request proposed facilities that did not conform to the specifications authorized by the Station Construction Permit.²³ Section 319(b) of the Act specifically provides that a "permit will be automatically forfeited if the station is not ready for operation within the time specified...."²⁴ A license will be granted only if "all the terms, conditions, and obligations set forth in the application and permit have been fully met...."²⁵ Thus, to warrant the issuance of a license, the Station must have been timely constructed in accordance with the Construction Permit and be ready to commence operation and service to its authorized community of license, not only "some portion" thereof, as Urban One suggests.²⁶ Urban One fashioned its proposed temporary facility as merely a stopgap to allow it to certify construction of *some* facility by the July 21, 2014, deadline, with the transparent objective of submitting an inferior technical proposal that could be granted by that impending deadline "to allow it to operate at the modified temporary tower site until a new collocation site [is] secured."²⁷ Because Urban One failed to file a license application by the July 21, 2014, deadline certifying the completion of the facilities authorized in the Construction Permit, the Bureau appropriately declared the permit automatically expired by operation of Section 319 of the Act, as of that deadline.²⁸ Therefore, we uphold the Bureau's decision for the reasons stated herein.

7. Accordingly, IT IS ORDERED that, pursuant to Section 5(c)(4),(5) of the Communications Act of 1934, as amended,²⁹ and Sections 1.115(c) and (g) of the Commission's Rules,³⁰ the Application for Review filed by Urban One Broadcasting Network, LLC on April 1, 2015, IS DENIED with respect to the Bureau's decision not to grant a waiver of the tolling rules or the construction deadline and IS DISMISSED and in the alternative IS DENIED with respect to the newly raised arguments discussed in paragraphs 5 and 6 of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²² See Application for Review at 7 ("[T]he Bureau frequently grants STAs allowing licensees and permittees who have lost tower sites to operation [sic] with temporary, generally lesser facilities until it is possible to operate with the licensed or permitted service. In this manner, some portion of the population within a station's listening area receives service and the station's license or permit does not terminate ... or is forfeited when a timely STA have been requested, with the filing of a timely application to cover."). Accordingly, Urban One's claim that grant of the STA would have obviated the need for historic preservation review is irrelevant. See Application for Review at 11.

²³ See Application for Review at 8; 47 C.F.R. § 73.1620(a) ("Upon completion of construction of an AM, FM, TV or Class A TV station *in accordance with the terms of the construction permit* . . .") (emphasis added).

²⁴ 47 U.S.C. § 319(b).

²⁵ See *id.*; see also 47 C.F.R. § 73.3598(c).

²⁶ See Application for Review at 7.

²⁷ Application for Review at 3.

²⁸ See 47 U.S.C. § 319(b); 47 C.F.R. § 73.3598(e).

²⁹ 47 U.S.C. § 155(c)(4),(5).

³⁰ 47 C.F.R. § 1.115(c),(g).

**CONCURRING STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

Re: *Urban One Broadcasting Network, LLC, Application for Construction Permit for New FM Station WURB(FM), at Cross City, Florida, Memorandum Opinion and Order.*

While I vote to concur with this Order, I am concerned about situations where applicants seeking to provide their communities with local radio service are ultimately rejected because they are unable to construct within a rigid construction permit period. The Commission has an obligation to ensure that permittees do not engage in spectrum squatting and I fully support this, but we also need to balance the interest of bringing service listening public and the business needs of permittees. I am unsure if this balance is reached in all cases within three years, especially in instances, as is here, where the permittee acquired the station after the construction permit was initially granted, and did not have the full benefit of three years to construct a station.

We cannot effectuate change based on the limited facts of this case, but it is my hope that in the future we are able to conduct a more comprehensive review which takes into account the needs of consumers, permittees and those in the Commission that must enforce our rules. I would actually support a limited extension, perhaps six months in cases like this one, but my office is always willing to listen to those who have ideas for how to improve our processes and make them more accessible, especially to smaller organizations that have limited resources and are less familiar with our rules and application requirements.