



6712-01

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 09-230; FCC 16-105]

Television Broadcasting Services; Seaford, Delaware

AGENCY: Federal Communications Commission.

ACTION: Final rule; application for review.

SUMMARY: In this Memorandum Opinion and Order, the Commission denies the application for review of the Media Bureau's dismissal of a petition for reconsideration of decisions that allotted VHF television channel 5 to Seaford, Delaware. The Media Bureau had dismissed the petition for reconsideration challenging the Seaford allotment because it was untimely filed and the Commission concludes that there is no basis to waive the statutory deadline for the filing of petitions for reconsideration.

DATES: [insert date of publication in the Federal Register].

ADDRESSES: Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Jeremy Miller, Media Bureau, (202) 418-1507, or by email at Jeremy.Miller@fcc.gov.

SUPPLEMENTARY INFORMATION: Pursuant to sections 331(a) and 307(b) of the Communications Act, this is a synopsis of the Commission's Memorandum Opinion and Order, MB Docket No. 09-230, adopted August 3, 2016, and released August 4, 2016.

The full text of this document is available for public inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY-

A257, 445 12th Street SW., Washington, DC, 20554. This document will also be available via ECFS (<http://fjallfoss.fcc.gov/ecfs/>). To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

Synopsis of Memorandum Opinion and Order

The Commission has before it for consideration an Application for Review filed by PMCM TV, LLC (“PMCM”), seeking review of three decisions by the Video Division of the Media Bureau (the “Division”): (1) the *Seaford Report and Order* that allotted very high frequency (“VHF”) television channel 5 to Seaford, Delaware; (2) the *Seaford MO&O on Reconsideration* rejecting a petition for reconsideration of the *Seaford Report and Order* and (3) the *Seaford MO&O on Further Reconsideration* dismissing PMCM’s petition for reconsideration of the prior *Seaford* decisions as untimely. For the reasons set forth below, we deny the AFR and affirm the Division’s dismissal of the PMCM Petition.¹

In ordering the Seaford allotment, the Commission concluded that the outcome of PMCM’s Reallocation Request was not relevant. PMCM did not seek reconsideration of that finding until nearly three years later when, for the first time, it opposed the new Seaford allotment that it had previously “strongly” supported. In hindsight, PMCM now argues that the Commission should have postponed allocating a new channel to Delaware while its efforts to reallocate channel 2 played out at the Commission and in court, even

¹ An Application for Review must establish that the actions of the delegated authority: (i) conflicted with statute, regulation, case precedent or Commission policy; (ii) involved a question of law or policy not previously resolved by the Commission; (iii) involved precedent or policy that should be overturned or revised; (iv) made an erroneous finding as to an important fact; or (v) made a prejudicial procedural error.

though the pendency of that litigation did not prevent PMCM from raising other concerns premised on a favorable outcome regarding its Reallocation Request, and the Seaford allotment is consistent with that request.² In short, it appears that PMCM simply changed its strategy as developments unfolded.

The staff was correct in determining that PMCM's Petition for Reconsideration of the *Seaford Report and Order* was untimely. Section 405 of the Act provides that "petitions for reconsideration must be filed within thirty days from the date upon which public notice is given of the action . . . complained of." Public notice of the *Seaford Report and Order* was given on May 7, 2010. The Petition for Reconsideration was filed on March 15, 2013, on the basis that allotment of a new channel to Seaford was improper.

PMCM's claim that its Petition was timely because it was filed within 30 days after issuance of the *Seaford MO&O on Further Reconsideration* is entirely without merit.

PMCM's Petition challenged the allocation adopted in the *Seaford Report and Order*, not the Commission's rejection of BMC's argument that the Commission should have placed the new allocation at channel 2 or 3. As to its request for reconsideration of the *Seaford MO&O on Reconsideration*, the Petition therefore was an impermissible collateral challenge to the *Seaford Report and Order*. The deadline for filing the Petition therefore was 30 days after public notice of the *Seaford Report and Order*, not 30 days after public notice of the *Seaford MO&O on Reconsideration*. Accordingly, PMCM filed its Petition for Reconsideration approximately three years late.

² PMCM now attempts to excuse its failure to object to the Seaford allotment earlier on the grounds that it had no reason to object to the proposal to place the allotment in Seaford, in Southern Delaware, which lacked robust broadcast service, but its interests changed when Western Pacific applied to change the community of license to Dover. PMCM even sought to bid in the auction for channel 5. As to its objection to an allotment in Dover, WMDE's application for a change in community of license is the proper proceeding for the airing of this grievance, and in fact, PMCM has sought reconsideration of the Bureau's decision in that proceeding.

The Commission can only accept late-filed petitions for reconsideration if the petitioner shows that extraordinary circumstances warrant overriding the statutory filing deadline. As the D.C. Circuit has explained, “[a]lthough section 405 does not absolutely prohibit FCC consideration of untimely petitions for reconsideration, we have discouraged the Commission from accepting such petitions in the absence of extremely unusual circumstances.” Consistent with the D.C. Circuit’s decisions, the Commission in applying that standard has focused on whether the Commission has failed to adhere to its procedural rules for providing notice of its decisions. PMCM has not even attempted to show that it has met this standard, much less demonstrated that the extraordinary circumstances required under this precedent are present here.

The assertion that the Court’s decision in *PMCM TV* constituted “changed circumstances” warranting an extension of the deadline for reconsideration of the *Seaford Report and Order* is also without merit. This contention presumes incorrectly that a showing of “changed circumstances” under section 1.429(b) warrants an extension of the statutory deadline for the filing of petitions for reconsideration. Thus, PMCM claims that “[i]t is hornbook law that ‘changed circumstances’ provide an adequate legal basis for reconsideration” and that the “relevant test is whether the petitioner has raised the changed circumstance at the first opportunity to do so.” Rather than supporting its theory that changed circumstances can support a request for reconsideration filed after the applicable statutory deadline, the single case PMCM cites, a 1979 Commission order, relates not to the filing of petitions for reconsideration after the statutory deadline but instead to the circumstances under which parties may seek reconsideration of a Commission order denying an application for review. Section 1.429(b)(1) sets forth the

limited circumstances in which new matter raised in a timely petition for reconsideration will be considered. It does not and cannot supersede the statutorily established deadline for the filing of petitions for reconsideration, which is set forth in Section 405 of the Act and reflected in Section 1.429(d) of the Commission's rules.³

For the foregoing reasons, PMCM's argument that the Petition was timely filed because of its submission within 30 days of the release of the *Seaford MO&O on Further Reconsideration* is without merit. We therefore affirm the Bureau's dismissal of the Petition and deny the AFR. In light of our denial of the AFR, the Motion to Dismiss and associated pleadings are moot. We therefore dismiss these filings.

ACCORDINGLY, IT IS ORDERED That, pursuant to section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. 155(c)(5), and § 1.115(g) of the Commission's rules, 47 CFR 1.115(g), the Application for Review IS DENIED.

IT IS FURTHER ORDERED That, pursuant to section 4(i)-(j) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i)-(j), and § 1.41 of the Commission's rules, 47 CFR 1.41, the Motion to Dismiss, Request for Leave to File Motion to

³ There is no exception in section 1.429(d) for late-filed petitions based on new information nor any other exception.

Dismiss, and Reply to Opposition to Motion to Dismiss of Western Pacific Broadcast, LLC, and the Opposition to Motion to Dismiss, Comments in Response to Reply to Opposition to Motion to Dismiss, and Request for Leave to File Comments in Response to Reply to Opposition to Motion to Dismiss of PMCM TV, LLC, ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch,

Secretary.

[FR Doc. 2016-20504 Filed: 8/25/2016 8:45 am; Publication Date: 8/26/2016]