

5/13/12

*Before the
Federal Communications Commission
Washington, DC 20554*

In re Application of)

GEORGIA EAGLE MEDIA, INC.)

File No. BPH-20070705AAA

Facility No. 65607)

For Construction Permit)

Station WMCD(FM), Sullivan's Island, South Carolina)

Filed with: Office of the Secretary

Directed to: The Commission

APPLICATION FOR REVIEW

Georgia Eagle Media, Inc. ("Geprgia Eagle"), licensee of Station WMCD(FM), Claxton, Georgia, and applicant for modification of facilities and for city of license change for Station WMCD(FM) to Sullivan's Island, South Carolina in File No. BPH-20070705AAA. by its attorney, hereby submits its Application for Review of the Letter ruling issued on April 9, 2013 (the "2013 Letter Ruling") with regard to the above-referenced application of Georgia Eagle Media concerning Station WMCD(FM), for Sullivan's Island, South Carolina. With respect thereto, the following is stated:

Issues Presented

1. Whether the 2013 Letter Ruling was clearly erroneous and contrary to the plain meaning of Section 73.3573(f)(1) of the Commission's Rules?

Background

The Georgia Eagle application for WMCD (the subject of this Petition), are intertwined with an application prosecuted by The Last Bastion Station Trust, LLC, As Trustee ("Last Bastion")¹ with regard to Station WMGL(FM), Ravenel, South Carolina. Station WMGL was originally licensed to operate on Channel 269C3. An application was filed with respect to Station WMGL(FM) (File No. BPH-20070413AFJ) (the "WMGL Application") on April 13, 2007, which sought Commission consent for operation on Channel 297C3 -- a lateral channel move generally permitted under new Section 73.3573(a)(1)(iii) of the Commission's Rules. The WMGL Application was not, however, immediately grantable, insofar as the application was short-spaced with the licensed facilities of Station WNKT(FM), and thereby violated the provisions of Section 73.208 of the Commission's rules. Rather, as admitted by the applicant:

THIS APPLICATION IS CONTINGENT WITH THE AMENDED APPLICATION OF
WNKT FOR A CHANGE IN COMMUNITY OF LICENSE TO EASTOVER, SC ON
CHANNEL 298C2 (BPH-20070119AEM)

WMGL Application at Exhibit 26. Section 73.3517 of the Commission's Rules clearly states as follows:

Contingent applications for new stations and for changes in facilities of existing stations are not acceptable for filing. Contingent applications will be accepted for filing under circumstances described below:

47 C.F.R. § 73.3517. As one of the only circumstances under which "contingent applications" may be filed by FM applicants and licensees, Section 73.3517(e) states in pertinent part:

(e) The Commission will accept up to four contingently related applications filed by FM licensees and/or permittees for minor modification of facilities. Two applications are related if the grant of one is necessary to permit the grant of the second application. Each application must state that it is filed as part of a related group of applications to

¹ Last Bastion is the successor to Citadel Broadcasting Company. Pursuant to the Commission's decision in *Citadel Broadcasting Company*, 22 FCC Rcd 7083 (2007), the WMGL license was assigned to Last Bastion due to Citadel's loss of its grandfathered status that enabled it to own Station WMGL in compliance with the Commission's multiple ownership rules. The assignee is a trust in which Citadel ostensibly is an independent trust in which Citadel does not hold a cognizable interest pursuant to the Commission's attribution standards. The assignment was consummated on June 12, 2007.

make changes in facilities, must cross-reference each of the related applications, and must include a copy of the agreement to undertake the coordinated facility modifications. **All applications must be filed on the same date.**

47 C.F.R. § 73.3517(e) (emphasis added).

The WMGL Application was filed in blatant disregard of this rule. The application with which the WMGL applicant contingently linked its application was one filed previously with respect to Station WNKT(FM) (File No. BPH-20070119AEM) (the “WNKT Application”), which was filed on January 19, 2007. The WMGL Application was filed on April 13, 2007 – 88 days after the WNKT parent/conflicting application initially was filed. Therefore, not only was the WMGL Application submitted in blatant violation of Section 73.3517 (which prohibits the filing of contingent applications), the application failed to qualify under the limited exception to the rule, which allows such filing only where the applications are filed simultaneously (*i.e.*: “on the same date”). 47 C.F.R. § 73.3517(e). Its WMGL application amendment also constituted a late-filed amendment that was submitted without a requisite showing of good cause. 47 C.F.R. § 73.3522(c)(3). No waiver of the Commission’s rules was sought. Nevertheless, *without* grant of waiver or issuance of a written decision, the Bureau accepted the amendment, and granted the WMGL Application on July 5, 2007. Again, no grant of any waiver of any Commission Rule was issued by the Bureau at that time.

This action was to great detriment to Georgia Eagle. Before the filing of the WMGL Application, it was determined by Georgia Eagle that the grant of the WNKT Application created the opportunity for Georgia Eagle to apply for a construction permit for modification of Station WMCD(FM), to change community of license from Claxton, Georgia, to Sullivan’s Island, South Carolina on Channel 297, its current channel of operation, thereby providing first service to Sullivan’s Island. In short, in a head-to-head contest between the two mutually-exclusive applications, Georgia Eagle’s application easily would prevail under Section 307(b) of

the Communications Act of 1934, as interpreted at that time. Insofar as it was known that under the Commission's rules (47 C.F.R. § 73.208) such an application for WMCD could not properly be filed until the WNKT Application was first granted, although an application was prepared on behalf of Georgia Eagle in anticipation of a grant of the WNKT Application, Georgia Eagle dutifully waited to file for the WNKT Application to be granted. Immediately after the WNKT Application was granted on July 5, 2007, Georgia Eagle's WMCD Application was filed with the Commission. That application (File No. BPH-20070705AAA) is the application at issue in this current proceeding, which was dismissed by the Bureau on April 9, 2013.

By virtue of the illegal prior grant of the Last Bastion WMGL Application, Georgia Eagle has been deprived of its *Ashbacker* right to file and have considered an application mutually-exclusive to the WMGL application. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

As explained already in greater detail in the pending Application for Review, consistent with Commission precedent, the WMGL Application never should have been accepted for filing or granted. The two contingent applications were not submitted in accordance with the plain meaning of the Commission's Rule, and acceptance of the WMGL Application also violated Section 73.3566 of the rules requiring the dismissal of defective applications.

Georgia Eagle filed for reconsideration of the Bureau's action with regard to the WMGL Application which, on March 25, 2008, was denied. On its merits, the Bureau stated:

Although both applications were not "filed" the same day, the WNKT Application was amended on April 13, 2007, the same date that the WMGL Application was filed and made contingent with the WNKT Application. Both applications describe the contingent nature of each filing and cross-reference each other. The Bureau staff has followed a policy in such situations of allowing contingent minor modification applications and amendments (to an earlier-filed application) that are filed the same day to be considered as if both *applications* were filed on the same day as stated in Section 73.3517(e) of the Rules.¹⁹ This policy of allowing amendments to earlier-filed applications saves both the Commission and applicants time and resources by eliminating the extra step of having an

applicant dismiss its earlier-filed application and re-file a new application with the contingent application. The Commission, of course, has the authority to waive *sua sponte* any provision of the Rules for good cause. In this case, waiver of the "same day filing" requirement facilitated the efficient and expeditious processing of two applications in a manner which did not prejudice the filing rights of any other potential applicant. We affirm the application of that policy based on the particular circumstances of this application proceeding.

2008 Letter Ruling at 4. The Bureau also denied reconsideration on the grounds that Georgia Eagle ostensibly had not shown "good cause" for not participating previously in the proceeding.

2008 Letter Ruling at 3-4.

As noted previously, an Application for Review of that ruling is still pending. When successful (either before the Commission, or later, before the United States Court of Appeals), Georgia Eagle should not nevertheless ever be deprived of the right to prosecute its application for Sullivan's Island, South Carolina. Despite the fact that the Application for Review of the erroneous grant of the WMGL application is still pending (and therefore the WMGL grant is not yet a "final order"), nevertheless, the Media Bureau has taken upon itself to prematurely dismiss the Georgia Eagle WMCD application prior to such time as it is determined whether, indeed, Georgia Eagle's application had priority over the improperly granted WMGL application. That Bureau action on April 9, 2013 interferes with Georgia Eagle's due process right to prosecute its application.

The Bureau's decision was arbitrary and capricious and contrary to Commission precedent and must be reversed.

Argument

Section 73.3517 of the Commission's Rules is a non-technical filing rule, which states in a straightforward fashion:

Contingent applications for new stations and for changes in facilities of existing stations are not acceptable for filing. Contingent applications will be accepted for filing under circumstances described below:

47 C.F.R. § 73.3517. As one of the only circumstances under which “contingent applications” may be filed by FM applicants and licensees, Section 73.3517(e), states in pertinent part:

(e) The Commission will accept up to four contingently related applications filed by FM licensees and/or permittees for minor modification of facilities. Two applications are related if the grant of one is necessary to permit the grant of the second application. Each application must state that it is filed as part of a related group of applications to make changes in facilities, must cross-reference each of the related applications, and must include a copy of the agreement to undertake the coordinated facility modifications. **All applications must be filed on the same date.** Any coordinated facility modification filing that proposes the cancellation of a community's sole noncommercial educational FM station license also must include a public interest justification.

47 C.F.R. § 73.3517(e) (emphasis added). The Commission has been consistent in its demands.

In the *Notice of Proposed Rulemaking* first proposing the rule, the Commission stated:

We propose to allow the filing of contingent minor change FM construction applications on a limited basis. We would **require that such applications be filed on the same date**, and that each include a copy of the agreement covering all related applications.

1998 Biennial Regulatory Review – Streamlining of the Radio Technical Rules in Parts 73 and 74 of the Commission's Rules, 13 FCC Rcd 14849, ¶13 (1998) (emphasis added). When adopting the Rule, the Commission stated:

In the Notice we proposed to permit on a limited basis the filing of contingent applications. Stations seeking to take advantage of these new procedures **would be required to file all applications on the same day** and include in each application a copy of the agreement that references all related applications.

* * * *

We continue to believe that certain revisions to our contingent application rule are warranted and that the proposal set forth in the Notice strikes a proper balance between the desire of broadcasters for additional flexibility and the limited staff resources that are available to review the substantially more complex facilities change applications that these rule changes will permit.

1998 Biennial Regulatory Review – Streamlining of the Radio Technical Rules in Parts 73 and 74 of the Commission's Rules, 14 FCC Rcd 5272, ¶¶12, 14 (1999) (emphasis added). Even more recently, in the *Report and Order* adopting rules concerning contingent FM city of license change proposals, the Commission *again* stated:

related minor change applications **must be submitted concurrently**, and will be subject to the requirements and restrictions that apply to contingent minor modification application filings

Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services, 21 FCC Rcd 14212, ¶ 17 (2006) (emphasis added; footnote omitted), citing to Section 73.3517.

Thus it can easily be seen that based upon any plain reading of the rule, Georgia Eagle has a case and position that is properly prosecuted, and Georgia Eagle stands a substantial likelihood of prevailing on the merits.

This is especially true when close attention is directed to the case of *Pathfinder Communications Corp.*, 18 FCC Rcd 9272, ¶ 17 (2003). In *Pathfinder*, as essentially here, applicants sought to file an application for minor change in anticipation of a filing window being established by the Commission, in violation of a filing freeze established by the Commission. Insofar as the filing opportunity had not yet opened, such applications were “contingent” applications, and thereby were governed by Section 73.3517 of the Commission’s Rules. As here, acceptance of such applications would give the applicants “first-come/first-serve” priority over other applicants.

As the Commission noted, “[t]he issue before us is whether the Commission should permit several stations to unilaterally determine the stations that will obtain authorizations for enhanced....service” or whether the Commission’s established procedures should control. The Commission chose the latter:

As argued by the Applicants and as recognized by the staff, Section 73.3517 prohibits the retention of the Contingent Applications....We find that it was error to retain these applications and direct the staff to strictly enforce Section 73.3517.

Id. at ¶ 17. Although the specific applications at issue in *Pathfinder* were not dismissed, this determination was made as a result of the fact that “the staff, sua sponte, made clear that these

applications would not be accorded any putative first-come, first-served rights that could be tied to their premature submission in violation of the rule.” *Id.* at ¶ 18. In short, although the applications were not dismissed, the applicants were given *no* preferential treatment, and were processed as though filed during the subsequent “filing window.” Absent this mitigating fact, the prematurely-filed, contingent applications, would have been dismissed by the Commission.

Similarly with regard to the WMGL/WMCD conflict, the first-come/first-serve “window” for WMGL to file for the vacated spectrum first opened on July 5, 2007. Just as in *Pathfinder*, by filing early (as a mere contingent application), Citadel’s WMGL Application had the effect of leapfrogging the Commission’s processing rules by allowing the WMGL Application to jump-ahead-of other potentially competing applications (such as Georgia Eagle’s), and either required dismissal of the application under Section 73.3517 (as advocated by *Pathfinder*), or at the very least, should have resulted in file renumbering and treatment as filed later (when the first-come/first service non-contingent window first opened on July 5, 2007), as the Bureau itself did in the *Pathfinder* case. The teaching of *Pathfinder* is clear and unambiguous – “contingent applications for new stations and for changes in facilities are not acceptable for filing.” 47 C.F.R. § 73.3517. The only way WMGL should have been properly permitted to move from Channel 269C3 to 297C3 was if WNKT was *first* granted the right to operate on Channel 298C2 – an event which did not occur until July 5, 2007. Under the Commission’s rules, if Last Bastion wished to validly file an application to move its channel of operation from Channel 269C3 to 297C3 at Ravenel, it was *obligated* to either (1) coordinate with Citadel/WNKT and *simultaneously* (i.e., “on the same date”) file a proper contingent application in concert with the WNKT; or (2) await the grant of the WNKT Application. at which time the filing opportunity is processed by the FCC “first-come/first-serve” under Section

73.3573(f) of the Commission's rules. 47 C.F.R. § 73.3573(f). To permit otherwise is to permit the various WMGL licensees to manipulate the Commission's filing and processing rules.

In contrast to WMGL's actions, Georgia Eagle properly waited, until July 5, 2007, as it was *required*, to file its application. By accepting and granting the WMGL Contingent Application in violation of its own rules, the Bureau prejudiced and violated Georgia Eagle's rights guaranteed under *Ashbacker* to have its mutually-exclusive application accepted, processed, and ultimately granted.

As reflected in the pending Application for Review, the Bureau's ruling was erroneous for a broad variety of reasons.

First, the Bureau's interpretation of Section 73.3517 conflicted with the plain language of Section 73.3517 of the rules, and there is there also is no provision allowing for the filing of later-filed "amendments" to pending applications to allow them to be considered as if both applications were filed on the same date. Indeed, the Media Bureau's own *Public Notice* interpreting the certain provision of its rules and which gave guidance as to their application contained the following examples as illustrative of the proper procedures to be followed:

Example 7 (Channel substitution to permit upgrade):

Station A proposes to substitute 287A for 221A to permit Station B to file upgrade from 223A to 223C3.

Procedure: Station A must file Form 301 and submit the appropriate minor modification application filing fee. Station B must file Form 301 and submit the appropriate minor modification application fee. See Paragraph 16 and Section 73.203. Both Form 301s **must be submitted the same day** and reference one another. See Section 73.3517.

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Example 9 (CofL change to permit new allotment):

Station A proposes changing CofL from Smalltown, VA, to Othertown, VA, to permit a New Allotment filed by New Allotment Proponent in Anytown, VA.

Procedure: Station A must file Form 301, including the Section 307(b) information required by Question 18 of Section III-B, and submit the appropriate minor modification

application filing fee. See Paragraphs 9-10. New Allotment Proponent must file a P4RM and a Form 301, with the appropriate new application filing fee. See Paragraph 20. Both Form 301s and P4RM **must be submitted on the same day** and must reference one another. See Section 73.3517.

Media Bureau Offers Examples to Clarify Treatment of Applications and Rulemaking Petitions Proposing Community of License Changes, Channel Substitutions, and New FM Allotments, 22 FCC Rcd 6852 (2007) (emphasis added). The Staff certainly provided no indication in any way suggesting the “actual” existence of a liberal policy of allowing for the “option” for applications to be filed on the same day or, as an alternative, simply as “the subject of amendment on the same day.”² Rather, the Bureau’s own interpretation provided in the *Public Notice* tracked exactly the literal, plain language of the Rule.

Second, it is well established that the Bureau and the Commission each are obligated to follow the Commission’s rules and policies.³ In the WMGL case, the Bureau did not follow the Commission’s published Rules. It expanded and extrapolated away from the filing rule, “*sua sponte*” waiving the strict requirements of the rule under the belief that that waiver “did not prejudice the filing rights of any other potential applicant.”

Finally, although the Bureau claimed that as justification for its decision, it had a “policy” of treating later-filed amendments as though filed on the first day the application was filed, no citation was provided where this “policy” was adopted or has elaborated upon in

² When an agency has omitted language in a legislative type regulation, it cannot supply that language by administrative interpretation. *M. Kraus & Bros. v. U.S.*, 327 U.S. 614 (1946). Although agency interpretations of their own regulations are normally given controlling weight, when these interpretations are clearly erroneous or inconsistent with the regulations, they are not entitled to such preferential treatment. *Bowles v. Seminole Block and Sand Co.*, 325 U.S. 410 (1945); *Udall v. Tallman*, 380 U.S. 1 (1965).

³ See *Teleprompter Cable Communications Corp. v. FCC*, 565 F.2d 736, 742 (D.C. Cir. 1977); *Reuters Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986); *Bachow Communications, Inc. v. FCC*, 237 F.3d 683, 686 (D.C. Cir. 2001). See also *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1358 (D.C. Cir. 1993). Moreover, “[i]t is a ‘well-settled rule that an agency’s failure to follow its own regulations is fatal to the deviant action.’” *Florida Institute of Technology v. FCC*, 952 F.2d 549, 553 (D.C. Cir. 1992) (quoting *Way of Life Television Network, Inc. v. FCC*, 593 F.2d 1356, 1359 (D.C. Cir. 1979), and *Union of Concerned Scientists v. Atomic Energy Comm’n*, 499 F.2d, 1069, 1082 (D.C. Cir. 1974)).

writing, and only one example of where this “policy” has been applied ever was provided, and of course Section 553 of the Administrative Procedure Act (“APA”), 5 U.S.C. § 553, describes the procedures agencies must follow to notify all potentially interested parties before adoption of any proposed new rule and permit them to submit comments, which also never were followed. As best as can be determined, the Bureau just “decided” one day, *i.e.*, for its own administrative convenience, to ignore the strict wording of the rule. Yet Georgia Eagle was the victim of that “policy.” In contrast to an informal adjudication or a mere policy statement (which “lacks the firmness of a [prescribed] standard)” an agency’s imposition of requirements that “affect subsequent [agency] acts” and have a “future effect” on a party before the agency triggers the APA notice requirement. *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 95-96 (D.C. Cir. 2002) (internal quotations and citation omitted). For purposes of the APA, “substantive rules” requiring notice and comment are those that effect change in existing law or policy or which affect individual rights and obligations. See, e.g., *Paralyzed Veterans of America v. West*, 138 F.3d 434 (Fed. Cir. 1998).⁴ The Bureau’s unpublished “policy” clearly falls within that

4 Although the precise difference between policy statements and interpretive rules is the subject of some dispute, see *Appalachian Power Co. v. Environmental Protection Agency*, 208 F.3d 1015, 1021 n. 13 (D.C. Cir. 2000), courts have observed that a policy statement “does not seek to impose or elaborate or interpret a legal norm,” but rather “represents an agency position with respect to how it will treat—typically enforce—the governing legal norm.” *Syncor International Corp. v. Shalala*, 127 F.3d 90, 94 (1997) (emphasis added). “By issuing a policy statement, an agency simply lets the public know its current enforcement or adjudicatory approach. . . . Policy statements are binding on neither the public, nor the agency.” *Id.* (citations omitted); see also *United States Telephone Ass’n v. FCC*, 28 F.3d 1232, 1234 (D.C. Cir. 1994) (“[T]he paradigm of a policy statement [is] an indication of an agency’s current position on a particular regulatory issue.”). In this case, the “policy” never publicized to the public, and therefore presumably are even less “binding” in nature.

An interpretive rule, on the other hand, “typically reflects an agency’s construction of a statute that has been entrusted to the agency to administer.” *Syncor International*, 127 F.3d at 94. That is not at issue in this case.

Substantive rules, in contrast to both interpretive rules and policy statements, modify or add to a legal norm. based on the agency’s own authority. *Id.* at 95. “That authority flows from a congressional delegation to promulgate substantive rules, to engage in supplementary lawmaking.” *Id.* Because the agency is engaged in lawmaking, the APA requires it to comply with notice and comment. *Id.* Because the Bureau’s is changing the substantive provisions of Section 73.3517 of the Rules in applying its “policy,” the Bureau is changing a legal norm. and implicating (and violating) the Administrative Procedure Act.

category. Nevertheless, neither Georgia Eagle (nor any other member of the public) ever was given notice of the adoption of this phantom "policy."

Just as in *Pathfinder* and in *Radio 2000*, the WMGL Application should not have been afforded preferential treatment; should have been processed as though filed on a non-contingent basis on July 5, 2007; and should have been treated as mutually-exclusive with the application timely filed by Georgia Eagle, File No. BPH-20070705AAA. To have done otherwise violated Georgia Eagle's rights under the seminal case of *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), which requires a comparative evaluation of Georgia Eagle's WMCD Application to Last Bastion's WMGL Application.

In light of all of the forgoing, it was wrong for the Bureau to insist that Georgia Eagle amend the WMCD application during the appellate process, thereby removing the mutual exclusivity with the original WMGL application and the very basis for the litigation. Section 73.3573(f)(1) of the Commission's rules states:

(f) Processing non-reserved FM broadcast station applications.

(1) Applications for minor modifications for non-reserved FM broadcast stations, as defined in paragraph (a)(2) of this section, may be filed at any time, unless restricted by the FCC, and, generally, will be processed in the order in which they are tendered. The FCC will periodically release a Public Notice listing those applications accepted for filing. Processing of these applications will be on a "first come/first serve" basis with the first acceptable application cutting off the filing rights of subsequent applicants. All applications received on the same day will be treated as simultaneously tendered and, if they are found to be mutually exclusive, must be resolved through settlement or technical amendment. Applications received after the tender of a lead application will be grouped, according to filing date, behind the lead application in a queue. The priority rights of the lead applicant, as against all other applicants, are determined by the date of filing, but the filing date for subsequent applicants for that channel and community only reserves a place in the queue. The rights of an applicant in a queue ripen only upon a final determination that the lead applicant is unacceptable and if the queue member is reached and found acceptable. The

queue will remain behind the lead applicant until a construction permit is finally granted, at which time the queue dissolves.

47 C.F.R. § 73.3573(f)(1) (emphasis added).

In this case, there clearly has not yet been any “final grant” of the WMGL construction permit application. Not only is Georgia Eagle continuing to validly challenge the propriety of the issuance of the WMGL permit in the pending Application for Review, Georgia Eagle is asking for the conflicting WMGL permit to be affirmatively revoked.

Requiring the amendment of the WMCD(AM) pending application to a “new site” at this early juncture in essence requires Georgia Eagle to abandon its Application for Review, thereby prejudicing Georgia Eagle’s due process right to prosecute its pending change of community application. Specifically, without the application remaining in “pending” status at the current proposed site, any new application by an outside party that is filed that may be mixed with the application/site the Bureau is asking Georgia Eagle to abandon would, by law, gain precedence over the 2007 Georgia Eagle WMCD application for Sullivan’s Island. Then, even upon grant of Georgia Eagle’s Application for Review and the acceptance by the full Commission of Georgia Eagle’s arguments (which would be followed by the subsequent dismissal of the WMGL application and permit (as requested by Georgia Eagle)), without preserving the Georgia Eagle WMCD application at the *exact* same site and *exact* same parameters, Georgia Eagle will not be retaining its absolute right to *move up* in the queue when such an event occurs.

For this reason, the 2007 Georgia Eagle WMCD Application should have been maintained in pending status and “in queue” until such time, if ever, the WMGL application receives a grant that becomes a *final* grant. Earlier dismissal is improper, and such action would be arbitrary and capricious, contrary to the plain language of the Commission rules, and an abuse of discretion.

Conclusion

Under the Commission's interpretation of *Ashbacker*, the Commission was obligated to open filing opportunities to all members of the public⁵; and in *Pathfinder*, the Commission reminded the Media Bureau that it was obligated to strictly enforce Section 73.3517, and dismiss any prematurely filed applications.⁶ Moreover, any departure from full enforcement of the Commission's rules is permissible only if justified and explained. 5 U.S.C. § 706(2)(a). See *Communications and Control, Inc. v. FCC*, 374 F.3d 1329, 1335-36 (D.C. Cir. 2004) (holding that a departure from established practice "with no explanation, renders its void *ab initio* rationale arbitrary and capricious," citing *Motor Vehicles Mfrs. Ass'n*, 463 U.S. 29, 57 (1983) ("[A]n agency changing its course must supply a reasoned analysis"). The Commission also was obligated to apply its rules and regulations uniformly⁷, and treat similarly situated parties in a similar manner.⁸ Moreover, the Commission, and those members of the public affected, were entitled to demand strict adherence to its rules. *Salzer v. FCC*, 778 F.2d 869, 871, 875 (D.C. Cir. 1985); *McElroy Electronics Corp. v. FCC*, 88 F.3d 248, 257 (D.C. Cir. 1996) (as against latecomers, timely filers who have diligently complied with Commission requirements have an equitable interest in enforcement of the cut-off rules"). *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, 21 FCC Rcd 14212, ¶ 17 (2006) (footnote omitted).

5 The Commission has promulgated various "cut-off" rules that establish deadlines by which applications must be filed. "The purpose of these rules is to attract all competitive applications for a particular [frequency] within a fixed and reasonably short time frame, allowing the Commission to satisfy its *Ashbacker* obligations....." *Florida Inst. of Tech. v. FCC*, 952 F.2d 549, 550 (DC Cir. 1992).

6 *Pathfinder Communications Corp.*, 18 FCC Rcd 9272 (2003).

7 *McElroy Electronics Corp. v. FCC*, 86 F.3d 248, 257 (D.C. Cir. 1996).

8 *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732 (D.C. Cir. 1965) (similarly situated cases should not be treated dissimilarly).

In this case and the Last Bastion case, virtually none of those principles were followed. It was only through a contorted and unreasonable reading of Commission rules that Last Bastion's Application is even colorably capable of being deemed acceptable under the Commission's Rules, and any broad examination of all of the facts in this case leads to the inescapable conclusion that nearly all of Citadel's and Last Bastion's actions with regard to Stations WNKT and WGML have been to engage in an overall manipulation of the Commission's rules and processes for their only private pecuniary advantage, to the detriment of the overall public interest.

For the Bureau now to seek to short-cut the litigation and decision-making process of the FCC's appellate process undermines George Eagle's due process rights. For this reason, the Letter Decision of the Bureau must be reversed.

WHEREFORE, for all the reasons stated here, it is requested that this Application for Review be granted.

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May 13, 2013

Respectfully submitted,

**GEORGIA EAGLE BROADCASTING,
INC.**

By: 

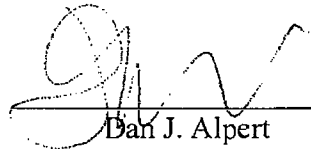
Dan J. Alpert

Its Attorney

CERTIFICATE OF SERVICE

I, Dan J. Alpert, hereby certify that on May 13, 2013, the forgoing Application for Review is being served on the following by First Class Mail:

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Dan J. Alpert