



Federal Communications Commission
Washington, D.C. 20554

February 23, 2012

DA 12-262

In Reply Refer to:

1800B3-IB

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In re: DWKAJ (AM), Little Falls, N.Y.
Facility ID 160470
File Nos. BNP-20070926ALF
as modified by BMP-20110207AET
Petition for Reconsideration

Dear Mr. Barraclough:

We have before us a January 27, 2012, "Petition for Reconsideration" ("Petition") concerning former, unbuilt station DWKAJ (AM), Little Falls, New York. Cranesville Block Company, Inc. ("CBC"), former permittee of DWKAN(AM), requests reinstatement of the above-referenced construction permit ("Permit") and additional time in which to complete construction and file a license application. For the reasons discussed below the Petition is dismissed as procedurally defective and, when considered as a waiver request, denied.

Background. The Commission originally issued the Permit to Michael Celenza on April 14, 2008, for a three-year construction period expiring April 14, 2011. On March 30, 2010, the Commission approved the assignment of the Permit from Celenza to CBC. The parties consummated the sale on April 15, 2010. Pursuant to rules then in effect, CBC qualified for additional construction time as an eligible entity.¹ Accordingly, we adjusted the construction deadline to October 15, 2011, *i.e.*, eighteen months from consummation of the assignment. In February 2011, CBC filed an application to modify the facilities by changing the community of license from Little Falls, New York to Saint Johnsville, New York. CBC stated in its application that the change was necessary because the original transmitter site was no longer available. We granted the modification on July 14, 2011. Beginning August 28, 2011, the area experienced flooding due to hurricanes and a tornado which also limited access to the transmitter site. On September 30, 2011, CBC filed a tolling request seeking to revise the construction deadline to no earlier than December 1, 2011. Photos of the site that CBC submitted at that time showed no above-ground construction. We found that the conditions which delayed construction during the final two months of the permit period warranted a waiver to adjust the permit expiration date by two months and, accordingly, revised the construction deadline from October 15, 2011 to December 15, 2011.²

¹ See 47 C.F.R. § 73.3598(a).

² The permit had already been in effect for over three unencumbered years, so qualified for a waiver of 47 C.F.R. § 73.3598(a) but not for tolling of the three-year construction period pursuant to 47 C.F.R. § 73.3598(b). See *JNE Investments, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 623, n.50 (citing *Texas Grace Communications, Inc.*, Memorandum Opinion and Order, 20 FCC Rcd 4820, 4284 (2005)).

The Commission did not receive a license application by the revised deadline nor any request for further waiver of the construction deadline. On January 5, 2012, our engineering staff e-mailed CBC's attorney to inquire whether CBC had completed construction by the December 15, 2011 expiration date and had filed a license application on FCC Form 302 (which is a non-electronic, paper filing). The staff requested a response by January 6, 2012. On January 8, 2012, counsel responded that construction had been delayed but completed, giving no construction details or completion date. Counsel also stated that CBC had not yet filed a Form 302 license application. The staff considered CBC's response to corroborate its belief that the permit had expired on its own terms on December 15, 2011. On January 25, 2012, the staff made entries in the Commission's database marking the permit cancelled and deleting the station's call sign and informed CBC of those steps by e-mail.

CBC filed the Petition on January 27, 2012, arguing that reconsideration is warranted for changed circumstances and additional facts. It states that it modified the previously authorized facilities in order to serve "a larger area and communities that have no local radio." However, its contractor abruptly abandoned the project without notice shortly before permit expiration, even though CBC had already paid two-thirds of the contract price. CBC states that, due to the holiday season, it was unable to find anyone to complete the job prior to the December 15, 2011 deadline. It submits photos dated January 26, 2012, and claims to have built all four towers, the transmitter, and control unit. CBC states that the only matters that currently prevent it from filing a license application are the need to install transmission cables on one of the towers³ and to perform proof of performance testing. CBC argues that it "has made significant investments of both time and money,"⁴ and acted diligently and in good faith to complete construction by the deadline, but was prejudiced by circumstances beyond its control.

Discussion. The Commission's Rules specify that Petitions for Reconsideration will be entertained within 30 days of public notice of a final Commission action.⁵ There was no Commission action in the present case, the Permit simply expired on December 15, 2011 by its own terms and was automatically forfeited on that date pursuant to Section 73.3598(e) of the Rules because the permittee had not constructed and filed a license application.⁶ The steps that the staff took to mark the permit as cancelled, to delete it from the Commission's database, and to inform CBC of those steps in a January 25, 2012 e-mail were purely ministerial and did not establish any independent basis for seeking reconsideration.⁷ Accordingly, we will dismiss the Petition as procedurally defective. We will, however,

³ CBC states that the reason this cable was not previously installed is that the cable was delivered short, and its engineer wanted no spliced cables.

⁴ CBC does not submit any documentation identifying the nature or amount of construction expenses incurred.

⁵ See 47 C.F.R. § 1.106(f). When there is no Federal Register publication nor descriptive document entitled "Public Notice" released, the public notice date is date of the action. *Id.* § 1.4(b)(5). Even had the Commission taken some final action on the date of permit expiration, CBC's Petition would have been late-filed. Petitions for Reconsideration of any December 15, 2011 "action" would have been due on Tuesday, January 17, 2012, given that the 30th day fell on the three-day Martin Luther King, Jr. holiday weekend. *Id.* § 1.4(e)(1).

⁶ *Id.* § 73.3598(e).

⁷ *Id.* (automatic forfeiture of broadcast construction permits upon expiration without any further affirmative cancellation by the Commission). See *Mobile Relay Associates*, Order on Reconsideration, 24 FCC Rcd 3234, n.28 (WTB 2009) (petition for reconsideration of wireless matter subject to dismissal as untimely when filed more than 30 days from the substantive staff action at issue, but within 30 days of a ministerial act taken to implement that action); *Compare R&M Broadcasting Co.*, Memorandum Opinion and Order and Notice of Apparent Liability, 26 FCC Rcd 10336 (MB 2011) (considering license renewal applications by constructed, operating broadcast stations filed more than 30 days after license expiration but within 30 days of staff expiration letter).

consider it as a request for the relief sought – *i.e.*, for reinstatement of the Permit *nunc pro tunc* pursuant to waivers of the automatic forfeiture and construction deadline provisions of Rule Sections 73.3598(a) and (e).

The Commission's rules may be waived only for good cause shown.⁸ An applicant seeking a rule waiver has the burden to plead with particularity the facts and circumstances that warrant such action.⁹ The Commission must give waiver requests “a hard look,” but an applicant for waiver “faces a high hurdle even at the starting gate”¹⁰ and must support its waiver request with a compelling showing.¹¹ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.¹² In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹³ However, waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.¹⁴ Consistent with these requirements, the Commission has stated that waivers of broadcast construction deadlines are appropriate when construction has been prevented by “rare and exceptional circumstances” beyond the permittee’s control.¹⁵

CBC’s request fails to present good cause for waiver of Sections 73.3598(a) and (e). CBC has not shown sufficiently unique “special” circumstances, *i.e.*, rare and exceptional circumstances beyond its control to justify a waiver of the broadcast construction deadline. A permittee’s decision to modify its authorized facilities or to acquire a permit requiring such a modification is an ordinary business decision that does not form a basis for extending the construction deadline.¹⁶ Vendor and contractor problems, whatever their cause, also are ordinary risks for which businesses must prudently plan, and would not generally form the basis for a waiver of broadcast construction deadlines.¹⁷ Although, as CBC notes, the Commission has sometimes granted license applications filed after permit expiration,¹⁸ the applicants in those cases had timely completed construction prior to permit expiration and the delay was limited to

⁸ 47 C.F.R. § 1.3.

⁹ See *Columbia Communications Corp. v. FCC*, 832 F.2d 189, 192 (D.C. Cir. 1987) (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 644, 666 (D.C. Cir. 1968)).

¹⁰ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff’d*, 459 F.2d 1203 (1972), *cert. denied*, 93 S.Ct. 461 (1972) (“*WAIT Radio*”). See also *Thomas Radio v. FCC*, 716 F.2d 921, 924 (D.C. Cir. 1983).

¹¹ *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999) (citing *Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974)).

¹² *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“*Northeast Cellular*”).

¹³ *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

¹⁴ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008) (“*NetworkIP*”); *Northeast Cellular*, 897 F.2d at 1166.

¹⁵ 1998 Biennial Regulatory Review - Streamlining of Mass Media Applications, Rules and Processes, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17541 (1999).

¹⁶ See *Birach Broadcasting Corp.*, Memorandum Opinion and Order, 20 FCC Rcd 5764, 5765 (2005).

¹⁷ See *Wendell & Associates*, Memorandum Opinion and Order, 17 FCC Rcd 18056 (2002) (unavailability of local crews following 9/11). See generally *NetworkIP*, 548 F.3d at 127 (“Procrastination plus the universal tendency for things to go wrong (Murphy’s Law) at the worst possible moment (Finagle’s Corollary) is not a ‘special circumstance’ [supporting waiver.]”).

¹⁸ Petition at 3 citing *WRFN-LP, Pasquo, Tennessee*, Letter, 24 FCC Rcd 12426 (MB 2009).

filing the application. In several instances, the Bureau also has waived the construction deadline, but for far shorter periods than sought here, upon a showing that the permittee substantially completed construction prior to permit expiration in accordance with the terms of its permit but was prevented from taking relatively small final steps needed to file a license application.¹⁹ Although CBC now claims substantial construction with relatively few steps remaining, it documents that claim only as of January 26, 2012 -- six weeks after permit expiration. The matters upon which CBC relies -- construction of four broadcast towers, installation of a transmitter, and related matters -- appear to have occurred after the December 15, 2011 permit expiration, at a time when CBC had neither requested a waiver of the deadline nor special temporary authority to construct despite expiration of its permit. CBC's construction would, thus, have been without any color of authority.²⁰ The Commission has a longstanding policy not to credit unauthorized construction and/or operation when considering whether a permittee's efforts justify a rule waiver.²¹ The public interest is generally not served by a waiver under such circumstances. We also reject CBC's argument that a waiver would serve the public interest by providing service to "communities that have no local radio." CBC is apparently referring to prior claims in its modification application that WKAJ(AM) would be the first radio station licensed to Saint Johnsville and the second nighttime AM signal received in that community.²² However, CBC has not shown that the automatic forfeiture of the WKAJ(AM) Permit would leave any substantial population without radio reception. For example, Saint Johnsville also receives service from ten FM stations licensed to surrounding communities.²³

Accordingly, the January 27, 2012 Petition for Reconsideration by Cranesville Block Company, Inc. IS DISMISSED and, when treated as a request for waiver, IS DENIED. To the extent that CBC has partially constructed, it is imperative to the safety of air navigation that any prescribed painting and illumination of the station's towers be maintained until they are dismantled. Accordingly, the owner of the towers where CBC's transmitting antenna is located is required, pursuant to Section 303(q) of the Communications Act of 1934, as amended,²⁴ to maintain the towers in the manner prescribed by our rules and the terms of the expired Permit until dismantled.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

¹⁹ See *Clear Channel Licenses, Inc.*, Letter, 21 FCC Rcd 8677, n.31 (MB 2006); *recon, denied*, 23 FCC Rcd 4526 (2008), *review denied*, Memorandum Opinion and Order, 26 FCC Rcd 7153 (2011), *appeal pending*.

²⁰ See 47 U.S.C. § 301(a); *California State University, Sacramento*, Memorandum Opinion and Order, 13 Comm. Reg. (P&F) 609 (1998) (installation of antenna, transmitter, transmission line, and related wiring prior to receipt of modified authorization was unauthorized and did not count in considering, under prior rules, whether to reinstate permit for substantial progress).

²¹ See *KSBN Radio*, Memorandum Opinion and Order, 19 FCC Rcd 20162 (2004), *recon. denied*, 23 FCC Rcd 2504 (2008) (rejecting permittee's claim that its construction of unauthorized facilities was a good faith effort that should warrant waiver of a construction deadline); *Joseph I. Kendrick*, Memorandum Opinion and Order, 11 FCC Rcd 19635 (1996) (longstanding policy of not crediting post-authorization construction in evaluating requests for extension of construction deadlines).

²² See File No. BMP-20110207AET, Exhibit E.

²³ *Id.*

²⁴ 47 U.S.C. § 303(q).