

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

In the Matter of
Request for Extension of Time to
Construct Digital Facilities
WGTW-DT, Burlington, New Jersey
File No. BEPCDT-20020228AFC
ID No. 7623

MEMORANDUM OPINION AND ORDER

Adopted: December 12, 2002

Released: December 13, 2002

By the Chief, Media Bureau:

1. The Media Bureau (the "Bureau") has before it a petition for reconsideration filed by Brunson Communications, Inc. ("Brunson") seeking reconsideration of the Bureau's letter of June 14, 2002, denying its request for an extension of time to construct the digital facilities for WGTW-DT and admonishing Brunson for failing to meet the May 1, 2002, construction deadline for its DTV facilities. For the reasons stated below, we deny the petition.

2. In its petition, WGTW argues that (1) the Bureau lacked the authority to deny DTV extension applications; and (2) the Bureau did not apply the Commission's standard for granting DTV extension requests.

3. Brunson argues that the Bureau was affirmatively prohibited from denying DTV extension applications at the time of the June 14 letter. As Brunson notes, Section 73.624(d)(3)(iii)1 of the Commission's Rules formerly read:

The Bureau may grant no more than two extension requests upon delegated authority. Subsequent extension requests shall be referred to the Commission. The Bureau may not on delegated authority deny an extension request but must refer recommended denials to the Commission.

Although the Commission formally amended that rule in Remedial Steps for Failure to Comply with Digital Television Construction Schedule, 17 FCC Rcd 9962 (2002), Brunson argues that the rule change was not effective until July 5, 2002, and that the Bureau did not have the authority to deny DTV extension requests at the time it issued the June 14 letter. We disagree. In describing its proposed set of graduated sanctions, the Commission announced that, initially, for a station that failed both to meet its

1 47 C.F.R. § 73.624(d)(3)(iii).

DTV construction deadline and to demonstrate that an extension was justified, its extension request would be denied and the station would be admonished for its failure to comply with its DTV construction obligation. In that same Order and Notice of Proposed Rulemaking, the Commission stated:

[W]e direct the Media Bureau to continue processing pending DTV extension requests on a case-by-case basis during the pendency of this rulemaking, utilizing the full range of permissible sanctions, including those set forth in this Notice, to ensure that licensees complete construction of their DTV facilities in an expeditious manner. As we stated in our *November DTV MO&O [Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television]*, 16 FCC Rcd 20594, 20612 (2001) the Bureau may grant up to two six-month extension requests or deny such requests under its delegated authority. We will amend our DTV construction rule to clarify this point. [footnotes omitted]

Given the specific directive from the Commission, the Bureau clearly was empowered to act on and deny extension requests while Section 73.624(d)(3)(iii) of the Rules was being clarified to reflect the Bureau's new delegated authority. Brunson's argument is, therefore, without merit.

4. Brunson next argues that denial of its extension request was an improper rendering of the DTV extension standard. Brunson states that its extension request was based on two claims: (1) that WGTW had experienced financial difficulties justifying an extension of the May 1 deadline; and (2) that obstacles to Brunson's acquisition of tower and antenna accommodations could not be overcome by the May 1 deadline. On the first issue, Brunson contends that it detailed the financial difficulties that it claims prevented it from complying with the May 1 deadline. Brunson argues that it had provided documents to the Commission demonstrating that it lacked the financial resources to build a DTV facility. In the transmittal sheet accompanying those documents, however, Brunson stated that it had "made substantial progress toward financing the DTV buildout, [sic] and expects to draw on that financing." Whatever its financial situation may have been, Brunson itself stated that it had the financing available to build its DTV facility. Brunson also claims that its projection that it would cost approximately \$150,000 to build minimal DTV facilities was adequate, even though Brunson acknowledges that it did not break that figure down into its components. Brunson argues that its failure to detail and provide support for its projected costs should be excused because the Bureau, as a result of its own expertise, knew or should have known that "Brunson's initial estimate could not have been inflated." The Bureau's duty, however, is to make a determination based on the facts presented in the record. It is the applicant's burden to provide those facts. Brunson failed to provide the necessary detail and support for its projected costs and the Bureau was, therefore, justified in rejecting Brunson's argument that it was financially unable to construct its DTV facility by the deadline.

6. On the second issue, tower availability, Brunson attaches a declaration by its counsel, Barry Wood, detailing his personal knowledge of Brunson's difficulties in securing tower space. In its petition, Brunson indicates that it is now supplementing its original showing regarding tower availability. Under Section 1.106 of the Commission's Rules, a petition for reconsideration that relies on facts not previously presented can only be granted if: (1) events have occurred or circumstances have changed since the last opportunity to present those matters; (2) the facts relied on were unknown to the petitioner and could not, through the exercise of due diligence, have been discovered prior to the last opportunity to present those matters.² Neither of those exceptions applies here.

² 47 C.F.R. § 1.106(b)(2).

7. ACCORDINGLY, IT IS ORDERED, THAT the petition for reconsideration filed by Brunson Communications,, Inc., seeking reconsideration of the Bureau's letter of June 14, 2002, which denied Brunson's request for an extension of time to construct the digital facilities for WGTW-DT and admonished Brunson for failure to meet the May 1, 2002, construction deadline for digital television facilities, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

W. Kenneth Ferree
Chief, Media Bureau