



Federal Communications Commission
Washington, D.C. 20554

March 22, 2007

DA 07-1372

In Reply Refer to:
1800B3-KD

Released: March 22, 2007

Mr. Frederick Gauthier De Castro
Radio 780
P.O. Box 154
San German, PR 00683

In re: DWREY(AM), Mulberry, FL
Facility ID No. 54464
File No. BP-19890301AF, modified by
BMP-20000915AAA

**Petition for Reconsideration of Denial of
Tolling Request**

Dear Mr. Gauthier De Castro:

We have before us a Petition for Reconsideration (the "Petition") filed March 14, 2005, by Radio 780, previous permittee of unbuilt and cancelled Station WREY(AM), Mulberry, Florida (the "Station"). Radio 780 seeks reconsideration of the January 24, 2005, decision of the Audio Division (the "Staff Decision")¹ denying Radio 780's request to toll the Station's December 21, 2000, construction deadline pursuant to Section 73.3598(b) of the Commission's Rules (the "Rules").² For the reasons discussed below, we dismiss the Petition.

Background. Radio 780 first received a construction permit for the Station on November 5, 1996, with a construction deadline of May 5, 1998. On June 22, 1998, in response to a timely-filed extension request, the staff set a new construction deadline of December 22, 1998.³ In transitioning to a new three-year construction period, the Commission extended the construction deadline to December 21, 2000, for this Station and many others.⁴ On November 21, 2000, the staff granted Radio 780's September 15, 2000, application to modify the permit.⁵ The permit modification was conditioned on completion of

¹ *Letter to Radio 780*, Ref. No. 1800B3-IB (MB Jan. 24, 2005).

² *See* 47 C.F.R. § 73.3598(b).

³ *See* File No. BMP-19980505JF.

⁴ *Streamlining of Mass Media Applications, Rules, and Processes*, Memorandum Opinion and Order, 14 FCC Red 17525, 17536 (1999) ("*Streamlining MO&O*").

⁵ File. No. BMP-20000915AAA.

the International Telecommunications Union (“ITU”) process, with a note that construction of the Station prior to ITU approval would be at Radio 780’s risk.⁶ On December 1, 2000, Radio 780 requested “tolling” of the construction period citing that condition and the ongoing ITU process, and the staff granted the request on December 21, 2000. By the terms of the Bureau’s action, upon resolution of the ITU matter, the permittee would receive the 30 remaining days (*i.e.*, the period between the November 21, 2000, grant of the modification application and the December 21, 2000, construction deadline) of the Station’s three-year construction period to complete construction of WREY(AM)’s facilities.

The ITU matter was resolved on December 21, 2000, but the Audio Division staff did not learn of this fact until November 2004. On November 5, 2004, the staff notified Radio 780 that, due to this development, its construction period was no longer tolled. The staff reissued the construction permit without the ITU condition and afforded Radio 780 the additional 30 days to which it was entitled with the resolution of the ITU matter. The permit expired on December 5, 2004, without Radio 780 certifying completion of Station construction.

On December 7, 2004, after the WREY(AM) permit had expired, Radio 780 requested additional time to construct, maintaining that further tolling of the permit was warranted for the following reasons: (1) damage caused by Hurricane Charlie; (2) a new “critical hours” requirement in the November 2004 permit; and (3) the additional 30 days allowed for construction deadline provided too “little time to complete the build.” The Staff Decision dismissed the request, concluding that it was late-filed and failed to justify tolling pursuant to Section 73.3598(b) of the Rules.⁷ Accordingly, the Staff Decision informed Radio 780 that the call sign WREY was deleted because construction was not completed by December 5, 2004, the permit’s expiration date.

In its Petition, Radio 780 argues, for the first time, that the provision contained in its modified permit noting that construction pending ITU approval would be done at Radio 780’s risk precluded it from either obtaining the funds necessary to build the Station or finding a buyer for the permit. It further maintains that it would have been able to obtain funds and commence construction within the allotted 30-day period had the Commission “recognized the ITU registration on a timely basis.” Radio 780 also argues that, if it had promptly received the ITU notice from the staff, it would have been able to request additional time to construct the Station in a timely manner.⁸

Discussion. The Commission will consider a petition for reconsideration when the petitioner shows either a material error in the Commission’s original order, or raises additional facts not known or

⁶ The ITU is an international organization within the United Nations system in which governments and the private sector coordinate global telecom networks and services. The ITU process allows ITU member states to coordinate use of radio frequency spectrum to eliminate harmful interference between radio stations of different countries. In this case, Radio 780’s application was submitted by the Commission to the ITU for approval because of its potential interference with foreign stations, such as those located in Cuba or the Dominican Republic.

⁷ Specifically, we held that the alleged connection between the damage to the site by Hurricane Charlie and the non-construction was too remote to justify tolling of the construction permit, since, at the time that the Hurricane hit the area, Radio 780 had neither commenced nor scheduled construction of the Station. Staff Decision at 2. We further held that none of the other circumstances presented by Radio 780 warranted tolling of the permit. *Id.*

⁸ Radio 780 reiterates the argument raised in its December 7, 2004, filing that it did not request tolling for hurricane damage within 30 days of its occurrence because its permit was already tolling based on the ITU condition. This argument was properly rejected in the Staff Decision, which stated that “even if we were to waive the 30-day filing requirement, which we do not, the tolling request would fail on the merits.” Staff Decision at 1. As such, we will not revisit this argument here.

existing at the time of the petitioner's last opportunity to present such matters.⁹ A petition for reconsideration that simply reiterates arguments that were previously considered and rejected will be denied.¹⁰ We find that the Petition neither demonstrates material error or omission in the Staff Decision, nor raises any new facts unavailable to Radio 780 when it filed its initial tolling request.

As a procedural matter, we note that Radio 780's Petition was late-filed and we will dismiss it on that basis. Petitions for reconsideration must be filed within 30 days of the date of the action taken (where, as here, no public notice was issued announcing the determination) and must be submitted to the Commission's Secretary.¹¹ Thus, a petition for reconsideration of the January 24, 2005, Staff Decision was due 30 days later, on February 23, 2005. The Commission, except in circumstances not applicable here, lacks the authority to extend or waive the statutory 30-day filing period for petitions for reconsideration set forth in Section 405 of the Communications Act of 1934, as amended (the "Act").¹² Although the Commission may consider a late-filed petition for reconsideration if the petitioner shows that its failure to file for reconsideration in a timely manner resulted from "extraordinary circumstances,"¹³ no such showing has been made here. While it appears that Radio 780 attempted to submit the Petition via e-mail to the Chief of the Audio Division on February 24, 2005, it did not properly file the Petition with the Commission in accordance with Section 1.106(h)(i) of the Rules until March 14, 2005, nearly three weeks after the filing deadline, and provided no explanation as to why it failed to file its Petition in a timely manner.¹⁴ In addition, the Petition relies on facts that were known to Radio 780 when it filed its initial tolling request (namely, its professed inability to obtain financing due to the ITU condition in the construction permit) but were not presented to the Commission at that time. While these procedural defects are fatal to the Petition, we will nonetheless briefly respond to Radio 780's arguments.¹⁵

The financial difficulties described by Radio 780 are neither tolling events nor, for the purposes of waiver, "rare and exceptional circumstances beyond the permittee's control" that prevented construction.¹⁶ The Commission has repeatedly held that the unavailability of funds is not considered a

⁹ 47 C.F.R. § 1.106. See also *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

¹⁰ See *WWIZ, Inc.*, 37 FCC at 686 (stating that "it is universally held that rehearing will not be granted merely for the purpose of again debating matters on which the tribunal has once deliberated and spoken").

¹¹ 47 U.S.C. § 405; 47 C.F.R. §§ 1.106(f), (i).

¹² 47 U.S.C. § 405. See *Reuters Limited v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986); *Pueblo Radio Broadcasting Service*, Memorandum Opinion and Order, 6 FCC Rcd 1416 (1991); *Panola Broadcasting Co.*, Memorandum Opinion and Order, 68 FCC 2d 533 (1978).

¹³ *Gardner v. FCC*, 530 F.2d 1086, 1091-92 (D.C. Cir. 1976); *Richardson Independent School District*, Memorandum Opinion and Order, 5 FCC Rcd 3135, 3136 (1990).

¹⁴ See *ACR Electronics, Inc.*, Order on Reconsideration, 18 FCC Rcd 11000, 11001-02 (2003) (holding that a petition must be properly filed and timely before the Commission will consider the petitioner's request for reconsideration).

¹⁵ See 47 C.F.R. § 1.106(c). See also *Carolyn Hagedorn*, Memorandum Opinion and Order, 11 FCC Rcd 1695, 1696 (1996) (staff did not err in refusing to consider new facts in applicant's petition for reconsideration, even where facts arguably were an "expansion" of matters raised in initial application).

¹⁶ Specifically, radio permits may be tolled by administrative or judicial review of the grant of the subject permit, by court proceedings related to a necessary legal, state, or federal requirement, by natural disaster "acts of God," or by failure of Commission-imposed condition precedent. 47 C.F.R. § 73.3598(b); *Streamlining MO&O*, 14 FCC Rcd at 17540. See also *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) (discussing waiver standard).

circumstance “beyond the control” of a permittee.¹⁷ In fact, despite holding the construction permit for over eight years, Radio 780 took no steps toward construction of the Station. Moreover, it has not provided any evidence that it sought any alternative means of financing the construction of the Station after realizing that its lender would not be releasing the funds. Indeed, Radio 780 has provided us with no meaningful documentation regarding its attempts to secure financing.¹⁸ As such, Radio 780 has failed to demonstrate that it has made “diligent and continual attempts” to complete construction that would warrant a waiver of Section 73.3598(b) of the Rules.

To the extent that Radio 780 argues that the inclusion of the ITU language in its modified permit made it difficult for it to obtain financing, we note that Radio 780 certified when it first applied for the permit that sufficient liquid assets were on hand or that sufficient funds were available to it from committed resources to construct the proposed facility and to operate it for three months without revenue.¹⁹ In any event, we reject Radio 780’s contention that it was unable to commence construction due to the timing of the ITU notification from the Bureau. Radio 780 held the construction permit for nearly four years before it filed an application to modify the permit which resulted in the imposition of the ITU condition. Radio 780 arguably could have and should have secured financing and commenced construction during this time, but failed to do so. Moreover, it was on notice since the Bureau’s December 21, 2000, grant of its tolling request that it would receive only 30 additional days to construct once ITU approval had been obtained. We fail to see how it was prejudiced by the Bureau’s delay until 2004 in notifying it that such approval had been granted. If anything, the delay worked to its advantage, providing Radio 780 nearly four additional years to make the necessary arrangements for construction before the additional 30-day period commence.

Accordingly, pursuant to Sections 405 of the Act and 1.106 of the Rules, the Petition for Reconsideration filed on March 14, 2005, by Radio 780 IS DISMISSED as untimely-filed.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

¹⁷ *Texas Grace Communications*, Memorandum Opinion and Order, 16 FCC Rcd 19167, 19173 (2001) (holding that a permittee’s financial difficulties are not grounds for tolling); *Letter to John Garziglia*, Esq., Ref. No. 1800B3-KDY (MMB, Aug. 30, 1996) (holding that the permittee’s loss of funding was not a circumstance “beyond its control”); *L.E.O. Broadcasting, Inc.*, Letter, 2 FCC Rcd 1810, 1811 (MMB 1987) (holding that unavailability of funds was not a circumstance “beyond the control” of the permittee, where it had not taken all possible steps to procure new financing). *Cf. Horseshoe Bay Centex Broadcasting Co.*, Memorandum Opinion and Order, 5 FCC Rcd 7125, 7128 (1990) (finding that permittee’s loss of funding was a circumstance “beyond its control,” where it had “made diligent and continual attempts to complete construction . . . only to see its efforts unexpectedly and summarily defeated by the repeated cancellation of committed financing from traditional capital sources.”).

¹⁸ *See Carolyn Hagedorn*, 11 FCC Rcd at n. 4 (noting that applicant’s failure to “detail any efforts to obtain alternate financing” was alternative ground for denying extension request).

¹⁹ *See* Application BP-19890301AF. *Cf.* Instructions for FCC Form 301, General Instruction K (Sept. 2005) (application form in use today, which no longer contains a financial certification, continues to require reasonable assurance of committed financing sufficient to construct and operate without revenue for three months).