



Federal Communications Commission
Washington, D.C. 20554

August 14, 2009

DA 09-1811

In Reply Refer To:

1800B3-RA

Released: August 14, 2009

Mr. Mark Himmler
2490 South Hill Road
Waterford, PA 16441

In re: New AM Station, Waterford, Pennsylvania
Facility ID No. 161049
File No. BNP-20040129AKX

Petition for Reconsideration

Dear Mr. Himmler,

We have before us the Petition for Reconsideration (the "Petition") that you filed on February 28, 2007, requesting reinstatement of your application for a new AM Station in Waterford, Pennsylvania (the "Application").¹ We deny the Petition for the reasons set forth below.

Background. On November 6, 2003, the Media Bureau and the Wireless Telecommunications Bureau (collectively, the "Bureaus") announced a five-day period for the filing of applications for certain new AM stations and major modifications to authorized AM stations.² On June 15, 2005, the Bureaus issued a Public Notice listing all applications received during the filing window that were found to be mutually exclusive with other applications submitted in the filing window.³ The *AM Auction Public Notice* defined three categories of MX applications, detailed the filings required for each category, and specified a September 16, 2005, deadline for submissions. The subject Application was determined to be mutually exclusive with five other applications. All six applications were listed in MX Group 84-154, and categorized as a Category I MX group. Applicants in Category I MX groups seeking to resolve mutual exclusivities were required to file a settlement agreement, an engineering solution, or an amendment addressing criteria under Section 307(b) of the Communications Act of 1934, as amended (the "Act"), by the September 16, 2005, deadline.⁴

As noted above, the Bureaus initially announced a deadline of September 16, 2005, for filing Section 307(b) supplemental information.⁵ However, in the aftermath of Hurricane Katrina, due to

¹ See *AM Auction No. 84 Mutually Exclusive Applications Dismissed for Failing to File or Untimely Filing of Required Settlement Agreement, Engineering Solution, or Section 307(b) Showing*, Public Notice, 22 FCC Rcd 1055 (2007) ("*MX Applications Dismissed*").

² See *AM New Station and Major Modification Auction Filing Window; Minor Modification Application Freeze*, Public Notice, 18 FCC Rcd 23016 (MB/WTB 2003).

³ *AM Auction No. 84 Mutually Exclusive Applicants Subject to Auction*, Public Notice, 20 FCC Rcd 10563, 10563 (MB/WTB 2005) ("*AM Auction Public Notice*").

⁴ *Id.* at Attachment 84-MX.

⁵ *AM Auction Public Notice*, 20 FCC Rcd at 10563.

disruptions in business, communications, and damage to some transmitter sites, numerous requests were sent to the Bureaus requesting that the September 16th deadline be extended.⁶ The Bureaus agreed that the circumstances warranted an extension of the filing deadline, and by a Public Notice released on September 7, 2005, announced an extended filing deadline of October 31, 2005.⁷

On January 29, 2007, the Media Bureau issued a Public Notice announcing the dismissal of applications that had failed to submit required filings by the October 31, 2005, deadline.⁸ Because the Commission did not receive the required Section 307(b) showing until November 1, 2005, one day after the filing deadline, the Application was dismissed.⁹ On February 28, 2007, you timely filed the Petition.

Discussion. Section 405(a) of the Act states that any party to an order, decision, report, or action may petition for reconsideration.¹⁰ Reconsideration is appropriate only where the petitioner either demonstrates a material error or omission in the underlying order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters.¹¹

In the Petition, you state that you sent a Section 307(b) filing via overnight mail four days before the October 31, 2007, deadline.¹² You assert that you do not know why the filing arrived a day after the deadline, and state that you "[have] to accept the fact that they were delivered late."¹³ You ask that the Application be reinstated because you "had every reason to believe that that [sic] the filing would arrive on time with a day to spare."¹⁴ We find that reconsideration is unwarranted. The *AM Auction Public Notice* specifically stated that the staff would "dismiss without further processing, the previously-filed FCC Form 175 application ... of any applicant which fails to file a settlement, technical amendment or a Section 307(b) amendment" by the filing deadline.¹⁵ Your late filing is not in dispute. Accordingly, we find the staff acted properly in dismissing the Application. Moreover, to the extent that you are requesting that we waive the Commission's Rules in order to reinstate the Application, we deny that request as well.¹⁶ The Commission may waive any provision of its rules, but a request for waiver must be supported by a

⁶ See *Auction No. 84 Settlement Period and Section 307(b) Submission Deadline Extended to October 31, 2005*, Public Notice, 20 FCC Rcd 14492, 14492 (MB/WTB 2005).

⁷ *Id.*

⁸ *MX Applications Dismissed*, 22 FCC Rcd at 1055.

⁹ *Id.*

¹⁰ 47 U.S.C. § 405(a).

¹¹ See 47 C.F.R. § 1.106(c); *EZ Sacramento, Inc.*, 15 FCC Rcd 18257 (EB 2000), citing *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub. nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

¹² Petition at 1.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *AM Auction Public Notice*, 20 FCC Rcd at 10566; see also 47 C.F.R. § 73.3568(a)(1) and *Green Valley Broadcasters, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 13341, 13345-46 (2004)

¹⁶ See 47 C.F.R. § 54.720(b).

showing of good cause.¹⁷ To justify a waiver of an application filing deadline, the applicant must demonstrate a calamity of such a widespread nature that even the best of planning could not have avoided the late filing.¹⁸ The Commission does not typically grant waivers based on failures of third-party couriers because “although the circumstances may be unexpected, they are reasonably foreseeable and therefore applicants should allow enough time to meet cutoff deadlines to account for such unanticipated delays.”¹⁹ You have not shown good cause for the untimely filing of the Application.

You also claim that your proposal was not mutually exclusive “within the existing application parameters.”²⁰ While we are unclear as to precisely what this means, it appears that you are suggesting that your proposal was not mutually exclusive with the other applications listed in MX Group 84-154. However, you present no evidence to support your claim, or to demonstrate that the Commission’s finding of mutual exclusivity may have been in error. Accordingly, we will not consider this issue further.²¹

Conclusion. For the foregoing reasons, your petition for reconsideration filed on February 28, 2007, is DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

¹⁷ See 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“*Northeast Cellular*”). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166. Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest. *Northeast Cellular*, 897 F.2d at 1166.

¹⁸ *Mary Ann Salvatoriello*, Memorandum Opinion and Order, 6 FCC Rcd 4705, 4708 (1991).

¹⁹ *Id.* (quoting *FCC Overrules Caldwell Television Associates, Ltd.*, Public Notice, 58 Rad. Reg. 2d 1706, 1707 (1985)).

²⁰ Petition at 1.

²¹ See *Westchester Council for Public Broadcasting, Inc.*, Memorandum Opinion and Order, 8 FCC Rcd 2213, 2214 (1993) (concluding that where no evidence was introduced to support a claim there was no reason to disturb an earlier ruling on the matter).