



Federal Communications Commission
Washington, D.C. 20554

DA 10-2308
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Re: New Television Station, Memphis, TN
Request for Tolling of Construction Deadline
Facility ID: 85102

Dear Counsel:

This concerns an "Application for Review" of the Video Division's April 3, 2008 decision to deny Mid-South Public Communications Foundation's ("Mid-South") request to toll the period of construction for its new single-channel digital television ("DTV") construction permit on channel *56, Memphis, Tennessee.¹ For the reasons stated below, we consider Mid-South's pleading as a petition for reconsideration and affirm the decision to deny Mid-South's request for tolling.

Background. On September 14, 2004, the Commission granted Mid-South² a construction permit to construct a new noncommercial educational station on pre-transition DTV channel *56 in Memphis, Tennessee.³ The permit was scheduled to expire three years later on November 9, 2007.⁴ On September 17, 2007, Mid-South erroneously filed an application⁵ to extend its channel *56 construction deadline pursuant to Section 73.624(d)(3) of the Commission's Rules.⁶ However, as a single-channel DTV permittee on channel *56, Mid-South was subject to the stricter tolling provisions of Section 73.3598(b).⁷ On March 17, 2008, four months after the channel *56 construction permit expired, Mid-South filed both a request to toll construction on channel *56 pursuant to Section 73.3598(b) and an application for minor modification to a post-transition DTV channel *10 construction permit⁸. Three days later, on March 20, 2008, the Video Division granted the application for a minor technical modification to the channel *10 permit, specifying a February 17, 2009 expiration date. The Video Division, however, denied Mid-South's channel *56 request for tolling on April 3, 2008. The Video Division stated, "tolling is not an option in this case, as Mid-South cannot justify tolling under the criteria set forth in the rule [Section

¹ Letter from Barbara A. Kreisman to Malcolm G. Stevenson, Esq., 23 FCC Rcd 5589 (MB 2008).

² Mid-South is also the licensee of noncommercial educational DTV station WKNO, channel *29, Memphis, Tennessee.

³ The post-transition DTV channel for this station was *10.

⁴ File No. BPEDT-19961213KH.

⁵ File No. BPEDT-20070917ADC.

⁶ 47 C.F.R. §73.624(d)(3).

⁷ Section 73.3598(b) provides three categories where the Commission will toll a construction deadline: (1) an act of God; (2) the permit is the subject of administrative or judicial review; or (3) the permit is delayed by any cause of action pending before any court related to local, state, or federal requirement for the construction or operation of the station, including zoning or environmental requirements.

⁸ File No. BMPEDT-20080317ACF.

73.3598(b)].”⁹ Furthermore, the Video Division explained that “we do not believe that unwillingness to build qualifies” as a “rare and exceptional circumstance.”¹⁰ Therefore, pursuant to Section 73.3598(e),¹¹ Mid-South’s channel *56 construction permit was automatically forfeited on November 9, 2007.

Mid-South submits the following arguments in its “Application for Review.” First, Mid-South asserts that the Video Division’s decision to deny its channel *56 tolling request is in conflict with Commission regulations because it constitutes an erroneous application of the tolling standard and the tolling standard’s underlying purpose. Next, Mid-South argues, for the first time, that the denial of its request to toll construction of channel *56 cannot be reconciled with the modification granted for channel *10. Mid-South also contends for the first time that the grant of its channel *56 tolling request would effectuate the Commission’s DTV policy. Finally, Mid-South asserts that the circumstances of this case constitute a “rare and exceptional circumstance,” which warrants tolling.

Discussion. Section 1.115(c) of the Commission’s rules provides that “No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.”¹² Since Mid-South has not afforded the Video Division an opportunity to consider all of the arguments presented in its “Application for Review,” its “Application for Review” will be considered as a petition for reconsideration before the Video Division.

In the Third Periodic Review, Notice of Proposed Rulemaking,¹³ the Commission proposed to relax the pre-transition build-out requirements for paired stations whose pre-transition DTV channel was different from their post-transition DTV channel. However, the Commission stated that “unbuilt DTV singletons must complete their required construction by their [construction permit] expiration date, whether that date is before or after the transition deadline.”¹⁴ Further, the Commission pointed out that “DTV singleton stations are currently subject to the tolling provisions of 47 C.F.R. §73.3598(b) and we propose that these stations continue to be subject to the provisions of that section.”¹⁵ Mid-South filed comments in response to the Third Periodic rulemaking, arguing that the Commission should change its policies and regulations regarding DTV singleton construction permits. However, the Commission did not choose to grant Mid-South’s request. Therefore, the only procedure available to Mid-South, a single channel digital permittee, to extend its pre-transition construction deadline is by qualifying for tolling pursuant to the provisions of Section 73.3598(b).

Section 73.3598(b)(2)(ii) allows for the period of construction of an original construction permit to be tolled due to “causes not under the control of the permittee,” such as when the construction permit “is the subject of administrative or judicial review.”¹⁶ Mid-South argues that the Commission’s issuance

⁹ *Letter from Barbara A. Kreisman*, DA 08-786 at 2.

¹⁰ *Id.* at 3 (citing *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes*, Memorandum, Opinion, and Order, 14 FCC Rcd 17525, 17541 (1999) (In the 1998 Biennial Regulatory Review, the Commission acknowledged that there are “rare and exceptional circumstances” beyond those delineated in the rule [Section 73.3598(b)] that may warrant tolling)).

¹¹ 47 C.F.R. §73.3598(e). Section 73.3598(e) provides that “Any construction permit for which construction has not been completed and for which an application for license has not been filed, shall be forfeited upon expiration without any further affirmative cancellation by the Commission.”

¹² 47 C.F.R. §1.115.

¹³ *Third Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, Notice of Proposed Rulemaking, 22 FCC Rcd 9478 (2007).

¹⁴ *Id.* at 9491.

¹⁵ *Id.* at 9512, note 158.

¹⁶ 47 C.F.R. §73.3598(b)(ii).

of the post-transition DTV channel *10 allotment to Mid-South on August 6, 2007,¹⁷ functioned to place Mid-South's pre-transition channel *56 DTV construction permit under administrative review for tolling purposes from the time of its grant on November 9, 2004. We disagree. This rule defines administrative review as Commission consideration of "petitions for reconsideration and applications for review of the grant of a construction permit." Moreover, the Commission has made clear that a permittee's failure to factor in the Commission's "processing procedures into its planning is an error entirely its responsibility and wholly within its control" and, therefore, is not an excuse or valid argument for failure to meet a Commission construction permit deadline.¹⁸

Next, the Video Division's grant of Mid-South's post-transition channel *10 modification application has no bearing on Mid-South's channel *56 pre-transition DTV construction obligation. The three-year pre-transition construction requirements of Section 73.3598(a) for a single-channel digital permittee cannot be voided by the filing or grant of a modification application for the permittee's post-transition DTV channel. As a single-channel digital permittee, Mid-South's only option for extending its channel *56 permit construction requirement was to establish tolling pursuant to the provisions of Section 73.3598(b). Mid-South did not submit an application to toll its channel *56 construction permit until four months after the permit was automatically forfeited pursuant to Section 73.3598(e). Moreover, once Mid-South did submit its request for tolling, it failed to make a showing that tolling was warranted.

Finally, the Commission's overriding DTV policy is to advance the DTV transition. By failing to construct its pre-transition digital facility on channel *56 within the three-year requirement, Mid-South voluntarily choose to deprive the public of digital television service. Moreover, Mid-South's voluntary choice not to expend the necessary funds to construct its pre-transition facility does not demonstrate a "rare and exceptional" circumstance.¹⁹ Having considered the arguments raised by Mid-South, we conclude the decision to deny Mid-South's request for tolling was correct. We see no reason to disturb it.

ACCORDINGLY, IT IS ORDERED that, Mid-South's "Application for Review" of the Video Division's decision to deny tolling of Mid-South's construction permit for DTV channel *56, Memphis, Tennessee, when considered as a petition for reconsideration, IS DENIED.

Sincerely,

Barbara A. Kreisman
Chief, Video Division
Media Bureau

¹⁷ *Advanced Television Systems and Their Impact Upon The Existing Television Broadcast Service*, Seventh Report and Order and Eighth Further Notice of Proposed Rule Making, 22 FCC Rcd 15581 (2007).

¹⁸ See *Koors Communications, Inc.*, 23 FCC Rcd 13246 (MB 2008) (citing *Dennis J. Kelly, Esq.*, Letter, 23 FCC Rcd 4786-4788 (MB 2008)). See also *Marc D. Sobel*, Order, 22 FCC Rcd 8961, 8965 (2007).

¹⁹ Mid-South also argues that the circumstances of this case, which involve a noncommercial educational broadcaster, the DTV transition, and tolling, are unique. We disagree. Other noncommercial educational broadcasters confronted with the DTV transition met the Commission's digital construction requirements and timely transitioned to DTV or met the tolling requirements.