



Federal Communications Commission
Washington, D.C. 20554

November 15, 2013

DA 13-2193
In Reply Refer to:
1800B3-PCC
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Mr. Grady Moates
24402 Lanier Street,
Tallahassee, FL 32310

In re: **FM Translator Construction Permit
DW286BA, Bloxham, Florida**
File No. BNPFT-20030828BDV
Facility ID No. 151661

Petition for Reconsideration

Dear Mr. Moates:

The Media Bureau (“Bureau”) has before it a Petition for Reconsideration (“Petition”) filed on December 10, 2007, by you (“Moates”), as the former permittee of unbuilt FM translator station DW286BA, Bloxham, Florida (“Station”), seeking reinstatement of an expired construction permit and a waiver of Section 73.3598 of the Commission’s Rules (“Rules”) to allow additional time for construction of the Station. For the reasons set forth below, we dismiss the Petition.

Background. The Commission issued Moates a construction permit for a new FM translator station in Bloxham, Florida (the “Permit”) on November 9, 2004, for a three-year period expiring automatically on November 9, 2007.¹ The Commission did not receive a license application to cover the construction permit nor any request for a waiver or tolling of the construction deadline prior to the Permit’s expiration. Instead, Moates filed the Petition on December 10, 2007, after the expiration of the construction permit.

In the Petition, Moates argues that reconsideration of the Permit’s automatic expiration and a waiver of Section 73.3598 are warranted because of unexpected delays in a Media Bureau (“Bureau”) proceeding proposing rule changes to permit AM stations to use FM translators to provide “fill-in” service.² Moates states that after the rulemaking is complete, he intends to identify a minority- or small business-owned AM station for rebroadcast over the Station.³ Moates specifically states that such an AM broadcaster has not yet been identified due to the delays.⁴ He assures the Commission that “[o]nce this . . . proceeding is complete . . . [he] is confident that this FM translator will be able to serve the public interest by rebroadcasting the signal of a qualified AM station.”⁵

¹ See *Broadcast Actions*, Public Notice, Report No. 45861 (MB Nov. 15, 2004).

² See *Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Notice of Proposed Rulemaking, 22 FCC Rcd 15890 (2007) (“*Translator NPRM*”).

³ Petition at 1.

⁴ *Id.*

⁵ Petition at 1-2. The rulemaking has concluded since the Petition was filed. See *Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Report and Order, 24 FCC Rcd 9462 (2009) (“*Translator Rulemaking Order*”), modified, 27 FCC Rcd 3364, 3394-95 (2012).

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission’s original order or raises additional facts not known or existing at the time of the petitioner’s last opportunity to present such matters.⁶ The Permit at issue expired automatically as a matter of law on November 9, 2007, pursuant to its terms and Section 73.3598(e) after Moates failed to either complete construction or file a covering license application by that date.⁷ Because the Commission did not “dismiss” the Permit or take any affirmative action but rather the Permit expired as a matter of law pursuant to Section 73.3598(e),⁸ we will dismiss the Petition as procedurally defective.⁹

We will, however, consider the merits of Moates’s request for the relief, *i.e.*, reinstatement of the Permit *nunc pro tunc* pursuant to waivers of the automatic forfeiture and construction deadline provisions of Section 73.3598.¹⁰ The Commission’s rules may be waived only for good cause shown.¹¹ Waiver of the Rules, however, is only appropriate if special circumstances warrant a deviation from the general rule and the deviation will serve the public interest.¹² The Commission has previously stated that waivers of broadcast construction deadlines are appropriate only when construction has been prevented by “rare and exceptional circumstances” beyond the permittee’s control.¹³ Furthermore, the Commission has broad discretion in determining whether circumstances alleged to have prevented timely construction were clearly beyond the permittee’s control.¹⁴

Moates’s request fails to meet this stringent standard. The NPRM alleged to have interfered with construction was not released until August 15, 2007, at which time only three months remained under the construction permit until the permit was rendered automatically expired as a matter of law¹⁵ – and the Rules promulgated therein were not adopted until June of 2009, long after the Permit had expired.

⁶ 47 C.F.R. § 1.106; *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).

⁷ 47 C.F.R. § 73.3598(e).

⁸ *See, e.g., Cranesville Block Company, Inc.*, Letter, 27 FCC Rcd 2018, 2019 (MB 2012) (ministerial steps of marking construction permit as cancelled and deleting it in the Commission’s database were not Commission actions; construction permit expired by its own terms).

⁹ *See* 47 C.F.R. § 1.106(a)(1) (providing that the Commission considers only petitions seeking reconsideration of “a final Commission action”).

¹⁰ *See, e.g., id.* at 2020 (considering a procedurally defective petition for reconsideration as a waiver request); *Three Eagles of Lincoln, Inc.*, Letter, 24 FCC Rcd 13483, 13485 (MB 2009) (denying a petition for reconsideration as procedurally defective and also denying the petition when considered as a request for a waiver).

¹¹ 47 C.F.R. § 1.3.

¹² *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-28 (D.C. Cir. 2008) (“*NetworkIP*”); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹³ *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules and Processes*, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17541 (1999).

¹⁴ *See New Orleans Channel 20, Inc., v. FCC*, 830 F.2d 361, 365-66 (D.C. Cir. 1987) (stating that “so long as the agency does not display evident disregard for its precedents, no violation occurs” when the agency refuses to exercise its discretion and denies a waiver request).

¹⁵ The comment period for the *Translator NPRM* ended on January 7, 2008, after Moates’s construction permit had expired as a matter of law. *See Media Bureau Announces Comment and Reply Comment Dates for the Notice of Proposed Rulemaking Regarding Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Public Notice, 22 FCC Rcd 19442 (2007). Moates’s claim about delay in the rulemaking is unsupported.

Rather, Moates's decision to refrain from constructing his station was the result of his private business calculations, including apparent procrastination until the end of the initial three-year construction period and his preference to use the FM translator to rebroadcast an AM station, which the Rules did not allow either when Moates applied for the construction permit for the Station or at any point during the Permit's three-year term. As a result, and unlike cases in which the Commission has recognized that a permittee encountered circumstances beyond its control,¹⁶ Moates has not demonstrated any sufficiently "rare and exceptional circumstances" that would justify a waiver of the three-year construction deadline and other requirements pursuant to Section 73.3598. In addition, granting a waiver of Section 73.3598(a) of the Rules here would undermine the public interest in enforcing a Rule that promotes rapid construction of stations and introduction of new and expanded service.

Finally, Moates notes that "the Commission is reportedly considering extensions of expiring construction permits in certain circumstances where minorities and small businesses may benefit."¹⁷ In 2008, the Commission adopted changes to the Rules to facilitate ownership diversity in the broadcasting industry.¹⁸ The rule allowing additional construction time applied solely to "issued and outstanding construction permits" sold or transferred to "eligible entities."¹⁹ In 2011, however, the United States Court of Appeals for the Third Circuit vacated the Commission's "eligible entity" definition and remanded all provisions of the *Diversity Order* that rely on the "eligible entity" definition.²⁰ Subsequent to the Third Circuit's decision, the Bureau suspended application of the eligible entity rule provisions and policies in all contexts.²¹ In announcing this course of action, the Bureau stated that, for pending applications, if the construction permit has expired, the construction permit is forfeited and the Bureau will dismiss the assignment application.²² In any event, Moates would have been ineligible for the extension because he was an original permittee rather than an "eligible entity" assignee acquiring an outstanding construction permit.²³

¹⁶ See, e.g., *Atlanta Area Broadcasting, Inc.*, Letter, 18 FCC Rcd 5034 (MB 2003) (granting a waiver of the three-year construction period when a government entity acquired an authorized broadcast transmitter site through exercise of its condemnation powers); *Texas Grace Communications*, Memorandum Opinion and Order, 16 FCC Rcd 19167 (2001) (waiving Section 73.3598(a) *sua sponte* as a result of perceived lack of clarity caused by the Commission itself with respect to whether a facility change coupled with a community of license change is sufficient to warrant tolling of the construction period). Compare to *Steven Wendell*, Letter, 24 FCC Rcd 11809 (MB 2009) (rejecting a permittee's request for a waiver of construction deadline because the inability to timely construct was rooted in the permittee's own error in selecting a site on which a proposed tower array could not be built); *KSBN Radio, Inc. Winchester, Nevada*, Memorandum Opinion and Order, 19 FCC Rcd 20162, 20167 (2004) (affirming the staff's denial of a waiver request when the permittee learned of a troublesome local zoning ordinance and did not try to resolve the problem in a manner consistent with Commission requirements).

¹⁷ Petition at 2.

¹⁸ *Promoting Diversification of Ownership in the Broadcast Services*, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922 (2008) ("*Diversity Order*").

¹⁹ *Diversity Order*, 23 FCC Rcd at 5930.

²⁰ *Prometheus Radio Project v. FCC*, 652 F.3d 431, 465-71 (3rd Cir. 2011). The Third Circuit determined that the Commission's definition of "eligible entity" was arbitrary and capricious because it lacked "a sufficient analytical connection to the primary issues th[e] Order intended to address." *Id.* at 471.

²¹ See *Media Bureau Provides Notice of Suspension of Eligible Entity Rule Changes and Guidance on the Assignment of Broadcast Station Construction Permits to Eligible Entities*, Public Notice, 26 FCC Rcd 10370 (2011).

²² *Id.*

²³ *Diversity Order*, 23 FCC Rcd at 5963. The Rule permitted eligible entities that acquired "an issued and outstanding construction permit . . . the time remaining on the construction permit or eighteen months from the

For the foregoing reasons, Moates has not demonstrated good cause to justify a waiver of the Commission's Rules governing timely construction of broadcast stations.

Conclusions/Actions. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed on December 10, 2007, IS DISMISSED and, when treated as a request for waiver, IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

consummation of the assignment or transfer of control . . . to complete construction and file for an application for license." *Id.*