

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

In the Matter of)
SATELLITE SIGNALS OF NEW ENGLAND,)
INC.)
Application for Review of Denial of Petition for)
Reconsideration and Request for Conditional)
Waiver of Installment Payment Rules for)
Auction 6)

MEMORANDUM OPINION AND ORDER

Adopted: January 6, 2010

Released: January 7, 2010

By the Commission:

I. INTRODUCTION

1. In this Order, we deny an Application for Review filed by Satellite Signals of New England, Inc. ("Satellite Signals"), which requests that the Commission vacate a Memorandum Opinion and Order of the Wireless Telecommunications Bureau ("Bureau"), released on August 21, 2009. The 2009 Order dismissed as untimely Satellite Signals's late-filed Petition for Reconsideration of an Order released by the Bureau on January 31, 2007. Satellite Signals's Petition sought to reverse the 2007 Order, in which the Bureau had denied its request for waiver of the Commission's installment payment rules and reinstatement of two Broadband Radio Service ("BRS") licenses.

II. BACKGROUND

2. This case involves two BRS licenses won by Satellite Signals in Auction 6 (the "Licenses"). Those Licenses cancelled upon Satellite Signals's failure to submit required installment payments and late fees within the time periods set forth in the Commission's rules. The 2007 Order and the 2009 Order provide additional background of the events that resulted in Satellite Signals's defaults,

1 Satellite Signals of New England, Inc., Application for Review, filed September 21, 2009 ("Application for Review").

2 Satellite Signals of New England, Inc., Petition for Reconsideration and Request for Conditional Waiver of Installment Payment Rules for Auction No. 6, Memorandum Opinion and Order, 24 FCC Rcd 10,919 (2009) ("2009 Order").

3 Satellite Signals of New England, Inc., Request for Waiver of Installment Payment Rules for Auction No. 6 and Reinstatement of Licenses, Order, 22 FCC Rcd 1937 (2007) ("2007 Order") (dismissing Satellite Signals of New England, Inc., Petition for Reconsideration and Request for Conditional Waiver of Installment Payment Rules for Auction No. 6, filed March 5, 2007 ("Petition")).

4 The Licenses had authorized operations in the Burlington, Vermont, BTA (MDB063) and the Rutland-Bennington, Vermont, BTA (MDB388).

the cancellation of the Licenses, and the institution of debt collection procedures as required under the Commission's rules.⁵

3. Following the automatic cancellation of the Licenses, Satellite Signals filed two petitions with the Commission, requesting that the Commission waive the installment payment deadlines and reinstate the Licenses.⁶ In its 2007 Order, the Bureau found that Satellite Signals had not satisfied the standard for a waiver of the Commission's installment payment rules, nor had it demonstrated that the automatic cancellation of the Licenses was ineffective or that the Licenses should have been reinstated.⁷ Accordingly, the Bureau confirmed that Satellite Signals's entire outstanding debt obligation was subject to debt collection procedures, and denied the petitions and waiver requests.⁸ The 2007 Order was released to the public on January 31, 2007, and published in accordance with the requirements of sections 0.445(b), (d), and (e) of the rules.⁹ However, personal service of the 2007 Order was not provided to Satellite Signals as contemplated by section 0.445(a) of the Commission's rules, which states that adjudicatory orders, such as the 2007 Order, are to be mailed to the parties.¹⁰ Satellite Signals nonetheless concedes that its counsel obtained a copy of the 2007 Order "shortly after it was issued."¹¹ It explained that its reasons for missing the deadline were not related to service of the 2007 Order,¹² but to

⁵ 47 C.F.R. § 1.2110(f)(4)(iv) (1998). *See also* Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374, 440, 443 ¶¶ 110, 116 (1998); Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and the Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15,293, 15,315-16 ¶ 39; 47 C.F.R. § 1.1914(a) (1998); 4 C.F.R. § 101.11 (1998).

⁶ Satellite Signals of New England, Inc., Petition for Reinstatement of BTA Authorization and Waiver Request for Late Acceptance of BTA Installment Payments, MDB063, filed April 26, 1999; Satellite Signals of New England, Inc., Petition for Reinstatement of BTA Authorization and Waiver Request for Late Acceptance of BTA Installment Payments, MDB388, filed April 26, 1999; Satellite Signals of New England, Inc., Supplement to Petition for Reinstatement of BTA Authorization and Waiver Request for Late Acceptance of BTA Installment Payments, Burlington, VT BTA (MDB063), filed April 21, 2004; Satellite Signals of New England, Inc., Supplement to Petition for Reinstatement of BTA Authorization and Waiver Request for Late Acceptance of BTA Installment Payments, Rutland, VT BTA (MDB388), filed April 21, 2004.

⁷ 2007 Order, 22 FCC Rcd at 1937 ¶ 30.

⁸ *Id.*

⁹ 47 C.F.R. §§ 0.445(b), (d), and (e). *See also* Daily Digest, Volume 26, Number 20, January 31, 2007.

¹⁰ 47 C.F.R. § 0.445(a). Satellite Signals maintains that § 6(a) of the Administrative Procedures Act also required the Commission to provide personal service of the 2007 Order. Application for Review at 2; *see also* 5 U.S.C. § 555(e).

¹¹ Satellite Signals of New England, Inc., Motion to Accept Supplement and Clarification to Petition for Reconsideration and Request for *Nunc Pro Tunc* Waiver of Section 1.106(f) of the Commission's Rules, filed March 26, 2007 ("Motion"); Supplement and Clarification to Petition for Reconsideration and Request for *Nunc Pro Tunc* Waiver of Section 1.106(f) of the Commission's Rules at 5, filed March 26, 2007 ("Supplement") (collectively, "Motion and Supplement"). Satellite Signals's pleadings suggest that its counsel may have received actual notice of the 2007 Order as early as the day of its release, January 31, 2007. Satellite Signals states that it began to make inquiries with a business partner upon learning of the 2007 Order, and that "after making numerous inquiries to [its partner] for over two weeks," it terminated its agreement with that partner on February 15, 2007, which was just over two weeks after the release date. Supplement at 13 (emphasis added).

¹² "Satellite Signals is not arguing that the Commission's failure to provide personal notice of its Order made it impossible for it to comply with the filing deadline." Supplement at 15.

the decision to pursue other legal matters before beginning work on the petition for reconsideration and to the fact that it “*lost sight of the filing date.*”¹³

4. As explained in the 2009 Order, Satellite Signals failed to file its petition for reconsideration within thirty days of the release of the 2007 Order, as required under the Communications Act of 1934 and the Commission’s rules.¹⁴ The Bureau therefore dismissed the Petition as untimely filed.¹⁵ In so doing, the Bureau concluded that Satellite Signals’s argument that the Commission was compelled to accept its late filing did not present the type of extraordinary circumstances contemplated by the U.S. Court of Appeals under the precedent it established in *Gardner v. FCC*.¹⁶ Following the release of the 2009 Order on August 21, 2009, Satellite Signals filed its Application for Review.

III. DISCUSSION

5. The Commission will grant an Application for Review of an action taken on delegated authority when such action, *inter alia*, conflicts with statute, regulation, precedent or established Commission policy; involves application of a precedent or policy that should be overturned; or makes an erroneous finding as to an important or material factual question.¹⁷ In its Application for Review, Satellite Signals reiterates its claim that the Commission’s failure to provide written personal notice of the 2007 Order justifies an exception to the 30-day statutory deadline for filing a petition for reconsideration, and argues that the Bureau erred in concluding that *Gardner* is inapplicable in this case.¹⁸ Upon review, we find no error in the Bureau’s decision and affirm the 2009 Order.

6. Section 405 of the Communications Act restricts the filing of petitions for reconsideration to a period that extends “thirty days from the date upon which public notice is given.”¹⁹ The Bureau observed in its decision below that “the D.C. Circuit has held that the Commission lacks authority to waive or extend the statutory thirty-day filing period unless the petitioner can show that its failure to file in a . . . timely manner resulted from ‘extraordinary circumstances indicating that justice would thus be served’” within the meaning of the court’s *Gardner* decision.²⁰ In cases where the rules require personal notice or the Commission customarily provides such notice, *Gardner* provides a narrow exception that may excuse compliance with the statutorily-mandated deadline in the event the Commission’s failure to provide personal notice within a reasonable time was the substantial cause of the petitioner’s untimely filing.²¹ Significantly, Satellite Signals does not claim that its filing delay was caused by Commission error or omission in giving notice.²² To the contrary, it has acknowledged that it only commenced work

¹³ *Id.* at 5-6, 11 (emphasis added).

¹⁴ 47 U.S.C. § 405(a); 47 C.F.R. § 1.106(f).

¹⁵ 2009 Order. The 2009 Order denied the Motion and Supplement to the extent they requested a waiver of the filing deadline and dismissed the Supplement to the extent that it addressed the merits of the Petition.

¹⁶ *Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976) (“*Gardner*”) (finding that the Commission had abused its discretion by rejecting as untimely a petition for reconsideration, the late filing of which was substantially due to the Commission’s failure to give personal notice of the decision).

¹⁷ 47 C.F.R. § 1.115.

¹⁸ Application for Review at 1-2.

¹⁹ 47 U.S.C. § 405(a).

²⁰ 2009 Order, 24 FCC Rcd at 10,923 ¶ 13 (citing *Gardner*, 530 F.2d at 1091-92).

²¹ *Id.*, 24 FCC Rcd at 10,923-25 ¶¶ 14-15.

²² *Id.*

on the Petition after completing other legal matters and that it “lost sight of the filing date.”²³ The Application for Review does not dispute the Bureau’s findings in this regard. The 2009 Order finds that information and arguments presented by Satellite Signals affirmatively demonstrate that Satellite Signals’s own conduct caused its untimely filing.²⁴ Accordingly, the Bureau properly concluded that the failure to provide personal service in this instance did not contribute in any way to Satellite Signals’s delay in filing a petition for reconsideration of the 2007 Order.

7. Satellite Signals’s principal argument is that the Bureau committed an “egregious” error in failing to provide personal service by mail as required by both statute and the Commission’s rules and that this error “far outweighed” any harm that might result if the Commission were to extend the reconsideration deadline in this case. Satellite Signals cites no authority for such a balancing test. *Gardner* determined that a Commission failure to provide personal notice does not in and of itself permit the extension of the petition for reconsideration filing deadline, instead holding that such an extension is only possible where justice would thus be served because the petitioner’s late filing was attributable to the failure to provide personal notice. Nor would the Commission’s failure to comply with a personal notice requirement alone – whether the requirement were based on regulation, statute or agency custom – rise to the level of the “unusual circumstances” that the *Gardner* court ruled were necessary to override the 30-day statutory deadline for filing petitions for reconsideration.²⁵ Indeed, the *Gardner* court, concerned that late filers might seek to expand that case’s exception to the statute’s firm thirty-day deadline, warned:

We emphasize that the failure to issue a prompt notification does not affect the validity of the decision made, but only the question of the time allowed to file for reconsideration. Even at that, a defect in mailing notification will have legal consequence only where the delay in notification in fact makes it impossible reasonably for the party to comply with the filing statute. A petitioner has a burden to show (a) when and how he received notice in fact, (b) that the time remaining was inadequate to allow him reasonably to meet the 30-day requirement (from date of issuance) of section 405, and (c) that he moved for reconsideration promptly on receiving actual notice. Because persons directly affected typically become aware of rulings and decisions, through items in the general or trade press, before the official letter arrives from the agency’s secretary, it will be an extraordinary case ... where a petitioner can meet that burden.²⁶

Nothing in the Application for Review persuades us that we should disturb the Bureau’s conclusion “that Satellite Signals has not met the heavy burden required by *Gardner* to show that any defect in the Commission providing notification ‘in fact [made] it impossible reasonably for [Satellite Signals] to

²³ Supplement at 5-6, 11.

²⁴ 2009 Order, 24 FCC Rcd at 10,925 ¶ 16.

²⁵ See, e.g., *Reuters Limited v. FCC*, 781 F.2d 946, 952 (D.C. Cir. 1986) (observing that the *Gardner* court took “great pains in the clearest of language to limit its holding to the highly unusual circumstances presented there[.]” including not only that the Commission had failed to provide the customary notice to the party of its action, but also that the affected party was located far from the FCC, was unrepresented by counsel, and, upon receiving by fortuitous circumstance informal notice of the action, had immediately engaged counsel who very promptly filed the requisite petition).

²⁶ *Gardner*, 530 F.2d at 1091 n.24.

comply with the filing statute.”²⁷ Nor could it do so, because Satellite Signals had previously admitted that lack of personal notice did not make it impossible for it to comply with the statutory deadline.²⁸

8. Moreover, the two decisions Satellite Signals cites as justification for an extension of the reconsideration deadline are factually distinguishable from its own case.²⁹ The petitioner in *Winbeam* first learned of the Commission action months after the deadline, because a ministerial error by Commission staff caused incorrect information to appear in the relevant public notices. The Bureau found that Winbeam had demonstrated that its delay was attributable to a ministerial error by the Commission staff and that the petitioner had acted promptly upon discovery of the error.³⁰ Here, Satellite Signals concedes that it did not begin drafting its petition until weeks after its receipt of the 2007 Order and that it “lost sight of the filing date.”³¹ Similarly, in *Connelly*, an extension of the thirty-day deadline was granted where the petitioner had “received no notice, *actual or constructive*,” of the action for which it sought review until months after the expiration of the thirty day deadline.³² On the other hand, Satellite Signals acknowledges that it received actual notice of the 2007 Order “shortly after it was issued” and well before the filing deadline.³³ Moreover, Satellite Signals also admits that the lack of personal service did not make it impossible for it to comply with the filing deadline.³⁴ In short, we find no support in these cases for overturning the 2009 Order. As such, we are unable to conclude that the Bureau’s conclusions in the 2009 Order were in error or should be overturned.

9. Finally, we agree with the Bureau that the institution of debt collection procedures, as required by the Commission’s installment payment rules upon a licensee’s failure to fully and timely perform its payment obligations, are neither unique nor extraordinary circumstances that would warrant extension of the reconsideration deadline.³⁵ We therefore concur with the Bureau’s conclusion that the public interest is better served by adhering to, not deviating from, the statutory filing period for petitions for reconsideration.³⁶

²⁷ 2009 Order, 24 FCC Rcd at 10,926 ¶ 18 (citing *Gardner*, 530 F.2d at 1091 n.24).

²⁸ Supplement at 15 (“Satellite Signals is not arguing that the Commission’s failure to provide personal notice of its Order made it impossible for it to comply with the filing deadline.”).

²⁹ Application for Review at 4 (citing Patrick E. Connelly, *Memorandum Opinion and Order*, 14 FCC Rcd 19,389 (1999) (“*Connelly*”) and Winbeam, Inc., *Order on Reconsideration*, 20 FCC Rcd 8741 (2005) (“*Winbeam*”)).

³⁰ *Winbeam*, 20 FCC Rcd at 8744-45 ¶ 8.

³¹ Supplement at 5-6.

³² *Connelly*, 14 FCC Rcd at 19,390 ¶ 3 (emphasis added).

³³ Supplement at 5-6, 11.

³⁴ *Id.* at 15.

³⁵ 2009 Order, 24 FCC Rcd at 10,926-27 ¶ 20. We note that Satellite Signals has failed to provide any new legal arguments or authority concerning debt collection, but simply repeats its unsupported assertion that the debt collection process is “extraordinary.”

³⁶ *Id.* We find no error in the Bureau’s determination, in light of the denial of the late-filed petition, not to enter into negotiations with a third party concerning a consent decree under which the canceled Licenses would be reinstated. See *id.*, 24 FCC Rcd at 10,923 ¶ 10. For the same reasons, we decline to entertain any such proposal here.

IV. CONCLUSION

10. Satellite Signals has failed to meet its burden to demonstrate that the 2009 Order conflicts with precedent or otherwise meets the standard for grant of an application for review.³⁷ We therefore deny the Application for Review.

V. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 5(b), 5(c)(1), 303(r), and 309(j) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 155(b), 155(c)(1), 303(r), and 309(j), the Application for Review is hereby DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁷ See 47 C.F.R. § 1.115.