

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

In the Matter of
TV Communications Network, Inc.
Request for Waiver of the Installment Payment
Rules and Reinstatement of Licenses

ORDER ON RECONSIDERATION

Adopted: October 14, 2011

Released: October 14, 2011

By the Commission:

I. INTRODUCTION

1. In this order on reconsideration, we deny a request to extend the 30-day period for filing a petition for reconsideration of a Commission decision and, accordingly, also dismiss the underlying late-filed petition. Because the period for filing reconsideration petitions is prescribed by statute, the Commission lacks authority to consider late-filed petitions for reconsideration except in narrow circumstances not present here.

2. At issue is a petition of TV Communications Network, Inc. ("TVCN"), in which TVCN seeks the reversal of our decision to affirm the denial of its request for waiver of the Commission's installment payment rules. Although Commission staff promptly served TVCN with copies of our decision, TVCN did not submit its combined petition for reconsideration and for extension of time until two weeks after the deadline for filing.

II. BACKGROUND

3. TVCN was a Broadband Radio Service ("BRS") licensee¹ when it defaulted on its obligation to make timely installment payments to the Commission for fourteen BRS licenses.² As a result, under

1 The Broadband Radio Service was originally called the Multipoint Distribution Service ("MDS"), and TVCN's licenses were for MDS spectrum. However, in 2004, the Commission renamed MDS as BRS. See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14,165 (2004). Accordingly, in this order we refer to the service by its current name of BRS.

2 The BRS licenses held by TVCN were for the following markets: Clarksburg-Elkins, WV (MDB082), Dickinson, ND (MDB113), Fairmont, WV (MDB137), Logan, WV (MDB259), Morgantown, WV (MDB306), Salina, KS (MDB396), San Luis Obispo, CA (MDB405), Scottsbluff, NE (MDB411), Scranton-Wilkes Barre, PA (MDB412), Steubenville, OH (MDB431), Stroudsburg, PA (MDB435), Watertown, NY (MDB463), Wheeling, WV (MDB471), (continued....)

the Commission's installment payment rules, the fourteen licenses canceled automatically.³ TVCN requested that the automatic cancellation rule be waived,⁴ and the Wireless Telecommunications Bureau ("Bureau") denied its requests.⁵ Seeking reversal of the Bureau's denial, TVCN filed an application for review.⁶

4. In our memorandum opinion and order released January 5, 2010 ("*Installment Payment Order*"), we denied TVCN's application for review.⁷ That same day, Commission staff emailed a copy of the *Installment Payment Order* to TVCN.⁸ The next day, January 6, 2010, Commission staff sent a copy of the *Installment Payment Order* by certified mail to TVCN.⁹ The U.S. Postal Service ("USPS") left notice of the certified item for TVCN on January 8, 2010,¹⁰ and delivered the item to TVCN on February 3, 2010.¹¹ The deadline for filing a petition for reconsideration of the *Installment Payment Order* was February 4, 2010. It was not until February 18, 2010, however, that TVCN filed the instant petition seeking reconsideration of the *Installment Payment Order* and an extension of the filing deadline.¹²

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and Williston, ND (MDB476). See TV Communications Network, Inc., Request for Waiver of Installment Payment Rules for Auction No. 6 and Reinstatement of Licenses, *Order*, 22 FCC Rcd 1397, 1397 n.1, 1398-1402 ¶¶ 3-8 (WTB 2007) ("*TVCN Order*") (providing a detailed background of this matter); see also Alpine PCS, Inc., Requests for Waiver of the Installment Payment Rules and Reinstatement of Licenses, *Memorandum Opinion and Order*, 25 FCC Rcd 469, 478 ¶ 13 (2010) ("*Installment Payment Order*").

³ See *TVCN Order*, 22 FCC Rcd at 1398 ¶ 2, 1400-01 ¶¶ 6-7; *Installment Payment Order*, 25 FCC Rcd at 478 ¶ 13.

⁴ See *TVCN Order*, 22 FCC Rcd at 1398 ¶ 2, 1409 ¶ 24; *Installment Payment Order*, 25 FCC Rcd at 478 ¶ 13.

⁵ See *TVCN Order*, 22 FCC Rcd at 1408 ¶ 23, 1409 ¶ 24; *Installment Payment Order*, 25 FCC Rcd at 478 ¶ 13.

⁶ TV Communications Network, Inc., Application [for] Review of The Staff's Order DA 07-315, dated 01/29/07 ("*Order*") To Deny TVCN's Temporary Waiver Request (TWR), filed Feb. 28, 2007. TVCN later filed a supplement to its application for review. TV Communications Network, Inc., Supplement to Application for Review, filed Mar. 20, 2007 ("*TVCN Supplement*").

⁷ *Installment Payment Order*, 25 FCC Rcd at 510 ¶ 93. We also dismissed as late-filed the TVCN Supplement. *Id.* at 479-80 ¶ 16 & nn.86 and 90, 510 ¶ 93; see 47 C.F.R. § 1.115(d). Although TVCN notes that an ordering clause of the *Installment Payment Order* refers incorrectly to the Supplement's filing date, that incorrect reference does not alter the fact that, as correctly related in the body of the *Installment Payment Order*, the Supplement was late-filed based on its actual filing date. See Petition for Reconsideration ¶ 2; *Installment Payment Order* at 479-80 ¶ 16 & nn.86 and 90. In the *Installment Payment Order*, we also denied the requests of seven other parties for reversal of staff-level decisions denying requests for waiver of section 1.2110 of the Commission's installment payment rules. Each of the other parties had, like TVCN, sought relief from the automatic cancellation of one or more licenses following its installment payment default. *Installment Payment Order*, 25 FCC Rcd at 470-71 ¶ 1.

⁸ Also on January 5, 2010, Commission staff emailed a copy of the *Installment Payment Order* to all seven of the other parties. TVCN's copy was sent to the email address that TVCN had listed on its application for review. Commission staff received no indication that the email was not delivered to TVCN's email address or that any of the other emails failed to reach their designated addresses.

⁹ See 47 C.F.R. § 1.47(f) ("Service by mail is complete upon mailing."). Commission staff sent a copy of the *Installment Payment Order* by certified mail on January 6, 2010, to each of the other seven parties, as well.

¹⁰ United States Postal Service, Track & Confirm Web page.

¹¹ *Id.*; Petition for Extension. The February 3, 2010, delivery date is also on the certified mail receipt returned to the Commission.

¹² TV Communications Network, Inc., Petition for (A) Extension of Time, and (B) Reconsideration of Order FCC 10-1 Re Application for Review ("Petition for Extension" and "Petition for Reconsideration"), filed Feb. 18, 2010.

III. DISCUSSION

5. Under the Communications Act of 1934, as amended (the “Act”), and the Commission’s rules, a petition for reconsideration must be filed within 30 days after the date on which public notice is given of an action or decision to be reconsidered.¹³ The Commission’s rules provide that the date of public notice of a non-rulemaking document is the date of the document’s release.¹⁴ Accordingly, the deadline for filing a petition for reconsideration of the *Installment Payment Order*, released on January 5, 2010, was February 4, 2010. TVCN’s February 18, 2010, filing was thus two weeks late.

6. The Commission has no discretion to extend or waive the statutory filing deadline in the absence of “extraordinary circumstances[,]” as narrowly defined by the courts.¹⁵ To date, the courts have recognized such circumstances only when the missed deadline is substantially attributable to Commission error in providing personal notice of the decision to be reconsidered.¹⁶

7. In this case, there was no error in providing personal notice,¹⁷ nor does TVCN allege any. Instead, it simply maintains that its Chief Executive Officer, Omar A. Duwaik, “was unable to continuously look out for FCC public releases after two years from filing the Application for Review since it was impossible for [Duwaik] to predict as to when [the Commission’s] Order would be issued.”¹⁸ TVCN further states that Duwaik was “traveling and away from the office during the month of January” and thus was unaware of the release of the *Installment Payment Order*. And TVCN adds that Duwaik did not receive the certified mail containing the order until he returned to the office on February 3, 2010.¹⁹

8. These statements do not present the “extraordinary circumstances” required for us to consider a petition for reconsideration filed after the statutory deadline. Rather, TVCN’s pleading suggests that its failure to monitor its mail for the nearly four weeks from January 8, 2010, when USPS left notice for

¹³ Section 405(a) of the Communications Act, as amended, provides that a “petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of.” 47 U.S.C. § 405(a). Section 1.106(f) of the Commission’s rules implements section 405(a) and provides that the “petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of public notice of the final Commission action.” 47 C.F.R. § 1.106(f).

¹⁴ 47 C.F.R. § 1.4(b)(2).

¹⁵ *Gardner v. FCC*, 530 F.2d 1086, 1091-92 & n.24 (D.C. Cir. 1976) (“*Gardner*”) (ruling that the Commission should not have rejected a late-filed petition for rehearing when the lateness of the filing was due to the Commission’s failure to give the petitioner personal notice of any kind, making it “impossible reasonably” for the petitioner to comply with the filing deadline); see *Virgin Islands Telephone Corp. v. FCC*, 989 F.3d 1231, 1237 (D.C. Cir. 1993) (“Although section 405 does not absolutely prohibit FCC consideration of untimely petitions for reconsideration, we have discouraged the Commission from accepting such petitions in the absence of extremely unusual circumstances.”).

¹⁶ See *Gardner*, 530 F.2d at 1091-92 & n.24. The *Gardner* court stressed that a delay by the Commission in providing personal notice of a decision does not affect the decision’s validity, “but only the question of the time allowed to file for reconsideration.” *Id.* The court explained further that even when personal notice by the Commission has been defective, that defect is consequential only when it “in fact makes it impossible reasonably for the party to comply with the filing statute.” *Id.* See also *Reuters Ltd. v. FCC*, 781 F.2d 946, 952 (D.C. Cir. 1986) (holding that the Commission had exceeded its authority by entertaining, in the absence of *Gardner* circumstances, a petition for reconsideration filed two days after the deadline); Satellite Signals of New England, *Memorandum Opinion and Order*, 25 FCC Rcd 515, 517-19 (2010).

¹⁷ As we outline above, the Commission provided TVCN with prompt personal notice of the *Installment Payment Order*. See *supra* para. 4.

¹⁸ Petition for Extension.

¹⁹ *Id.*

TVCN of the certified envelope containing the *Installment Payment Order*, until February 3, 2010, when TVCN finally took delivery of the certified item, was a business decision or an oversight entirely within its control.²⁰ Thus, we have no basis in the record for granting TVCN's Petition for Extension and considering its Petition for Reconsideration.

IV. ORDERING CLAUSE

9. Accordingly, IT IS ORDERED, pursuant to sections 4(i) and 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 405(a), and section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, that the Petition for Extension of Time filed by TV Communications Network, Inc., on February 18, 2010, IS DENIED and that the accompanying Petition for Reconsideration of Order FCC 10-1 Re Application for Review IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁰ It was also TVCN's decision not to file its Petition for Reconsideration – which is less than two pages long – on February 4, 2010, the final day of the 30-day filing period. We note that by checking the Commission's daily releases on the FCC's Web site, TVCN could have determined when the *Installment Payment Order* was released and could have read the *Installment Payment Order* online. See <http://www.fcc.gov/encyclopedia/daily-digest>. See also *Gardner*, 530 F.2d at 1091-92 n.24 (“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 [the] burden” of showing that “a defect in mailing notification . . . in fact [made] it impossible reasonably for the party to comply with the filing statute.”).