

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

In the Matter of)
)
TEXAS GRACE COMMUNICATIONS) File No. BPH-19960201MB
) as modified by File No. BMPH-19990217IB
Request to Toll the Period to Construct Unbuilt) Facility ID No. 79024
Station DKRZB(FM), Archer City, Texas)
)

MEMORANDUM OPINION AND ORDER

Adopted: September 16, 2015

Released: September 16, 2015

By the Commission:

I. INTRODUCTION AND BACKGROUND

1. Before us is an application for review, filed October 27, 2014, by Texas Grace Communications (“Texas Grace”).¹ Texas Grace seeks review of a staff decision letter of the Audio Division, Media Bureau (“Bureau”),² denying Texas Grace’s “Motion to Accept Pleading Out of Time,” (“Motion”) in which it requested that the Bureau accept its Request despite being filed after the statutory 30-day filing period for Petitions for Reconsideration had elapsed.³ Texas Grace maintains that it was unable timely to file its Motion and Request due to its courier service’s inability to file the document by the September 2, 2014, deadline date, and Texas Grace’s principal’s inability to file the document electronically, in part because staff were not available late on the filing deadline date to assist him with electronic filing.⁴

¹ The full title of the application for review appears as, “Request for Acceptance of Pleading Entitled ‘Request for Reconsideration, and Reinstatement of Texas Grace Communications’ 97.5 KRZB-FM Archer City, TX Construction Permit and Station/Spectrum Rights,’ With Open Addressing of FCC Misconduct Cited in Appeal, Including Division Chief’s Failure to Provide the Protected, Full-Term/3-Year Construction Permit Promised by FCC Order 01-317, While Helping the Conflicting Interests of Former FCC Officials Seeking to Expand Another Station on KRZB-FM’s Frequency.” Because this pleading was addressed to, *inter alia*, the Chairman and Commissioners, we treat it as an application for review (“AFR”). In the underlying untimely “Request for Reconsideration, and Reinstatement of Texas Grace Communications’ 97.5 KRZB-FM Archer City, TX Construction Permit and Station/Spectrum Rights” (“Request”), Texas Grace sought reconsideration of our decision in *Texas Grace Communications*, Memorandum Opinion and Order, 29 FCC Rcd 9733, 9734 (2014) (“*Texas Grace III*”), in which we denied Texas Grace’s application for review of two Media Bureau decisions denying requests for further construction time on the construction permit for station DKRZB(FM), Archer City, Texas (“Permit”).

² *Mr. Dave Garey*, Letter, Ref. No. 1800B3-ATS (MB Sept. 25, 2014) (“*Staff Decision*”).

³ 47 U.S.C. § 405(a); 47 C.F.R. §§ 1.104(b), 1.106(f).

⁴ AFR at 2-4. We reject Texas Grace’s contention that, because it was able to send a copy of its Request to the Commission’s Inspector General by electronic mail, this should “serve to justify treating [Texas] Grace’s Request for Reconsideration as timely filed.” AFR at 4. Pleadings may only be filed by hand or mail delivery to the Office of the Secretary as specified in 47 C.F.R. § 0.401(a), or otherwise as set forth in Public Notices. See *Media Bureau Expands CDBS Features to Permit the Electronic Filing of Pleadings*, Public Notice, 27 FCC Rcd 7579 (MB 2012) (containing instructions for filing certain Media Bureau pleadings, including petitions for reconsideration). Filing of pleadings by electronic mail to Commission staff is not permitted.

2. The DKRZB(FM) Permit was originally granted more than 18 years ago, in October 1996, and Texas Grace was given the then-standard 18-month construction period. The Request that Texas Grace seeks to file is the latest in a series of pleadings dating back to March 5, 1999, when Texas Grace first sought tolling of the construction period for the Permit.⁵ Although the Commission subsequently held that Texas Grace was not entitled to tolling at that time, it nonetheless granted Texas Grace a full additional three-year construction period in its October 26, 2001, Memorandum Opinion and Order.⁶ That construction period, after further tolling, ended on April 9, 2010, and the Permit expired on that date.⁷ The full history of Texas Grace's Permit is set forth in *Texas Grace I*, the Commission's March 1, 2005, Memorandum Opinion and Order,⁸ and *Texas Grace III*, as well as various Bureau decisions. Briefly, Texas Grace's ongoing contention is that it is entitled to an uninterrupted three-year period in which to construct its station. Thus, despite the fact that Texas Grace has had a total of over 44 "unencumbered" months in which to construct,⁹ Texas Grace continues to insist that its construction period should be reset for an additional new three-year term each time a tolling event occurs. Moreover, in the AFR, Texas Grace attributes its failure to construct DKRZB within those 44 months to a variety of causes, including but not limited to allegations of "agency misconduct" by current Commission staff and alleged favoritism shown to former Commission staff.¹⁰

II. DISCUSSION

3. Despite the many allegations raised in the AFR and exhibits thereto – most of which are irrelevant to the issue of untimely filing – we limit our review to the propriety of the Bureau's denial of Texas Grace's Motion and refusal to accept the untimely Request. Having reviewed the record and the *Staff Decision*, we conclude that the Bureau properly decided the matters raised below, and uphold the *Staff Decision* for the reasons stated therein. As the Bureau noted, the Commission generally lacks the authority to waive the statutory 30-day period in which to file a petition for reconsideration,¹¹ absent extremely unusual circumstances.¹² The failure of a courier service timely to deliver pleadings is not

⁵ 47 C.F.R. § 73.3598(b) – (d) (the period of construction for an original construction permit shall toll when construction is prevented by certain enumerated causes not under the permittee's control; permittee must notify the Commission of the commencement and cessation of tolling events).

⁶ *Texas Grace Communications*, Memorandum Opinion and Order, 16 FCC Rcd 19167 (2001) ("*Texas Grace I*") (denying tolling as requested under 47 C.F.R. § 73.3598(b), but waiving 47 C.F.R. § 73.3598(a) on Commission's own motion to grant Texas Grace an additional 36 months to construct).

⁷ *Dave Garey, Proprietor, Texas Grace Communications*, Letter, Ref. No. 1800B3-IB (MB Dec. 19, 2008). *See also Texas Grace III*, 29 FCC Rcd at 9734 (finding that "Texas Grace has failed to timely construct its station," and agreeing with the Bureau that it was not entitled to additional time to do so).

⁸ *Texas Grace Communications*, Memorandum Opinion and Order, 20 FCC Rcd 4820 (2005) ("*Texas Grace II*") (dismissing as untimely applications for review and petition for reconsideration of orders denying further tolling of the Permit).

⁹ *Id.* at 9733 n.3 (noting that Texas Grace received approximately 44 unencumbered months of construction time since the release of *Texas Grace I* – that is, over and above the original 18-month construction period – albeit in three segments of 19 months, 5-1/2 months, and 19-1/2 months each). We summarily rejected Texas Grace's ongoing contention that its construction period must consist of 36 consecutive months. *Id.* at 9734.

¹⁰ *See, e.g.*, AFR at 6-9.

¹¹ Section 405(a) of the Communications Act of 1934, as amended, requires 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 of the Commission . . ." for which reconsideration is sought. 47 U.S.C. §405(a). *See also* 47 C.F.R. § 1.106(f).

¹² *See NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008) ("NetworkIP") (attorney's failure to include proper filing fees was not sufficiently unusual circumstance to justify Commission's allowing late-filed complaint); *Virgin Islands Telephone Corporation v. FCC*, 989 F.2d 1231, 1237 (D.C. Cir. 1993) (upholding the Commission's refusal to entertain a petition for reconsideration where the petition had been filed one day late, and intra-law firm miscommunications did not constitute extenuating circumstances excusing the petitioner from filing within the

(continued....)

considered to constitute such extremely unusual circumstances, nor is the unavailability of staff to assist Texas Grace with the electronic filing process at the last minute before a relevant filing deadline.¹³

4. We observe that this *Memorandum Opinion and Order* is the fourth in which the Commission has been asked to consider, or allow the filing of, Texas Grace's requests to extend the construction period for DKRZB(FM), in addition to no fewer than seven staff decisions.¹⁴ Over the past 18 years the Commission and its staff have thoroughly considered, and found lacking in merit, Texas Grace's contentions that it is entitled to additional time to construct DKRZB(FM), including its claim that "agency misconduct" is the cause of its failure to construct.¹⁵ We therefore plan to consume no additional limited staff resources considering arguments to extend this authorization, and we hereby direct the staff to dismiss summarily, citing this *Memorandum Opinion and Order*, any subsequent pleadings filed by Texas Grace, its principal, or related parties with respect to an extension of the construction period for Station DKRZB(FM).¹⁶

III. ORDERING CLAUSE

5. For the foregoing reasons, the AFR filed by Texas Grace Communications IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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prescribed time limits); *Reuters Limited v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986) (Commission could not rescind lawfully granted licenses when grant was challenged by petition for reconsideration filed two days after statutory 30-day deadline). See also *FCC Overrules Caldwell Television Associates, Ltd.*, Public Notice, FCC 85-534, 58 R.R. 2d 1706 (rel. Oct. 4, 1984) ("Caldwell"), in which the Commission clarified that waivers of filing deadlines will only be granted under unusual or compelling circumstances. "The Commission will no longer consider as unusual or compelling, however, requests for waiver based upon claims that copying machines, delivery services or even, in most cases, inclement weather or illness, was responsible for the tardy filing. Although these 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." 58 R.R. 2d at 1707.

¹³ *Caldwell*, *id.* See also *NetworkIP*, *supra* note 10, 548 F.3d at 127 ("[P]rocrastination plus the universal tendency for things to go wrong (Murphy's Law) – at the worst possible moment (Finagle's Corollary) – is not a 'special circumstance.'").

¹⁴ See *Texas Grace I*, *supra* note 6; *Texas Grace II*, *supra* note 8; and *Texas Grace III*, *supra* note 1. See also *Dave Garey, Texas Grace Communications*, Letter, Ref. No. 1800B3-GDG (MB Oct. 20, 2000); *Texas Grace Communications*, Letter, Ref. No. 1800B3-GDG (MB Dec. 14, 2000); *Texas Grace Communications*, Letter, Ref. No. 1800B3-GDG (MB Jan. 29, 2004); *Texas Grace Communications*, Letter, Ref. No. 1800B-IB (MB Jan. 29, 2004); *Dave Garey, Proprietor, Texas Grace Communications*, Letter, Ref. No. 1800B3-IB (MB Feb. 5, 2007); *Mr. Dave Garey, Proprietor, Texas Grace Communications*, Letter, Ref. No. 1800B3-MJW (MB Dec. 23, 2008); *Staff Decision*, *supra* note 2.

¹⁵ See *Texas Grace III*, *supra* note 1.

¹⁶ See, e.g., *Warren C. Havens*, Order on Reconsideration, 25 FCC Rcd 511, 513 n.22 (2010); *Central Mobile Radio Phone Service, Inc.*, Memorandum Opinion and Order, FCC 86-88, 1986 WL 292748, para. 3 (rel. Mar. 4, 1986).