

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

In re Application of)
)

Joseph I. Kendrick)
Permittee)

File Nos. BMPH-940919JA
BLH-950920KC

For Extension of Time to Construct)
WDBS(FM),)
Bolingbroke, Georgia)

MEMORANDUM OPINION AND ORDER

Adopted: November 1, 1996

Released: November 8, 1996

By the Commission:

1. The Commission has under consideration a June 7, 1996 application for review filed by Joseph I. Kendrick ("Kendrick"). Kendrick holds a cancelled construction permit for WDBS(FM), Bolingbroke, Georgia. Kendrick seeks review of an April 30, 1996 action by the Chief, Mass Media Bureau ("Bureau") that upheld the cancellation of the subject construction permit and ordered WDBS(FM) to cease operations. See Letter to Lawrence J. Bernard, Jr., Esquire ("Bureau Order"), 11 FCC Rcd 5320 (MMB 1996). Spaulding Broadcasting, L.P. ("Spaulding") opposes Kendrick's application for review.¹ As set forth below, we affirm the Bureau Order.

2. The Bureau Order upheld an August 2, 1995 action by the Chief, Audio Services Division ("Division Letter")² that denied extension of the construction permit and cancelled the permit. The Bureau Order agreed that Kendrick's sole basis for failing to construct during the authorized construction period – reference to a "vague" process of preparing a modification application – did not warrant an extension of the construction permit under the "one-in-three"

¹ On May 13, 1996, Kendrick filed a pleading styled "Emergency Motion for Immediate Stay of Mass Media Bureau Order Requiring Cessation of Operations of Station WDBS" ("Motion for Stay"). Spaulding also opposed the Motion for Stay. Because of our action herein, the Motion for Stay is moot.

² See August 2, 1995 letter to Lawrence J. Bernard, Jr., Esquire from Larry D. Eads, Chief, Audio Services Division.

test set forth in 47 C.F.R. § 73.3534(b).³ Although Kendrick argued on reconsideration that he had completed construction and had begun operations, the Bureau Order found that Kendrick constructed after expiration of the permit and that "the bulk of the construction, if not all of the construction" occurred after the Division Letter's cancellation of the permit. 11 FCC Rcd at 5321. Citing the Commission's well-established policy against crediting post-authorization construction, the Bureau Order concluded that Kendrick did not warrant an extension of the permit. See Rainbow Broadcasting Company ("Rainbow"), 11 FCC Rcd 1167, 1167-1168 (1995) (citations omitted). Finally, the Bureau Order directed WDBS(FM) to cease broadcasting, concluding that the public interest would be "ill-served" by rewarding Kendrick's untimely construction efforts in contravention of long-standing Commission policy. 11 FCC Rcd at 5321.⁴

3. Kendrick offers no basis to overturn the Bureau Order. Significantly, Kendrick does not contest the Bureau's application of 47 C.F.R. § 73.3534(b) to the instant facts, or the Bureau's finding that Kendrick's construction efforts occurred entirely outside the authorized construction period and, apparently, after notice of the permit's cancellation.⁵ Rather, Kendrick's core argument is that the Bureau's action is contrary to the decisions in Mt. Baker Broadcasting, Inc. ("Mt. Baker"), 3 FCC Rcd 4777 (1988) and Letter to Stephen Diaz Gavin, Esq. ("WGGR"), 1800B3-PHD, (released October 6, 1995).

4. We find, however, that neither case compels the Commission to overturn the Bureau Order. Although the staff in Mt. Baker initially accepted the permittee's post-authorization construction efforts in granting an extension, on reconsideration the staff subsequently cancelled the permit because the permittee failed to construct in accordance with the permit's terms. Mt. Baker at 4777. On review of that decision, the Commission upheld the staff's cancellation of the permit without addressing the crediting of the post-authorization construction by the staff. Id. at 4778. As Kendrick correctly notes, the U.S. Court of Appeals for the District of Columbia, in another case, recognized that Mt. Baker does not imply Commission endorsement of crediting post-authorization construction. Miami MDS Co. v. FCC, 14 F.3rd 658, 660 (D.C. Cir. 1994) (Bureau's refusal to credit post-authorization construction in line with Commission precedent). Regarding WGGR, we have reviewed the record in that case and, to the extent that the staff may have credited the permittee's post-authorization construction, we find that WGGR represents staff error that we are not bound to follow. See North Texas Media, Inc. v. FCC, 778 F.2d 28, 33

³ Section 73.3534(b) of the Commission's Rules provides that the Commission will grant an application for extension where a permittee can show that: (1) construction is complete and testing is underway; or (2) substantial progress has been made (i.e., demonstration that equipment is on order or on hand, site acquired, site cleared and construction proceeding toward completion); or (3) no progress has been made for reasons clearly beyond the control of the permittee (such as delays caused by governmental budgetary processes and zoning problems) and the permittee has taken all possible steps to expeditiously resolve the problem and proceed with construction.

⁴ Though its action would remove WDBS(FM)'s service from Bolingbroke, the Bureau Order noted that the community would nevertheless continue to receive reception service from "approximately twenty radio stations." 11 FCC Rcd at 5321.

⁵ Although Kendrick generally asserts that "substantial steps" to complete construction had been taken prior to the Division Letter's release, Kendrick fails to support that allegation and the record, as pointed out in the Bureau Order, suggests otherwise.

(D.C. Cir. 1985) (an initial staff error contravening established Commission policy is not controlling); Quinnipiac College, 8 FCC Rcd 6285, 6286 (1993); Walter P. Faber, 4 FCC Rcd at 5492, 5493 (1989), recon. denied, 6 FCC Rcd 3601 (1991), aff'd, Faber v. FCC, 962 F.2d 1076 (D.C. Cir. 1992). We continue to adhere to our established policy of not crediting post-authorization construction efforts when reviewing applications for extensions of time to construct. See Rainbow, supra; see also Miami MDS Co. v. FCC, supra.

5. Finally, we disagree with Kendrick that the timing of the staff's cancellation of expired construction permits treats similarly-situated permittees differently.⁶ Kendrick's argument is that because the staff has no fixed timetable for canceling an expired permit,⁷ "if the staff acts before construction is completed the application is denied, but if the staff is delayed for any reason and construction is completed during the delay, the application is granted." We disagree. As noted above, it has long been the Commission's policy that activities undertaken after the authorized construction period are not considered in evaluating an extension application. See Rainbow, supra. Only those activities undertaken during the most recent construction period are relevant. See Panavideo Broadcasting, Inc., 6 FCC Rcd 5259, 5259 (1991) (an extension application will be judged according to the progress made during the most recent construction period). Contrary to Kendrick's implication, the filing of a license application in the permit's post-authorization period does not justify grant of a pending extension application absent a showing that extension of the permit was warranted pursuant to 47 C.F.R. § 73.3534(b) based on events occurring in the construction period itself or that a waiver of our rules would serve the public interest.⁸ The record here supports neither a grant under the rules nor that a waiver would serve the public interest.

6. Accordingly, the June 7, 1996 application for review filed by Joseph I. Kendrick IS DENIED. The May 13, 1996 Motion for Stay filed by Joseph I. Kendrick IS MOOT. Station WDBS(FM) IS ORDERED TO CEASE broadcast operations.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

⁶ Kendrick cites Melody Music v. FCC, 345 F.2d 730, 732 (D.C. Cir. 1965).

⁷ While a construction permit or an extension of the permit expires pursuant to the terms stated therein, the cancellation of an expired permit requires a separate staff action. See Amendment of Section 73.3598, 102 FCC2d 1054, 1058 n. 11 (1985).

⁸ See Rainbow, 11 FCC Rcd at 1169 (designating application for hearing to determine whether grant of a waiver of 47 C.F.R. § 73.3598(a) or grant of an extension under 47 C.F.R. § 73.3534(b) is justified).