



Federal Communications Commission
Washington, D.C. 20554

August 10, 2011

In Reply Refer To:
1800B3-VMM

Ms. Amy Meredith
Radio Layne, LLC
2175 S. Highway 121, Apt. 3108
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In re: NEW(FM), Port Lions, Alaska
Radio Layne, LLC
Facility ID No. 164234
File No. BNPH-20050103AHT, as modified by
File No. BMPH-20070305AAG

**Petition for Reconsideration of Cancellation
of Construction Permit**

Dear Ms. Meredith and Mr. Peltzman:

We have before us a pleading styled as a "Petition for Reconsideration" filed May 10, 2010, by Radio Layne, LLC ("Radio Layne"). Radio Layne seeks reinstatement of its construction permit (File No. BNPH-20050103AHT, as modified by File No. BMPH20070305AAG) for a new FM station at Port Lions, Alaska ("Permit"), which expired as a matter of law on February 8, 2010. For the following reasons, we dismiss the Petition as procedurally defective, and treat it and deny it as a request for waiver ("Waiver Request") of Section 73.3598(e) of the Commission's Rules ("Rules").

Background. Section 73.3598(a) of the Rules,¹ promulgated pursuant to Section 319(b) of the Communications Act of 1934, as amended ("Act"),² states that construction permits for new stations "shall specify a period of three years from the date of issuance of the original construction permit within which construction shall be completed and application for license filed."³ In addition, Section 73.3598(e) of the Rules provides that "[a]ny construction permit for which construction has not been completed and

¹ 47 C.F.R. § 73.3598(a).

² 47 U.S.C. § 319(b).

³ See 47 C.F.R. § 73.3598(a).

for which an application for license has not been filed, shall be automatically forfeited upon expiration without any further affirmative cancellation by the Commission.”⁴

Radio Layne’s Permit was issued originally on February 8, 2007, with an expiration date of February 8, 2010. Radio Layne subsequently filed an application to modify the Permit, to change its community of license from King Salmon to Port Lions, Alaska. While the modification application was granted on August 24, 2007, the Permit’s expiration date remained February 8, 2010. Radio Layne failed to file a covering license application by this date and the Permit, by its own terms, expired. Radio Layne filed its Waiver Request on May 10, 2010.

Radio Layne acknowledges that it inadvertently allowed the Permit to expire, thinking incorrectly that the grant of its modification application in August 2007 automatically extended the expiration date of the Permit to August 2010. It requests that the Commission reinstate the Permit and grant a three to six month extension in order to finish Station construction. Radio Layne’s Waiver Request states that weather and economic conditions in Alaska have delayed construction. Radio Layne also states that it paid in full for the Permit, and kept all of its paperwork up to date. Finally, it states that it had just started working with an engineer, and was in the process of purchasing equipment and starting construction, when the Permit expired.

Discussion. Procedural Issue. As an initial matter, we conclude that Radio Layne incorrectly styled its pleading as a Petition for Reconsideration. Section 1.106(a)(1) of the Rules is clear that, with one noted exception, the Commission or delegated authority will only entertain petitions requesting reconsideration of a final action.⁵ Here, Radio Layne asks us to reconsider our “cancellation” of the Permit.⁶ However, the Commission did not “dismiss” the Permit or take any other affirmative action in this case; the Permit simply expired automatically as a matter of law pursuant to Section 73.3598(e) of the Rules.⁷ Accordingly, we will dismiss the Petition and instead treat it as a request for waiver of Section 73.3598(e) of the Rules.

Request for Waiver. Radio Layne essentially requests reinstatement *nunc pro tunc* of the Permit pursuant to waiver of Sections 73.3598(a) and (e) of the Rules. As discussed above, the Permit expired as a matter of law on February 8, 2010, pursuant to Section 73.3598(e) of the Rules. A waiver of that Rule would allow us to reinstate the Permit and consider Radio Layne’s tolling request. The Commission will not waive its rules absent good cause.⁸ Applicants for waiver face a high hurdle, and must plead with particularity the facts and circumstances which warrant such action.⁹ In turn, the agency must take a “hard look” at requests for waiver¹⁰ and consider all relevant factors.¹¹ With respect to waivers of the

⁴ 47 C.F.R. § 73.3598(e).

⁵ 47 C.F.R. § 1.106(a)(1).

⁶ Petition at 1.

⁷ 47 C.F.R. § 73.3598(e).

⁸ See 47 C.F.R. § 1.3.

⁹ *WAIT Radio v. FCC*, 418 F.2d at 1157 (D.C. Cir. 1969) (“*WAIT Radio*”), citing *Rio Grande Family Radio Fellowship Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968).

¹⁰ *WAIT Radio*, 418 F.2d at 1157.

¹¹ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (an agency’s decision must be consistent with its statutory authority and be based on the “relevant factors”).

broadcast station construction period rule, the Commission recognizes that there may be “rare and exceptional circumstances” beyond a permittee’s control that prevent completion of construction within the three-year construction period.¹²

Looking at all the relevant factors, we determine that Radio Layne’s request fails to present good cause for a waiver of Section 73.3598(e) because it lacks particularity, and because it fails to show that construction was delayed by “rare and exceptional circumstances.” We reject Radio Layne’s argument that it paid in full for the Permit and maintained its paperwork. This is something expected of every permittee purchasing its authorization at auction,¹³ and thus fails to provide any support for a waiver. We also reject Radio Layne’s argument that weather and economic conditions in Alaska delayed its proposed construction. This general argument is too vague to support a waiver under the particularity requirement, or as a “rare and exceptional circumstance.”¹⁴ Furthermore, Radio Layne was aware that it was building its station in Alaska and should have planned for the weather and economic conditions of that area.¹⁵ Finally, Radio Layne argues that it had engaged an engineer, purchased equipment, and started construction just before the Permit expired. The delay in hiring an engineer and starting construction was fully within Radio Layne’s control and shows that Radio Layne did not plan properly for the construction of the proposed station.¹⁶ These actions deprived the public of service, and cannot provide the basis for a waiver.¹⁷

¹² *Streamlining of Mass Media Applications, Rules and Processes*, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17541 (1999) (“*Streamlining MO&O*”) (noting Section 73.3598(b) may be waived in “rare and exceptional circumstances”).

¹³ 47 C.F.R. § 1.2109(a)(1).

¹⁴ See *Koor Communications, Inc.*, Letter, 23 FCC Rcd 13246, 13247 (MB 2008) (affirming staff’s finding that New Hampshire’s winter weather conditions did not justify waiver of the three-year construction period). We note that Radio Layne claims that construction started near the end of the three-year term of the Permit, but provides no specific explanation for the delays prior to that date. Radio Layne also provides no specific information about when construction started or what progress was made.

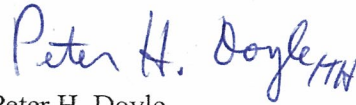
¹⁵ *Streamlining MO&O*, 14 FCC Rcd at 17539 (Commission expressing its intention to eliminate previous nonfeasance in construction process and establish an incentive for all potential applicants to plan carefully prior to and during construction and to treat the station construction process with the same degree of urgency brought to other business ventures).

¹⁶ See *Birach Broadcasting Corp.* Memorandum Opinion and Order, 18 FCC Rcd 1414, 1416 (2003) (denying waiver because permittee’s lack of diligence was not a “rare and exceptional circumstance”); *Jeffrey W. Smith*, Letter, 22 FCC Rcd 17579, 17580 (MB 2007) (same).

¹⁷ See *Christopher Imlay, Esq., et al.*, Letter, 24 FCC Rcd 11809, 11812 (MB 2009) (waiver request denied where delay in construction was caused by permittee’s voluntary decision to change transmitter site).

Conclusion. Accordingly, the Petition for Reconsideration filed on May 10, 2010, by Radio Layne, LLC, IS DISMISSED, and, when considered as a Request for Waiver of Section 73.3598(e) of the Commission's Rules, IS DENIED.

Sincerely,

A handwritten signature in blue ink that reads "Peter H. Doyle" followed by a stylized monogram "PH".

Peter H. Doyle
Chief, Audio Division
Media Bureau