



Federal Communications Commission
Washington, D.C. 20554

July 22, 2013

In Reply Refer to:
1800B3-HOD

Donald E. Martin, Esq.
P.O. Box 8433
Falls Church, VA 22041

William Johnson, President
Urban One Broadcasting Network, LLC
1101 North Main Street
Gainesville, FL 32601

In re: New AM, Lake City, Florida
Facility ID No. 160813
File No. BP-20041029ADT

**Request for Tolling
Petition for Reconsideration**

Dear Sirs:

We have before us a Petition for Reconsideration ("Petition") filed by Newman Media, Inc. ("Newman") on January 2, 2013.¹ Newman challenges our denial of its request for tolling of the construction period for a new AM station in Lake City, Florida.² For the reasons discussed below, we deny the Petition.

Background. We granted a construction permit for a new AM station at Lake City, Florida, to Advance Acquisitions, Inc. ("AAI") on January 25, 2007, for a three-year period expiring January 25, 2010. On March 5, 2008, the Commission released its *Diversity Order*. Therein, the Commission revised Section 73.3598 – the rule governing construction permit deadlines – to afford eligible entities that acquire an expiring construction permit additional time to build out the facility.³ Specifically, the Commission granted such entities the time remaining on the original construction permit or 18 months, whichever is greater.

AAI was later restructured as Sovereign Radio Services, LLC ("Sovereign"). AAI/Sovereign did not construct the station. On October 27, 2009, AAI/Sovereign filed an application ("Assignment Application") to assign the permit to Newman. Newman claimed to be an "eligible entity" and asserted it was entitled to 18 additional months upon consummation of the assignment pursuant to the revisions made to Section 73.3598 in the *Diversity Order*. On April 22, 2011, we granted the Assignment Application over the objection of Urban One Broadcasting Network, LLC ("Urban One"). Newman consummated the assignment on May 17, 2011. After determining that Newman qualified as an eligible entity, we extended the construction deadline to November 17, 2012.

Our grant of the Assignment Application did not become final because Urban One filed a Petition for Reconsideration on May 20, 2011. At Newman's request, we extended the construction permit

¹ Urban One Broadcasting Network, LLC ("Urban One") filed an ("Opposition") on January 14, 2013.

² Letter to Donald E. Martin, Esq. from Peter H. Doyle, Chief, Audio Division, Media Bureau (dated Sept. 7, 2011) ("Letter Decision").

³ Promoting Diversification of Ownership in the Broadcast Services, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922, 5928-31 ¶¶ 10-16 (2008) ("*Diversity Order*").

deadline to allow for an 18-month eligible entity construction period running from the date we issued a decision addressing Urban One's Petition for Reconsideration.

On July 7, 2011, the United States Court of Appeals for the Third Circuit ("Third Circuit") issued a decision finding the Commission's eligible entity definition arbitrary and capricious.⁴ The Third Circuit vacated that definition and remanded to the Commission those provisions of the *Diversity Order* that relied upon the Commission's eligible entity definition.

In response, the Media Bureau ("Bureau") issued a Public Notice providing guidance on the effect of the Third Circuit's decision on pending applications involving assignments of broadcast construction permits to eligible entities.⁵ Specifically, the Bureau stated that, if the assignment of a construction permit to an eligible entity was not yet final when the Third Circuit issued its mandate with respect to its decision, the permit would revert back to its original expiration date. The Bureau explained that, under any scenario, the Third Circuit's decision "(including its effect on the plans or expectations of any party)" did not constitute a tolling event under Section 73.3598 of the Commission's rules.⁶ Despite this, Newman sought tolling of the construction deadline for the Station. We denied Newman's tolling request on September 7, 2011.

Newman sought reconsideration of the *Letter Decision* on January 2, 2013. Newman argues that we interpreted the tolling rule too narrowly. Newman further argues that the Bureau's decision to revert the deadlines on certain construction permits back to their original expiration dates was arbitrary and inconsistent with Commission precedent. Recognizing that its Petition was untimely filed,⁷ Newman also submitted a Petition for Leave to Request Reconsideration ("Petition for Leave"). We address both of Newman's petitions below.

Discussion. At the outset, we note that the Petition is procedurally defective. Section 405 of the Communications Act of 1934, as amended,⁸ specifies that petitions for reconsideration "must be filed within 30 days from the date upon which public notice is given of the order, decision, report or action complained of." As Newman acknowledges, the *Letter Decision* was dated September 7, 2011 and addressed to Newman's counsel at the address provided by Newman to the Commission. Pursuant to Section 1.4 of the Commission's Rules,⁹ Newman should have filed its Petition by October 7, 2011. Newman did not. It is well established that, the Commission cannot waive or extend the filing period for petitions for reconsideration except in "extraordinary circumstances."¹⁰ Newman states that its "counsel did not receive the letter and was entirely unaware of its existence until a copy was forwarded to him by email from a Bureau staff attorney on December 3, 2011" and argues that this constitutes an extraordinary circumstance justifying acceptance of its late-filed petition for reconsideration.¹¹ We disagree. Extraordinary circumstances include instances where a late-filing is substantially due to the Commission's failure to afford a party timely notice of the action for which reconsideration is sought. There was no failure to afford Newman timely notice here. We mailed the *Letter Decision* to Newman's counsel at the address provided by Newman. Newman has not disputed that the letter was sent to the

⁴ *Prometheus Radio Project v. FCC*, 652 F.3d 431, 470-72 (3d Cir. 2011).

⁵ See *Media Bureau Provides Notice of Suspension of Eligible Entity Rule Changes and Guidance on the Assignment of Broadcast Station Construction Permits to Eligible Entities*, Public Notice, 26 FCC Rcd 10370 (MB 2011).

⁶ *Id.* at 10371.

⁷ Petition at 1.

⁸ 47 U.S.C. § 405.

⁹ 47 C.F.R. § 1.4(b)(5).

¹⁰ *Gardner v. FCC*, 530 F.2d 1086, 1090-91 (D.C. Cir. 1976).

¹¹ Petition for Leave at 1.

correct address. Instead, Newman makes the bare allegation that the *Letter Decision* was not received. The Commission has established a presumption that an item mailed is received by the addressee.¹² Newman's bare allegation that the *Letter Decision* was not received at the address provided to the Commission and to which prior correspondence had been successfully mailed is insufficient to rebut this presumption.¹³ Accordingly, we will deny the Petition for Leave and dismiss the Petition as procedurally defective.

In any event, were we to reach the merits of the Petition, we would affirm our denial of Newman's request. We note, however, that we should have denied Newman's request on different grounds. The *Letter Decision* analyzed Newman's request under the standards for tolling when it should have explained that the permit was not eligible for tolling¹⁴ and treated Newman's request as one for a waiver of the construction deadline.¹⁵ It is inappropriate, however, to grant a waiver when to do so would undermine the Third Circuit's mandate.¹⁶ Accordingly, we would decline to waive the construction deadline for the Station. Finally, we would not herein consider Newman's other arguments, which relate to the policy adopted by the Media Bureau in response to the Third Circuit's decision. The deadline for challenging that decision expired well before Newman filed its Petition.

Conclusion/Actions. IT IS ORDERED that the Petition for Leave to Request Reconsideration filed by Newman Media, Inc. on January 2, 2013, IS DENIED. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by Newman Media, Inc. on January 2, 2013, IS DISMISSED.

Sincerely,



Peter H. Doyle
Chief, Audio Division
Media Bureau

¹² *Denver MDS Co.*, 62 RR 2d 104, 106 ¶ 7(1987); 62 *Applications for Authority to Construct and Operate Multipoint Distribution Service Stations at 24 Transmitter Sites*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 11178, 11206-207 ¶¶ 126-28 (1995).

¹³ *Juan Galiano*, Memorandum Opinion and Order, 5 FCC Rcd 6442, 6443 ¶ 10 (1990) ("If the Commission were to entertain and accept unsupported arguments that letters mailed in Commission proceedings were not delivered... procedural havoc and abuse would result.").

¹⁴ AAI/Sovereign had three unencumbered years in which to construct. Accordingly, tolling was not available to AAI/Sovereign or any subsequent holder of the permit. See *JNE Investments, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 623, n. 50, citing *Texas Grace Communications, Inc.*, Memorandum Opinion and Order, 20 FCC Rcd 4820, 4824 ¶ 10 (2005).

¹⁵ Given our finding that the permit was ineligible for tolling, we will not address Newman's arguments challenging the findings in the *Letter Decision* related to tolling.

¹⁶ See, e.g., *Inquiry Relative to the Future Use of the Frequency Band 806-960 MHz*, Memorandum Opinion and Order, 55 FCC 2d 771, 772 ¶ 4 (1975) (stating that the Commission "would not, of course, take any action which we believed would be inconsistent with" a mandate issued by the United States Court of Appeals for the District of Columbia ("D.C. Circuit")); *Lamar Life Broadcasting Co.*, Memorandum Opinion and Order, 28 FCC 2d 654, 655 ¶ 4 (1971) (reversing action of the Review Board that the Commission concluded would be inconsistent with a mandate issued by the D.C. Circuit).