



Federal Communications Commission
Washington, D.C. 20554

April 18, 2017

In Reply Refer to:
1800B3-ATS

Mr. Victor Aronow
Southwest Heritage Foundation
Phoenix Center for the Arts
1202 North 3rd Street
Phoenix, AZ 85004

In re: Southwest Heritage Foundation
DKPCR-LP, Phoenix, AZ
Facility ID No. 197600
File No. BNPL-20131115AUU

Petition for Reconsideration

Dear Mr. Aronow:

We have before us the Petition for Reconsideration (Petition) filed by Southwest Heritage Foundation (SWHF), seeking reinstatement of its expired permit to construct a new LPFM station at Phoenix, Arizona (Permit). For the reasons set forth below, we treat the Petition as a request for waiver of Section 73.3598 of the FCC's Rules (Rules)¹ and deny the Petition.

Background. SWHF filed the application for the Permit during the October 2013 LPFM filing window. The Bureau granted the Application on February 5, 2014, with an expiration date of June 5, 2016.² On April 17, 2015, the Bureau granted SWHF an additional 18 months in which to complete construction pursuant to Section 73.3598(a) of the Rules,³ and thus the Permit was set to expire on February 5, 2017. SWHF did not timely file a covering license, and the Permit expired on its own terms pursuant to Section 73.3598(e) of the FCC's Rules.⁴

In the Petition, SHWF requests additional time in which to complete construction of its LPFM station. SWHF states that during preliminary testing, it discovered that its LPFM station would receive interference from co-channel Station KKLD(FM) Cottonwood, Arizona, and commissioned an engineering study to look for alternative sites and frequencies.⁵ SWHF states that it completed construction of its studio, and operates an Internet radio station, but it never constructed a transmitter

¹ 47 CFR § 73.3598.

² *Broadcast Actions*, Public Notice, Report No. 48173 (MB Feb. 10, 2014).

³ 47 CFR § 73.3598(a) ("each original construction permit for the construction of a new LPFM station shall specify a period of eighteen months from the date of issuance of the construction permit within which construction shall be completed and application for license filed. A LPFM permittee unable to complete construction within the time frame specified in the original construction permit may apply for an eighteen month extension upon a showing of good cause. The LPFM permittee must file for an extension on or before the expiration of the construction deadline specified in the original construction permit.").

⁴ 47 CFR § 73.3598(e) ("Any construction permit for which construction has not been completed and for which an application for license has not been filed, shall be automatically forfeited upon expiration without any further affirmative cancellation by the Commission.").

⁵ Petition at 1. The engineering study, dated August 28, 2014, is attached to the Petition. Letter from Erik C. Swanson, Hatfield & Dawson, to Victor Aronow, Southwest Heritage Foundation (Aug. 28, 2014) (Engineering Study).

facility. SWHF states that it was unable to obtain permission from the City of Phoenix to install a transmitter on the roof of the building where the studio was located.⁶ SWHF notes that it has developed an alternative signal delivery method and can transmit to either its original site or an alternative location which would minimize interference from KKLD.⁷ SWHF argues that the public interest would be served by allowing it to complete construction of its LPFM station.⁸

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order or raises new facts or changed circumstances not known or existing at the time of the petitioner's last opportunity to present such matters.⁹ The Permit expired automatically as a matter of law on February 5, 2017, pursuant to its terms and Section 73.3598(e) after SWHF failed to complete construction of the LPFM station and file a covering license application by that date.¹⁰ The Commission did not dismiss the Permit or take any affirmative action on it. Rather the Permit expired as a matter of law pursuant to Section 73.3598(e).¹¹ As such, we will dismiss the Petition as procedurally defective,¹² but will consider the merits of SWHF's request for the relief—reinstatement of the Permit.¹³

The Rules may be waived only for good cause shown.¹⁴ An applicant for waiver “faces a high hurdle even at the starting gate.”¹⁵ Waiver is appropriate only when: (1) special circumstances warrant a deviation from the general rule; and (2) such deviation better serves the public interest.¹⁶

⁶ *Id.* at 1-2.

⁷ *Id.* at 2.

⁸ *Id.* at 2-3.

⁹ 47 CFR § 1.106(c); *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686, para. 2 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 397 U.S. 967 (1966); *Board of Trustees, Davis & Elkins College*, Memorandum and Order, 26 FCC Rcd 15555, 1556, para. 5 (MB 2011).

¹⁰ 47 CFR § 73.3598(e).

¹¹ *See, e.g., Cranesville Block Company, Inc.*, Letter Order, 27 FCC Rcd 2018, 2019 (MB 2012) (*Cranesville*) (ministerial steps of marking construction permit as cancelled and deleting it in the Commission's database were not Commission actions; construction permit expired by its own terms).

¹² *See* 47 CFR § 1.106(a)(1) (providing that the Commission considers only petitions seeking reconsideration of “a final Commission action”).

¹³ *See, e.g., Grady Moates*, Letter Order, 28 FCC Rcd 15777, 15778 (MB 2013) (dismissing petition for reconsideration of expired construction permit as procedurally improper); *Cranesville*, 27 FCC Rcd at 2020 (considering a procedurally defective petition for reconsideration as a waiver request); *Three Eagles of Lincoln, Inc.*, Letter Order, 24 FCC Rcd 13483, 13485 (MB 2009) (denying a petition for reconsideration as procedurally defective but considering the petition as a request for a waiver).

¹⁴ 47 CFR § 1.3.

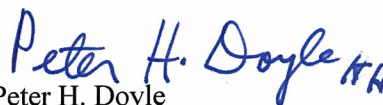
¹⁵ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT Radio*), *aff'd*, 459 F.2d 1203 (1972), *cert. denied*, 93 S.Ct. 461 (1972) (finding that the Commission may decide in some instances that rule waiver serves the public interest if an applicant's proposal will not undermine the policy served by the rule). *See also Thomas Radio v. FCC*, 716 F.2d 921, 924 (D.C. Cir. 1983) (on judicial appeal, the applicant must show that the agency's reasons for declining the waiver were “so insubstantial as to render that denial an abuse of discretion.”) (internal citations omitted).

¹⁶ *Network IP, LLC v. FCC*, 548 F.3d 116, 125-28 (D.C. Cir. 2008); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio*, 418 F.2d at 1159.

Section 319(b) of the Communications Act of 1934, as amended, provides that a construction permit “will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee.”¹⁷ SWHF has not demonstrated any circumstances beyond its control that would justify a waiver of the three-year construction deadline and other requirements pursuant to Section 73.3598.¹⁸ Based on the Engineering Study, SWHF was apparently aware since at least August 2014 that its initially authorized facilities would be unsuitable for the LPFM station. Thus it was SWHF’s own failure to expeditiously pursue modification options that resulted in its inability to timely complete construction of the LPFM station.¹⁹ Moreover, although SWHF has apparently resolved the issues concerning its main studio, SWHF never began construction of its actual transmission facilities.²⁰ In addition, granting a waiver of Section 73.3598(a) of the Rules here would undermine the public interest in enforcing a Rule that promotes rapid construction of stations and introduction of new and expanded service.²¹ Accordingly, we will deny the request for waiver of Section 73.3598.

Conclusion/Actions. Accordingly, for the reasons set forth above, IT IS ORDERED that the Petition for Reconsideration filed on March 8, 2017, by Southwest Heritage Foundation, IS DISMISSED and, when treated as a request for waiver, IS DENIED.

Sincerely,



Peter H. Doyle
Chief, Audio Division
Media Bureau

¹⁷ 47 U.S.C. § 319(b).

¹⁸ See, e.g., *Steven Wendell*, Letter Order, 24 FCC Rcd 11809 (MB 2009) (rejecting a permittee’s request for a waiver of construction deadline because the inability to timely construct was rooted in the permittee’s own error in selecting a site on which a proposed tower array could not be built); *KSNB Radio, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 20162, 20166-67, para. 13 (2004) (affirming the staff’s denial of a waiver request when the permittee learned of a troublesome local zoning ordinance and did not try to resolve the problem in a manner consistent with Commission requirements). Compare *Atlanta Area Broadcasting, Inc.*, Letter Order, 18 FCC Rcd 5034 (MB 2003) (granting a waiver of the three-year construction period when a government entity acquired an authorized broadcast transmitter site through exercise of its condemnation powers); *Texas Grace Communications*, Memorandum Opinion and Order, 16 FCC Rcd 19167 (2001) (waiving Section 73.3598(a) *sua sponte* as a result of perceived lack of clarity caused by the Commission itself with respect to whether a facility change coupled with a community of license change is sufficient to warrant tolling of the construction period).

¹⁹ *Church Planters of America*, Memorandum Opinion and Order, 29 FCC Rcd 14023, 14025, para. 3 (2014) (the effects of ordinary construction tasks and risks can be mitigated through diligence and prudent planning and would not warrant additional construction time under Section 73.3598).

²⁰ Compare *CMCG Puerto Rico License LLC*, Letter Order, 21 FCC Rcd 12900 (MB 2006) (allowing permittee additional time in which to construct facility after severe weather destroyed nearly complete facility).

²¹ See *1998 Biennial Regulatory Review -- Streamlining of Mass Media Application, Rules, and Processes, Report and Order*, 13 FCC Rcd 23056, 23090, para. 83 (1998) (extending construction period to three years will reduce requests for extensions of construction period).