

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FCC 96-170

In re Applications of )  
PDB Corporation, State College )  
For Construction Permit )  
For a New Commercial FM Station ) File No. BPH-880315MA  
For Reinstatement of Expired Construction )  
Permit ) File No. BPH-920603JY  
WUMI(FM), State College, Mississippi )

MEMORANDUM OPINION AND ORDER

Adopted: April 11, 1996

Released: May 16, 1996

By the Commission:

1. Before the Commission are: (1) a letter of August 31, 1995, by the Chief, Audio Services Division, Mass Media Bureau, which dismissed a petition for reconsideration filed by PDB Corporation, State College ("PDB"), permittee of new FM broadcast station WUMI(FM), State College, Mississippi; and (2) an application for review filed by PDB on September 29, 1995. PDB seeks review of the staff's action dismissing PDB's application for reinstatement of expired construction permit and cancelling the construction permit. As set forth below, we will deny the application for review because PDB failed to file its petition for reconsideration within the thirty day statutory period required by Section 405 of the Communications Act, 47 U.S.C. Section 405.

2. **Background.** On June 3, 1992, PDB filed an application for reinstatement of expired construction permit (BPH-920603JY).<sup>1</sup> While that application was pending, PDB filed a petition for rulemaking requesting an upgrade of its proposed facility from a Class A to a Class C3 station. The Commission granted PDB's upgrade request on November 20, 1992,

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<sup>1</sup> The original construction permit was granted on July 13, 1989, to expire January 13, 1991. Following the assignment of the permit to PDB, the time to complete construction was extended to May 28, 1992.

with the requirement that PDB file an application effectuating the proposal. *In the Matter of Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (State College, Mississippi)*, 7 FCC Rcd 7575 (1992). Upon discovering in 1994 that PDB had not filed the upgrade application, the staff, by letter dated March 7, 1994, directed PDB to file an application within 20 days, or face cancellation of its construction permit. Several requested extensions of time to file the upgrade application were granted by the staff, but the application was never submitted. By letter dated November 16, 1994, the staff dismissed PDB's pending reinstatement application, cancelled the underlying construction permit and deleted the WUMI call letters.

3. The public notice of the staff's action was released December 1, 1994; thus any request for reconsideration by PDB was required to be filed by January 2, 1995. See 47 C.F.R. Section 1.106(f). However, PDB did not file its petition until January 27, 1995. The staff accordingly dismissed PDB's late-filed petition on procedural grounds.

4. **Discussion.** Section 405 of the Communications Act, 47 U.S.C. Section 405, requires that a petition for reconsideration be filed within thirty days from the date of the Public Notice announcing the Commission's action. Because the time period for filing petitions for reconsideration is prescribed by statute, the Commission may not, with one narrow exception, waive or extend the filing period. See *Reuters Limited v. FCC*, 781 F.2d 946, 952 (D.C. Cir. 1986). The narrow exception to this statutory filing period allows the Commission to extend or waive the 30 day filing period in an "extraordinary case" where the late-filing is due to the Commission's failure to give a party timely notice of the action for which reconsideration is sought. *Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976). In such circumstances, the petitioner must demonstrate that the delay in filing is attributable to Commission error in giving notice and that it acted promptly upon discovering the adoption of the Commission's decision. *Fortuna Systems Corporation*, 3 FCC Rcd 5122, 5123 (1988). See also *Richardson Independent School District*, 5 FCC Rcd 3135, 3136 (1990).

5. PDB asserts that although it knew that the staff had taken action on its pending replacement application in mid-November, 1994, it maintains that from the end of November to the middle of January, 1995 it was unable to reach the staff to learn the contents of the letter or to successfully obtain a copy of the letter through the mail. PDB argues that because it was not told of the contents of the staff's November 16 letter over the phone, and because it never received a copy of the staff's letter through the mail, "extraordinary circumstances" existed which prevented it from filing a timely petition for reconsideration.

6. We disagree. PDB has not demonstrated that its failure to timely file for reconsideration was attributable to Commission error. The record shows that PDB was given notice that action had been taken on its pending replacement and underlying construction permit on four different occasions. First, PDB concedes that in mid-November the staff advised it by telephone that a letter was being sent concerning disposition of its pending replacement application. Second, the staff's cancellation letter of November 16, 1994 was sent to PDB at its address of record on that date. Third, when PDB advised that this address was no longer valid, the staff re-sent a copy of its letter to the new address provided by PDB on

November 29, 1994. PDB claims that it never received a copy of the letter at this new address. Finally, the Commission issued a Public Notice on December 1, 1994, reporting that the pending replacement application had been dismissed, the construction permit cancelled, and the call sign deleted (*see Public Notice, Report No. 22035*).

7. Since PDB was solely responsible for notifying the Commission of any address changes (*See 47 C.F.R. Section 1.5*), its alleged failure to receive the staff's original November 16 letter was its own fault. Moreover, other than its own self-serving statement, PDB has not substantiated its failure to receive the second letter. "[I]f the Commission were to entertain and accept unsupported arguments that letters mailed in Commission proceedings were not delivered, . . . procedural havoc and abuse would result."<sup>2</sup> *Juan Galiano*, 5 FCC Rcd 6442, 6443 (1990). In *Gardner*, the Court emphasized that "a defect in mailing notification will have legal consequence only where the delay in notification in fact makes it impossible reasonably for the party to comply with the filing statute. . . . Because persons directly affected typically become aware of rulings and decisions, through items in the general or trade press, before the official letter arrives from the agency's secretary, it will be an extraordinary case . . . where a petitioner can meet that burden [of showing that it had not received notice in order to file for reconsideration within the time constraints set out in Section 405 of the Communications Act]." *Gardner, supra*, 530 F.2d at 1092. PDB has not met that burden.

8. Accordingly, IT IS ORDERED, That, pursuant to 47 C.F.R. § 1.115(g), the Application for Review filed September 29, 1995 by PDB Corporation, State College, IS DENIED.

**FEDERAL COMMUNICATIONS COMMISSION**

William F. Caton  
Acting Secretary

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<sup>2</sup> The same procedural havoc and abuse would result if we were to give credence to PDB's arguments that its alleged inability to reach staff persons by telephone should cause the statutorily imposed time for filing petitions for reconsideration to be extended.