



Federal Communications Commission  
Washington, D.C. 20554

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DA 12-949

*In Reply Refer to:*

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In re: DWKAJ(AM), Little Falls, N.Y.<sup>1</sup>  
Facility ID 160470  
File Nos. BNP-20070926ALF  
as modified by BMP-20110207AET  
**Petition for Waiver and Reinstatement**

Dear Counsel:

We have before us an April 23, 2012 “Petition for Waiver and Reinstatement of Construction Permit *Nunc Pro Tunc*” (“April Petition”) filed by Cranesville Block Company, Inc. (“CBC”), permittee of former station WKAJ(AM). Also before us are letters of support from government officials concerning the merits of CBC’s proposal.<sup>2</sup> For the reasons below we dismiss CBC’s filing procedurally without reaching the merits.

**Background.** The WKAJ(AM) permit expired on its own terms on December 15, 2011, and automatically forfeited on that date because CBC had not completed construction and filed a license application. At that time, CBC did not attempt to show that it was entitled to any additional construction time.<sup>3</sup> On January 27, 2012, however, CBC filed a “Petition for Reconsideration” (“January Petition”)

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<sup>1</sup> The station’s original permit specified the community of Little Falls, New York. On July 14, 2011, we granted CBC’s application to move to a new transmitter site from which it would serve the community of Saint Johnsville, New York. CBC’s filing associates the station with Saint Johnsville. However, because CBC did not timely complete construction and file an application for a license to cover the permit, our database continues to associate the station with Little Falls. The letter “D” in the call sign indicates that the call sign has been deleted.

<sup>2</sup> The Town of St. Johnsville and New York State Assemblyman, George A. Amedore, Jr., filed letters on April 20, 2012 and June 7, 2012 respectively explaining how the community could benefit from a radio station. On May 10, 2012, U.S. Congressmen Paul D. Tonko and Richard L. Hanna submitted a joint letter agreeing with many of CBC’s arguments on the merits. On May 24, 2012, Congressman Tonko participated in a conference call with staff from the Audio Division and Office of Legislative Affairs. During this call, the Congressman reiterated his support for the CBC proposal and advocated for favorable Commission action on the April Petition.

<sup>3</sup> CBC had previously requested and received two adjustments of the construction deadline. We adjusted the original April 14, 2010 construction deadline to October 15, 2011 pursuant to an “eligible entity” policy in effect when CBC acquired the permit by assignment. See 47 C.F.R. § 73.3598(a). We further adjusted that deadline to December 15, 2011 following CBC’s September 30, 2011 notification that flooding, hurricanes, and a tornado had limited its access to the transmitter site. CBC had sought a six-week adjustment of the construction deadline but the (footnote continued)

seeking reinstatement of the construction permit *nunc pro tunc* and additional time to complete construction and file a license application. On February 23, 2012, the Media Bureau's ("Bureau") Audio Division issued a *Letter Decision*<sup>4</sup> dismissing the January Petition as procedurally defective.<sup>5</sup> As a secondary, alternative holding, the Bureau addressed the merits of CBC's filing and denied its request to waive the automatic forfeiture and construction deadline provisions of the Commission's Rules.<sup>6</sup> CBC's April Petition challenges these determinations.<sup>7</sup>

**Discussion.** Pursuant to the Commission's Rules, an Application for Review would have been due 30 days from release of the *Letter Decision*, *i.e.*, by Monday, March 26, 2012.<sup>8</sup> Requests for extension of filing deadlines must be submitted at least seven days before the applicable deadline (*i.e.*, by March 19, 2012 in this proceeding) and are not routinely granted.<sup>9</sup> CBC did not file a timely Application for Review or a timely request for an extension of the filing deadline. The April Petition devotes no textual discussion to procedural requirements. In a short footnote, CBC argues that regardless of "whatever the Commission's procedural rules dictate" the Bureau must consider the April Petition because CBC therein "provides compelling substantive reasons to allow WKAJ to go on the air."<sup>10</sup> CBC

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Bureau provided a full two months, corresponding to the delay in construction occurring during the final two months of the permit. The Bureau granted the additional time by waiver. CBC did not qualify for tolling under the rules because its permit had already been outstanding for more than three unencumbered years as a result of the prior adjustment. *See Brian J. Barraclough, Esq.*, Letter, 27 FCC Rcd 2018 at 2018, n.2 (MB 2012) ("*Letter Decision*") *citing JNE Investments, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 623, n.50 (2008) and *Texas Grace Communications*, Memorandum Opinion and Order, 20 FCC Rcd 4820, 4824 (2005).

<sup>4</sup> *Id.*

<sup>5</sup> Specifically, the January Petition was not filed within 30 days of a Commission action because: (1) the permit had expired automatically without any affirmative action by the Commission; and (2) even had there been some cognizable action on the permit's expiration date, the January Petition would have been ten days late. *Letter Decision*, 27 FCC Rcd at 2019, n.7.

<sup>6</sup> *See* 47 C.F.R. §§ 73.3598(a) and (e). CBC had sought additional time based on the following claims: (1) abandonment of the project by CBC's contractor; (2) photographs dated January 26, 2012 allegedly showing substantial completion of construction; (3) service to communities with no local radio; and (4) substantial monetary investment. The Bureau rejected each of those claims in the *Letter Decision*. The Bureau stated that contractor problems are ordinary risks for which businesses must prudently plan. *Letter Decision*, 27 FCC Rcd at 2019-20, n.17 *citing Wendell & Associates*, Memorandum Opinion and Order, 17 FCC Rcd 18056 (2002). With respect to the claim of substantial construction, the Bureau observed that CBC undertook much of the claimed work without authority during a six-week period following permit expiration. *Id.* at 2010-21, n.21 *citing KSBN Radio*, Memorandum Opinion and Order, 19 FCC Rcd 20162 (2004), *recon. denied*, 23 FCC Rcd 2504 (2008); *Joseph I. Kendrick*, Memorandum Opinion and Order, 11 FCC Rcd 19635 (1996). With respect to local service, the Bureau observed that the station would have been St. Johnsville's first local transmission service, but that the community also receives signals from stations licensed to other communities. *Id.* at 2021. With respect to CBC's investment, the Bureau stated that CBC had not documented the nature or amount of those expenses. *Id.* at 2019, n.4.

<sup>7</sup> In the April Petition, CBC provides additional information about its earlier substantive arguments. CBC submits more detailed claimed expenses of about \$336,000, additional photographs dated April 19, 2012, and information about the reception quality and content of other signals received in the area. April Petition, Exhibits 1 and 2. CBC also suggests therein that a monetary forfeiture (presumably for construction without authority after permit expiration) would be more appropriate than loss of the construction permit. *Id.* at 8, n.7.

<sup>8</sup> *See* 47 C.F.R. §§ 1.4(b)(2) and 1.115(d). The 30<sup>th</sup> day fell on a Saturday, so the pleading was due the first business day thereafter.

<sup>9</sup> *Id.* at §§ 1.46(a) and (c).

<sup>10</sup> April Petition, n.1.

cites two cases that it alleges would support any procedural rule waiver the Bureau might deem necessary to consider the April Petition on the merits.<sup>11</sup>

We find that the April Petition is procedurally defective and that CBC has not sufficiently supported its request for waiver of our procedural rules. The April Petition, treated as either a petition for reconsideration or an application for review,<sup>12</sup> was filed 25 days after the expiration of the 30-day period for seeking reconsideration or review.<sup>13</sup> If CBC's intention was to file an Application for Review (and we observe that CBC advocates a waiver of Section 1.115, the rule pertaining to Applications for Review), the April Petition would also be defective because it fails to specify with particularity from among specific factors which warrant Commission consideration.<sup>14</sup> Alternatively, if CBC's intention was to file a petition for reconsideration (and we observe that CBC directs its filing to the Bureau rather than to the full Commission and that one letter of support references a "Petition to Reconsider") the Bureau is without authority to waive the statutory 30-day period for filing Petitions for Reconsideration specified in Section 405(a) of the Communications Act,<sup>15</sup> except where "extraordinary circumstances indicate that justice would thus be served."<sup>16</sup> In any event, a petition for reconsideration of a decision dismissing or denying a petition for reconsideration may be dismissed as repetitious.<sup>17</sup>

CBC contends that these procedural infirmities are inconsequential because the agency can waive its procedural rules and should do so here. CBC bases its waiver argument on a claim that there are "compelling substantive reasons to allow WKAJ to go on the air."<sup>18</sup> This argument ignores the

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<sup>11</sup> *Id.* citing *Charles T. Crawford*, Order, 17 FCC Rcd 2014 (2002) ("*Crawford*") and *MTD, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 34 (1991) ("*MTD*").

<sup>12</sup> Although CBC captioned the April Petition as a "Petition for Waiver and Reinstatement," the filing challenges the conclusions reached in the *Letter Decision*, relies on the same facts raised previously, and seeks the same relief denied in the *Letter Decision*. A petitioner cannot avoid filing deadlines by placing an informal caption on a filing that, in effect, seeks either reconsideration or review of a staff action. *See Davina Sashkin, Esq.*, Letter, DA 12-403 (MB Mar 26, 2012).

<sup>13</sup> *See* 47 C.F.R. § 1.106(b) and 1.115(d).

<sup>14</sup> *Id.* at § 1.115(b)(2).

<sup>15</sup> 47 U.S.C. § 405(a).

<sup>16</sup> *Gardner v. FCC*, 530 F.2d 1086, 1091 (D.C. Cir. 1976). CBC has not made such a showing, as discussed *infra* at n.20.

<sup>17</sup> *See* 47 C.F.R. § 1.106(k)(3) ("a petition for reconsideration of an order which has been previously denied on reconsideration may be dismissed by the staff as repetitious"); *Great Lakes Broadcast Academy, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 11655 (2004) (second reconsideration petition properly dismissed despite argument that station would have provided first local transmission service). We further observe that petitions for reconsideration generally must rely on changed facts or facts that could not previously have been learned through ordinary diligence. *See* 47 C.F.R. § 1.106(b)(2) and (c). Petitions for reconsideration may be dismissed or denied where, for example, they relate to an order for which reconsideration has previously been denied on similar grounds or are untimely. *Id.* at § 1.106(p). In this case CBC's attempt to raise new arguments is procedurally barred. CBC challenges for the first time the sufficiency of the Bureau's October 2011 grant of a two-month waiver of the WKAJ construction period, which exceeded the time CBC had requested. *See Letter Decision*, 27 FCC Rcd at 2018. A CBC petition for reconsideration of that underlying action would have been due even earlier -- within 30 days of the October 2011 grant or, if new encumbering circumstances occurred thereafter, within 30 days of those circumstances. *See* 47 C.F.R. § 73.3598(c). Moreover, CBC does not show that it could not have submitted the "new" information with its original filing. For example, most of the material CBC submits concerning alleged expenses is dated prior to the January Petition and, thus, could have been submitted therewith.

<sup>18</sup> April Petition at 1, n.1.

established standard for rule waivers, a two-pronged test requiring both: (i) special circumstances that warrant a deviation from the general rule, and (ii) a finding that such deviation will serve the public interest.<sup>19</sup> CBC fails the first prong because it provides no special circumstances – indeed no reason at all – to excuse the late filing and other procedural defects of the April Petition.<sup>20</sup> Professed public interest reasons for considering a pleading cannot alone provide adequate basis for a waiver where the waiver proponent fails to provide a sufficiently unique and compelling reason for the pleading’s late-filing.<sup>21</sup> Thus, CBC would not qualify for a waiver even if, *arguendo*, it made a sufficient public interest showing under the second prong of the test. As the U.S. Court of Appeals for the D.C. Circuit has observed, “[w]hen an agency imposes a strict deadline for filings, as the FCC has done, many meritorious claims are not considered; that is the nature of a strict deadline.”<sup>22</sup> The Court, thus, has repeatedly “discourage[d] the Commission from entertaining late-filed pleadings ‘in the absence of extremely unusual circumstances.’”<sup>23</sup> The Commission has followed, and the Court has recently upheld, this approach in a similarly late-filed challenge to the Bureau’s denial of additional time to construct a radio station.<sup>24</sup> While CBC characterizes the approach as unnecessarily “rigid” and “punitive” and faults the *Letter Decision* for ignoring the potential public benefits its station might provide,<sup>25</sup> it is well established that an agency must adhere to its own rules. The Court has opined that departures from those rules in the absence of unusual circumstances, even to achieve laudable aims, cannot be sanctioned because “therein lie the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action.”<sup>26</sup> Accordingly, the “Commission does not abuse its discretion when it ‘declines to entertain a late-filed petition in the absence of extenuating circumstances prohibiting a timely filing.’”<sup>27</sup>

CBC’s reliance on several cited cases is misplaced. In *Crawford*, the Commission held that it is not barred from waiving its procedural rules in appropriate circumstances.<sup>28</sup> However, the Commission found no such circumstances in *Crawford*, where an application for review was filed 22 days late and contained no explanation for its untimeliness. We likewise find no grounds for a waiver of a filing deadline on the strikingly similar facts of this case. The second case upon which CBC relies, *MTD*, waived the filing deadline for an Application for Review that was ten days late. The *MTD* waiver

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<sup>19</sup> *NetworkIP, LLC v. FCC*, 548 F.3d 116 at 125-28 (D.C. Cir. 2008) (“*NetworkIP*”) (Where Commission found that waiver of a filing deadline would serve a public interest but not that any special circumstance led to the late filing, the Commission’s waiver of the filing deadline was arbitrary).

<sup>20</sup> CBC argues that it has made “a powerful showing of special circumstances, hardship, and good faith, and has pointed out that no other party would be injured by a waiver,” but the circumstances alleged relate solely to its failure to build the station prior to December 15, 2011 permit expiration, not to its failure to timely challenge the February 23, 2012 *Letter Decision*. See April Petition at 1-2 and 7.

<sup>21</sup> See *NetworkIP*, 548 F.3d at 127.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* citing *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003) (quoting *21<sup>st</sup> Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 200 (D.C. Cir. 2003)).

<sup>24</sup> See *Royce International Broadcasting Co.*, 23 FCC Rcd 9010 (2008), *recon. dismissed* 26 FCC Rcd 9249 (MB 2011), *aff’d sub nom. per curiam, Royce International Broadcasting Co. v. FCC*, No. 11-1270 (D.C. Cir. June 12, 2012).

<sup>25</sup> Petition at 2.

<sup>26</sup> *NetworkIP*, 548 F.3d at 127 (quoting *Reuters Ltd. v. FCC*, 781 F.2d 946, 950-51 (D.C. Cir. 1986)).

<sup>27</sup> *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003) (quoting *21<sup>st</sup> Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 200 (D.C. Cir. 2003)).

<sup>28</sup> *Crawford*, 17 FCC Rcd at 1218, n.44.

discussion consists of a brief footnote observing merely that no party would be prejudiced by consideration of the merits.<sup>29</sup> If we accept *arguendo* that the Commission based the 1991 procedural waiver in *MTD* solely on lack of prejudice and that a waiver would likewise cause no prejudice in the present case, we would nevertheless find an insufficient basis to waive our procedural rules here. *MTD* did not apply the two-pronged test for waiver that the Court articulated in the 2008 *NetworkIP* decision.

**Conclusion/Action.** Accordingly, the April 23, 2012 “Petition for Waiver and Reinstatement of Construction Permit *Nunc Pro Tunc*” by Cranesville Block Company, Inc. IS DISMISSED.

Sincerely,

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

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<sup>29</sup> *MTD*, 6 FCC Rcd at 34, n.2.