

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Request for Extension of Time to
Construct Digital Facilities
KGAN-DT, Cedar Rapids, Iowa
File No. BEPCDT-20020301AKS
ID No. 25685

MEMORANDUM OPINION AND ORDER

Adopted: September 10, 2002

Released: September 16, 2002

By the Chief, Media Bureau:

1. The Media Bureau (the "Bureau") has before it a petition for reconsideration filed by KGAN Licensee, LLC (KGAN) seeking reconsideration of the Bureau's letter of June 14, 2002, denying its request for an extension of time to construct the digital facilities for KGAN-DT and admonishing KGAN for failing to meet the May 1, 2002, construction deadline for DTV facilities. For the reasons stated below, we deny the petition.

2. In its petition, KGAN argues that the Bureau (1) misstated relevant facts and ignored the realities of DTV construction; (2) ignored KGAN's good faith efforts to meet the May 1, 2002, construction deadline; (3) failed to provide due process by not providing adequate notice of its intent to impose admonishments; and (4) failed to afford similarly situated parties similar treatment.

3. KGAN relies on essentially the same facts and arguments in support of its first two claimed grounds for reconsideration. On the first issue, KGAN claims that the Bureau misstated relevant facts when it concluded that KGAN had four years to make adequate arrangements to build its DTV facility. KGAN also claims that the Bureau erred in concluding that KGAN's representations that its facility would be operational by October 2002 had no reasonable basis. KGAN states that it was unreasonable for the Bureau to have expected completion of the station by the May 2002 deadline because the construction permit was not issued until May 2001, and the national DTV build out generated market constraints on the availability of engineers due to unusual demand. KGAN explains that its DTV construction was delayed because of delays in reaching an agreement with a local PBS station, KCRG, to use its tower. KGAN expected to finalize that agreement by May 1, 2002. KGAN also provides a timeline setting out past and future construction steps in support of its position that it made extensive good faith efforts to meet the May 1, 2002, deadline. KGAN contends that its actions supported a reasonable expectation that its DTV facility would be operational by October 2002.

4. We find these arguments unpersuasive. To begin with, any delay in the approval of KGAN's DTV application arose from the proposals laid out in the application itself. DTV applications that

were incomplete, that presented technical, legal, or financial questions, or that were mutually exclusive with other applications naturally took longer to resolve than applications that were grantable as filed. Furthermore, KGAN reasonably should have anticipated that there would be heavy demand on engineers due to the nationwide DTV conversion and should have allowed for possible delays based on that workload. Therefore, KGAN's delays either arose from its own actions or from a situation which it easily could have foreseen. In addition, KGAN's statements regarding its ability to commence DTV operation by October 2002 were predicated upon, among other things, finalization of a tower lease with KCRG. As of the time of the petition for reconsideration, that lease had not been finalized. In its timeline, KGAN states that its engineer will file a modification application to relocate its station's antenna to the KCRG tower upon finalization of that lease agreement. The Commission's records indicate that the modification application has not yet been filed. Whether the failure to file the modification application indicates that the lease still has not been finalized or that the engineer has encountered a delay in filing the application, the result is that KGAN's projection of commencing service in October 2002 does not appear to be justified. In addition, KGAN's new timeline abandons the October 2002 date and states that the licensee now hopes to commence DTV operation in December, 2002. The Bureau's conclusion that KGAN had failed to justify its failure to meet the May 1, 2002, date and that KGAN's projection that its station would be operational by October 2002 had no reasonable basis were, therefore, well founded.

5. KGAN next argues that the Bureau failed to give sufficient notice that it would admonish parties who failed to meet the DTV construction deadline. Admonishment is not an unusual or excessively punitive remedy, but rather is a penalty regularly imposed in a variety of contexts for failure to abide by Commission requirements.¹ In this context, KGAN failed to comply with a Commission imposed build-out requirement. Its apparent expectation that it would be permitted to do so without ramifications was baseless and mistaken. As a result, KGAN's contention that it was denied "due process" when it received an admonishment for failure to comply with the build-out requirement is without merit. KGAN should note, however, that if it continues to miss deadlines imposed by the Commission on its DTV build out, it will be subject to additional sanctions.

6. Finally, KGAN argues that similarly situated parties were not given similar treatment. Apparently, KGAN contends that it was treated unfairly because its DTV application was approved later than the applications of other parties. As noted above, any delay in processing KGAN's application resulted from the terms of KGAN's proposal, not from any disparate treatment of KGAN. We, therefore, reject KGAN's contention that it was treated differently than similarly situated parties.

7. ACCORDINGLY, IT IS ORDERED, THAT the petition for reconsideration filed by KGAN Licensee, LLC seeking reconsideration of the Bureau's letter of June 14, 2002, which denied

¹ See, e.g., *Davidson County Broadcasting*, 12 FCC Rcd 3375 (1997)(failure to comply with EEO rules); *Rainbow Broadcasting*, 14 FCC Rcd 11099 (1999)(failure to obtain Commission consent prior to replacing authorized antenna); *Black Media Broadcasting*, 16 FCC Rcd 3374 (2001)(broadcast of commercials on noncommercial station).

KGAN's request for an extension of time to construct the digital facilities for KGAN-DT and admonished KGAN for failure to meet the May 1, 2002, construction deadline for digital television facilities, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

W. Kenneth Ferree
Chief, Media Bureau