

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

In the Matter of
Request for Extension of Time to Construct
Digital Facilities for Station
KXXV-DT, Waco, Texas
File No. BEPCDT-200203201AJL
Facility ID No. 9781

MEMORANDUM OPINION AND ORDER

Adopted: July 28, 2004

Released: August 2, 2004

By the Commission:

1. The Commission has before it for consideration an application for review filed by Centex Television Limited Partnership (Centex), permittee of digital television station KXXV-DT, Waco, Texas, seeking review of the October 16, 2002, Memorandum Opinion and Order (MO&O) by the Media Bureau (Bureau). In that MO&O, the Bureau denied Centex's petition for reconsideration of the Bureau's letter ruling of June 14, 2002 (Letter), in which it denied Centex's request for extension of time to construct KXXV-DT's digital television facilities and admonished it for failing to meet the May 1, 2002, construction deadline. For the reasons stated below, we deny the application for review.

2. Station KXXV-DT is currently on the air and operating pursuant to Special Temporary Authority. The extension request, therefore, is moot. The only issue remaining is whether the admonishment imposed by the Bureau was appropriate at the time it was given in the Letter.

3. In the Fifth Report and Order in its DTV proceeding, the Commission announced its willingness to grant, on a case-by-case basis, an extension of the applicable DTV construction deadline where a broadcaster has been unable to complete construction due to circumstances that are either unforeseeable or beyond the permittee's control, provided that the broadcaster has taken all reasonable steps to resolve the problem expeditiously. In the Letter, the basis for denying the extension and imposing the admonishment was that Centex had only begun studying the feasibility of using its existing tower in February 2002 and, therefore, did not know if its tower could support its proposed antenna at the time of the extension request. Without knowing this basic fact, there was no reasonable basis for Centex to assert that it could meet its projected construction date. Therefore, the Bureau found that Centex had not met the extension standard.

4. In its application for review, Centex largely reiterates the arguments it advanced on reconsideration; namely, that the Bureau: (1) lacked the authority to deny a request for extension on June 14, 2002; (2) failed to adequately address Centex's argument against imposing sanctions without

1 See File No. BEDSTA-20030522AJG.

2 Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Fifth Report and Order, 12 FCC Rcd 12809 (1997) (Advanced Television Systems).

notice; (3) failed to respond to Centex's arguments regarding the Administrative Procedure Act; (4) failed to apply the proper standard to KXXV-DT; (5) misstated relevant and material facts; (6) acted against the public interest; and (7) erred by not giving similarly situated parties similar treatment.

5. On the first issue, Centex claims that the Bureau's authority to deny a request for extension of time to construct a DTV facility did not take effect until July 5, 2002, twenty-one days after it denied Centex's request for KXXV-DT. On May 24, 2002, the Commission adopted its order regarding *Remedial Steps for Failure to Comply with Digital Television Construction Schedule*.³ In that order, the Commission granted the Bureau delegated authority to deny extension requests, and set up a graduated series of sanctions to be imposed on permittees who did not comply with construction deadlines. Centex contends that these changes were not effective until 30 days after they were published in the Federal Register. Federal Register publication took place on June 4, 2002. *See Broadcast Services, Television Stations*.⁴ According to Centex, this meant the Bureau could not deny extension applications prior to July 5, 2002.

6. In making its argument Centex ignores the following language in paragraph 24 of the *Remedial Steps Order*:

Given the importance of this matter, we direct the Media Bureau to continue processing pending DTV extension requests on a case-by-case basis during the pendency of this rulemaking, utilizing the full range of permissible sanctions, including those set forth in this Notice, to ensure that licensees complete construction of their DTV facilities in an expeditious manner. As we stated in our November DTV MO&O, the Bureau may grant up to two six-month extensions or deny such extensions under its delegated authority.⁵

Based on this language, it is clear that the Bureau had the authority to deny Centex's extension request on June 14, 2002, and to impose appropriate sanctions. In addition, we find that the Bureau had the delegated authority to act on the extension request prior to the *Remedial Steps Order*. In *Advanced Television Systems*, the Commission delegated authority to the Chief, Mass Media Bureau, to grant an extension of time for up to six months beyond the applicable construction deadline, upon demonstration by the applicant that the standard for extension had been met. The Bureau could only grant two extensions under this delegated authority.⁶ This authority was subsequently affirmed in the November, 2001 *Memorandum Opinion and Order on Reconsideration in Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*,⁷ in which the Commission directed the Bureau to examine closely each extension request and promptly notify the applicants of any denial of a request. Accordingly, the Bureau had the authority to deny extension requests well before the adoption of the *Remedial Steps Order*.

7. Centex also argues that the Bureau failed to adequately address its arguments regarding imposing sanctions without notice in accordance with the Administrative Procedure Act. In its MO&O, the Bureau

³ 17 FCC Rcd 9962 (2002) (*Remedial Steps Order*)

⁴ 67 Fed. Reg. 38423 (June 4, 2002).

⁵ *Remedial Steps Order*, 17 FCC Rcd at 9968.

⁶ *Advanced Television Systems*, 12 FCC Rcd at 12841.

⁷ 16 FCC Rcd 20594, 20612 (2001).

rightly stated that admonishment is not an “unusual or excessively punitive remedy.” Admonishment is a routine sanction for violation of the Commission’s rules and it does not require a rulemaking in order for the Bureau to issue an admonishment when those rules have been violated.⁸ Although the NPRM sought comment on the suitability of the entire range of sanctions that were to be imposed for failure to meet DTV build-out deadlines, at the time of the *Letter* the Bureau already had the power to issue an admonishment for a violation of our Rules.⁹ Therefore, no notice was necessary and the Administrative Procedure Act was not implicated.

8. Next, Centex claims that the Bureau failed to apply the proper standard to KXXV-DT’s request. Centex states that the delays it encountered in trying to construct its DTV station were unforeseen and outside its control. Centex claims that, among the unforeseeable circumstances, was the discovery that it could not use its existing antenna plate to bolt its new antenna to its tower. In the *Fifth Report and Order in MM Docket No. 87-268*,¹⁰ the Commission referred to circumstances such as the inability to “obtain zoning or FAA approvals, or similar constraints, or the lack of equipment necessary to transmit a DTV signal” as among the kind of obstacles beyond a permittee’s control that would justify an extension of a DTV construction deadline.¹¹ The fact that Centex made a mistake in evaluating the suitability of its antenna plate and had to revise its antenna proposal does not rise to a level of circumstances that are either unforeseeable or beyond the licensee’s control.

9. Centex also claims that the Bureau misstated relevant and material facts in the MO&O when it said that Centex’s construction schedule was based on overly optimistic assumptions as demonstrated by the fact that its construction schedule had “already slipped by approximately one month.” Centex claims that its projected date of completion remained essentially accurate in spite of unforeseen delays beyond its control. Although Centex claims the Bureau misstated relevant facts regarding the construction schedule, Centex itself stated in its Petition for Reconsideration that its construction schedule had “slipped by approximately one month.”¹² Furthermore, as the *Letter* stated, Centex’s construction schedule was premised on the outcome of a tower study that had not been completed at the time it made its projections. Centex may have wanted the Bureau to reach a different conclusion, but it cannot claim that the Bureau misstated facts, especially when the Bureau was quoting Centex.

10. Centex contends that the Bureau erred in the *Letter* when it stated that Centex had ample time to select its antenna system. The Bureau stated, and Centex does not deny, that Centex had not selected its antenna system eleven months after its construction permit was issued. Centex does not explain why eleven months is an unreasonably short amount of time in which to select an antenna system or what it believes would have constituted a reasonable amount of time.

11. Centex asserts that it would have had time to construct its station, but for the fact that its construction permit was not issued until nineteen months following the filing of its application. We disagree. The Commission has held that “the pendency of applications at the Commission or the failure of the Commission to act on an application within a particular time period does not give rise to any equitable

⁸ See, e.g., *Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991).

⁹ *Id.*

¹⁰ 12 FCC Rcd 12809, 12841 (1997) (*Fifth Report and Order*).

¹¹ *Id.*

¹² Centex Petition for Reconsideration at n. 18.

claim by a party allegedly harmed.”¹³ Moreover, the record indicates that the processing of Centex’s application was delayed because of concerns regarding the level of interference that would be caused by its proposed operations.¹⁴

12. Centex contends the Bureau erred in the *Letter* when it did not find an extension justified because “Centex’s antenna installer would not schedule an installation date until a firm antenna delivery date had been set.” FCC Form 337 states that an extension may be granted based on the “unavailability of work or tower crews.”¹⁵ Centex does not claim, however, that a tower crew was actually unavailable. Centex only states that the installer would not schedule its crew until Centex had a firm date for the delivery of the antenna. That is not the same thing as the crew being unavailable and is not adequate to support a request for extension.

13. Centex next claims that the Bureau erred in denying an extension because Centex could not guarantee to a “metaphysical certainty” that it would commence its digital operations by a certain date. The Bureau never asked for any such certainty. In accordance with our rules, the Bureau required Centex to “set forth the date by which one reasonably expects under its circumstances to complete construction.”¹⁶ As the Bureau stated in its *Letter*, Centex’s construction projections at the time of its extension request did not have any reasonable basis because, among other things, Centex did not even know if its tower would support its antenna. Furthermore, at the time of the request, Centex did not know what antenna system it would be using. Until those fundamental issues were resolved, Centex’s projections regarding its construction schedule were mere speculation.

14. Centex goes on to claim that the Bureau disserved the public interest by denying its extension request. Centex claims that it was constrained by the denial to alter its original plans to build a full-power facility, rather than the lower power facility it ultimately built, and that it would have provided Spanish-language programming on the full-power system. Centex asserts that it should have been allowed more time to build because a full-power facility would have better served the public interest. Notwithstanding these claims, as the Bureau correctly noted, Centex did not present adequate evidence to support its extension request. In the *Remedial Steps Order*, the Commission recognized that some licensees who were making good faith efforts to build out their DTV facilities in a manner consistent with our rules faced hardships and challenges that were beyond their control and that, in those few situations, an extension might be warranted. Centex has failed, however, to show that it had met the enumerated extension criteria. Under the circumstances, the Bureau was correct in determining that enforcement of the Commission’s rules and deadlines would serve the public interest.

15. Finally, Centex claims that the Bureau erred by not giving similarly situated parties similar treatment.¹⁷ Centex contends that commonly-owned station KFDA-TV, Amarillo, Texas was granted an

¹³ See *Deleted Station WPHR(FM)*, 11 FCC Rcd 8513, 8516 (1996); see also *Community Service Telecasters, Inc.*, 6 FCC Rcd 6026, 6029 (1991); *Rebecca Radio*, 5 FCC Rcd 2913 (1990).

¹⁴ See *Letter from Brendan Holland to Magalie Roman Salas, Secretary, Federal Communications Commission*, dated March 19, 2001.

¹⁵ *FCC Form 337, Jan. 2002, Question by Question Instructions to Application for Extension of Time to Construct a Digital Television Broadcast Station*.

¹⁶ *Id.*

¹⁷ *Citing Melody Music, Inc. v FCC*, 345 F.2d 730 (1965).

extension even though it relied on similar facts in comparable markets. As the Bureau stated in its MO&O, Centex's argument does not take into account that KFDDA's construction delay was not solely caused by equipment and antenna issues, but was also caused by a conflict with a rulemaking proceeding involving KCBD-TV, Lubbock, Texas. Resolution of that rulemaking conflict affected initiation of the construction of KFDDA-TV's digital facilities. Centex next contends that its treatment was not consistent with that afforded to KWKT(TV), Waco, Texas. Centex argues that KWKT(TV) also experienced equipment delays. Once again, the Bureau distinguished this case by pointing out that the extension granted to KWKT(TV), relied on its financial hardship showing. Centex made no such showing. We, therefore, reject Centex's contention that it was treated differently than similarly situated parties.

16. ACCORDINGLY, IT IS ORDERED THAT, the application for review, filed by Centex Television Limited IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary