

ORIGINAL

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

In the Matter of)
)
MARITIME COMMUNICATIONS/LAND)
MOBILE, LLC, DEBTOR-IN-POSSESSION)
Application to Assign Licenses to)
Choctaw Holdings, LLC)
)
MARITIME COMMUNICATIONS/LAND)
MOBILE, LLC)
Applications to Modify and to Partially)
Assign License for Station WQGF318 to)
Southern California Regional Rail Authority)
)
Application for New Automated Maritime)
Telecommunications System Stations)
)
Order to Show Cause, Hearing Designation)
Order, and Notice of Opportunity for Hearing)

Accepted/Files
WT Docket No. 13-85
FCC File No. 0005552500 **OCT 29 2014**
Federal Communications Commission
Office of the Secretary

FCC File Nos. 0004153701 and
0004144435

FCC File No. 0002303355

EB Docket No. 11-71
File No. EB-09-IH-1751
FCC File Nos. 0004030479,
0004144435, 0004193028,
0004193328, 0004354053,
0004309872, 0004310060,
0004314903, 0004315013,
0004430505, 0004417199,
0004419431, 0004422320,
0004422329, 0004507921,
0004153701, 0004526264,
0004636537, and 0004604962

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To: Marlene H. Dortch, Secretary
For transmission to the Commission

**CONSOLIDATED MOTION TO DISMISS
PETITIONS FOR RECONSIDERATION**

1. Southern California Regional Rail Authority ("SCRRRA") hereby moves to
dismiss the Petitions for Reconsideration submitted in the above-captioned matter by "Skytel-1"

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and “Skytel-2” (collectively, “the Havens Parties”).¹ As the Havens Parties have expressly admitted, the petitions were filed after the statutorily-imposed 30-day deadline for petitions for reconsideration. Before those petitions may be accepted and considered, therefore, the deadline must be waived. But no basis for a waiver exists.

2. In emphasizing the importance of adherence to filing deadlines in Commission proceedings, the D.C. Circuit has repeatedly cautioned that deadlines should be waived only in special, even unique, circumstances. *E.g.*, *Reuters Ltd. v. FCC*, 781 F.2d 946 (D.C. Cir. 1986); *Keller Communications, Inc. v. FCC*, 130 F.3d 1073 (D.C. Cir. 1997). In precisely this context the Court articulated the hard truth that demands dismissal of the Havens Parties’ petitions:

[P]rocrastination plus the universal tendency for things to go wrong (Murphy’s Law) – at the worst possible moment (Finagle’s Corollary) – is not a “special circumstance,” as any junior high teacher can attest.

NetworkIP v. FCC, 548 F.3d 116, 127 (D.C. Cir. 2008). The Havens Parties had weeks of time within which to prepare and file their petitions. They chose instead to wait until the very last minute. Their lateness is thus not attributable to any “special circumstance”, and their petitions must be summarily dismissed.²

3. The petitions both seek reconsideration of various aspects of the Commission’s Memorandum Opinion and Order (“*MO&O*”), FCC 14-133, in the above-captioned matter. The *MO&O* was released on September 11, 2014. Petitions for reconsideration were thus due to be

¹ As defined in the petitions, both of which were signed by Warren Havens: “Skytel-1” consists of Mr. Havens and two entities (Intelligent Transportation and Monitoring Wireless and Skybridge Spectrum Foundation) controlled by Mr. Havens; “Skytel-2” consists of four other entities (Environmental LLC, Verde Systems LLC, Telesaurus Holdings GB LLC and V2G LLC), all of which are also controlled by Mr. Havens.

² Because the Havens Parties’ petitions must be dismissed, SCRRA is not herein addressing any of the various arguments raised in those petitions. In the unlikely event that the petitions are not dismissed, SCRRA reserves the right to respond to those petitions.

filed no later than October 14, 2014. *See* 47 U.S.C. §405; 47 C.F.R. §1.106.³ As reflected in the Commission's Electronic Comment Filing System (ECFS), and as admitted by the Havens Parties⁴, their petitions were not filed until October 15.

4. As a threshold matter, because the 30-day deadline for petitions for reconsideration is explicitly set forth in the Communications Act, it may not ordinarily be waived by the Commission. *See, e.g., TV Communications Network, Inc.*, 26 FCC Rcd 14891 (2011) ("The Commission has no discretion to extend or waive the statutory filing deadline in the absence of 'extraordinary circumstances[.],' as narrowly defined by the courts."). *Accord, e.g., Holy Family Oratory of St. Philip Neri*, FCC 14-169 (released October 20, 2014); *The Atlanta Channel, Inc.*, 27 FCC Rcd 14541 (2012); *TV Communications Network, Inc.*, 26 FCC Rcd 14891 (2011). Since the Havens Parties failed to comply with the deadline, their petitions must be dismissed summarily.

5. To be sure, precedent does provide an extraordinarily narrow exception to this otherwise absolute rule. *Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976). The *Gardner* decision defines the only circumstances in which the 30-day deadline for reconsideration petitions may be waived. Those circumstances entail a failure by the Commission to provide adequate notice of the decision of which reconsideration is eventually sought; the agency's failure, in turn, can

³ Both Section 405 of the Communications Act and Section 1.106 of the Commission's rules provide that petitions for reconsideration shall be filed within 30 days of the release of the decision of which reconsideration is sought. Thirty days from September 11 was October 11, which happened to fall on the Saturday of Columbus Day weekend. Since the computation of time provisions of Section 1.4 provide in such circumstances that the filing deadline shall be the next business day, the petitions were due by Tuesday, October 14.

⁴ *See* "Explanation of Timely Filing, and Explanation of ECFS Problems on 10/14/14, and Conditional Request to Accept" filed by the Havens Parties on October 22, 2014 at, *e.g.*, 3 ("... the [Havens Parties'] filings were not submitted ... until October 15, 2014").

justify a waiver “only where the delay in notification in fact makes it impossible reasonably for the party to comply” with the 30-day deadline. *Gardner, supra*, 530 F.2d at 1091. In other words, the mere fact that a party encountered some difficulty possibly attributable to the Commission is *not* sufficient to justify waiver of the 30-day deadline. Rather, the Commission must have failed to provide adequate notice of the decision of which review was to be sought, thereby making timely-filing of the petition for reconsideration *reasonably impossible*.⁵

6. Here the Havens Parties do not ascribe their late-filing to any lack of adequate notice of the *MO&O*. Nor could they. At an October 1, 2014 prehearing conference in Docket No. 11-71 attended by both Mr. Havens (by speakerphone) and counsel for some of the Havens Parties, the *MO&O* was a matter of considerable discussion. The discussion included specific reference to the deadline for petitions for reconsideration (which was at that point two weeks off). Counsel for some of the Havens Parties expressly indicated that his clients were contemplating preparation of a petition for reconsideration. In other words, the threshold factual element of *Gardner* – lack of adequate notice – is not present here. Accordingly, acceptance of the late-filed petitions is not warranted.

7. The Havens Parties would have the Commission believe that their late-filing was attributable to apparent technical problems they encountered when they attempted to file their petitions electronically through ECFS, beginning (apparently) at approximately 11:30 p.m. on October 14. According to the Havens Parties, the ECFS system was supposedly overloaded by

⁵ While “impossibility” may seem a harsh standard, the *Gardner* court expressly emphasized the narrowness of the exception it was creating. *Gardner*, 530 F.2d at 1091 (“it will be an extraordinary case ... where a petitioner can meet that burden.”). See also *Reuters, supra*, 781 F.2d at 952, where the Court observed that that the *Gardner* court took “great pains in the clearest of language to limit its holding to the highly unusual circumstances presented there.” Those circumstances included principally that the Commission had failed to provide the customary notice to the party of its action.

comments being filed in the “Open Internet” proceeding.⁶ There are at least a couple of problems with these claims.

8. First, apart from a handful of computer messages suggesting that ECFS may have been slow to respond, the Havens Parties have offered no evidence that the system was in fact overloaded so as to prevent the submission of the Havens Parties’ petitions. While the Havens Parties assert that they spoke with some unnamed representatives of the Commission’s technical staff who supposedly opined that there may have been problems with the system, those assertions – even if taken as true, notwithstanding their obvious hearsay nature – provide no proof at all that any problems the Havens Parties may have encountered were in fact the Commission’s fault.

9. Moreover, regardless of the problems the Havens Parties claim to have encountered, the fact is that, even if we assume *arguendo* that those problems occurred, they did not make it “impossible reasonably” for them to complete their filings. Both MC/LM and Choctaw Holdings were apparently able to file their respective petitions for reconsideration through ECFS on October 14, which establishes that the filing of petitions through ECFS on that date was far from “impossible”.

10. The real problem that the Havens Parties encountered was one of their own making. By holding off on their filings until the very last minute, they exposed themselves to the possibility that something, anything, might go wrong and prevent their timely filing. That is a

⁶ It is undeniable that the Open Internet proceeding attracted more than 3,000,000 comments, but it should be noted that the deadline for reply comments in that proceeding – *i.e.*, the date on which a deluge of comments might have been expected – was September 15, a month *before* the October 14 deadline for the Havens Parties’ petitions.

risk that they themselves assumed, and they cannot blame the Commission if the unhurried approach they chose resulted in late-filing.

11. While the Havens Parties might argue that their one-day lateness is so minor as to be disregarded, Commission precedent is to the contrary. *See, e.g., Panola Broadcasting Co.*, 68 FCC 2d 533 (1978); *Metromedia, Inc.*, 56 FCC 2d 909 (1975).⁷ Similarly, the Havens Parties' apparent efforts to "file" their petitions in various non-ECFS manners – by, *e.g.*, uploading them to ULS or emailing them to the Commission's Secretary – are also unavailing. Section 0.401(a)(iii) of the Commission's rules provides that electronic filings "where permitted, must be transmitted as specified by the Commission or relevant Bureau or Office." In this case, electronic filings were permitted, but ECFS was the only mechanism specified for such filings. *See* Public Notice, DA 13-569 (released March 28, 2013). Thus, the Havens Parties' alternatives do not constitute "filing".⁸

12. In summary, the admonition of the Court in *NetworkIP* bears repeating:

⁷ With respect to the fatal effect of even seemingly *de minimis* shortfalls, *see also NetworkIP, supra*. There a party had tendered its submission on the deadline, but its filing fee was \$5 short. The Commission concluded that it would be inappropriate to reject the filing simply because of a mere \$5 shortfall. The Court, however, disagreed, citing the Commission's own "adamantine standard" set out in *Meredith/New Heritage Strategic Partners, L.P.*, 9 FCC Rcd 6841, 6842-43, ¶¶ 6-9 (1994). As the Commission held there – and as the *NetworkIP* court emphasized – deadlines can be waived only under "unusual or compelling circumstances" involving "a calamity of a widespread nature that even the best of planning could not have avoided, such as an earthquake or a city-wide power outage which brings transportation to a halt," *id.* at 6842. Notably, the deadline waiver at issue in *NetworkIP* was merely regulatory, *not* statutory, in nature.

⁸ *See also Reuters, supra*. In *Reuters*, a party filed competing applications on the last possible date for submission, but filed them with the wrong Commission office. By the time that error was caught and the applications were properly filed with the correct office, the deadline for filing had passed. While the Commission, in the interest of "fairness", initially agreed to consider the applications as having been timely-filed, the Court on review held that, in so doing, the Commission had erred. Here again, the deadline waiver at issue was merely regulatory in nature.

[P]rocrastination plus the universal tendency for things to go wrong (Murphy's Law) – at the worst possible moment (Finagle's Corollary) – is not a “special circumstance,” as any junior high teacher can attest.

NetworkIP v. FCC, 548 F.3d 116, 127 (D.C. Cir. 2008). The Havens Parties were aware of the deadline for petitions for reconsideration weeks in advance of that deadline. Having chosen to wait until the very last minute, they ran the risk that problems might arise – and problems apparently did indeed arise. The law is clear that, having chosen to take that risk, the Havens Parties must live with the consequences, harsh though they may seem. Their petitions were filed late, and no special circumstances exist to warrant waiver of the statutory deadline here. The Havens Parties' petitions must be summarily dismissed.⁹

Respectfully submitted,



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October 29, 2014

⁹ As noted in Footnote 2, above, because the Havens Parties' petitions must be dismissed, no purpose would be served in responding to those petitions at this time. In the unlikely event that the petitions are not dismissed, SCRRRA reserves the right to respond to them before any substantive consideration might be given to them.

CERTIFICATE OF SERVICE

I, Paul J. Feldman, hereby certify that, on this 29th day of October, 2014, I have caused copies of the foregoing Motion to Dismiss Petitions for Reconsideration to be sent, by U.S. mail, first class postage prepaid, or (as indicated below) by hand-delivery or email, addressed to the following:

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A handwritten signature in black ink that reads "Paul Feldman". The signature is written in a cursive style with a long horizontal line extending to the right from the end of the name.

Paul J. Feldman