



Federal Communications Commission
Washington, D.C. 20554

August 6, 2008

DA 08-1851

In Reply Refer to:

1800B3-MJW

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CSN International
c/o Lauren A. Colby, Esq.
10 E. Fourth Street
P.O. Box 113
Frederick, MD 21705-0113

In re: **CSN International**
KOGR(FM), Rosedale, California
Facility ID No. 93176
BPED-19990407MD

Request for Additional Time to Construct

Petition for Reconsideration

Dear Counsel:

We have before us a Petition for Reconsideration ("Petition") filed January 10, 2007, by CSN International ("CSN"), former permittee of the captioned station. CSN seeks reconsideration of the December 19, 2006, letter¹ ("*Division Letter*") denying CSN's request for additional time to construct its authorized facilities.² For the reasons set forth below, we deny the Petition.

Background. The Commission granted CSN a construction permit (the "Construction Permit") for KOGR(FM) on October 29, 2003. By its terms, the Construction Permit expired on October 29, 2006, if CSN failed to construct the station.³ CSN, however, did not start construction until October 24, 2006. When it began to install its antenna that day on the American Tower Corporation ("ATC") tower specified in the Construction Permit, CSN learned that the United States Forest Service ("USFS") prohibited installation of broadcast antennas at that location.⁴ The following day, CSN filed a request with the Commission to toll the Construction Permit expiration date.

The *Division Letter* denied CSN's tolling request. It held that Section 73.3598(b) of the Commission's Rules ("Rules")⁵ provides for tolling of construction permit deadlines only in "specific circumstances beyond a permittee's control that delay construction, including litigation over government

¹ *Letter to Lauren Colby, Esq.*, Dec. 19, 2006.

² See *Division Letter* at 1.

³ See 47 C.F.R. § 73.3598(a),(e). (Construction permits are forfeited automatically, without further Commission action, if the permittee fails to construct its authorized facilities and file a license application before the permit expires.)

⁴ The ATC tower is on Plowshare Peak in the Los Padres National Forest which is under USFS jurisdiction.

⁵ 47 C.F.R. § 73.3598(b) ("Section 73.3598(b)").

requirements for construction.”⁶ It pointed out that there was no such litigation pending,⁷ and that CSN’s circumstances did not “qualify as a tolling event under any other provision of the Rule.”⁷

The *Division Letter* also found that a waiver of Section 73.3598(b) was unwarranted because CSN was not diligent in ascertaining the restrictions on construction at its site, having discovered the restrictions only “three days before its FCC construction permit was about to expire,”⁸ and that “[i]t was incumbent upon CSN to determine the USFS’s requirements and to allow sufficient time to obtain any necessary permits and approvals.”⁹ The *Division Letter* also noted that the restrictions on installation of broadcast antennas in the Los Padres National Forest were contained in a draft USFS Forest Management Plan (the “Management Plan”).¹⁰

CSN makes three arguments in its Petition. Its principal argument is that its construction deadline should have been tolled, or Section 73.3598(b) waived, because the USFS allegedly did not follow the Administrative Procedure Act when it adopted the Management Plan.¹¹ Second, CSN argues that it relied on ATC as “an agent of the Forest Service” to determine whether the USFS permitted broadcast antennas on the ATC tower.”¹² Third, CSN submits that the Commission waives Section 73.3598(b) in “rare and exceptional circumstances.” It encountered those circumstances, CSN argues, because (a) it was “confronted at the very last moment with an unexpected surprise which it could not have possibly anticipated,”¹³ *i.e.*, the USFS restriction on broadcast antennas, and (b) it cannot relocate to a site where such antennas are permitted.¹⁴

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order, or raises additional facts, not known or existing at the time of petitioner's last opportunity to present such matters.¹⁵ CSN has not met those threshold requirements in its Petition.

First, CSN elected to use a site in a National Forest. It therefore knew, or should have known, that the site was under USFS jurisdiction. A diligent applicant would have contacted the USFS before it filed its application - and remained in contact with the USFS thereafter - to determine any restrictions on CSN’s proposed site.¹⁶ Thus, CSN’s ignorance of the site restriction was not caused by a lack of “APA notice” from the USFS to CSN. Instead, it was due to CSN remaining - as it candidly concedes -

⁶ *Division Letter* at 1.

⁷ *Id.* at 2.

⁸ *Id.*

⁹ *Id.*

¹⁰ The USFS issued the draft Management Plan more than a year before CSN’s construction permit expired. *Id.*

¹¹ CSN claims it had “no notice, actual or constructive, of the [Management Plan],” which, CSN claims, was posted only on a website, was not published in the Federal Register and “to this day [] has never been adopted as a final rule.” It submits, therefore, that the revised plan “cannot bind CSN,” because the USFS promulgated it without the notice and comment required by the APA. *See* Petition at 4

¹² *Id.* at 5.

¹³ *Id.* at 6.

¹⁴ *Id.*

¹⁵ *See* 47 C.F.R § 1.106. *See also* *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff’d* *sum nom.* *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

¹⁶ Applicants and permittees are required to ensure that their sites remain available. *See* *Marlene V. Borman*, Letter, 23 FCC Rcd 4786, 4788-4789 (2008) (citing *1998 Regulatory Review - Streamlining of Mass Media Applications, Rules, and Processes*, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17540 (1999) (“*Streamlining MO&O*”); *Arizona Number One Radio*, Decision, 103 FCC 2d 551, 555 (Rev. Bd. 1986)).

“blissfully unaware that there was any problem”¹⁷ with its site until its construction period had nearly expired.¹⁸

Second, CSN’s purported but improbable reliance on ATC as “an agent of the Forest Service” does not justify a waiver. It is well established that applicants and permittees are responsible for ensuring that their sites are suitable, initially, and that they remain so during the term of a construction permit. They may delegate, but not abdicate, that responsibility to third parties.¹⁹ Thus, it was CSN - not ATC - that had the ultimate responsibility for ensuring that CSN’s broadcast antenna could be installed on the ATC tower.

Third, CSN has not established that its surprise at learning broadcast antennas were not permitted on the ATC tower justifies a waiver under the “rare and exceptional circumstances” exception discussed in the Commission’s *Streamlining* proceeding.²⁰ The threshold requirement for a “rare and exceptional circumstances” waiver is that failure to timely construct facilities is due to “reasons beyond [a permittee’s] control. . . .”²¹ Here, however, CSN’s failure to inform itself - and remain informed - about USFS restrictions on its site was a matter entirely within its control.²²

Decision/Action. CSN has not shown a material error or omission in the Division Letter. Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed by CSN International IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

¹⁷ Petition at 4.

¹⁸ With diligence, CSN could have identified the restriction on broadcast antennas well before its permit expired and challenged the USFS restriction on APA or other grounds.

¹⁹ See *KM Radio of St. Johns*, Memorandum Opinion and Order and Notice of Apparent Liability, 19 FCC Rcd 5847 (2004) (actions of engineering contractor); *Belo Broadcasting Corp.*, Decision, 68 FCC 2d 1479, 1486 (1978) *aff’d sub nom. Wadeco, Inc. v. FCC*, 628 F.2d 122 (D.C. Cir. 1980) (purported reliance on former counsel).

²⁰ *Streamlining MO&O*, 14 FCC Rcd at 17541.

²¹ *Id.*

²² CSN’s argument that a waiver is warranted because it lacks an alternative site is undercut by the fact it did not timely exhaust its remedies at the ATC site. For example, CSN - had it exercised diligence - could timely have initiated litigation against the USFS, Petition at 3, or timely have sought a special use permit pursuant to 36 C.F.R. § 251.54. *Id.* at 5. It did neither.