



Federal Communications Commission
Washington, D.C. 20554

June 19, 2009

DA 09-1365

In Reply Refer to:

1800B3-MFW

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In re: **DKJL(AM), Pine Bluffs, WY**
Facility ID No. 129604

File No. BL-20080801BCZ
Request for Special Temporary
Authorization (BSTA-20081211ACK)

Petition for Reconsideration

Dear Mr. Friedman:

This letter concerns: (1) the referenced application (the "Application") of Timothy C. Cutforth ("Cutforth") for license to cover the construction permit¹ for a new directional AM station DKJL(AM) in Pine Bluffs, Wyoming; and (2) the December 11, 2008, request for special temporary authorization (the "STA Request") to resume operations for the purpose of completing antenna proofs. By letter dated February 19, 2009, the staff, *inter alia*, dismissed the Application as patently defective.² On March 23, 2009, Cutforth filed a timely Petition for Reconsideration (the "Petition"), which he supplemented on March 24, 2009.³ For the reasons set forth below, we deny the Petition.

Background. On October 23, 2000, Cutforth filed an application for a new AM station at Pine Bluffs, Wyoming, on frequency 540 kHz, proposing 900 watts daytime power and 700 watts nighttime power, utilizing a directional antenna. The staff granted the uncontested application on July 28, 2005.

The DKJL(AM) construction permit specified a construction permit expiration date of July 28, 2008. It authorized the construction of an antenna array consisting of five identical 105-meter towers, and included the following conditions:

1. A complete nondirectional proof of performance, in addition to a complete proof on the daytime and nighttime directional antenna system, shall be submitted before program tests are authorized. The nondirectional and directional field strength measurements must be

¹ File No. BNP-20001023ADJ.

² *Letter to Mr. Timothy C. Cutforth*, Reference 1800B3-MFW (MB Feb. 19, 2009).

³ *See* March 24, 2009, Petition for Leave to File Supplement and Supplement.

made under similar environmental conditions.

. . . .

3. Before program tests are authorized, permittee shall establish sufficient current distribution measurement data to establish clearly that the current distribution approximates that of an antenna with an electrical height of 107.2 degrees, as proposed.

On August 1, 2008, four days *after* the DKJL(AM) construction permit had expired, Cutforth filed the subject Application for covering license. The Application failed to comply with Conditions 1 and 3 on the construction permit, in that it did not contain the daytime full proof of performance or the other required exhibits. Accordingly, on November 17, 2008, the staff, pursuant to Section 73.3564 of the Rules,⁴ issued a deficiency letter to Cutforth identifying these defects and providing 30 days to file a curative amendment.⁵ Upon receipt of the deficiency letter, on December 11, 2008, Cutforth filed: (1) a letter requesting additional time to provide the documentation requested;⁶ and (2) the STA Request which, because the DKJL(AM) permit had expired, seeks authority to operate the station with the permitted facilities for the purpose of conducting proof of performance field strength measurements.

On February 19, 2009, the staff dismissed the Application as patently defective, declared that DKJL(AM) construction permit had expired by operation of law, deleted the call sign DKJL(AM), and dismissed the STA Request as moot.

In the Petition, Cutforth claims that the Staff “ignored the record evidence and its own precedent and incorrectly” declared Cutforth’s permit expired.⁷ Cutforth indicates that he has constructed the Station but ran into “unforeseen problems” which necessitated the filing of the STA to enable Cutforth to conduct the necessary proof of performance testing.⁸ Specifically, Cutforth describes in detail the self-denoted “sweat equity” and “other extensive efforts undertaken to construct the Station,

Including successfully navigating the zoning and permitting process for the tower and accessory building, applying for and obtaining FAA approval, clearing the site and digging the building foundations, tower foundations, and tower guy anchors, pouring concrete, digging trenches for the cables between the towers, working nights to plow ground wires into the dirt around the towers, constructing and pre-tuning five antenna

⁴ 47 C.F.R. § 73.3564.

⁵ *Letter to Timothy C. Cutforth*, Reference 1800GB2-JBS (Nov. 17, 2008).

⁶ *Letter to Marlene H. Dortch* (rec’d Dec. 11, 2008). In this letter, Cutforth requests an additional 209 days to complete the measurements for KJL(AM). *Id.*, “Sequential Measurement Plan.” He indicated that he was issued construction permits for three AM stations (KJME(AM) and KCEG(AM), Fountain, Colorado, and KJL(AM), Pine Bluffs, Wyoming) and “ran short of time to document the operation of the facilities.” *Id.* at 3. He also describes the difficulty of doing the measurements, as access along “most of the radials” is “limited” due to terrain and because “a significant portion of the area surrounding the tower site has restricted access.” *Id.* at 2.

⁷ Petition at 9.

⁸ *Id.* at 8.

tuning units for five towers, locating and moving a modular equipment shelter for the transmitter building and placing it on the foundation, and purchasing state of the art light systems for the five towers.⁹

Cutforth also describes the “unforeseen problems” he encountered in attempting to build the Station, albeit expressly acknowledging for the first time that in fact construction of DKJL(AM) was not completed by the July 28, 2008, permit expiration date. He indicates that there were only two tower crews in the state of Wyoming that had the equipment and experience to erect very heavy (1000-pound) towers; one of these tower crews was “overbooked” with tower erection and DTV antenna work, while the other began work but left the Station partially completed as they went to work for larger clients.¹⁰ Cutforth indicates that the tower crew returned in December of 2007 and erected 125 feet of each of the five towers, but “a large snowstorm stopped work that weekend and the snow remained over a foot deep with drifting on the site making tower erection impossible for months.”¹¹ The tower crew was then “booked through 2008 with their large clients” and could only schedule work on the Station on July 1, 2008. After one week, the tower crew had added only 100 feet to the center tower, when again it left, and Cutforth says that he was unable to get the tower crew back on site before the Station’s construction period had expired.¹² He argues that the staff failed to give due consideration to these circumstances.

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.¹³

Cutforth does not contest the staff’s conclusion that the Application was patently defective in that it failed to supply the critical data necessary for evaluating the operation of the KJL(AM) directional antenna system. Moreover, we are unconvinced that Cutforth’s failure to complete construction of the station and submit a timely and complete license application for DKJL(AM) was due to circumstances beyond his control rather than his own dilatory actions and poor planning. It is clear that snowfall in the mountains of Wyoming would not qualify for “tolling” under Section 73.3598 of the Rules. The Commission tolls a station's three-year construction period when the permittee notifies the staff, pursuant to Section 73.3598(c) of the Rules, that construction has been encumbered by administrative or judicial review of a grant of a construction permit; by judicial review of any cause of action relating to necessary local, state or federal requirements for the construction and/or operation of the station; and/or by an “act

⁹ *Id.* at 2-3, referencing Declaration of Timothy Cutforth, ¶¶ 3-23 (“Cutforth Declaration”). Cutforth declares that “the Station transmitter plant has been fully constructed as of 07/28/08 with the exception of the erection of the final sections of the tower. The facility is otherwise ready to operate in full compliance with the construction permit.” Cutforth Declaration at ¶ 3.

¹⁰ Petition at 5; Cutforth Declaration at ¶ 15.

¹¹ Cutforth Declaration at ¶ 16.

¹² *Id.* at ¶ 17. Cutforth indicates that the tower company represented to him that it could complete the job of erecting the KJL(AM) towers in 10-14 days. *Id.*

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

of God”(i.e., weather-related disasters such as tornadoes, hurricanes, floods, and earthquakes).¹⁴ Differences in regional weather conditions do not excuse permittees from timely constructing their authorized facilities.¹⁵ Neither does Cutforth’s failure to secure the services of a tower construction company meet the criteria specified in Section 73.3598(c) of the Rules. Thus, the DKJL(AM) construction permit would not have qualified for tolling even had Cutforth properly notified the staff of the difficulties he encountered.¹⁶ The allegedly “unforeseen problems” encountered by Cutforth are not persuasive.

It is not in dispute that Cutforth failed to complete Station construction by the July 28, 2008, construction deadline. The Application mentions obliquely in the final paragraph of the Engineering Statement appended to the application that “[t]he construction of the KJL system is substantially complete.”¹⁷ Moreover, the STA Request implicitly concedes that none of the five towers was completed.¹⁸ Despite the fact that construction of the Station had not been completed, Cutforth filed the Application, omitting critical data necessary for evaluating the operation of the DKJL(AM) directional antenna system, yet certifying that “all the terms, conditions, and obligations set forth in the . . . construction permit [were] fully met.”¹⁹ We believe that Cutforth improperly filed a covering license application for DKJL(AM) when the facilities ostensibly covered by that application were not constructed. The Commission has designated for evidentiary hearing license applications filed to cover unconstructed facilities.²⁰ However, given that the staff had previously dismissed the Application, we will not institute further enforcement proceedings concerning that filing.

¹⁴ See *1998 Regulatory Review - Streamlining of Mass Media Applications, Rules and Processes*, Report and Order, 13 FCC Rcd 23056, 23091 (1998) (“*Streamlining Order*”), *recon. granted in part and denied in part*, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17536 (1999) (“*Streamlining MO&O*”).

¹⁵ See *Koor Communications, Inc.*, Letter 23 FCC Rcd 13246, 13249 (MB 2008), citing *Streamlining MO&O*, 14 FCC Rcd at 17539 (finding that factors such as weather may cause construction delays, but – given the expanded three-year construction period – such factors are not so insurmountable that they excuse parties’ lack of diligence in planning and implementing their authorized facilities).

¹⁶ See *Dwayne Burris*, Letter, 23 FCC Rcd 1817 (MB 2008) (staff acted properly in dismissing license application and declaring construction permit forfeit where permittee’s alleged SIBR’s circumstances do not fall within this limited exception to the three year construction deadline and permittee did not ask for tolling of the expiration date of the construction permit pursuant to Section 73.3598(c) of the Rules.

¹⁷ *Id.*, Engineering Statement at 3.

¹⁸ In the STA Request, Cutforth indicates that “[d]uring the period of the Construction Permit all of the materials and essential broadcasting equipment was gathered and the facilities were assembled on the transmitter site.” STA Request, December 11, 2008, Letter of from Timothy C. Cutforth at 1.

¹⁹ See File No. BL-20080801BCZ, Section II, Item 4.

²⁰ See, e.g., *William L. Zawila, et al.*, Order to Show Cause, Notice of Opportunity for Hearing, and Hearing Designation Order, 18 FCC Rcd 14938 (2003).

Conclusion/Action. We have reviewed the Petition, and we find that Cutforth has demonstrated no error in the staff's dismissal of the DKJL(AM) license application as patently defective, nor has he presented new facts or changed circumstances that otherwise warrant reconsideration. Accordingly, the March 23, 2009 Petition for Reconsideration filed by Timothy C. Cutforth IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Mr. Timothy C. Cutforth