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In re: WXNH(AM), Jaffrey, NH
Facility ID No. 129522
File Nos. BNP-20001023ACT
and BMP-20080214AHR
Petitions for Reconsideration

Dear Counsel:

This letter concerns two Petitions for Reconsideration filed by Steven Wendell ("Wendell") concerning his permit for unbuilt station WXNH(AM), Jaffrey, New Hampshire. On April 4, 2008, Wendell petitioned for reconsideration of a March 5, 2008, decision which terminated tolling of the station's construction deadline ("Tolling Decision").¹ Subsequently, on July 9, 2008, the staff dismissed Wendell's application for authority to move to an alternate transmitter site ("Modification Decision").² On August 8, 2008, Wendell petitioned for reconsideration of the Modification Decision. The licensee of station WLIE(AM), Islip, New York ("WLIE"), filed oppositions to each of Wendell's petitions for

¹ See *Letter to Christopher Imlay, Esq.*, Ref. 1800B3-IB (MB Mar. 5, 2008).

² See *Broadcast Actions*, Public Notice, Rep. No. 46771 (July 14, 2008).

reconsideration.³ For the reasons below, we deny reconsideration of the Tolling Decision and dismiss as moot the petition for reconsideration of the Modification Decision.

Background. The WXNH(AM) construction permit (the “Construction Permit”) was issued on September 17, 2003, for a three-year term expiring September 17, 2006.⁴ On June 1, 2006, we granted in part Wendell’s May 26, 2006, request for tolling of the permit’s expiration date. We acted pursuant to Section 73.3598(b)(2) of the Rules, based on Wendell’s notification of zoning litigation concerning his transmitter site.⁵ We concurrently rejected Wendell’s other claimed bases for tolling including matters relating to an alternate site proposed in two modification applications.⁶

In October 2007, WLIE submitted a “Petition to Terminate Tolling.” Responsive pleadings made clear to staff for the first time that the litigation at issue did not concern the authorized site specified in the WXNH Construction Permit but, rather, the alternative site specified in Wendell’s then-pending modification application.⁷ We concluded in our March 5, 2008 Tolling Decision that the court action did not qualify for tolling treatment under Section 73.3598(b)(2). Specifically, we stated that litigation concerning a move to a site for which Wendell held no permit could not relate to a requirement necessary for construction of the station as authorized by the Commission.⁸ The staff gave Wendell the benefit of the erroneous June 1, 2006, Tolling Decision, revising the WXNH(AM) construction deadline to August 28, 2008. This is the same deadline which would have applied had a legitimate tolling event ended on the date of the Tolling Decision. The staff also afforded Wendell an opportunity to document any circumstances that might warrant additional construction time by rule waiver.

On April 4, 2008, Wendell submitted a petition for reconsideration of the Tolling Decision, contending that the staff improperly terminated tolling and also proffering arguments for waiver of the three-year construction deadline. WLIE filed an Opposition.

³ Ownership of WLIE(AM) has changed several times in the course of this proceeding. The current licensee is Principle NY Holding Co., LLC. It acquired the WLIE(AM) license in March 2009 by assignment from Principle Broadcasting Network of New York which, in turn, acquired it in January 2008 from Long Island Multimedia. For purposes of this letter we refer to arguments by any WLIE(AM) licensee as those of “WLIE.”

⁴ See File No. BNP-20001023ACT.

⁵ See 47 C.F.R. § 73.3598(b)(2). That Rule provides for tolling if construction is impeded by specifically named circumstances beyond the control of the permittee including when “construction is delayed by any cause of action pending before a court of competent jurisdiction relating to any necessary local, state, or federal requirement for the construction or operation of the station, including zoning or environmental requirement.” *Id.* Wendell’s tolling request was untimely and tolling, therefore, became effective April 26, 2006, 30 days prior to the late-filed request. See 47 C.F.R. § 73.3598(c). We required Wendell to report the status of the litigation at 6-month intervals. Wendell’s most recent status update, dated June 30, 2009, avers that the case remains active.

⁶ Wendell filed two applications for the same alternate site. The first was dismissed as defective on August 20, 2006, and reconsideration was denied on January 5, 2008. Wendell filed a new application for that site on February 14, 2008, rather than seeking review. The second application was dismissed as defective on July 9, 2008.

⁷ The Construction Permit identifies the authorized transmitter site’s coordinates, but not a town name. The Construction Permit specifies coordinates for a transmitter site in Peterborough, New Hampshire and the site of the proposed modification was in Fitzwilliam, New Hampshire. Wendell’s tolling request contained many references to the Town of Fitzwilliam. Nevertheless, the staff initially believed that it was denying all modification-related arguments and granting tolling based solely on zoning litigation relating to the authorized site. For example, the court action was brought in August 2005 and Wendell did not file a modification application until April 2006.

⁸ *Tolling Decision at 2* (citing *Dennis J. Kelly, Esq.*, Letter, 21 FCC Rcd. 2956, 2958 (MB 2006), *recon. denied*, 23 FCC Rcd 4786 (MB 2008) and cases cited therein).

As indicated previously, the July 9, 2008, Modification Decision dismissed Wendell's second application proposing the alternate site. On August 8, 2008, Wendell filed a petition for reconsideration and WLIE subsequently filed an opposition.

The nominal expiration date of Wendell's permit was August 28, 2008. On September 18, 2008, WLIE filed an application to modify its co-channel station. WLIE's application is mutually exclusive with Wendell's permit.

Discussion. Tolling and Reconsideration Standards. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the original order, or raises additional facts, not known or existing at the time of petitioner's last opportunity to present such matters.⁹ The Commission will toll the construction period of a broadcast station for specific circumstances beyond a permittee's control delineated in Section 73.3598(b) of the Commission's rules. The Commission has also recognized that additional construction time may be warranted on a waiver basis for "rare and exceptional circumstances" beyond the permittee's control.¹⁰

Tolling Reconsideration/Request for Waiver. Wendell maintains that litigation concerning his alternate transmitter site qualifies for tolling "as of right" under Section 73.3598(b)(2) because that rule specifically references "any" litigation necessary for construction, including zoning litigation. Wendell argues that the proposed site move and, thus, zoning litigation relating to that move are necessary for construction of WXNH(AM). He asserts that he cannot build at the authorized site and his only other choice would be to surrender the Construction Permit. Specifically, Wendell states that shortly after issuance of the Construction Permit, he discovered that the authorized site could not accommodate the proposed three-tower array.¹¹ In the alternative, Wendell requests additional time by waiver. Although Wendell recognizes that the Commission expects permittees to specify suitable sites in their original applications, he argues that the Rules do not preclude site changes. Wendell emphasizes that he has not purposefully delayed construction to warehouse spectrum. Rather, he contends that he selected the original site in good faith and that the site proved unsuitable because he is a non-engineer working with complex AM engineering regulations. Wendell also asserts that he has expended considerable efforts with respect to the alternate site, both locally and at the Commission. Therefore, Wendell contends that the Commission should waive the construction deadline based on matters relating to a site for which no authorization is held.

WLIE responds that the Commission has consistently based tolling decisions on factors relating to construction impediments at authorized sites and not on construction impediments at proposed alternate sites. WLIE contends that the litigation at issue has never prevented Wendell from constructing at the site specified in the construction permit. It argues that Wendell's inability to build at the original site due to a mistake in selecting a suitable parcel of land due to lack of technical experience is grounds for neither tolling nor waiver.

⁹ 47 C.F.R § 1.106, and *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).

¹⁰ See *Streamlining of Mass Media Applications*, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17541 (1999) ("*Streamlining MO&O*").

¹¹ Wendell states that he immediately commenced local efforts to use an alternative site in August 2004. He explains that he did not file an FCC modification application for this site until April 2006, because he was acting *pro se*.

Upon consideration of Wendell's arguments, we find no error in our termination of tolling. Wendell's reading of Section 73.3598(b) as applicable to *any* litigation needed for construction of a station *anywhere* is erroneous and taken out of context.¹² The rule specifies that tolling is granted when "construction is prevented" by "causes not under control of the permittee" including litigation relating to "any necessary" governmental requirement for construction pursuant to "an original construction permit."¹³ Wendell's circumstances fall outside the rule in several ways. First, the root of Wendell's inability to construct is his own error in selecting a site on which the proposed tower array could not be located. This is not a matter beyond his control. Second, the litigation at issue did not prevent construction at the authorized Construction Permit site. Finally, the litigation does not relate to a matter necessary for construction because Wendell holds no permit for the alternate site. It is axiomatic that one cannot build broadcast facilities absent a Commission authorization.¹⁴ Wendell's observation that the Commission does not preclude permittees from applying for alternative sites provides no support for his conclusion that tolling is warranted.

Moreover, a permittee's voluntary decision to change sites does not generally establish a basis for additional time by waiver.¹⁵ Wendell argues that the need to change sites was not voluntary. He has not, however, identified any rare and exceptional circumstance beyond his control. As discussed previously, Wendell's authorized site became unusable for reasons within his control.¹⁶ Wendell's decision not to engage the services of a consulting engineer for matters he found complex also was voluntary. Such choices may, as Wendell observes, place a permittee in a situation where it has no alternative but to seek a new site. Nevertheless, as Wendell recognizes, applicants "are expected to specify sites suitable for their intended purposes in their original application."¹⁷ In adopting the current construction requirements, the Commission rejected applicant "misjudgments in specifying tower sites" as a basis for additional time.¹⁸ The Commission's clear intention was "to establish an incentive for all applicants to plan construction carefully, even prior to applying for a permit" and to "minimize instances in which applicants filed for permits without taking preliminary steps to ensure that they could begin – much less complete – construction."¹⁹ Inability to construct a station due to such matters deprives the public of service.²⁰ We reject Wendell's position that he is entitled to additional time as a result of his corrective efforts and

¹² See *JNE Investments, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 623, 629-30 (2008).

¹³ 47 C.F.R. § 73.3598(b). Use of the term "any" serves to underscore that, in keeping with the Commission's decision to provide tolling for judicial review, judicial appeals concerning governmental requirements such as zoning -- which would not qualify for tolling prior to reaching court -- are not excluded from tolling treatment during court proceedings. See generally *Cram Communications, LLC*, Memorandum Opinion and Order, 23 FCC Rcd 658, 661 (2008).

¹⁴ See 47 U.S.C. § 301.

¹⁵ See *Royce International Broadcast Co.*, Memorandum Opinion and Order, 23 FCC Rcd 9010 (2008).

¹⁶ Compare, *WMLB(AM), East Point, GA*, Letter, 18 FCC Rcd 5034 (MB 2003) (waiver of construction period where authorized site was taken by the government through eminent domain).

¹⁷ *Streamlining MO&O*, 14 FCC Rcd at 17539.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

continuing commitment to build a station.²¹ Accordingly, the request for waiver is denied. The Construction Permit has expired on its own terms.

Reconsideration of Modification Dismissal. As a result of our decision above, there is no time remaining on or which will be added to the WXNH Construction Permit, which expired on August 28, 2008. Wendell's request for reconsideration of his application to modify that permit is, therefore, moot.

Conclusion. Accordingly, IT IS ORDERED That Steven Wendell's Petition for Reconsideration of the Termination of Tolling (File No. BNP-20001023ACT) IS DENIED. IT IS FURTHER ORDERED that Wendell's request for additional time by waiver IS DENIED and that the permit, therefore, expired on August 28, 2008. IT IS FURTHER ORDERED that the Petition for Reconsideration of the dismissal of the application to modify facilities (File No. BMP-20080214AHR) IS DISMISSED AS MOOT.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

²¹ Wendell and WLIE disagree about whether Wendell has taken all steps needed to move the zoning/litigation process forward at the alternate site. An applicant's failure to take steps needed for construction can lead to a finding that delays were within the applicant's control. *E.g., Birch Broadcasting Co.*, Memorandum Opinion and Order, 18 FCC Rcd 1414, 1416 (2003), *recon. denied*, 20 FCC Rcd 5764 (2005). Assuming *arguendo* that Wendell took all necessary steps to pursue the alternate site, however, additional time would not be warranted for the reasons discussed previously.