

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

In the Matter of)	
)	
KSBN Radio, Inc.)	File No. BP-19890501AB, as modified by
)	File No. BMP-19980605AB
Request to Toll the Period to)	
Construct Unbuilt Station DKZTY(AM))	Facility ID No. 56749
Winchester, Nevada)	

MEMORANDUM OPINION AND ORDER

Adopted: February 7, 2008

Released: February 11, 2008

By the Commission:

I. BACKGROUND

1. The Commission has before it a Petition for Reconsideration ("Petition") filed by KSBN Radio, Inc. ("KRI"), former permittee of unbuilt broadcast station KZTY(AM), Winchester, Nevada.¹ The call sign was deleted from the Commission's database because the construction permit expired without construction of the facilities authorized therein.² The Commission previously concluded that KRI's construction of two 114-foot fiberglass whip antennas ("Whip Antenna System") without prior Commission approval did not fulfill the terms of KRI's construction permit to build two 285-foot steel towers.³ The Commission also denied KRI's request for tolling of the construction deadline because the permit, as tolled, would nevertheless have expired on September 1, 2001, 30 days following dismissal of litigation pursuant to a stipulation by the parties.⁴ For the reasons set forth below, we affirm the Commission's prior decision.

II. DISCUSSION

2. Where the Commission has denied an application for review, a petition for reconsideration will be entertained only if there have been new facts or changed circumstances.⁵ A petition for reconsideration which fails to meet these requirements may be dismissed as repetitious.⁶ A petition which relies on facts not previously presented may be granted only if circumstances have changed since the last opportunity to present such matters, the facts were unknown at that time and could not have been learned through ordinary diligence, or consideration of the facts is required in the public interest.⁷

¹ Petition for Reconsideration of KSBN Radio, Inc. (Nov. 3, 2004).

² See *KSBN Radio, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 20162 (2004) ("Decision").

³ *Id.* at 20163.

⁴ *Id.* at 20166. See also 47 C.F.R. § 73.3598(b)(ii).

⁵ See 47 C.F.R. § 1.106(b)(2).

⁶ See 47 C.F.R. § 1.106(b)(3).

⁷ See 47 C.F.R. § 1.106(c).

3. KRI's Petition raises two issues. First, KRI reasserts that it constructed facilities that complied with Section 73.1690(b)(1) of the Commission's Rules (the "Rules"), which allows permittees to replace an authorized tower "with a new tower of identical height and geographic coordinates."⁸ KRI repeats its argument, rejected by the Bureau, and then by the Commission on review, that the fiberglass antenna system need not have been at the same physical height as the facilities authorized because it was of "an identical electrical height."⁹ KRI argues that Section 73.1690(b)(1) is unclear as to the meaning of "height" and that the Commission's clarification is required in the public interest because towers of a lower physical height more effectively address aeronautical and aesthetic concerns.¹⁰ KRI's argument involves no new facts and is therefore dismissed as repetitious. The Commission, in denying KRI's Application for Review, has already determined that KRI's unauthorized construction violated the Communications Act of 1934, as amended, and the Rules.¹¹ The Commission cited the staff's rejection of KRI's "identical electrical height" argument, noting that "[t]he staff specifically denied as a bare, unsupported assertion, KRI's claim that the Whip Antenna System was an 'identical' 'replacement' tower permitted under Commission rules."¹² Accordingly, we dismiss the Petition as repetitious with regard to this argument.

4. Second, KRI argues that this is its first opportunity to correct a factual error in the Commission's Decision with respect to tolling of the construction deadline.¹³ According to KRI, the Commission incorrectly faulted KRI for not reporting that the litigation which formed the basis for the tolling claim had been resolved on August 2, 2001, a fact which the Commission learned from a telephone call to the court clerk's office.¹⁴ KRI claims that the litigation has not been resolved. KRI argues that the parties "stipulated dismissal without prejudice," *i.e.*, that the lawsuit, which challenged the legality of a local zoning ordinance, "can be revived" in the event of an adverse zoning determination.¹⁵ KRI further reports that local zoning authorities will not resolve the zoning issues unless the Commission affirms that KRI continues to hold a valid construction permit.¹⁶

5. We find no factual error. A permit remains in a tolling posture based on litigation concerning a necessary governmental requirement only so long as the cause of action is "pending before

⁸ 47 C.F.R. § 73.1690(b)(1).

⁹ Petition at 2 (emphasis in original); *See* Decision, 19 FCC Rcd at 20163, note 10.

¹⁰ Petition at 3.

¹¹ *See* Decision at 20167, note 39 (*citing* 47 U.S.C. §§ 301 and 319(c); 47 C.F.R. § 73.33(b)).

¹² *Id.* at 20163, note 10. KRI's construction permit authorized a directional array operating at 620 kHz with 285-foot conventional towers. The manufacturer of the unconventional 114-foot fiberglass "Whip Antenna System," Valcom, has only provided the Commission with data purporting to demonstrate performance of its 75-foot and 85-foot towers in non-directional AM arrays operating at 1200 kHz and above. *See Request for Approval of Specified Radiation Efficiencies* (Jan. 26, 2007) *transmitted by* Letter from George R. Borsari, Counsel for Valcom to Peter Doyle, Chief, Audio Division (Feb. 9, 2007). The inapplicability of that manufacturer's data to the instant proposal is why applicants such as KRI are required to specify all relevant details of the proposed construction in their Form 301 (Application for Construction Permit). We note that the type of substitution that KRI made can only be authorized through a second Form 301 application modifying the original construction permit, and demonstrating the performance of the newly proposed equipment. We further note that the proposed equipment is unproven in the type of facility proposed here by KRI.

¹³ Petition at 4.

¹⁴ *Id.*

¹⁵ *Id.* (emphasis in original).

¹⁶ *Id.*

any court of competent jurisdiction.”¹⁷ A court case that has been dismissed is no longer before the court, regardless of whether the dismissal was with or without prejudice. In the present case, KRI states that the matter reverted to the local zoning authority after the dismissal. Zoning matters pending before a local zoning board do not qualify for tolling.¹⁸ It is immaterial whether the local matter has been in court previously. Accordingly, we also reject this argument, and we deny the Petition.

III. ORDERING CLAUSE

6. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by KSBN Radio, Inc. IS DISMISSED to the extent indicated herein and DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁷ See 47 C.F.R. § 73.3598(b)(ii).

¹⁸ See 1998 Biennial Regulatory Review - Streamlining of Mass Media Applications, Rules, and Processes, 13 FCC Rcd 23056, 23091 (1998) (noting that “a permit would not qualify for tolling on the basis of the pendency of a zoning application before a local zoning board,” but that “the pendency of an application in a local court of a final zoning board decision would qualify for tolling.”), *aff’d in relevant part*, 14 FCC Rcd 17525, 17539-40 (1999).