

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

In the Matter of	)	
	)	
Steven Wendell	)	File Nos. BNP-20001023ACT
	)	and BMP-20080214AHR
Request for Tolling of Construction Period	)	Facility ID No. 134960
and Application for Modification of	)	
WXNH(AM), Jaffrey, New Hampshire	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 3, 2013**

**Released: April 4, 2013**

By the Commission:

1. The Commission has before it for consideration an Application for Review<sup>1</sup> filed on October 13, 2009, by Steven Wendell (“Wendell”), permittee of unbuilt station WXNH(AM), Jaffrey, New Hampshire. Wendell seeks review of a letter decision by the Media Bureau, Audio Division (the “Bureau”)<sup>2</sup> which denied reconsideration of a decision to terminate “tolling” treatment for WXNH(AM)’s construction permit<sup>3</sup> and dismissed as moot a separate petition for reconsideration of the dismissal of an application to move transmitter sites.<sup>4</sup> In the *Letter*, the Bureau found that Wendell’s inability to construct was not a matter beyond his control and that his circumstances did not qualify for tolling under the Commission’s rules.<sup>5</sup>

2. Upon consideration of the Application for Review and the entire record, we conclude that Wendell has failed to demonstrate that the Bureau erred. The Bureau properly decided the matters raised, and we uphold its decision for the reasons stated in its *Letter*.

3. In addition, we reject Wendell’s claim that the Bureau’s decision to terminate tolling based on zoning litigation was “arbitrary and capricious.” Wendell claims to have reported “regularly and candidly” on the zoning litigation and states that he spent substantial sums in reliance on the tolling decision.<sup>6</sup> Our review of the record, however, shows that, as the Bureau noted in the *Letter*, Wendell was not entitled to tolling under Commission rules because the zoning litigation related to an alternate site rather than the site authorized in Wendell’s construction permit.<sup>7</sup> The problem here is that Wendell’s initial filings did not clearly identify the zoning litigation as involving an alternate site. Indeed, the

<sup>1</sup> On October 28, 2009, Principle Broadcasting Network New York, LLC (“Principle”), licensee of co-channel station WLIE(AM), Islip, New York, filed an Opposition to Application for Review.

<sup>2</sup> *Christopher Imlay, Esq.*, Letter, 24 FCC Rcd 11809 (2009) (“*Letter*”).

<sup>3</sup> *Christopher Imlay, Esq.*, Letter, Ref. 1800B3-IB (MB Mar. 5, 2008).

<sup>4</sup> See *Broadcast Actions*, Public Notice, Rep. No. 46771 (July 14, 2008).

<sup>5</sup> See 47 C.F.R. §73.3598(b).

<sup>6</sup> Application for Review at 16.

<sup>7</sup> See *Letter*, 24 FCC Rcd at 11812.

timing of the zoning litigation suggested otherwise. Wendell had represented that the litigation commenced in August 2004, almost two years before he first filed his application to change the transmitter site in April 2006.<sup>8</sup> The Bureau's mistaken belief that Wendell was relying on litigation pertaining to zoning of the permitted site should have been evident to Wendell from the Bureau's June 1, 2006 initial grant of tolling, which stated that "Tolling will continue until the earlier of a court decision [resolving the zoning issue] that becomes final or the Commission's grant of your modification application *thereby mooted the litigation concerning zoning for the current site.*"<sup>9</sup> Wendell did nothing to correct this misimpression. It was not until October 2007, more than a year after the tolling grant, that Wendell disclosed that the zoning litigation did not relate to the site authorized in the construction permit, in a footnote to a pleading filed in response to a third-party's "Petition to Terminate Tolling."<sup>10</sup> The Bureau's decision to terminate tolling under these circumstances was thus warranted. Furthermore, the Bureau acted fairly in nonetheless giving Wendell the benefit of nearly two years additional time for construction that he had received erroneously, and by affording him an opportunity to document circumstances that might warrant additional construction time by waiver. Any resulting investment in the zoning litigation was the result of Wendell's own conduct. Based on this record, we reject Wendell's argument that the Bureau's action was arbitrary and capricious.

4. ACCORDINGLY, IT IS ORDERED that, pursuant to section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and section 1.115(g) of the Commission's rules, 47 C.F.R. § 1.115(g), the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>8</sup> See Tolling Request at 4 and Exhibit J.

<sup>9</sup> Letter to Steven Wendell (June 1, 2006) at 1-2 (emphasis added).

<sup>10</sup> Opposition to Petition to Terminate Tolling at 2, n.1.