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

In the Matter of	)	
	)	
Timothy C. Cutforth	)	
	)	
Application for License to Cover Construction of DKJJL(AM), Pine Bluffs, Wyoming	)	Facility I.D. No. 129604
	)	
	)	File Nos. BL-20080801BCZ
Request for Special Temporary Authority	)	BSTA-20081211ACK

MEMORANDUM OPINION AND ORDER

Adopted: October 14, 2014 **Released: October 15, 2014**

By the Commission:

1. The Commission has before it for consideration an Application for Review filed on July 20, 2009, by Timothy C. Cutforth ("Cutforth"), former permittee of unconstructed station KJJL(AM), Pine Bluffs, Wyoming.[1] Cutforth seeks review of a June 19, 2009 decision *Letter* [2] in which the Media Bureau ("Bureau") upheld dismissal of Cutforth's August 1, 2008 application for a license to cover the station's allegedly constructed facilities (the "License Application").[3] The Bureau noted that the License Application was incomplete[4] and incorrectly certified that all permit conditions were fully satisfied although none of the station's five authorized towers were complete and two special operating conditions on the permit had not been met.[5] The Bureau also let stand its rejection of Cutforth's December 11, 2008 request for more

[1] Cutforth argues that the Bureau erroneously held him to the construction and filing deadlines imposed by Section 73.3598 instead of waiving those provisions. *See* 47 C.F.R. § 73.3598. He believes that the rule's "harsh" results were intended to eliminate permittees in large markets who "tie up the spectrum indefinitely" without "the intent or foresight to ensure prompt initiation and conclusion of construction." Application for Review at 9, *citing Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922, 5929 (2007). In contrast, Cutforth presents himself as a first time permittee who devoted "sweat equity" and undertook "arduous efforts" in good faith to bring a truly local, second full-time transmission service to a rural community and needed only a brief extension to overcome obstacles that he had encountered. Application for Review at 2-5. Cutforth further contends that the Bureau failed to give full consideration to the magnitude of his circumstances, and treated him disparately from applicants that have received short waivers in response to unforeseen circumstances. *Id.* at 7-8. He re-argues and/or enhances previous arguments that snowfall, tower crew difficulties, illness, terrain, and restricted access around the site were unusual and/or unforeseeable and contends that the Bureau did not adequately explain why these circumstances did not warrant extension of his July 28, 2008 construction deadline. *Id.* at 6-7.

[2] *See Barry A. Friedman, Esq.,* Letter, 24 FCC Rcd 8210 (MB 2009) ("*Letter*").

[3] The *Letter* also upheld (1) a determination that the underlying construction permit expired by operation of law; (2) the deletion of the station's call sign; and (3) the dismissal as moot of Cutforth's request for special temporary authority to commence operations for the purpose of conducting measurements.

[4] Although the License Application was delivered to the FCC by the July 28, 2008 construction deadline, it was returned due to a missing fee form, and resubmitted with a request for late acceptance.

[5] Specifically, the License Application provided none of the required measurements of current distribution and field strength -- critical data needed to evaluate an AM station's directional antenna system – because, notwithstanding

(continued....)

time to construct and found untimely and unsupported his subsequent argument that additional time was warranted for allegedly unforeseeable circumstances.[6] For the reasons stated herein, we affirm the Bureau's actions.

2. First, we observe that Cutforth has submitted with his Application for Review lengthy new exhibits of weather conditions and construction progress, which he did not supply to the Bureau.[7] Similarly, Cutforth failed to raise before the Bureau many of the cases that he now cites as precedent.[8] Accordingly, we will dismiss these portions of the Application for Review.[9] Upon consideration of the remaining portion of the Application for Review and the entire record, we conclude that Cutforth 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*. With respect to Cutforth's claim of disparate treatment, we especially note that the facts presented here – difficulties that he allegedly encountered well in advance of the construction deadline, his failure to have the station substantially completed by the construction deadline, and his request for additional time in excess of 30 days provided to permittees which had completed most but not all station construction – distinguish this case from those which he cites in which the Bureau has granted waivers of construction deadlines such as that which he seeks.[10]

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his representation at Section II, Item 3 of the Application that "all the terms, conditions and obligations set forth in the …construction permit have been fully met," that system was not complete. Cutforth should have completed construction of five 344-foot (105-meter) towers but disclosed on reconsideration that he had, in fact, completed only 225 feet of one tower and 125 feet of the others. The Bureau considered – but declined – to designate the License Application for hearing on false certification grounds. It concluded that this additional action was unnecessary as a result of the dismissal of the License Application and the expiration of the underlying construction permit. *Letter* at 4.

[6] *See Letter* at 4. In response to a deficiency letter, Cutforth requested between 180 to 209 additional working days to complete measurements. He now states that he could complete the towers and measurements within 45 days. Application for Review at 5.

[7] Cutforth details wind speed, snowfall, and related conditions from December 2007 to March 2008. *Id.* at Exhibit A. He also submits many site photos taken on October 27, 2007, November 29, 2007, and June 2, 2008, along with a construction narrative. *Id.* at Exhibit B.

[8] These cases include, for example, unreported Bureau decisions Cutforth cites for grant of brief waivers to applicants that had substantially constructed but could not complete relatively small final steps due to unexpected factors occurring in the final month. *See also* 47 C.F.R. § 0.445(e) (unreported cases not precedent). Moreover, the few waiver cases which Cutforth raised previously and repeats on review do not support the relief he seeks. For example, Cutforth equates his circumstances with those in *Bruce A. Henoch, Esq.,* Ref. 1800B3-TH (MB Nov 16, 2006) because each claimed to have spent considerable time and money. However, the waiver grant in *Henoch* was not based on time and money, but rather upon an unprecedented six-month freeze on all zoning and planning activity in an entire county, unlike anything that Cutforth experienced. *Id.*

[9] *See* 47 C.F.R. § 1.115(c) ("No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass."); *BDPCS, Inc. v. FCC,* 351 F.3d 1177, 1184 (D.C. Cir. 2003).

[10] The types of waivers Cutforth references are granted for periods of 30 days or less, upon a showing that the permittee has substantially completed construction prior to expiration in accordance with the terms of its permit but cannot take relatively minor final steps to file a license application due to unforeseen circumstances, insufficient for tolling, arising just prior to the deadline. *See, e.g., CMCG Puerto Rico License, LLC,* 21 FCC Rcd 12900 (MB 2006) (30-day waiver when lightning struck site within final month, destroying equipment needed to complete construction); *Harry Martin, Esq.,* Letter, Ref. 1800B3-GDG (MB Apr. 23, 2003) (30-day waiver for otherwise constructed station to conduct proof of performance measurements that had been delayed by rainstorms within final month causing impassible mud). Even had Cutforth filed a timely request for waiver of the construction deadline instead of inaccurately professing to have completed construction prior to expiration of his three-year period of construction, his circumstances would not have justified a waiver.

3. 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 DISMISSED IN PART and DENIED IN PART.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary