

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

In the Matter of)	File Nos. BP-19961227AA (as modified
)	by BMP-19990624AC), BMP-
JNE Investments, Inc.)	20020517AAU, and BMAP-20040128AOO
)	
Request to Toll the Period to)	Facility ID No. 84907
Construct Unbuilt Station KSDG(AM),)	
Julian, California)	

MEMORANDUM OPINION AND ORDER

Adopted: January 15, 2008

Released: January 18, 2008

By the Commission:

I. INTRODUCTION

1. JNE Investments, Inc. (“JNE”) seeks review of a staff decision issued on August 3, 2004 (the “Staff Decision”).¹ That decision denied reconsideration of a staff ruling that JNE was not entitled to additional time to build new station KSDG(AM), Julian, California. The staff has also referred to the Commission JNE’s petition for reconsideration of the staff’s dismissal of JNE’s application for a minor modification to the station’s facilities.² JNE’s requests are supported by Mr. Amador Bustos (“Bustos”) and opposed by Multicultural Radio Broadcasting Licensee, LLC (“Multicultural”).³ For the reasons set forth below, we deny JNE’s Application for Review and dismiss its Petition for Reconsideration as moot.

II. BACKGROUND

2. The staff issued an initial permit to Mountain Communities Radio on June 23, 1999, for construction of new station KSDG(AM) at a site to serve Julian, California (the “Julian I” site). The permit required completion of construction by June 23, 2002. Jeffrey N. Eustis (“Eustis”) acquired the permit on December 14, 2000, and shortly thereafter secured approval for the permit’s *pro forma* assignment to JNE, which Eustis controls.

3. Under the rules then and still in effect, an initial or successor permittee must complete construction of an authorized new facility no later than three unencumbered years after the grant of the original permit.⁴ This period can be “tolled” for certain “encumbrances” beyond the permittee’s control,

¹ *Letter to Christopher D. Imlay, Esq.* (MB Aug. 3, 2004).

² *See* 47 C.F.R. § 1.106(a)(1).

³ Bustos has an option to purchase KSDG(AM) from JNE. Multicultural was the licensee of KALI(AM), West Covina, California. On November 26, 2007, the staff granted an application to assign the KALI(AM) license from Multicultural to Transition Radio, LLC, Trustee.

⁴ *See* 47 C.F.R. § 73.3598(a). *See also* 1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules, and Processes, Report and Order, 13 FCC Rcd 23056, 23092 (1998) (“Streamlining Order”), *aff’d* Memorandum Opinion and Order, 14 FCC Rcd 17525, 17539-40 (1999) (“Streamlining MO&O”).

as follows: acts of God, administrative or judicial review of a permit grant, failure of a condition precedent on the permit, or judicial action related to necessary local, state, or federal requirements.⁵ The Commission has also recognized that there may be “rare and exceptional circumstances beyond a permittee’s control” other than those delineated above that could warrant a waiver of the construction period rule.⁶

4. On May 16, 2001, JNE filed its first tolling request.⁷ JNE’s request was prompted by advice from a local attorney that the County of San Diego (the “County”) could not be expected to issue a requisite zoning permit for the station’s construction.⁸ A real estate agent also reportedly advised JNE that no suitable sites were available in the Julian area and recommended that JNE relocate to an existing tower elsewhere.⁹ On the basis of this advice, JNE concluded that its only option was to relocate KSDG(AM) to an existing tower near Oceanside, California, approximately 46 miles west of Julian.¹⁰ At that site, KSDG(AM) would co-locate with KKSM(AM) by diplexing with that station’s existing facilities. Operating from Oceanside, however, would not provide the community of Julian with the requisite city grade signal coverage. The specification of a new community of license, necessary to satisfy community coverage requirements, was considered a major modification of JNE’s permit.¹¹ At that time, there was no filing window open or anticipated for AM major modification applications.¹²

5. The staff denied JNE’s first tolling request on July 30, 2001.¹³ JNE had never applied to the County for a zoning permit. The staff found the local attorney’s conclusions “speculative” and faulted JNE for not determining the permit’s viability during the assignment process.¹⁴ The staff also concluded that JNE did not make the threshold showing that an encumbrance beyond JNE’s control prevented construction at Julian I. The staff denied JNE’s petition for reconsideration on January 10, 2002.¹⁵ That decision became final after JNE voluntarily withdrew an application for review.

6. In a second request for tolling filed February 5, 2002, JNE documented that it had

⁵ See 47 C.F.R. § 73.3598(b); *Wendell & Associates*, Memorandum Opinion and Order, 17 FCC Rcd 18576, 18577 (2002) (“*Wendell*”).

⁶ See *Streamlining MO&O*, 14 FCC Rcd at 17541; *Texas Grace Communications*, Memorandum Opinion and Order, 16 FCC Rcd 19167 (2001). See also *Wendell*, 17 FCC Rcd at 18577 (waiver denied when permittee failed to prosecute diligently its modification application and commence preliminary construction efforts); *Birach Broadcasting Corporation*, Memorandum Opinion and Order, 18 FCC Rcd 1414 (2003) (“*Birach I*”) (assignee’s greater broadcast experience not a relevant good cause for waiver of construction period rule), *recon. denied*, Order on Reconsideration, 20 FCC Rcd 5764 (2005) (“*Birach II*”).

⁷ See *Letter from Christopher D. Imlay, Esq.* (May 16, 2001) (“First Tolling Request”), supplemented by *Letter from Christopher D. Imlay, Esq.* (June 14, 2001) (“Tolling Supplement”).

⁸ See *Letters from William D. Petterson, Esq., Petterson & Bark* (Jan. 15, 2001 and June 6, 2001) (submitted as Exhibit A to First Tolling Request and Exhibit A to Tolling Supplement).

⁹ See *Letter from Fred Nielsen, Village Real Estate* (June 6, 2001) (submitted as Exhibit B to Tolling Supplement).

¹⁰ See First Tolling Request at 2.

¹¹ See 47 C.F.R. § 73.3571(a)(1).

¹² See generally *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, First Report and Order*, 13 FCC Rcd 15920, 15973 (1998), *recon. granted in part*, 14 FCC Rcd 8724 (1999), *modified*, 14 FCC Rcd 14521 (1999).

¹³ *Letter to Christopher D. Imlay, Esq.* (MMB July 30, 2001).

¹⁴ *Id.*

¹⁵ See *Letter to Christopher D. Imlay, Esq.* (MMB Jan. 10, 2002).

identified an alternative site near Julian (the “Julian II” site) and that Bustos, the site’s lessor and potential purchaser of KSDG(AM),¹⁶ had recently brought a judicial action in the Superior Court for San Diego County (“2002 Litigation”) regarding JNE’s potential use of this site. The staff addressed JNE’s request in an April 26, 2002, letter (the “2002 Waiver Decision”) determining that the 2002 Litigation did not qualify for *tolling* because the litigation involved an alternative site -- Julian II -- not JNE’s outstanding permit for the Julian I site.¹⁷ The staff was also mindful that there had been no showing that Julian I was unavailable, nor as noted above, evidence that JNE had ascertained the viability of the Julian I site prior to its acquisition of the station. Nevertheless, JNE convinced the staff that pursuit of the Julian II site was a reasonably diligent way to expedite construction; JNE professed that the site was already zoned for commercial and industrial use, including “the erection and operation of a small A.M. radio broadcasting facility.”¹⁸ The staff also found that the 2002 Litigation addressed a “rare and exceptional” circumstance beyond JNE’s control: despite the appropriate zoning of the property, the local zoning authority had reportedly refused to accept an application or even to make its zoning procedures known. On that basis, the staff stated that it would *wave* the three-year construction period, provided that JNE filed a “complete and acceptable minor modification application” to move to the Julian II site.¹⁹ The staff further stated that it would adjust the expiration date of JNE’s permit after resolution of the 2002 Litigation.

7. JNE filed a minor modification application to move to Julian II on May 17, 2002 (the “Julian II Application”).²⁰ JNE notified the staff in a status report of October 9, 2002, that the County had demurred in the 2002 Litigation, that the Superior Court had sustained the County’s demurrer, and that JNE had appealed.²¹ In successive reports dated June 26, 2003, September 18, 2003, and December 17, 2003, JNE notified the staff that its appeals to several state appellate courts had been unsuccessful.²² The Julian II Application remained pending during these appeals. JNE’s status reports also disclosed that it had obtained a written opinion from the County’s Land Use Department that a major use permit was required prior to obtaining a building permit for Julian II, and that JNE had unsuccessfully challenged that opinion at the County’s Planning Commission.²³ Meanwhile, Multicultural initiated separate efforts to upgrade the licensed facilities of KALI(AM), West Covina, California. As discussed further below, the proposals of Multicultural and JNE conflict, and the later-filed Multicultural’s proposal must wait in queue behind the earlier-filed JNE proposal.

8. On January 9, 2004, JNE filed another request for tolling – its third such request. JNE reported additional litigation initiated by Bustos on January 7, 2004 (the “2004 Litigation”). The 2004 Litigation was a court challenge of the County’s requirement that JNE apply for a major use permit for the Julian II site. JNE sought yet additional time based on the new litigation. On January 26, 2004, the Commission opened a filing window for new AM stations and major modifications to authorized AM stations. JNE filed an application for a major modification of the KSDG(AM) permit on January 28, 2004, specifying diplexed facilities at the Oceanside site, and proposing to serve Camp Pendleton South instead of Julian (the “Camp Pendleton Application”).²⁴

¹⁶ As indicated previously, Bustos holds an option to purchase KSDG(AM) from JNE.

¹⁷ *Letter to Christopher D. Imlay, Esq.* (MB Apr. 26, 2002).

¹⁸ February 2002 Tolling Request, Exhibit A at 3.

¹⁹ *Letter to Christopher D. Imlay, Esq.* (MB Apr. 26, 2002).

²⁰ *See* File No. BMP-20020517AAU.

²¹ *See Letter from Christopher D. Imlay, Esq.* (Oct. 9, 2002) at 2.

²² *See Letters from Christopher D. Imlay, Esq.* (June 26, 2003, Sept. 18, 2003 and Dec. 17, 2003).

²³ *See Letters from Christopher D. Imlay, Esq.* (Sept. 18, 2003 and Dec. 17, 2003).

²⁴ *See* File No. BMAP-20040128AOO.

9. The 2002 Litigation became final on March 15, 2004, as a result of Bustos' failure to seek certiorari in the United States Supreme Court by that deadline. The staff concluded that the basis for waiver of the construction period had ended. Therefore, on March 30, 2004, the staff issued a letter adjusting the permit's expiration date to August 5, 2004.²⁵ The same letter also denied JNE's third tolling request. The staff stated that the 2004 Litigation, on which JNE's request was based, was unlike the 2002 Litigation because it involved no rare and exceptional circumstance beyond JNE's control and appeared to promote delay rather than expedite construction. JNE sought reconsideration of that action on April 29, 2004, which Multicultural opposed on July 21, 2004. The August 3, 2004, Staff Decision denied JNE's petition for reconsideration and dismissed Multicultural's opposition as untimely.²⁶ JNE did not construct by the permit's revised expiration date of August 5, 2004. JNE filed a timely application for review of the Staff Decision on September 2, 2004.²⁷ Bustos filed a "Motion to Intervene" as well as an "Intervener's Brief" in support of JNE's Application for Review.

10. On October 8, 2004, the Media Bureau (the "Bureau") issued a public notice announcing the availability of new broadcast application forms which had been revised to reflect changes in the multiple ownership rules.²⁸ The Julian II Application had been filed on a 2001 version of Form 301. The Bureau released a public notice on November 18, 2004, requiring applicants that had filed on pre-2002 versions of the form to amend their applications with new ownership information by December 18, 2004, and warning that applications not amended by that date would be dismissed.²⁹

11. JNE did not file the required ownership amendment by the December 18, 2004, deadline. By public notice dated January 27, 2005, the staff dismissed the Julian II Application along with others for failure to amend.³⁰ On February 22, 2005, JNE filed the "petition for reconsideration and request for reinstatement *nunc pro tunc*" at issue here.³¹ On November 23, 2004, in the separate matter concerning Multicultural's proposed upgrade of KALI(AM), Multicultural filed an engineering amendment.³² JNE filed an opposition to that amendment, alleging that Multicultural's proposed modification, as amended, conflicted with KSDG(AM)'s pending Julian II Application. The staff has deferred action on Multicultural's modification application until the Commission issues a decision in the instant case.

²⁵ See *Letter to Christopher D. Imlay, Esq.* (MB Mar. 30, 2004). The new expiration date was 143 days from finality of the 2002 Litigation, reflecting the number of days which had remained on the KSDG(AM)'s permit when the litigation began.

²⁶ See Staff Decision at 6.

²⁷ Multicultural filed an opposition to which JNE filed a reply.

²⁸ See *Revised FCC Forms 301, 314 and 315 Approved*, Public Notice, 19 FCC Rcd 19642 (MB 2004). Applicants that had filed on the 2002 version of the FCC Form 301 were required to amend their applications with new ownership information by November 8, 2004.

²⁹ See *Media Bureau Announces Dismissal of Unamended Form 301, 314, and 315 AM and FM Applications; Amendment Deadline Set for Certain Other Commercial Radio Station Applications*, Public Notice, 19 FCC Rcd 22776 (MB 2004).

³⁰ See *Media Bureau Dismissal of Unamended Form 301, 314 and 315 AM and FM Applications*, 20 FCC Rcd 1611 (MB 2005).

³¹ Multicultural filed an opposition and JNE filed a reply.

³² KALI(AM) is constructed and operating. Multicultural's modification application, originally filed on August 29, 2003, had been dismissed for engineering defects on March 31, 2004. Multicultural filed a timely petition for reconsideration and amendments, which are pending and awaiting the outcome of this proceeding.

III. DISCUSSION

A. Procedural Matters

12. Bustos Filings. On September 2, 2004, Bustos filed a motion to intervene in the proceeding (“Motion to Intervene”). Bustos claims that he is an experienced minority broadcaster that has invested “over \$150,000 to date in working with JNE to attempt to construct” KSDG(AM), and claims that he stands to lose this investment under the Staff Decision.³³ The Commission’s Rules do not provide for petitions to intervene in non-hearing cases.³⁴ Accordingly, Bustos’ motion is dismissed. Even if we were to consider Bustos’ Motion to Intervene, however, Bustos has failed to satisfy the factors for intervention.³⁵ Bustos’ claimed interest in this proceeding is his potential loss of investment in the ventures of a Commission permittee.³⁶ A financial stake in the survival of a permittee, standing alone, is not the type of “interest” that would satisfy the Commission’s intervention requirements.³⁷ Nor would Bustos’ general claim that he is an “experienced minority broadcaster” establish sufficient “interest” for intervention.³⁸ The remaining factors weigh heavily against Bustos’ intervention. Bustos fails to provide an affidavit in support of his request.³⁹ He also offers no explanation how his participation will assist the Commission in the determination of the issues in question. Moreover, Bustos fails to offer any explanation for his delay in seeking intervention, even though the record shows he has held an option to purchase the station since at least 2002.⁴⁰ At the time Bustos filed his Motion to Intervene, JNE’s three tolling requests had been denied,⁴¹ JNE’s petition for reconsideration had been denied on August 3, 2004, and the construction permit’s August 5, 2004, expiration date had passed. Thus, to allow Bustos to intervene at this juncture would simply delay the process without facilitating resolution of the proceeding.⁴²

³³ See Motion to Intervene at 2.

³⁴ See 47 C.F.R. § 1.223 (governing petitions to intervene in proceedings designated for hearing). See also *Texas Cable and Telecommunications Assoc. v. GTE Southwest, Inc.*, Order, 17 FCC Rcd 6261, 6264 (2002) (finding the Commission’s rule on intervention, 47 C.F.R. § 1.223, is not directly applicable in a complaint proceeding because the rule applies to cases designated for hearing).

³⁵ See *Teleconnect Co. v. Bell Telephone Co. of Pennsylvania*, Memorandum Opinion and Order, 6 FCC Rcd 5202 n.52 (1991) (“Section 1.223(b) provides our only standard for considering a petition to intervene. Although this section specifically addresses intervention in an evidentiary hearing, we believe it to be a useful standard when considering the petition for intervention before us.”). Under our Rules, a petitioner seeking intervention must: explain its interest in the proceeding; show how its participation will assist the Commission in determination of the issues in question; set forth any proposed additional issues for consideration; and provide the affidavit of a person with knowledge as to the facts set forth in the petition. See 47 C.F.R. § 1.223(b). Where a petition to intervene is untimely, the petitioner must also set forth reasons why it was not possible to file the petition for intervention earlier in the proceeding. See 47 C.F.R. § 1.223(c).

³⁶ Motion to Intervene at 2.

³⁷ Cf. *Arizona Mobile Telephone Co.*, Memorandum Opinion and Order, 80 FCC2d 87 (Rev. Bd. 1980) (“creditors are not generally permitted to intervene as a matter of right solely on the ground that they have a financial stake in the survival of the parties”); *Hertz Broadcasting of Birmingham, Inc.*, Memorandum Opinion and Order, 46 FCC2d 350 (Rev. Bd. 1974) (company not permitted to intervene in a hearing based solely on its financial stake as a creditor of an applicant).

³⁸ Bustos cites no precedent for according standing based solely on minority status. In any event, even if we could consider the minority status of a permittee or potential assignee after the United States Supreme Court’s decision in *Adarand v. Peña*, 515 U.S. 200 (1995), and accord standing on that basis, we observe that two minority broadcasters, Bustos and Multicultural, have each expressed an interest in the outcome of this case, that each one intends to serve minority audiences, and that the applications at issue conflict with one another. Thus, even if we were to consider Bustos’ “minority status” argument, we would also take into account Multicultural’s claim that it too “is a minority-owned company with a strong history of providing foreign language programming to the minority

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13. Multicultural Filings. With respect to tolling, Multicultural filed an Opposition to JNE's Application for Review, arguing that a grant of tolling to JNE "could have the effect of denying Multicultural's pending application."⁴³ JNE filed a reply thereto claiming, among other things, that Multicultural lacks standing to submit an Opposition.⁴⁴ We need not address JNE's standing argument because in denying JNE's Application for Review *infra*, we have not relied upon Multicultural's Opposition.

14. With respect to modification, Multicultural filed an Opposition to JNE's February 22, 2005, Petition for Reconsideration of the dismissal of the Julian II Application. Multicultural contends that action favorable to JNE would continue to tie up spectrum that Multicultural could use immediately to provide service to the public.⁴⁵ JNE responds that Multicultural lacks sufficient interest to participate, and that Multicultural's submission should be dismissed as late-filed. Oppositions to petitions for reconsideration must be filed no later than ten days after the petition is filed.⁴⁶ Oppositions to JNE's Petition for Reconsideration were thus due on March 4, 2005, but Multicultural did not file its Opposition until March 9, 2005. Multicultural argues that the Commission should consider its Opposition as timely-filed because JNE failed to serve Multicultural with a copy of the Petition for Reconsideration. Alternatively, Multicultural requests a waiver of the filing deadline because it was not aware of JNE's Petition for Reconsideration until March 3, 2005, the date that it appeared on public notice, leaving Multicultural only one day to meet the March 4 deadline. JNE replies that it was not required to serve Multicultural because Multicultural had not established status as a party in this proceeding. We agree. Multicultural, as a non-party, properly received notice through the Commission's public notice process. When, as here, a potential participant determines that there is insufficient time to file a timely responsive pleading and that fewer than seven days remain until that pleading's due date, the participant must file a motion for extension of time by the due date and (in addition to serving a copy on the parties) orally notify all parties and the Commission staff of its motion.⁴⁷ Multicultural has not followed those

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population of many communities [that seeks to] immediately expand the unique minority, ethnic, and foreign language programming it now offers." Opposition to Application for Review at 9. Thus, it appears that neither application could be preferred to the other based on minority status. The staff has held Multicultural's application in queue behind the Julian II Application because the acceptability of Multicultural's amendment depends upon a finding in the instant proceeding of whether the KSDG(AM) permit has expired.

³⁹ Bustos contends that his participation is appropriate under principles established in *Knox Broadcasting*. See Motion to Intervene at 2 (citing *Knox Broadcasting, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 3337 (1997) ("*Knox*"). In *Knox*, the petition was dismissed because the petitioner, like Bustos, failed to submit a necessary affidavit in support of its petition. *Id.* at 3338-3339. See also note 42 *infra*.

⁴⁰ See ¶¶ 6-8, *supra*.

⁴¹ The first tolling request was denied on July 30, 2001, the second on April 26, 2002 (where a waiver was granted), and the third on March 30, 2004.

⁴² Similarly, if we were to consider Bustos' request as an application for review, we would find it deficient for the same reasons. Bustos is not aggrieved within the meaning of the rule, and has not shown good reason why it was not possible to participate earlier. See 47 C.F.R. § 1.115(a). Bustos' newly alleged Fifth Amendment Taking argument relies on matters upon which the staff had no opportunity to pass. See 47 C.F.R. § 1.115(c). Moreover, that argument largely seeks a fundamental change to the "period of construction" rule in 47 C.F.R. § 73.3598, rather than making a legal claim tailored to the instant proceeding.

⁴³ Opposition to Application for Review at 1.

⁴⁴ See JNE Reply at 2.

⁴⁵ Opposition to Petition for Reconsideration at 2.

⁴⁶ See 47 C.F.R. § 1.106(g).

⁴⁷ 47 C.F.R. § 1.46(c).

procedures nor explained why it could not do so. Accordingly, we deny Multicultural's waiver request and dismiss its Opposition to JNE's Petition for Reconsideration.

B. Substantive Issues

15. Tolling. The primary substantive question in JNE's Application for Review is whether the 2004 Litigation should have triggered tolling of the three-year construction period for KSDG(AM). JNE argues that tolling is mandatory for *any* zoning-related litigation, including the 2004 Litigation. We disagree. With respect to litigation, Section 73.3598(b) establishes a threshold test: the litigation must arise from circumstances "not under the control of the permittee."⁴⁸ Additionally, where, as here, the litigation does not relate to "the grant of the permit," the litigation must: (1) be pending before "any court of competent jurisdiction;" (2) relate to "any necessary local, state, or federal requirement for the construction or operation of the station;" and (3) cause "construction [to be] delayed."⁴⁹ Otherwise, litigation will not toll a station's construction period.

16. We find that the 2004 Litigation fails the rule's requirements on several counts.⁵⁰ First, JNE has not demonstrated that the 2004 Litigation resulted from a matter beyond its control. The 2004 Litigation concerns Bustos' argument that he should not be required to follow County application procedures that were made known during the course of the 2002 Litigation, *i.e.*, that Bustos must apply for a special use permit rather than a building permit. JNE and Bustos have indicated that they are working together on this project, but JNE provides insufficient justification for the decision to bring the 2004 Litigation instead of following known County procedures. The staff properly rejected JNE's position that local procedures are too costly⁵¹ and might result in unwanted conditions on any local permit that might be issued. Such possibilities, which JNE raises again on review, cannot bring a discretionary decision within the tolling rules.

17. Even had JNE demonstrated that the circumstances leading to the 2004 Litigation were beyond its control, the litigation would fail other prerequisites for tolling. We find that the 2004 Litigation does not relate to a *necessary* government requirement for construction of KSDG(AM) pursuant to its permit. The KSDG(AM) permit specifies Julian I, whereas the 2004 Litigation concerns zoning-related matters at Julian II.⁵² We reject JNE's argument that 2004 Litigation was necessary

⁴⁸ 47 C.F.R. § 73.3598(b).

⁴⁹ *Id.*

⁵⁰ We reiterate that the tolling provision of 47 C.F.R. § 73.3598 is inapplicable if there have already been three unencumbered years to construct a station. *See Texas Grace Communications, Inc.*, Memorandum Opinion and Order, 20 FCC Rcd 4820, 4824 (2005) (permittee not eligible for tolling because it previously had received three unencumbered years). The KSDG(AM) permit was in effect for approximately five years, including more than two years (during the 2002 Litigation) that the staff provided by waiver. *See Letter to Christopher D. Imlay, Esq.* (Apr. 26, 2002) at 2 ("Accordingly, the three-year construction period of the referenced permit . . . IS WAIVED."). Where grant of a waiver results in a construction period of greater than three unencumbered years, grant of additional time for further problems arising thereafter can only be accomplished through an additional waiver of the construction period. We consider below JNE's position that the staff erred in characterizing grant of time for the 2002 Litigation as a waiver rather than as tolling. *See* ¶¶ 19-20 *infra*.

⁵¹ JNE submits information from Bustos' local counsel indicating that the County would require a site plan, environmental impact documents, a land survey, a storm water control plan, slope analysis, project drawings, and a septic survey in connection with an application for a special use permit. *See Letter from David P. Hubbard, Esq. to Christopher D. Imlay, Esq.* (Apr. 14, 2004) (submitted as Application for Review, Exhibit B).

⁵² JNE contends that the 2004 Litigation would have related directly to JNE's permitted site had the staff granted the Julian II Application and issued a permit for that site on an expedited basis, as JNE argues the staff promised. The 2002 Waiver Decision indicated that the staff would consider the Julian II Application on an expedited basis. Once the staff began that expedited review, however, it identified deficiencies that required amendment. Further, the staff

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because the staff “required” JNE to move to Julian II in connection with the earlier 2002 Litigation. JNE made purely voluntary decisions not to pursue the unencumbered Julian I site and instead, together with Bustos, to pursue litigation concerning potential use of the Julian II site.⁵³ After Bustos brought the 2002 Litigation, JNE asked the staff to consider that litigation as a basis for additional time. The staff found the circumstances at issue in the 2002 Litigation highly unusual⁵⁴ but noted that JNE had not, consistent with its professed intent to build at Julian II, filed any application for facilities at the Julian II site. Accordingly, the staff conditioned its grant of a waiver on JNE’s filing of the Julian II Application. The staff’s facilitation of JNE’s desired pursuit of Julian II through the 2002 Litigation falls far short of a governmental *requirement* that JNE move to Julian II.

18. Nor has JNE shown that the 2004 Litigation caused delay in constructing KSDG(AM). JNE argues that it could not construct because governmental requirements placed it in a “Catch 22” position.⁵⁵ Specifically, JNE argues that it could not build at Julian I due to “draconian” local requirements, could not move to Julian II without bringing the litigation against the local government, and has been “stymied” in its plans to move to the Oceanside site -- first by lack of a Commission filing window and then by lack of staff action on its major change application. JNE’s argument is entirely dependent on acceptance of two premises: (1) that the local zoning authority would never approve use of Julian I, which we reject as speculative and untested;⁵⁶ and (2) that the decision to challenge rather than to comply with County procedures for Julian II was beyond JNE’s control, which we reject as unsubstantiated.⁵⁷ Additionally, the lack of an application filing window is not grounds for tolling.⁵⁸

19. Consistent Decisionmaking. JNE argues that the staff’s denial of tolling for the 2004 Litigation is at odds with the staff’s grant of additional time for the 2002 Litigation. According to JNE, the staff “specifically granted tolling due to [the 2002 Litigation],” but mistakenly called it a waiver.⁵⁹ JNE argues that “there is nothing in the [2002 Litigation] that differentiates it from [the 2004 Litigation] relative to tolling.”⁶⁰ According to JNE, the 2004 Litigation is a mere “continuation” of the 2002 Litigation involving a dispute by “the *same* parties over land use approvals at that *same* site.”⁶¹ Therefore, JNE concludes that the staff has applied the Commission’s tolling rule inconsistently in

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had anticipated, in reliance on JNE representations, that resolution of the 2002 Litigation and receipt of local approvals would occur quickly. Instead, the litigation became protracted, raising substantial questions of whether JNE had sufficient assurance that the Julian II site would be available for its intended use.

⁵³ Had JNE chosen not to file the Julian II Application in May 2002, its underlying construction permit for the Julian I site would have expired on June 23, 2002. By availing itself of the conditional waiver and filing the modification application, JNE was able to extend the expiration date of its underlying permit to August 5, 2004.

⁵⁴ As discussed *supra* in ¶ 6, JNE had advised the Commission that the Julian II site was already zoned for AM towers, that transmissions from Julian II could cover the community of Julian, that JNE wanted to build at Julian II as soon as possible, but that JNE had to await resolution of the 2002 Litigation because the County would not at that time make its building permit procedures known. JNE’s current submissions make no mention of zoning for AM towers, and indicate only that a cellular tower is located nearby.

⁵⁵ Application for Review at 4.

⁵⁶ The staff rejected that argument in its decision denying JNE’s first tolling request. See ¶ 5 *supra*. That decision has long been final.

⁵⁷ See ¶ 16 *supra*.

⁵⁸ See *Birach II*, 20 FCC Rcd at 5766.

⁵⁹ Application for Review at 8.

⁶⁰ *Id.* at 6.

⁶¹ *Id.* at 8 (emphasis in original).

virtually identical situations. JNE adds that it desires only tolling, not a waiver.

20. JNE mischaracterizes the history of this proceeding. The staff did not, as JNE alleges, grant tolling based on the 2002 Litigation. The staff explicitly stated that it was considering JNE's tolling request pursuant to the waiver standard because tolling is inapplicable outside of the circumstances identified in Section 73.3598(b).⁶² Thus, the staff consistently found that neither the 2002 Litigation nor the 2004 Litigation triggered tolling, and we affirm both findings.

21. Although JNE did not raise the issue, we also find that the staff's denial of a waiver for the 2004 Litigation is not inconsistent with its grant of a waiver for the 2002 Litigation. Waivers of the Commission's rules are committed to the discretion of Commission staff, acting on a case-by-case basis pursuant to delegated authority, and are granted only in compelling circumstances.⁶³ The Commission has provided for the grant of waivers of the construction period rule only for "rare and exceptional circumstances" beyond the permittee's control.⁶⁴ The Commission has acknowledged that many factors other than those delineated as tolling circumstances can cause delay, but has emphasized that such delays would rarely be so insurmountable as to excuse failure to construct within three years.⁶⁵ With respect to zoning and other site-related difficulties, the Commission has stated that a diligent permittee can resolve such matters in the vast majority of cases, either by securing an alternative site or by obtaining the necessary approvals.⁶⁶ A permittee's voluntary decision to abandon its permitted site in favor of an alternative site is not grounds for the grant of additional time.⁶⁷

22. As discussed above, the Staff Decision addressed in detail the differences between its 2002 and 2004 decisions under the waiver standard. The staff based the 2002 Waiver Decision on circumstances distinct to the 2002 case, including JNE's representations that the land was properly zoned for AM radio towers and that the only impediment to construction at Julian II was the County's refusal to make its application procedures known. The staff intended that JNE have the opportunity to apply for a site where it might be able to launch operations more quickly. Thereafter, the County made its procedures known and JNE tested and disproved its theory that it would be possible to construct at Julian II in a rapid manner. Thus, the staff found that the unusual circumstances which led to a waiver in 2002 no longer existed in 2004. The staff rejected JNE's arguments, similar to those made on review, concerning the cost of following County procedures and the potential for such procedures to result in unwanted conditions on any permit that might be issued. As the staff correctly observed, financial reasons for non-construction do not form a basis for tolling or waiver. We find no reason to disturb the staff's decision, which adequately distinguishes its 2002 and 2004 actions.

23. Modification Applications. As indicated previously, JNE filed one minor modification request, the Julian II Application, which the staff dismissed for failure to amend,⁶⁸ and a major modification request, the Camp Pendleton Application. JNE's Petition for Reconsideration seeks reinstatement of the Julian II Application *nunc pro tunc*. JNE states that its counsel believed that there

⁶² See *Letter to Christopher D. Imlay, Esq.* (MB Apr. 26, 2002).

⁶³ See *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1180 (D.C. Cir. 2003) (the rules never compel the Commission to grant a waiver); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972).

⁶⁴ See *Streamlining MO&O*, 14 FCC Rcd at 17541.

⁶⁵ *Id.* at 17539.

⁶⁶ *Id.*

⁶⁷ *Id.* at 17541 n.56 ("We reiterate that we will afford no additional time to permittees who make a business decision not to use the site approved in the construction permit").

⁶⁸ See *supra* ¶¶ 10-11.

was no need to amend the Julian II Application for multiple ownership purposes because “the underlying Construction Permit had expired on its face, and was before the Commission on a pending Application for Review.”⁶⁹ Additionally, JNE states that the Commission “specifically required” and “ordered” JNE to file the Julian II Application, that it was simply an engineering change specifying a new site, and that the lack of a multiple ownership amendment was immaterial because JNE has never had any other media interests in this market.

24. We find that JNE’s Petition for Reconsideration has become moot as a result of our affirmation of the staff’s denial of tolling, and we dismiss it as such. JNE recognizes that the denial of tolling would cause “termination of the KSDG(AM) construction permit.”⁷⁰ Specifically, without the grant of additional construction time, the permit is a nullity, having expired on August 5, 2004. Similarly, JNE’s Camp Pendleton Application has become moot because that application also seeks to modify an underlying permit that has expired. One cannot modify a permit that is no longer valid.⁷¹

IV. ORDERING CLAUSES

25. Accordingly, IT IS ORDERED, that the Application for Review filed on September 2, 2004, by JNE Investments, Inc. concerning tolling of its construction permit (File No. BP-19961227AA, as modified by BMP-19990624AC) IS DENIED.

26. IT IS FURTHER ORDERED, that the Motion to Intervene and the Intervener’s Brief, both filed on September 2, 2004, by Amador Bustos ARE DISMISSED.

27. IT IS FURTHER ORDERED, that the Petition for Reconsideration and Request for Reinstatement *Nunc Pro Tunc* filed on February 22, 2005, by JNE Investments, Inc. concerning dismissal of its minor modification application (File No. BMP-20020517AAU) IS DISMISSED AS MOOT, and that the Opposition to the Petition for Reconsideration filed on March 9, 2005, by Multicultural Radio Broadcasting Licensee LLC IS DISMISSED.

28. IT IS FURTHER ORDERED, that the application for major modification filed by JNE Investments Inc. (File No. BMAP-20040128AOO) IS DISMISSED AS MOOT.

29. IT IS FURTHER ORDERED, that the staff shall delete call sign KSDG(AM) from the Commission’s broadcast database.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁶⁹ Petition for Reconsideration at 3.

⁷⁰ Application for Review at 1.

⁷¹ See *WYCQ, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 16900, 16904 (2003).