

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

April 26, 2002

In Reply Refer To:
1800B3-GDG

FCC - MAILROOM

APR 30 2002

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Christopher D. Imlay, Esq.
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Washington, D.C. 20016-4120

In re: KSDG(AM), Julian, CA
Facility No. 84907
BP-19961227AA, as modified
by BMP-19990624AC

Dear Mr. Imlay:

This letter concerns the uncontested "Notification of Event Preventing Construction and Request for Determination of Tolling of Period of Construction" filed February 5, 2002 on behalf of JNE Investments, Inc. ("JNE"). JNE states that its permit is entitled to additional time in which to complete construction pursuant to the *Report and Order* in MM Docket 98-43, 13 FCC Rcd 23056, 23090 (1998), *recons. granted in part and denied in part* ("Streamlining MO&O"), 14 FCC Rcd 17525 (1999).

Background. On June 23, 1999, the staff granted the initial permit to construct a new AM station to serve Julian, California on 890 kHz, requiring completion of construction and submission of a broadcast license application by June 23, 2002. On July 30, 2001, the staff denied JNE's request to toll this expiration date. The denial rejected the permittee's claims that factors beyond its control deprived it of the use of the authorized site and that waiver of the AM processing rules was thus warranted to enable it to file a major modification (change of community of license) application to specify a new site and a new community of license.¹ The staff denied JNE's petition for reconsideration of this action, concluding that the permittee made its decision to change sites "without determining the viability of the authorized site prior to acquisition and without applying to the [San Diego] County for zoning approval."² JNE's February 8,

¹Letter to Christopher D. Imlay, Esq., Ref. 1800B3-GDG, (Audio Services Division, July 30, 2001).

²Letter to Christopher D. Imlay, Esq., Ref. 1800B3-GDG, (Audio Services Division, January 10, 2002).

On February 5, 2002, JNE notified the staff that it believed new circumstances distinct from those offered in its 2001 notification warranted tolling of its permit. Specifically, JNE cited, pursuant to 47 C.F.R. § 73.3598(b)(ii), new litigation concerning a necessary local requirement for the construction of the station at a third and different site. While not a direct party to the judicial proceeding, JNE explains that the suit, filed by Amador S. Bustos³ on January 31, 2002 with the Superior Court of California, challenges the County of San Diego Land Use and Environmental Group's procedural refusal to accept his application for a building permit to construct the station on his property.⁴

Discussion. Only those circumstances explicitly identified in Section 73.3598(b) of our rules and in our *Streamlining* decisions will toll a permit. *Texas Grace Communications*, 16 FCC Rcd 19167, 19171 (2001). In addition to these defined circumstances, the Commission recognizes that there may be "rare and exceptional" circumstances in which a waiver of the tolling rule might be warranted on a case-by-case basis. *Streamlining MO&O*, 14 FCC Rcd at 17541.

The unusual circumstances present here warrant a waiver. While the grant of JNE's initial permit is not the direct subject of either administrative or judicial review, there is a pending judicial challenge of the legality of zoning practices that form a necessary step to construction of KSDG's facilities at an alternate site. It is highly unusual for a local zoning authority to refuse, as alleged and supported by affidavit here, to accept an application or to make its procedures known to applicants. The judicial consideration of this unusual situation justifies the exercise of our discretion to grant a waiver. *Streamlining MO&O*, 14 FCC Rcd at 17541.

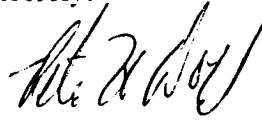
Accordingly, the three-year construction period of the referenced permit BP-19961227AA, as modified by BMP-19990624AC, IS WAIVED on the following condition: Prior to the current expiration of the permit, JNE must file a complete and acceptable minor modification application to move to the site at issue in the Superior Court litigation. If we do not receive such an application or determine that the application as filed is patently defective, the permit will expire on June 23, 2002. If, however, we receive an acceptable application, it will be reviewed on an expedited basis, but will toll the construction period during the pendency of the litigation until resolution of the Bustos

³In addition to being the plaintiff in the case before the Superior Court of California and the holder of the interest in the land on which JNE hoped to construct the station, Mr. Bustos has the right to acquire KSDG(AM)'s permit under certain circumstances pursuant to an Asset Purchase Agreement dated June 19, 2001.

⁴*Declaration of Bruce R. Knowles, Esq.*, January 26, 2002 (Attachment to Request). The staff has informally reviewed the technical parameters regarding the site on Mr. Bustos's property, and has determined that this proposal satisfies applicable Commission technical criteria, including the provision of the requisite city-grade signal over Julian, the authorized community of license.

litigation concerning the new site. During this tolling period, JNE must file a progress report every ninety days and must notify us of the resolution of the tolling event. This action is without prejudice to the matters now before the Commission in JNE's Application for Review.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter H. Doyle". The signature is written in a cursive style with a large initial "P" and "D".

Peter H. Doyle
Chief, Audio Division
Office of Broadcast License Policy
Media Bureau