



Federal Communications Commission
Washington, D.C. 20554

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Sent via electronic mail

In reply refer to: 1800B3-VM

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In re: **KMMI(FM), Loleta, CA**
Facility ID No. 170982
File No. BNPH-20070406ABY

KJNY(FM), Ferndale, CA
Facility ID. No. 39505
File No. BPH-20181207AAT

Tolling/waiver of construction permit expiration

Dear Mr. Carb and Mr. McCutchen:

This is in reference to a request for extension of tolling for new FM station KMMI, Loleta, California (KMMI), filed on behalf of permittee Miriam Media, Inc. (Miriam), and a separate request for extension of waiver of the construction deadline for FM Station KJNY Ferndale, California (KJNY), filed on behalf of licensee Mad River Radio, Inc. (MRR). Based on the foregoing, we grant Miriam's request and deny MRR's request. The KJNY permit, therefore, is expired and cancelled.

Background. On February 18, 2011, we granted Miriam the construction permit for a three-year term, expiring on February 18, 2014 authorizing Miriam to build KMMI to operate on channel 254C1. Due to various tolling grants since 2013, the term remaining on the permit is 10 months and 12 days. We previously granted tolling for this permit based on the condition precedent on the permit, that KJNY vacate channel 254C1 and be licensed on Channel 249C1, which condition remains unfulfilled. We granted MRR a construction permit for KJNY to move to channel 249C1 on February 1, 2019 for a three-year term expiring on February 1, 2022. On February 1, 2022, we granted a six-month tolling extension to Miriam for KJNY, and a six-month waiver of the construction deadline to MRR for KJNY, expiring on August 1, 2022.¹ The KJNY waiver was conditioned on both parties filing with the Commission monthly reports describing the status of efforts to modify each station's license or permit.

¹ See Emailed Letter from Albert Shuldiner, Chief, Audio Division, Media Bureau, FCC, to Miriam Media, Inc. and Mad River Radio, Feb. 1, 2022 10:22 EST.

On March 11, 2022,² April 18, 2022³ and May 31, 2022,⁴ the parties filed status reports indicating some incremental progress toward construction, narrowing down the equipment that would be compatible with the tower on which KJNY is located. On July 22, 2022, the parties requested additional time to construct their respective stations because the site owner had informed MRR that the existing building used by MRR at the site did not have room to accommodate the KMMI equipment.⁵ The parties stated that they had explored use of another building on the property but the land owner had not responded to their inquiry. They also suggested adding an additional building to the property, but said this option was forestalled by the land owner's death.

While tolling is still available to Miriam based on the condition precedent on the permit, we are not able to grant MRR an additional waiver of the construction deadline based on the issues raised related to use of the site. It is long-standing Commission tolling policy that issues related to site choice, including losing or gaining access to one's site, are within the permittee's control, and are not grounds for tolling of the construction deadline.⁶ Waiver of the three-year construction deadline for site-related construction delays is appropriate only under rare and exceptional circumstances beyond the permittee's control. For example, the Commission has waived the three-year construction deadline following governmental actions that took the land by eminent domain,⁷ or highly restricted the periods during which construction could occur to accommodate the breeding and migration of endangered species first discovered at the site during construction.⁸

We find that MRR has failed to show that special circumstances exist here, or that the public interest would be served by a grant of an extension of waiver in this case. When we granted the waiver of

² See *Emailed Letter from Evan Carb, Esq., Counsel, Miriam Media, Inc, to Victoria McCauley, Attorney, Audio Division, FCC*, Mar. 11, 2022, 1532 EST.

³ See *Emailed Letter from Evan Carb, Esq., Counsel, Miriam Media, Inc, to Victoria McCauley, Attorney, Audio Division, FCC*, Apr. 18, 2022, 11:09 DST.

⁴ See *Emailed Letter from Evan Carb, Esq., Counsel, Miriam Media, Inc, to Victoria McCauley, Attorney, Audio Division, FCC*, May 31, 2022, 10:43 DST.

⁵ See *Emailed Letter from Evan Carb, Esq., Counsel, Miriam Media, Inc, to Victoria McCauley, Attorney, Audio Division, FCC*, FCC, July 22, 2022, 10:39 DST.

⁶ See *1998 Biennial Regulatory Review—Streamlining of Mass Media Application Rules and Processes, Report and Order*, 13 FCC Rcd 23056 (1998) (Streamlining R&O), recon. granted in part and denied in part, *Memorandum Opinion and Order*, 14 FCC Rcd 17525, 17540, para. 39 (1999) *Streamlining R&O* at 23091, para. 86 (noting that a permittee chooses its own site), *aff'd in relevant part, Streamlining MO&O*, at 17539-40, paras. 35-38 (noting that the three-year term should provide ample time to secure an alternate site should obstacles to construction arise at site of choice); see also *Levine/Schwab Partnership d/b/a Schwab Multimedia LLC*, *Memorandum Opinion and Order*, DA 22-1, pp. 4-5, paras. 6-8 (Jan. 5, 2022) (site loss, a circumstance which does not qualify for tolling, was the proximate cause of permittee's inability to construct); *Royce Int'l Broad. Co.*, *Memorandum Opinion and Order*, 23 FCC Rcd 9010, 9016, para. 15 (2008) (site-related difficulties are not part of the tolling criteria); *Letter from Peter H. Doyle, Chief, Audio Division, MB, FCC to Christopher Imlay, Esq., et al.*, 24 FCC Rcd. 11809, 11812, (MB 2009) (site choice, even if flawed, is solely within the control of the permittee and does not provide a basis for tolling).

⁷ See *Rebecca Duke, Esq.*, *Letter*, 18 FCC Rcd 5034 (MB 2003) (six-month waiver of construction period justified by loss of site due to taking by local authority through eminent domain).

⁸ See *Dorann Bunkin, Esq.*, *Letter*, 21 FCC Rcd 8671 (MB 2006) (six-month waiver of the construction period granted to accommodate the local requirement that outdoor construction cease for extended periods during the breeding and migration of endangered species).

the construction deadline to MRR initially, there appeared to be no site-related impediments, and both parties separately stated that they had entered into negotiations to construct both facilities jointly and were beginning to come to terms regarding a reimbursement arrangement. The parties represented that they planned to co-locate the two stations at KJNY's tower, with Miriam paying an agreed upon portion of a new combined antenna and the stations possibly sharing some equipment and space. The parties stated that implementing such a solution would require (i) input from antenna manufacturers regarding the cost, weight and loading characteristics of such an antenna, (ii) a review of such antenna by the tower owner and the tower owner's agreement to the plan, (iii) a modification filing by Miriam to collocate at that site, and (iv) ordering, delivery and installation of such equipment to allow for a coordinated launch of KMMI and frequency changeover by KJNY. The parties agreed to this plan, knowing that they had been granted six months to achieve these goals.

We agreed to this plan because the parties described no site-based impediments and we believed it would serve the public interest by (i) allowing the parties to find common ground, thereby increasing the likelihood of each station's survival, (ii) providing KJNY with additional time to change frequencies, thereby avoiding the expense, delay and administrative burden resulting from a potential refiling of the modification application, (iii) eliminating a potential reimbursement dispute, (iv) achieving the launch of new service in the Eureka area and (v) ending a long-standing standoff that has delayed the arrival of additional service to the area. We also took into account Mr. McCutchen's illness with COVID-19, which he stated had impaired his ability to fully participate in these negotiations and the construction of KJNY.

However, the death of the site owner now presents a site-related construction delay or obstacle of unknown duration. The potential loss of access to the parties' desired site for co-location is not a basis for extension of tolling or a waiver of the tolling rule under our case law, as described above.

Accordingly, the request for extension of tolling filed by Miriam Media, Inc., for Station KMMI(FM), Loleta, California, IS GRANTED for six months.⁹ The request for extension of waiver of the construction period filed by Mad River Radio, Inc. for Station KJNY(FM), Ferndale, California, IS DENIED, and the permit IS CANCELLED. Mad River must refile its application for construction permit within 30 days.

Sincerely,

Albert Shuldiner

Albert Shuldiner
Chief, Audio Division
Media Bureau

⁹ Miriam Media is required to continue to file updates on a six month basis. The next report will be due six months from the date of this letter.