

15839

date

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Received & Inspected
AUG 24 2011
FCC Mail Room

In re Construction Permit for)
Davidson County Broadcasting, Inc.)
Station WWLV(FM) (formerly WTHZ))
Lexington, NC)
)
)

File No. BPH-200303030ACA
Facility ID No. 15839

To: Office of the Secretary
Attn: Chief, Audio Division

**OPPOSITION TO EMERGENCY
REQUEST TO STAY CONSTRUCTION PERMIT**

Davidson County Broadcasting, Inc., licensee of commercial radio station WWLV(FM), Lexington, North Carolina ("Davidson"), by its attorneys and pursuant to Rule 1.45(d) of the Commission's rules, respectfully files and serves this Opposition to Emergency Request to Stay Construction Permit in the above-captioned matter.

For the reasons stated below, Davidson requests that the Commission deny the Petitioner's request.

**I.
Introduction**

The Emergency Request to Stay Construction Permit ("Emergency Request") and companion Request for Termination of Construction Period Tolling filed by Petitioner William B. Clay ("Petitioner"), as was the case with his prior filings related to and against Davidson, are based on empty arguments and speculation. The Petitioner, now living in Italy, claims he will suffer irreparable harm if his request to stay construction of a tower at a site in Rowan County, North Carolina, is not granted. The Petitioner utterly

2011 AUG 24 P 2:22

fails to meet his burden to show that the Emergency Request should be granted. The Petitioner's request should, therefore, be denied.

II. Procedural History

The Petitioner requests that the Commission grant an "emergency stay" of Davidson's construction permit issued in FCC File Number BPH-20030303ACA (the "Construction Permit"). The Emergency Request was filed contemporaneously with the Petitioner's informal Request to Terminate Construction Tolling Period.

The procedural history of the Construction Permit is lengthy. Davidson first filed the Construction Permit application on March 3, 2003, and the Commission granted the Construction Permit on September 11, 2003.

The Media Bureau first tolled the Construction Permit effective April 27, 2004, leaving 2 years, 4 months, and 14 days on the Construction Permit commencing upon the end of the tolling.¹ The Construction Permit was tolled because the grant of the Construction Permit was initially the subject of administrative review, and later because construction was delayed due to pending litigation. The pending litigation culminated in an appeal to the North Carolina Supreme Court, which denied Davidson's petition to review the case on August 26, 2008.² The North Carolina Supreme Court's decision became final on November 25, 2008, when the time for filing a petition for certiorari with

¹ See Letter to Mark Prak from the Audio Division, dated September 28, 2005 (reference 1800B3-IB).

² See *Davidson County Broadcasting, Inc. v. Rowan County Bd. of Com'rs*, 186 N.C. App. 81 (2007), *pet. for discretionary review denied*, 362 N.C. 470 (2008).

the United States Supreme Court expired.³ Thereafter, the Media Bureau calculated April 8, 2011, as the Construction Permit's expiration date.

On or about January 29, 2009, the owners of the property for the site specified in the Construction Permit, Richard and Dorcas Parker, submitted to the Rowan County Zoning Board of Adjustment an application for a zoning permit for the property for construction of the authorized tower. The County denied the application on February 6, 2009. The owners made a subsequent request for the zoning permit, which the County also denied on March 13, 2009. The County's decision denying the zoning permit was affirmed on June 15, 2009, in connection with an administrative appeal. On September 15, 2010, the property owners filed an appeal of the County's denial of the zoning permit with the Superior Court in Rowan County in Docket Number 10 CVS 2637.

By letter dated September 22, 2010, Davidson informed the Commission of the pending litigation, styled pursuant to governing rules of procedure as an Appeal of Decision of Zoning Board of Adjustment. On October 20, 2010, the Media Bureau again tolled the Construction Permit effective September 15, 2010. The Rowan County litigation, which is the basis for the current tolling of the Construction Permit, remains unresolved. While the Superior Court dismissed the action on May 26, 2011, the Parkers timely filed a Notice of Appeal of the dismissal on June 23, 2011. A copy of the Notice of Appeal is attached hereto as Exhibit A. Davidson had planned to submit a copy of the Notice of Appeal to the Media Bureau in connection with its next six-month tolling status report due in October 2011. The appeal remains pending. It is well established that the

³ See SUP. CT. R. 13.

tolling of a construction permit does not terminate until the court's judgment becomes final and no longer subject to appeal.⁴

Of course, Petitioner's filing of the Emergency Request to Stay Construction Permit and informal Request to Terminate Construction Tolling Period has again placed the Construction Permit under administrative review and triggers new grounds for tolling of the Construction Permit's expiration date. In accordance with Section 73.3598 of the Commission's rules, Davidson will be filing separately a new notification of tolling of the Construction Permit due to the instant administrative review.

While the Construction Permit remains tolled due to the pending litigation (and now, the instant action), separate and apart from the pending litigation, in May 2010, the Parkers and Davidson submitted a new application to the Rowan County Board of Commissioners (the "Board"). On August 3, 2011, following a two-day hearing, the Board orally granted a conditional use permit application to construct the facility authorized by the Construction Permit. Pursuant to Section 153A-345 of the North Carolina General Statutes, the Board's decision becomes final and not subject to appeal after 30 days following the filing of the written decision of the Board. At this time, the Board's decision has not been finalized in written form. Accordingly, the decision remains subject to appeal. Of course, upon the decision becoming final, the separate pending litigation in the Rowan County Superior Court will become moot and no longer be the basis for tolling, and Davidson County will notify the Media Bureau accordingly (though the current tolling will continue until the instant administrative review is resolved and final).

⁴ See *Oconee River Broadcasting*, Letter, 23 FCC Rcd 15826 (MB 2008).

II. Argument

It is well established Commission precedent that a stay will be granted only if a petitioner can show that: (i) the petitioner is likely to prevail on the merits; (ii) the petitioner will suffer irreparable harm absent a stay; (iii) other interested parties will not be harmed if the stay is granted; and (iv) the public interest favors grant of the stay.⁵ The petitioner requesting a stay has the burden of demonstrating that the injunctive relief requested is warranted based on these factors.⁶ As discussed below, Petitioner has utterly failed to meet his burden. Accordingly, the stay request should be denied.

A. Petitioner is Unlikely to Succeed on the Merits.

The Petitioner argues that he is likely to succeed on the merits of the underlying Request to Terminate Construction Period Tolling. The Petitioner essentially argues that the Commission acted contrary to its rules and policies when it granted Davidson's tolling requests on September 28, 2005, and on October 20, 2010. Contrary to the Petitioner's claims, the Petitioner is not likely to succeed on the merits of his Request.

First, with respect to the decisions of the Media Bureau on September 28, 2005, and October 20, 2010, to toll the Construction Permit expiration date, Petitioner failed to timely object in both instances. With respect to the September 28, 2005, tolling, the Petitioner first "objected" on November 6, 2009, in connection with his Informal

⁵ See *WTVG, Inc. and WUPW Broadcasting, LLC*, 25 FCC Rcd 12263, ¶ 3 (MB 2010) (citing *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) and *Washington Metropolitan Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977)); *In re Cumulus Licensing Corp.*, 16 FCC Rcd 1052, ¶ 5 (2001) (citing *Washington Metropolitan*, 559 F.2d at 842-43).

⁶ See, e.g., *Washington Metropolitan*, 559 F.2d at 844; *Petitions for Partial Waiver or Stay of Inmate-Only Payphones Declaratory Ruling*, Order, 11 FCC Rcd 8013, ¶ 7 (CC 1996).

Objection to Davidson's application to modify the Construction Permit in FCC File Number BMPH-20090724ACK, more than four years after the Media Bureau's tolling decision.⁷ With respect to the October 20, 2010, tolling, Petitioner objects for the first time here, nearly 10 months after the Media Bureau's tolling decision. Pursuant to Section 1.4(b)(5) and Section 1.104 of the Commission's rules, the Media Bureau's decisions, in both cases, became final prior to Petitioner's objection. As such, the Petitioner is time barred from challenging both tolling grants.

Second, with respect to the October 20, 2010, tolling grant, the Petitioner complains about the nature of the legal actions filed in 2009 and 2010 in the Rowan County Superior Court. As explained earlier, these actions were filed by third-parties, Richard and Dorcas Parker. Davidson is not a party to either litigation. As such, it is misleading for Petitioner to imply that such litigation, which is not within Davidson's control, is an improper basis for tolling.

Furthermore, Petitioner's contentions, based on speculation and surmise, about the purportedly "sham" nature of the actions go directly to the merits of the underlying state court litigation. Yet, it is well settled law that the Commission defers to state courts on the merits of litigation matters that are governed by state law.⁸ Accordingly, the

⁷ See *Davidson County Broadcasting, Inc. for Minor Modification to Construction Permit Station WTHZ(FM), Lexington, NC*, File No. BMPH-20090724ACK, Informal Objection of William B. Clay (filed Nov. 6, 2009) (hereinafter "*Informal Objection*").

⁸ See, e.g., *Listeners Guild v. FCC*, 813 F.2d 465 (D.C. Cir. 1987); *Thomas K. Kurian Assignor, AMTS Consortium, LLC Assignee*, Order on Reconsideration, 22 FCC Rcd 7318, ¶ 6 (WTC Bureau 2007) (discussing the Commission's policy against interjecting itself into private disputes); *Mid Atlantic Network, Inc., Assignor and Centennial Licensing II, L.L.C., Assignee*, Memorandum Opinion and Order and Notice of Apparent Liability, 23 FCC Rcd 7582, ¶ 10 (MB 2008).

underlying merits of the Parker's pending litigation are irrelevant to a proper application of the Commission's tolling rule.

Nonetheless, in the event the Commission wishes to evaluate the merits of the Parker's pending litigation, it should be noted that the Rowan County Superior Court is a court of competent jurisdiction within the meaning of Rule 73.3598(b)(2) of the Commission's rules. The Rowan County Superior Court is the proper forum under governing rules of North Carolina law for the Parkers to bring a case involving the use to which they wish to put their real property, and it is the proper authority to grant (or deny) the motion to dismiss the Parkers' case. Whether or not the court has jurisdiction over a particular matter due to statute of limitations concerns, as was at issue before the Rowan County Superior Court when it ordered the dismissal, is an entirely different matter. *See, e.g., Nello L. Teer Co. v. North Carolina Dept. of Transp.*, 175 N.C.App. 705, 708 625 S.E.2d 135, 137 (2006) (“[V]iolation of a statute of limitations does not implicate the court's power to hear the case.”)

B. Petitioner Will Not Suffer Irreparable Harm Absent a Stay.

The Petitioner will not be harmed, and indeed *cannot* be harmed, if a stay of the Construction Permit is not granted by the Commission.

Prior to filing the Emergency Request, the Petitioner relocated from the Charlotte, North Carolina, area. Mr. Clay now resides in Italy.⁹ Accordingly, Mr. Clay, the Petitioner, is located nowhere near the facilities authorized in the Construction Permit. Indeed, he is not even located on the same continent and thus will suffer no harm if the

⁹ *See* Exhibit B (attached hereto).

Construction Permit facility is constructed. As a non-resident, Mr. Clay has no standing to prosecute his request for stay.¹⁰

Furthermore, the harms alleged by the Petitioner, by his own omission, relate to a separate application for minor modification of the Construction Permit filed in 2009 in FCC File Number BMPH-20090724ACK.¹¹ That application proposed to change WWLV(FM)'s community of license from Lexington to Faith, North Carolina, and the Petitioner's objections principally related to the merits of the proposed community of license change.¹² The Commission has not yet acted on the modification application. As such, any supposed harms are merely theoretical at this point, and in any event, are certainly not grounds for an "emergency" stay. Petitioner has no basis to request the stay, as he simply makes no allegation that irreparable harm would be caused by virtue of construction of the facilities currently authorized in the Construction Permit.

Moreover, any theoretical harms that Petitioner claims would occur based on a proposed community license change are now moot. On August 18, 2011, Davidson has filed a request to voluntarily dismiss the 2009 minor modification application.¹³

Accordingly, any harms the Petitioner claims he will suffer in the absence of a stay are (1) irrelevant to the authorized Construction Permit and (2) moot.

¹⁰ See, e.g., *CHET-5 Broadcasting, L.P.*, Memorandum Opinion and Order, 14 FCC Red 13041, ¶¶ 3-4 (1999) (in the context of petition to deny, "we will accord party-in-interest status to a petitioner who demonstrates either residence in the station's service area or that the petitioner listens to or views the station regularly, and that such listening or viewing is not the result of transient contacts with the station").

¹¹ See Request at ¶ 12.

¹² See *Informal Objection*.

¹³ See Exhibit C (attached hereto).

Finally, it is clear that the circumstances presented here do not amount to an “emergency” requiring the urgent action of the Commission. The “emergency” exists only in the mind of the Petitioner. As explained earlier, the Board’s oral decision issued on August 3, 2011, is not a final order as it is still subject to appeal. Petitioner’s protestations to the contrary, there is simply no urgency to the Petitioner’s request.

C. Other Interested Parties Will Be Harmed if the Stay is Granted.

As Petitioner acknowledges, other parties will be harmed if the Commission grants the requested stay. In addition to harms to Davidson and the Parkers, the public and WWLV(FM)’s listeners would be harmed because they would continue to be deprived of the enhanced service authorized in the Construction Permit. There has already been a delay of *more than eight years* in constructing the authorized facility. Further delay will only continue to harm the station’s listeners, Davidson, and the Parkers. The fact that the Petitioner cites no harm whatsoever with respect to the authorized Construction Permit is heavily outweighed by the actual harm that has been and would continue to be caused to other parties.

D. There Has Been No Showing the Public Interest Favors Grant of a Stay.

On August 3, 2011, the Board, acting within its authority, determined that any alleged harms to the public caused by the subject tower were not sufficient to overcome grant of the conditional use permit required to construct the tower. The local Board weighed the evidence and made its own public interest decision under local law.

Any purported public interest benefit claimed by the Petitioner is simply outweighed by the local public interest in support of construction of the authorized facility, as demonstrated by the Board’s decision approving the tower. It is well

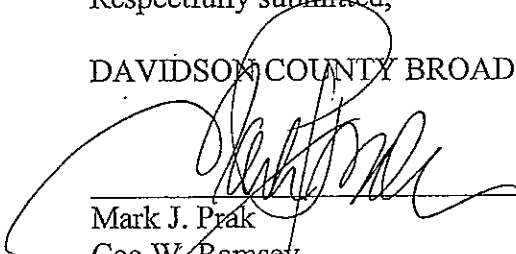
established that such decision concerning purely local matters is entitled to deference by the Commission.¹⁴

III. Conclusion

Petitioner's Emergency Request to Stay the Construction Permit is simply not justified. Petitioner has failed to demonstrate that his objections to tolling are likely to prevail, that he would suffer irreparable harm, that other interested parties would not be harmed, or that the public interest favors grant of the stay. For the foregoing reasons, Davidson respectfully requests that the Commission promptly deny the Emergency Request to Stay Construction Permit.

Respectfully submitted,

DAVIDSON COUNTY BROADCASTING, INC.



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Elizabeth Spainhour
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Counsel to Davidson County Broadcasting, Inc.

August 18, 2011

¹⁴ See, e.g., *Robert B. Jacobi, Esq.*, Letter, 26 FCC Rcd 3883, *11 (MB 2011) ("The record in the local zoning approval process clearly indicates that [state and local] authorities carefully reviewed the environmental impact of [the station's] towers and the proposed towers before issuing the permits required for their construction. We therefore defer to those authorities on the issue of the aesthetic impact of the [subject] proposal.").

Certificate of Service

The undersigned, of the law firm of Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., hereby certifies that s/he has caused a copy of the foregoing **Opposition to Request to Terminate Construction Permit Tolling and to Emergency Request to Stay Construction Permit** to be placed in the U.S. Mail, first-class postage prepaid, addressed as follows:

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Oakland, CA 94609

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Smithwick & Belendiuk, P.C.
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This the 18th day of August, 2011

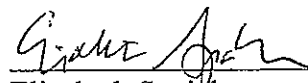

Elizabeth Spairhour

EXHIBIT A

Notice of Appeal

DECLASSIFIED

NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
JUN 23 1992
SUPERIOR COURT DIVISION
10 CVS 2637

ROWAN COUNTY

ROWAN COUNTY, C.S.C

RICHARD L. PARKER and DORCAS
PARKER,

54

Petitioners,

-VS-

NOTICE OF APPEAL

ROWAN COUNTY and ROWAN
COUNTY ZONING BOARD OF
ADJUSTMENT,

Respondents.

NOW COME the Petitioners, Richard L. Parker and Dorcas Parker, through the undersigned counsel, who hereby give notice of their appeal to the Court of Appeals of North Carolina from the Order granting Respondents' Motion to Dismiss by the Honorable Joseph N. Crosswhite filed on May 26, 2011 in the Superior Court of Rowan County.

This the 23 day of June, 2011.

Andrew T. Cornelius
State Bar No. 32633

Appellate Counsel for the Petitioners-
Appellants Richard Parker and
Dorcas Parker

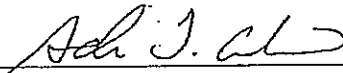
OF COUNSEL:
HARTSELL & WILLIAMS, P.A.
71 McCachern Boulevard
Post Office Box 368
Concord, NC 28026-0368
Telephone (704) 786-5161

CERTIFICATE OF SERVICE

I, Andrew T. Cornelius, Appellate Counsel for the Petitioners-Appellants Richard L. Parker and Dorcas Parker, do hereby certify that service of the foregoing Notice of Appeal was made upon the following counsel for the Respondents by placing same in the United States mail, postage prepaid and addressed as follows:

Anthony Fox
Parker Poe Adams & Bernstein, LLP
Three Wells Fargo Center
401 S. Tryon St., Ste. 3000
Charlotte, NC 28202

This the 23 day of June, 2011.



Andrew T. Cornelius
Appellate Counsel for the Petitioners-
Appellants Richard Parker and
Dorcas Parker

EXHIBIT B

Official Notice Requested

MICHAEL COUZENS

ATTORNEY AT LAW

6536 TELEGRAPH AVENUE, SUITE B201

OAKLAND, CALIFORNIA 94609

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ADMITTED IN
CALIFORNIA AND IN THE
DISTRICT OF COLUMBIA

June 9, 2011

Peter H Doyle, Chief, Audio Division
Media Bureau
Federal Communications Commission
Washington DC 20554

Re: your reference 1800B3-VMM 02/09/2011
Facility 24230
File No. BMPH-20070119AES

Dear Mr. Doyle,

In the letter order referenced above, dated and released on February 9, 2011 over your signature, the Audio Division dismissed William B. Clay's petition for reconsideration of an FM broadcast construction permit. Neither Mr. Clay nor I, his attorney, have received notice of this action.

By first-class mail posted from Rapid City SD on August 26, 2010 (attached), Mr. Clay notified the Division, the Secretary's office, and licensees' counsel in eight proceedings to which he is a party that all further correspondence should be directed to me. Despite this timely notification, the action referenced above was apparently sent to Mr. Clay's obsolete Charlotte NC address.

Since at least one notice of Division action apparently has gone astray, I am unsure of the current status of the other proceedings to which Mr. Clay is a party. Would you please have your staff review the proceedings listed below and confirm or correct our understanding of their status?

facility ID	file no.	as of	status
52553	BPH-20020116AAG	05 Feb 2004	Commission review pending
25520	BPH-20070119ABG	22 Sep 2008	Commission review pending
24230	BMPH-20070119AES	09 Feb 2011	reconsideration dismissed by staff
24230	BLH-20090403BR	05 May 2009	staff reconsideration pending
34435	BPH-20070119AFW	16 Jan 2009	Commission review pending
34435	BMPH-20080417AAY	29 Jan 2009	staff reconsideration pending
164260	BMPH-20070119AGG	15 Jun 2007	staff reconsideration pending
15839	BMPH-20090724ACK	06 Nov 2009	informal objection pending

Peter H. Doyle
June 9, 2011
Page two.


Please ensure that any future notices to Mr. Clay in these proceedings are sent to:

Michael Couzens, Esq.
PO Box 3642
Oakland CA 94609

Mr. Clay has relocated to Italy. While he desires to remain active and continues to monitor these proceedings, service only on counsel is a necessity if it is to be effective.

Thank you for your assistance in this matter.

Sincerely,



Michael Couzens,
Attorney for William B. Clay

cc:

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

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Peter H. Doyle
June 9, 2011PleasePage three.

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EXHIBIT C

Letter Dismissing BMPH-20090724ACK

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SUITE 301

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August 18, 2011

Marlene H. Dortch, Esquire
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

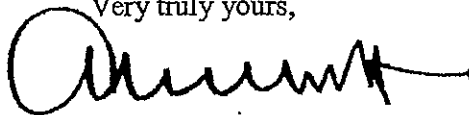
Re: Station WWLV(FM), Lexington, NC
File No. BMPH-20090724ACK
Request for Dismissal of Application

Dear Ms. Dortch:

Transmitted herewith, on behalf of Davidson County Broadcasting, Inc., licensee of Station WWLV(FM) (formerly WTHZ), Facility I.D. No. 15839, Lexington, NC, in triplicate, is a request to dismiss the above-referenced application (File No. BMPH-20090724ACK), for a minor change construction permit.

If any question arises in connection with this request, please contact undersigned counsel.

Very truly yours,



Gary S. Smithwick
Counsel for
Davidson County Broadcasting, Inc.

GSS/sls

Enclosure

cc: As Per Certificate of Service
WWLV Public File

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

In the Matter of)

DAVIDSON COUNTY)
BROADCASTING, INC.)

File No. BMPH-20090724ACK
Facility No. 15839

For Minor Change Construction Permit)
WWLV(FM) [Was: WTHZ] Lexington, NC)
(Relocation to Faith, NC))

To: Office of the Secretary

Attention: Chief, Audio Division

REQUEST FOR DISMISSAL OF APPLICATION

Davidson County Broadcasting, Inc. ("Davidson"), applicant (File No. BMPH-20090724ACK) for a construction permit to modify the facilities of WWLV(FM), Lexington, North Carolina, to operate at Faith, NC, hereby requests that the application be dismissed.

Under penalty of perjury, the undersigned certifies that neither Davidson, nor its principals have paid or will pay, or have received or will receive, money or other consideration in exchange for dismissing the above-captioned application.

Executed this 18th day of August, 2011.

**DAVIDSON COUNTY
BROADCASTING, INC.**

By Greeley N. Hilton, Jr.
Greeley N. Hilton, Jr.
President

[certificate of service
omitted]