

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

7925 JONES BRANCH DRIVE
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wileyrein.com

ORIGINAL

Received & Inspected

RECEIVED

JUL 09 2014

2014 JUL 10 A 7:01

FCC Mail Room

Mark Lipp
202.719.7503
mlipp@wileyrein.com

July 8, 2014

VIA COURIER AND EMAIL

Marlene H. Dortch
Secretary
Federal Communications Commission
9300 East Hampton Drive
Capitol Heights, MD 20743
Attention: Media Bureau, Audio Division

Re: Request for Waiver of Section 73.3598 Construction Deadline
Station KRPI(AM), Ferndale, Washington
Fac. ID No. 21416
FCC File No. BP-20090226AAF

Dear Ms. Dortch:

BBC Broadcasting, Inc. ("BBC"), licensee of KRPI(AM), Ferndale, Washington (Fac. ID No. 21416) ("KRPI"), by its counsel, hereby respectfully requests a waiver of the Section 73.3598 deadline to complete construction of the permitted facility for Station KRPI (FCC File No. BP-20090226AAF) due to "rare and exceptional circumstances" beyond BBC's control.

The Commission granted the construction permit to BBC on May 24, 2012, to relocate KRPI's transmission facility from Ferndale, Washington to Point Roberts, Washington (FCC File No. BP-20090226AAF). Pursuant to Section 73.3598(a) of the Commission's Rules, the construction permit is set to expire on May 24, 2015.

Upon receiving its construction permit, BBC worked diligently to secure the necessary permits and equipment to construct the authorized facility. A major undertaking for the facility, following grant of the construction permit, is obtaining a land use approval for a conditional use permit ("CUP") to allow the facility to be located at the selected site. This land use permit approval is a prerequisite to obtaining a building permit. The site in Point Roberts is within the jurisdiction of Whatcom County, and the CUP must be obtained through the County processes. An environmental review under the Washington State Environmental Policy Act ("SEPA") is also required in order to process a CUP application. BBC promptly engaged a land use consultant and land use attorneys to assist it with these applications. From past experience of its attorneys, and the judgment of its land use consultant, BBC understood that its facility was likely to be very controversial with local residents of Point Roberts. The CUP and SEPA processes provide extensive

July 8, 2014

Page 2

opportunities for public comment, and the public is entitled to participate substantively in the required open record administrative hearing for these land use permit processes. A critical component of the process for BBC was to prepare a very complete CUP application and SEPA checklist with documentation of anticipated environmental effects. Major local land use issues with an AM transmitter facility include visual impacts, impacts to critical areas such as wetlands, impacts to wildlife, radio frequency interference impacts, and potential human health impacts.

After retaining its land use consultant and attorneys, BBC undertook a dedicated effort to engage experienced experts to prepare the necessary surveys, reports and analyses required to support its application. Ultimately a team of experts was selected. These experts had to be educated about the proposal, and each expert required time, in some cases substantial time, to conduct their analyses and prepare their work product. Due to the extensive regulations in both the Whatcom County Code and the Whatcom County Comprehensive Plan, as well as the Point Roberts specific regulations, these efforts were significant. BBC's team of consultants and experts worked diligently through the fall and winter of 2012 and into the spring of 2013 to complete their work. Several challenging problems with local conditions had to be addressed in this work, and the resulting work product had to go through a thorough process of review and comment, with resulting additional changes, including certain changes to the proposal specifics, in order to prepare an application package that would be accepted and processed by the County staff. Careful attention to issues of visual effects analysis and environmental concerns was required due to anticipated public comments. The resulting time frame of approximately one year to complete all of this work is not unusual for a controversial land use project of this type, especially for the environmentally and politically sensitive West Coast.

On July 10, 2013, BBC timely submitted its Conditional Use Application for the Point Roberts facility to Whatcom County Planning and Development Services ("WCPDS"). WCPDS issued a notice of completeness on July 22, 2013 and requested comments on the application by August 16, 2013. From there, however, the normal CUP process was thwarted.

The community response to BBC's application—much of which has come from residents across the Canadian border—has overwhelmed the relatively small county planning staff and brought the process to a halt. According to the local community newspaper, the *All Point Bulletin*, "Whatcom County planning and development services has received over 500 requests to be made parties of record and receive

July 8, 2014

Page 3

notice of the application.”¹ The single staff person at the county hearing examiner’s office told the paper that she has been “swamped” with requests—more than 100 over just a three day period. Numerous parties have also filed substantive comments with the WCPDS.² In Delta, British Columbia (located just across the border from Point Roberts), reports indicated that “[w]ell over 100 residents packed Delta council chambers . . . to hear from their local [Member of Parliament] about the highly contentious proposal to erect radio transmission towers in Point Roberts.”³

The volume and intensity of this response—all of which is outside of BBC’s control—has severely delayed the processing of BBC’s application. Typically, the Whatcom County Code requires a final decision on any project permit application within 120 days of a determination of completeness,⁴ which would have been November 19, 2013. On November 6, 2013, however, WCPDS Senior Planner Suzanne Bosman sent a letter to BBC’s consultant, AVT Consulting, LLC, stating that: “Due to the volume of public comments and reports submitted for this project, staff concurs with the recommendation that Whatcom County stop the clock.”⁵ In response to the voluminous public comments, the WCPDS also has made numerous requests of BBC for detailed information that goes well-beyond anything that BBC would have been expected to provide in its initial application. As a result, BBC’s consultants and experts have had to prepare, at additional expense, detailed work to produce the type of information necessary to be responsive to these requests, notwithstanding the fact that they go well-beyond the information usually required to be submitted in any reasonable zoning proceeding. For example, BBC’s experts on RF health and wildlife (avian) issues have had to conduct detailed analyses of speculative and controversial issues of alleged impacts of RFE on birds that have no precedent in the typical process.

It now appears extremely unlikely that the zoning issues will be resolved before BBC’s construction permit expires. A hearing on BBC’s application still has not

¹ See All Point Bulletin (June 26, 2014). Although much of the public response has been opposed to BBC’s application, Whatcom County also has received approximately 150 comments in support of the application. See Exhibit A All Point Bulletin (October 10, 2013).

² See Whatcom County Planning and Development Services, KRPI AM Radio Transmitter Site / BBC Broadcasting Inc. – CUP2013-0004, <https://www.whatcomcounty.us/pds/plan/current/kрпи-radio.jsp>.

³ See Delta Optimist (June 25, 2014).

⁴ Whatcom County Code § 2.33.090.

⁵ See Exhibit B.

July 8, 2014

Page 4

been scheduled, and the hearing examiner's office has indicated that it will not occur before September at the earliest.⁶ The Whatcom County process requires the County staff to prepare a CUP report and recommendation, as well as a SEPA determination, addressed to the hearing examiner, all of which must be complete before the hearing examiner will confirm a hearing date. Due to the volume of public interest, and the number of experts BBC has had to engage, the open record public hearing before the hearing examiner could take many hearing days to complete. Moreover, once the hearing is complete, and the hearing examiner makes his determination, any party may file an administrative appeal to the County Council within 14 days.⁷ Such an administrative appeal is a virtual certainty in this proceeding, regardless of the hearing examiner's decision. The potential for a remand to the hearing examiner cannot be ruled out during this administrative appeal process. Given the level of public participation in this proceeding, the administrative process alone may very well extend beyond the May 24, 2015 permit deadline. Although Section 73.3598(b)(2) of the Commission's Rules provides that a construction permit "shall toll when . . . construction is delayed by any cause of action pending before any court of competent jurisdiction relating to . . . any zoning or environmental requirement,"⁸ a judicial appeal (to the Washington State Superior Court) would not commence until the administrative appeal is exhausted—at which point BBC's construction permit either will have expired, or will have minimal time remaining.

The delays in the WCPDS review process are particularly problematic for BBC given the inherent difficulties of constructing a 50,000 watt directional facility from a remote site such as Point Roberts. As BBC's Consulting Engineer Stephen S. Lockwood explains in the letter attached as **Exhibit C** hereto, it could take six to nine months or more to construct the facility, given the logistical challenges associated with Point Roberts. Mr. Lockwood's letter details several of the construction challenges unique to this project, not the least of which is Point Roberts' location on a peninsula extending south of the Canadian mainland, which will require "either the crossing of an international border or delivery by barge." Weather, scheduling, supply problems, and the local regulatory process may further delay construction.

In light of the foregoing, BBC requests a waiver of the construction period specified in Section 73.3598(a) of the Commission's Rules and an extension of the

⁶ See All Point Bulletin (June 26, 2014).

⁷ Whatcom County Code § 20.84.240.

⁸ 47 C.F.R. § 73.3598(b).

July 8, 2014

Page 5

construction permit from the date that the WCPDS would have normally taken action on BBC's application for a conditional use permit for the Point Roberts facility.⁹

The Commission has ample authority to grant the requested relief under the circumstances presented here. In the *Streamlining MO&O*, the Commission recognized that "there may be rare and exceptional circumstances other than those delineated [in the rule] which would warrant the tolling of construction time."¹⁰ Although the present circumstances do not fall within the categories for which tolling is provided in Section 73.3598(b) of the Commission's rules,¹¹ they do present a "rare and exceptional circumstance" for which waiver of the construction permit deadline is appropriate and would serve the public interest. Alternatively, the Commission has authority under Section 319(b) of the Communications Act, as amended, to waive the construction deadline where delay is due to causes beyond the permittee's control.¹²

There are at least two factors that make the present circumstances "rare and exceptional." First, the exceptionally large public participation in the WCPDS review process—not only from Whatcom County residents, but particularly from across the Canadian border—has caused extensive and unpredictable delays in the zoning process. As noted above, zoning applications in Whatcom County typically are subject to a 120 day "shot clock." Not only has that shot clock been suspended for more than six months, but WCPDS does not expect to hold a hearing until at least September—possibly later—and then, if the permit is granted, the county council will need to resolve an almost certain appeal. Second, as BBC documented in the Site Selection Report attached to its application, BBC already conducted an extensive survey of alternative sites and ultimately determined that Point Roberts was the only site that: (1) provides protection of the Ferndale FCC Monitoring Facility; (2) reduces the population subject to blanketing interference; (3) is acceptable for permitting (i.e...is not a wetland area, an area of cultural significance, a wildlife area, an airport area, an industrial area, or an area near other AM radio

⁹ The date that the WCPDS shot clock would have expired is November 19, 2013. Thus tolling should be based on that date since BBC could not have started construction until that date.

¹⁰ *1998 Regulatory Review - Streamlining of Mass Media Applications, Rules and Processes, Memorandum Opinion and Order*, 14 FCC Rcd. 17525 ¶ 42 (1999) ("*Streamlining MO&O*").

¹¹ 47 C.F.R. § 73.3598(b).

¹² Section 319(b) of the Act authorizes the Commission to declare a construction permit forfeited if construction thereunder is not completed within the time specified, "unless prevented by causes not under control of the grantee." 47 U.S.C. § 319(b).

July 8, 2014

Page 6

stations; (4) is not near the BC Hydro/BPA 500 kV Intertie transmission line; and (5) has sufficient land area for the construction of five towers and the ground system.¹³ BBC has continued to explore alternatives to the proposed site and concluded, as it did in the application, that none meet these criteria. Thus, BBC cannot simply select a different site, as other licensees facing similar delays might do. Taken together, these factors create the “very limited circumstances” for which the Commission has recognized that a waiver of the construction deadline is appropriate.¹⁴

As demonstrated by the foregoing, despite its diligent efforts, BBC faces “rare and exceptional circumstances” for which waiver of the construction deadline in Section 73.3598(b) of the Commission’s Rules is necessary and appropriate. Such a waiver is contemplated by Section 319(b) of the Communications Act and is warranted by the unique site requirements for KRPI as well as BBC’s diligent efforts to this point. The present circumstances are unique to constructing an AM radio facility in Point Roberts and are outside of BBC’s control.

Extending the construction deadline will serve the public interest by enabling BBC to continue providing programming to its local audience members, including northwest Washington’s substantial South Asian population, while reducing the population subject to blanketing interference. Accordingly, the Commission should waive the construction deadline and provide BBC with the time that it should have had if the WCPDS had adhered to its shot clock, starting from the date the WCPDS approval becomes final, to construct the new facility at Point Roberts.

Sincerely,


Mark Lipp

Enclosures

cc: Victoria McCauley, Audio Division, Media Bureau

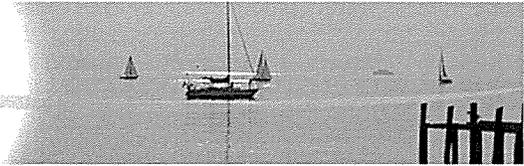
¹³ See FCC File No. BP-20090226AAF, Attachment 14.

¹⁴ *Streamlining MO&O* ¶ 42.

EXHIBIT A

All Point Bulletin

The Community Newspaper of Point Roberts, Washington



Home News Letters Sports Columns Classifieds Multimedia Community Business Blogs About Us

Local News

The fight against the KRPI radio towers hits a snag

Published on Thu, Oct 10, 2013

[Read More News](#)

Like Tweet 1

Swamped with form letters in support of relocating the KRPI radio towers to Point Roberts and boosting the Punjabi radio station's signal, county planner Suzanne Bosman wants to shut the door on further general comments.

"I need solid stuff now," Bosman said. "I'm still open to receiving pertinent, study-related evidence," regarding possible environmental, health, interference and aesthetic effects of locating the towers on the Point.

The county is reviewing a conditional use application from BBC Broadcasting LLC to install an array of five 150-foot lattice radio towers at the corner of Tyee Drive and McKenzie Way. The facility will broadcast the Richmond, B.C. radio station Sher-e-Punjab operating as KRPI 1550 AM.

While prior to October 3 only one out of 100 comments received by Whatcom County supported the application, Bosman said she now has approximately 150, received in four packets, from the Punjabi community on both sides of the border.

Strong opposition to the project has come from residents of Point Roberts and Tsawwassen, a dozen of whom attended the October 8 meeting of the Point Roberts Community Advisory Committee (PRCAC) where efforts to defeat the proposal were the core of the agenda.

"We need to continue to push and let them know there are a great number of people in Tsawwassen as well as Point Roberts who are strongly opposed," said Tsawwassen resident Nancy Beaton. Beaton said a meeting was planned for Wednesday, October 23 at 7 p.m. in the South Delta Secondary School theatre to discuss community concerns about the project. Vicki Huntington, a member of the British Columbia Legislative Assembly, has committed to attend, as well as environmental advocate Milt Bowling, whom Beaton described as an expert in electric and magnetic fields (EMF).

"Our only goal is to prevent a nuisance from pouring over the border," said Steve Graham, another Tsawwassen resident. That nuisance is radio frequency interference. KRPI is currently located in Ferndale, where there have been loud complaints from residents about radio interference affecting cordless phones, computers, baby monitors and HAM radios.

PRCAC chair Arthur Reber said the recently formed group Fight the Towers (FTT) was preparing four "position papers" to submit to the county with information on errors and omissions in the application materials, benefits to the community, EMF effects and the overall impact on the community.

Reber said they would also submit materials arguing that the contour lines showing the extent of a one-volt per meter electromagnetic field that would be emitted by the towers in relation to the population density were misrepresented by applicants. "They didn't take Tsawwassen into account and the main body of Tsawwassen residents are within that contour," he said. "If they had, it's 45 times more population density than allowable under the guidelines."

With the towers 150 feet tall, two of them lighted, Reber said they also would argue the towers would be a visual blight that would violate the Point Roberts character plan.

There is a precedent in Point Roberts for this argument. An application for a television tower on the corner of Johnson Road and Monte Drive was denied by hearing examiner Ed Good in 1993 because "it would not be harmonious and in accord with the zoning regulations for Point Roberts because it cannot be constructed, operated and maintained in harmony and appropriate appearance with the intended or existing character of the vicinity." However, current hearing examiner Michael Bobbink twice approved the same tower at a different location across the street. Whidbey Telephone Company has a tower very close to the location approved by Bobbink. Bosman said county staff is currently reviewing the county comprehensive plan, the Point Roberts subarea and character plans to "confirm compliance with these regulations."

Reber said FTT is also preparing material that will address the issue of what benefit the facility would bring to Point Roberts, which is required of a public utility like a radio station under county codes. "BBC argues they will provide advantages to the community but it's bogus," Reber said.

Andy Skotland, owner of two powerful AM radio stations in Everett and a veteran at dealing with controversies surrounding broadcast facilities siting, has been retained as a consultant by BBC Broadcasting. He said KRPI has a "substantial audience base" that could "represent a significant tourism base for Point Roberts to draw from."

"It might be true but it's empty," Reber said, adding that Point Roberts businesses already have the opportunity to advertise with KRPI to reach that same audience. None do.

Skotland also said KRPI would broadcast emergency alerts in English. "One or two local HAM radio operators can only serve the Point for so long without water or electricity, and they aren't really serving everyone because few people have radios capable of receiving ham radio frequencies," he said. KRPI will have infrastructure designed to remain on air during regional emergencies.

Fire chief Christopher Carleton said he is still researching what impact an AM radio facility would have on emergency communications and what mitigation might be appropriate. He added, however, that his department would rely on ham radio operators for communications during a regional emergency.

"Finally, and most importantly, KRPI will be required by the FCC to produce programming specifically for Point Roberts, which they plan to do in English," Skotdal said. The KRPI website currently has a link featuring event listings for Ferndale.

Bosman said additional material received from the applicant will be available on the county planning website as of October 10 addressing radio frequency emissions, interference and exposure standards. At an October 2 meeting, county planners and legal staff met with the applicants to identify areas of concern and the county intends to issue a letter next week requesting more information on environmental, health, interference, and aesthetic concerns.

EXHIBIT B

WHATCOM COUNTY
Planning & Development Services
5280 Northwest Drive
Bellingham, WA 98226-9097
360-676-6907, TTY 800-833-6384
360-738-2525 Fax



J.E. "Sam" Ryan
Director

November 6, 2013

AVT Consulting, LLC
Ali Tayshi
1708 F Street
Bellingham, WA 98225

**Subject: Notice of Additional Requirements
CUP2013-00004 – KRPI Radio AM 1550**

Dear Mr. Tayshi:

Thank you for coming into our office on November 1, 2013 to speak with me about the status of the project proposal for BBC Broadcasting Inc.

Due to the volume of public comments and reports submitted for this project, staff concurs with the recommendation that Whatcom County stop the clock as it pertains to "regulatory reform". Under the Growth Management Act, the 120-day clock can justifiably be stopped and started by actions on both sides of the proposal.

At the meeting on October 2, 2013 the Applicant's team of professionals [the team] volunteered to provide a broad mix of miscellaneous information to staff to better assist them in making their final determination. More specifically, staff requested detailed information in laymen terms explaining how radio transmissions are generated/emitted and how they contrast between Telecommunication Towers (cell towers), AM Radio Towers and FM Radio Towers. The team also volunteered to provide maps and/or addresses of existing locations of AM radio facilities located in Whatcom County. This could be valuable information if there are existing AM towers in high density areas whether inside or outside the city limits of Whatcom County.

This Notice of Additional Requirements (NOAR) is being sent to you to formally request the following information and/or professional studies. In addition, please provide us with information from sources other than the Federal Communications Commission (FCC):

1. Staff received a Visibility Simulation (Analysis) prepared by Steve Wolf, MSME, (attached) that differs substantially by the one prepared for BBC Broadcasting Inc., by URS in November 2012. There are several locations in Mr. Wolf's report that indicate the towers will be visible from several residential locations in Pt. Roberts. If his assessment is incorrect please explain how.
2. What information and/or studies can be provided to show that radio towers emitting 50,000 watts of power will not negatively affect the migration and nesting patterns of birds? Can you show there is no correlation between the presence of radiation and bird breeding, nesting and roosting in the vicinity of electromagnetic fields? Please refer to the email correspondence between Mr. Steve Wolff and Albert M. Manville, III, Ph.D., D.W.B. dated September 17, 2013 and September 19, 2013. Additional information and attachments regarding these same concerns were also submitted in an e-mail from John Lesow dated September 22, 2013.

Mr. Manville III is a Senior Wildlife Biologist and Avian-Structural Lead, Division of Migratory Bird Management, USFWS in Arlington, VA. He states that radiation continues to be a significant concern. In his email dated September 19, 2013 he states, "Communication towers need not be guyed to kill migratory birds...". Staff would like a more comprehensive review of the potential impacts on birds from the non-ionizing, non-thermal radiation produced by towers.

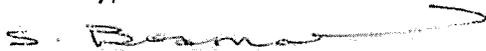
3. What effects, if any, will the EMF's play in reducing the likelihood the Blue Herons will return to the abandoned Pt. Roberts Rookery?

Whatcom County Planning and Development Services will be reviewing the Wetland Assessment by Aqua-Terr Systems, Inc. (ATS) prepared in June 2010. Our Natural Resource Wetland Specialist may request additional information once staff has finished reviewing the report by ATSI and after returning from a site inspection scheduled for November 7, 2013. Since the assessment was prepared three years ago, it is not likely the site will still be flagged when our critical areas staff conducts their inspection.

The Technical Review Committee looks forward to receiving the information regarding the operation of different types of towers, the location of existing AM radio towers in Whatcom County, and the studies for the three concerns as listed above.

If you have any questions please don't hesitate to contact me at Sbosman@whatcomcounty.us

Sincerely,



Suzanne Bosman
Senior Planner

Attachments:

Appendix 2: Visibility Analysis, Steve Wolff, MSME
Email Copy: September 19, 2013 from Steve Wolff
Email Copy: September 22, 2013 from John Lesow
FCC Notice Proposed Rulemaking FWS Final Comments – Manville.doc; Cell Tower
Radiation Study-USFWS-Manville.ppt
Guidance to FCC-AMM.docx

EXHIBIT C

HATFIELD & DAWSON

BENJAMIN F. DAWSON III, PE
THOMAS M. ECKELS, PE
STEPHEN S. LOCKWOOD, PE
DAVID J. PINION, PE
ERIK C. SWANSON, PE

THOMAS S. GORTON, PE
MICHAEL H. MEHIGAN, PE

CONSULTING ELECTRICAL ENGINEERS
9500 GREENWOOD AVE. N.
SEATTLE, WASHINGTON 98103

TELEPHONE (206) 783-9151
FACSIMILE (206) 789-9834
E-MAIL hatdaw@hatdaw.com

JAMES B. HATFIELD, PE
CONSULTANT

MAURY L. HATFIELD, PE
(1942-2009)

PAUL W. LEONARD, PE
(1925-2011)

25 June 2014

Mr. Mark N. Lipp, Esq.
Wiley Rein, LLP

RE: Construction Time for KRPI, 1550 kHz, Point Roberts

Dear Mr. Lipp;

I have reviewed the construction time for several recent projects and visited with some project managers experienced in constructing AM arrays. We believe that for a project of this magnitude the most optimistic construction time line would be on the order of six months. This would assume a competent project manager with all permits complete, supplies available, and contractors ready to work. In most projects that involve construction there are typically delays encountered due to: weather, scheduling, supply problems, and local regulatory process. Any of these can cost a project months of delay.

There are a number of challenges with the KRPI construction. Situated on a peninsula extending south from the Canadian mainland, Point Roberts has been referred to as the "ultimate gated community". The only road access to Point Roberts is through Canada, requiring two international border crossings for any delivery from the mainland US. There is no ferry service. While there is a hardware store in Point Roberts the acquisition of many items will require either the crossing of an international border or delivery by barge. This is also true for contractors, heavy equipment and all items that will be needed to construct this facility including transmitters, towers, antenna tuning and phasing equipment, concrete, lumber and other construction supplies.

We anticipate many delays with this project due to the logistical challenges associated with Point Roberts and expect that the construction schedule for this project may expand to nine or more months.

Sincerely



Stephen S. Lockwood, P.E.