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**Federal Communications
Commission**

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Re: WMSK-FM "Tolling"

CC:

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

December 9, 2004

In Reply Refer To:
1800B3-MW/GDG

John F. Garziglia, Esq.
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Martin L. Hensley
15 Wood Street
Greenfield, Indiana 46140

In re: WMSK-FM, Morganfield, KY
Facility No. 68810
BPH-20010926AAD, as modified
by BMPH-20040116ADB

Gentlemen:

This letter concerns: (i) the staff's August 17, 2004, grant of an application filed by Union County Broadcasting Co., Inc. ("Union") for minor modification of the licensed facilities of WMSK-FM, Morganfield, Kentucky; (ii) a September 7, 2004, "Petition to Deny Construction Permit (Rescind CP)" ("Objection") filed by Martin L. Hensley ("Hensley"),¹ and (iii) the request ("Request") filed November 15, 2004, by Union that the referenced construction permit be treated pursuant to the tolling provisions of 47 C.F.R. Section 73.3598(b)(ii). For the reasons detailed below, we will dismiss Hensley's petition, deny Union's request for treatment pursuant to the Commission's tolling rule, and grant Union's request for waiver of the Commission's construction period rule, 47 C.F.R. § 73.3598(a), to the extent indicated below.

Background. On December 19, 2001, the Commission approved Union's application for a minor modification to its licensed facilities. The grant required that Union complete construction and file a covering license application no later than December 19, 2004. On August 17, 2004, the staff approved Union's uncontested application to modify this permit, making no change to the December 19, 2004, expiration date. The grant was placed on public notice on August 20, 2004.² On September 7, 2004, Martin Hensley ("Hensley") filed a "Petition to Deny

¹ Mr. Hensley filed his objection as both a concerned individual and as a member of Hoosier Public Radio Corporation ("HPR"). HPR indicates that it is willing to file for the Morganfield, Kentucky allotment and that it filed an application to be placed in a processing line queue if it is allowed to do so. *Objection* at 2.

² See Broadcast Actions (Report No. 45803 Aug. 20, 2004).

Construction Permit (Rescind CP)" against the newly granted modification. Union countered with an October 19, 2004, Motion to Dismiss and Opposition. Union claims that the Hensley pleading satisfies the Commission's "administrative review" tolling criteria, and that its efforts to construct have been encumbered since the filing of the Hensley petition.³

Discussion. Hensley Petition. Because Hensley's petition was filed against an application not subject to the Commission's local public notice rules, the pleading, if timely filed, would have been treated, pursuant to Section 73.3587 of the Commission's rules, as an informal objection.⁴ This rule requires that an informal objection be filed *before* Commission action on an application. Hensley claims that his filing occurred *after* the Commission's action because he "had notice of the construction permit as he was denied public file viewing."⁵ This claim is not persuasive. The Commission issued a Public Notice of the acceptance of Union's modification application on January 23, 2004, providing constructive notice of the filing of the WMSK-FM proposal.⁶ Additionally, the electronically-filed application was available for both viewing and downloading by interested parties from the Commission's public database, http://svartifoss2.fcc.gov/prod/cdbs/pubacc/prod/cdbs_pa.htm. With this notice, Hensley had ample time to file a timely informal objection prior to the August 17, 2004, grant of the application but chose to submit his concerns three weeks after Public Notice of the grant of the referenced permit. The informal objection is therefore late-filed, and will therefore be dismissed as untimely.⁷

Union Tolling Request. Turning to Union's request that the staff treat the referenced permit as encumbered by the Hensley petition, the Commission recognizes that a permit's three-year construction period may be tolled by administrative review, *i.e.*, petitions for reconsideration and applications for review of the grant of a construction permit pending before the Commission.⁸ Requests for treatment pursuant to the Commission's tolling rules must be filed within thirty days of the event encumbering construction.⁹ The Commission also recognizes that they may be "rare and exceptional" circumstances other than those defined in its tolling rules that also, for reasons beyond a permittee's control, encumber authorized

³ Union contends that the staff routinely treats a late-filed informal objection as Petition for Reconsideration if filed within 30 days of a staff action. If this contention is accurate, Union concludes that its permit will be encumbered by administrative review of a pleading recognized in the Commission's tolling rules.

⁴ See 47 C.F.R. § 73.3587.

⁵ *Objection at 1.*

⁶ See *Broadcast Applications* (Report No. 25657, rel. Jan. 23, 2004).

⁷ *Aspen FM*, 12 FCC Rcd 17852, 17856-7 (1997) ("*Aspen FM*") (absent compelling circumstances, the Commission will not treat an untimely informal objection as a petition for reconsideration).

⁸ See 47 C.F.R. § 73.3598(b)(ii).


⁹ See 47 C.F.R. § 73.3598(c).

construction.¹⁰ Requests involving such circumstances must also be filed within thirty days of the alleged encumbrance.¹¹

Union filed its request on November 15, 2004, more than two months after Hensley filed his "Petition."¹² Union provides no explanation for the late-filing. Additionally, given the action above and the clear precedent established in *Aspen FM*, Union's presumption that the Hensley pleading will be treated as a petition for reconsideration is invalid. However, we recognize as a practical matter that construction of WMSK-FM's modified facilities was encumbered while the staff considered the Hensley objection. We will therefore waive the construction period rule to define the period of encumbrance from October 15, 2004, thirty days prior to Union's late-filed request, to the date of this letter and recalculate the permit's expiration date to add 55 days to the permit's construction period.

Accordingly, the "Petition to Deny Construction Permit (Rescind CP)" filed by Martin Hensley IS DISMISSED, the "Request to Toll Expiration Date" IS DENIED when treated as a notification for tolling treatment but IS GRANTED when treated as a request for waiver of the Commission's broadcast construction period rule. Union is now required to complete construction and file a covering broadcast license application no later than February 12, 2005. This action is without prejudice to the staff's consideration of Hensley's pending objection to the renewal applications for WMSK(AM) (File No. BR-20040329AJU) and WMSK-FM (BRH-20040329AJQ).

Sincerely,


Peter H. Doyle, Chief
Audio Division
Media Bureau

¹⁰ 1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes, 13 FCC Rcd 23056 (1998), recons. granted in part and denied in part 14 FCC Rcd 17525, 17541 (1998).

¹¹ *Birach Broadcasting Corporation*, 16 FCC Rcd 1414, 1416 (2003).

¹² The Hensley pleading indicates it served Union with a copy of the objection. *Objection* at 6.