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ORIGINAL

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

FILED/ACCEPTED

JAN 11 2013

Federal Communications Commission
Office of the Secretary

In re Application of)
)
Church Planters of America)
)
For modification of the facilities of)
Station WGHW(FM), FCC Facility ID No. 89986,)
Lockwoods Folly Town, NC)

File No. BPED-20110211AAK

2013 JAN 14 P 2:30

TO: Marlene H. Dortch, Secretary

For transmission to: Peter H. Doyle, Chief
Audio Division, Media Bureau

APPLICATION FOR REVIEW

1. Pursuant to Section 1.115 of the Commission's rules, Craven Community College ("Craven") hereby seeks Commission review of the decisions of the Audio Division ("the Division") set forth in letters dated December 12, 2012 ("the December, 2012 Division Letter") and May 18, 2012 ("the May, 2012 Division Letter"). Copies of those letters are included as Attachments A and B, respectively.

Questions for Review

Where the holder of a construction permit was prevented, by causes not under its control, from the timely completion of construction of the facilities specified in that permit, and where timely notice of that fact was submitted to the Commission, was it not contrary to the Communications Act to treat the permit as having expired?

Under the circumstances described in the preceding paragraph, was it not unlawful for the Division to treat the permit as having expired without first providing the permittee the notice which the Division customarily provides to other permittees in such circumstances?

Factors Warranting Commission Consideration

2. The actions reflected in the May Letter and the December Letter should be reviewed because they are in conflict with the Communications Act and they are inconsistent with routine Commission practice.

Background

3. The factual background of this matter is set out in detail in Craven's two Petitions for Reconsideration in this matter, both of which are hereby incorporated by reference. For the convenient reference of the Commission, copies are included as Attachments C and D hereto. In summary, Craven held a permit for the modification of the facilities of noncommercial educational FM Station WZNB, New Bern, North Carolina. As a result of causes beyond Craven's control, Craven was not able to complete construction of those modified facilities prior to the permit's expiration date. Craven so notified the Commission approximately two months prior to the expiration date. Receiving no contrary determination from the Commission, Craven understood that the expiration date of its permit had been tolled. Craven was therefore surprised to learn, in April, 2011, that the Division had accepted for filing, and granted, the above-captioned application of Church Planters of America ("CPA") for facilities that were precluded by Craven's permit.

4. Believing the WZNB permit still to be in effect and the Division's acceptance and grant of the CPA application to have been the result of an oversight, Craven sought reconsideration of the grant of the CPA application in April, 2011. The Division denied that petition in the May, 2012 Division Letter. In that letter the Division notified Craven for the first time that, in the Division's view, the Craven permit had automatically expired notwithstanding the tolling notification that Craven had submitted. Since Craven's first petition for

reconsideration had been addressed to the improper grant of the CPA application in view of the continued vitality of Craven's permit – a vitality which Craven, at that time, had no reason to doubt – Craven had not presented in that first petition arguments concerning the supposed expiration of its permit. Accordingly, Craven thereupon sought reconsideration of the May, 2012 Division Letter. The December, 2012 Division Letter rejected Craven's second petition for reconsideration.¹

Argument

5. Questions relating to the expiration of construction permits are controlled by the Communications Act. Section 319(b) of the Act provides that broadcast construction permits will be automatically forfeited if the station is not ready for operation within a time to be

¹ In the December, 2012 Division Letter, the Division purported to dismiss Craven's second petition for reconsideration as repetitive and late. As to the first claim, Craven's second petition was plainly *not* repetitive. Rather, it addressed the question of the supposed expiration of Craven's permit, a question which was not directly addressed in Craven's first petition because, as noted above, Craven legitimately understood at that time that its permit had not expired. Contrary to the assertion of the December, 2012 Division Letter (at page 2), Craven's second petition did *not* present arguments "virtually identical to those advanced" in Craven's first petition. Indeed, had Craven not presented its additional arguments in its second petition, Craven could have been foreclosed from raising them in this Application for Review because they had not been raised previously. *See* Section 1.115(c) ("No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.")

As to the timeliness of Craven's second petition, that petition did not seek reconsideration of the specific expiration date of its permit, as the December, 2012 Division Letter suggests. To the contrary, the second petition was addressed to the Division's conclusion – first disclosed in the May, 2012 Division Letter – that Craven's notification of tolling had, at least in the Division's view, been ineffective. Since, prior to the May, 2012 Division Letter, there had been no discernable Division determination in that regard, Craven's arguments, presented in its second petition for reconsideration addressing that determination, were clearly timely.

Because, in the December, 2012 Division Letter, the Division elected not to consider the substantive arguments raised by Craven in its second petition, those arguments are presented here for the full Commission's consideration.

specified by the Commission, “unless prevented by causes not under the control of the grantee.” By this language Congress made clear that, where failure to timely construct occurs for reasons “not under the control” of the permittee, the permit is *not* subject to automatic forfeiture. In so doing, Congress did not distinguish between or among the various types of “causes not under the control”. Rather, presumably in acknowledgement of the undeniable fact that unforeseen and unavoidable complications can and do arise in any number of ways, Congress sweepingly referred simply to “causes not under the control”.

6. In crafting Section 73.3598 supposedly pursuant to the mandate of Section 319(b), the Commission took a step inconsistent with that mandate. That is, the Commission identified in Section 73.3598 certain types of “causes not under the control” that would automatically result in tolling of the construction deadline. The effect of “causes not under the control” that were *not* specifically included among those identified types was not expressly addressed in the rule, even though Section 319(b) clearly provides that *any* such “causes not under the control” warrant tolling of construction deadlines. Since the language of Section 319(b) is clear and unequivocal and affords no latitude for agency interpretation, the Commission’s decision to differentiate among various types of “causes not under the control” in making tolling determinations is contrary to the statute and, thus, impermissible.

7. The Commission, of course, acknowledges that there exists a wide range of “causes not under the control” that warrant tolling. *See, e.g., Koor Communications, Inc.*, 23 FCC Rcd 13246, 13249-50 (Audio Division 2008) (“the circumstances described in Section 73.3598(b)[] are not exhaustive of those under which the Commission will toll a construction permit deadline”). In the May, 2012 Division Letter, though, the Division maintained that, for some “causes not under the control”, permittees need only notify the

Commission, while for other such causes permittees must affirmatively seek a “waiver”. Again, that bifurcated approach is flatly inconsistent with Congress’s language, which draws no distinctions whatsoever among possible “causes not under the control”. Having established a “notification” process for deadline tolling arising from some “causes not under the control”, the Commission cannot, consistently with the Act, apply a different process to other “causes not under the control”.

8. Craven submitted the requisite notice in a timely manner.² That could and should have sufficed to toll the WZNB construction deadline.

9. In its notice, Craven explained that the need for tolling arose from circumstances beyond its control, circumstances that occurred in the process of ordering its antenna. In neither of its letters has the Division disputed that explanation. Instead, in the May, 2012 Division Letter, the Division asserted that Craven could and should have acted earlier than it did to finalize antenna design and proceed with construction. As Craven pointed out in its second petition for reconsideration, that analysis fell short of reasoned or reasonable.

10. As an initial matter, as Craven has repeatedly noted, the first two years of Craven’s construction permit were concurrent with the worst economic recession the United States has suffered since the Great Depression. While Craven was and remained qualified to complete construction throughout the term of its permit, undertaking a major capital improvement of that nature implicated other, broader considerations of which Craven, as a part of the North Carolina educational system, had to be mindful. For that reason, Craven proceeded cautiously in the early portion of its construction term. While Craven does not assert and has not

² A copy of Craven’s notice reflecting receipt by the Secretary’s Office was included as an attachment to Craven’s first petition for reconsideration.

asserted that the Recession of 2008 was what necessitated the tolling, the Commission cannot ignore the effect that those economic conditions had on all sectors of the country. The caution exhibited by Craven was entirely appropriate.

11. But, again, concern about the economy was *not* the essential trigger for Craven's tolling notice. Despite its cautionary approach in the initial portion of its construction term, Craven fully expected to be able to complete construction in a timely manner. It was only when mishaps caused by others not within Craven's control – indeed, mishaps that occurred despite Craven's best efforts – led to unforeseen delays in ordering the antenna that Craven submitted its tolling notice. Again, the Division has not disputed that the crucial mishaps were not within Craven's control, nor has it questioned Craven's ability to complete construction if those mishaps had not intervened.

12. Ignoring that factor, the May, 2012 Division Letter instead harped on the “woulda-coulda-shoulda” theme, claiming that, had Craven acted sooner, it wouldn't have encountered the problems it did. That line of “reasoning” is fallacious and fundamentally inconsistent with the Commission's approach to tolling.

13. As an initial matter, a permittee's conduct prior to the tolling event does not alter the fact that, but for the tolling event, construction might have been completed. For example, if a permittee has done absolutely nothing in the way of construction for the first 24 months of its construction permit, only to suffer some “act of God” (to use the phrasing of Section 73.3598) with 12 months to go, that permittee is ordinarily entitled to tolling. Even if one might theorize that, had the permittee moved forward promptly in the first 24 months, it could have completed construction well in advance of the “act of God”, tolling would be available – because a permittee is given three years within which to construct, and it is entitled to use all three years.

14. Moreover, harping on what might have been done prior to the claimed tolling event is in any event contrary to the operation of the Commission's tolling policy. Generally, tolling takes effect only as of the date of the tolling event (following notice to the Commission of that event), and remains in effect only as long as the tolling event prevents construction. In other words, if a permittee has chosen to fritter away the first 24 months of its construction period only to encounter a legitimate tolling event in Month 25, tolling will not retrieve any of those initial 24 months. *See, e.g., Letter to Lauren A. Colby et al.*, 21 FCC Rcd 1260 (Audio Division 2006). The pre-tolling event time is lost to the permittee, and cannot be retrieved through the tolling process. Thus, it makes no difference to the Commission what may or may not have occurred during the pre-tolling event time. The only meaningful consideration is whether the permitted facilities could be completed within the time remaining in the construction term but for the claimed tolling event. In neither of its letters did the Division address that all-important factor.

15. Additionally, the Division attempted to blame Craven for not checking with the Commission's staff relative to the status of Craven's tolling notice. But that attempt ignored the fact that tolling notices are just that – notices. As indicated in the language of Section 319(b) of the Act, Congress has directed that a permit will not expire automatically when construction has been “prevented by causes not under the control of the grantee”. Thus, simple notice that such a “cause not under the control” has arisen is all that is required. *See* Section 73.3598(b). The Commission's rules include no provision for obtaining prior agency approval of a tolling notice. As a result, the fact that Craven did not undertake any follow-up inquiry about the status of its tolling notice is neither surprising nor blameworthy.

16. Rather, it is the Division's conduct which is both surprising and blameworthy. Craven understands that the Audio Division, as a matter of routine practice, reviews tolling

notices and advises the notifying party if, for some reason, the staff does not believe that tolling is warranted. *See, e.g., Koor Communications, supra.* Craven also understands that such advisories are ordinarily given prior to the construction deadline, presumably in order to afford the permittee time to take appropriate responsive action. Indeed, such notice would ordinarily be expected, if not required, as a matter of fundamental fairness, particularly when the Commission's rules and procedures provide steps that can be taken to avoid loss of a permit through expiration.³

17. Craven never received such an advisory.

18. The Commission and all of its component offices must treat similarly situated regulatees in similar fashion. *E.g., Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965). *See also NetworkIP LLC v. FCC*, 548 F.3d 116 (D.C. Cir. 2008) (quoting *Reuters Ltd. v. FCC*, 781 F.2d 946, 950-51 (D.C. Cir. 1986) (“[a]d hoc departures from th[e agency’s] rules, even to achieve laudable aims, cannot be sanctioned, for therein lie the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action.”)). Agency officials cannot pick and choose among regulatees, according advantages to some while withholding those advantages from others in the same position. Had the Commission given Craven some notice, any notice, prior to its construction deadline that Craven’s tolling notification – filed nearly two months prior to the construction deadline – might be somehow

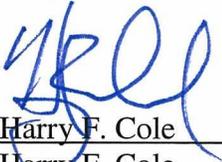
³ Possible appropriate responsive actions might include: (a) revision of the tolling notice to provide additional details; (b) development of alternative plans to complete construction within the initial construction term; or (c) voluntary relinquishment of the permit prior to its expiration, followed by near-simultaneous filing of an application for the same facilities. That last alternative would, in effect, result in affording the permittee an extension of three years, as opposed to the relatively minor matter of weeks or months that might otherwise be all that would be necessary. It is odd that the Commission would, rather than provide a limited amount of additional time, instead insist that the permittee engage in a multi-step operation that ties up Commission resources and results in an extension of years, not weeks or months.

inadequate, Craven could and would have taken prompt responsive steps to protect its permit. Since the Commission routinely affords other similarly situated permittees that opportunity, the Commission's failure to do so in Craven's case further undermines the validity of the Division's apparent rejection of Craven's tolling notice and the consequent grant of the above-captioned CPA application.

Relief Requested

For the reasons stated, Craven Community College submits that the Division's actions below should be reviewed by the Commission, which should (a) rescind the grant of the above-captioned application, (b) dismiss the above-captioned application, and (c) accord Craven the appropriate remaining time within which to complete construction of the modified facilities of Station WZNB(FM).

Respectfully submitted,


/s/ Harry F. Cole
Harry F. Cole

Fletcher, Heald & Hildreth, P.L.C.
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703-812-0483

Counsel for Craven Community College

January 11, 2013

ATTACHMENT A



Federal Communications Commission
Washington, D.C. 20554
December 12, 2012

In Reply Refer to:
1800B3-TSN

Harry F. Cole, Esq.
Fletcher, Heald & Hildreth, PLC
1300 North 17th Street
11th Floor
Arlington, VA 22209

Church Planters of America
c/o William Danny Hawkins, President
6704 Highway 8 South
Germanton, NC 27019

Re: Craven Community College
WZNB(FM), New Bern, North Carolina
Facility ID No. 94050
File No. BPED-20070906AFE

**Application for Minor Modification to
Noncommercial Educational FM Station**

Dear Counsel and Applicant:

We have before us a Petition for Reconsideration ("Petition"), filed June 18, 2012, by Craven Community College ("Craven"), seeking reconsideration of the expiration of its construction permit for modification to the facilities of noncommercial educational FM ("NCE") station WZNB(FM), New Bern, North Carolina.¹ For the reasons stated below, we dismiss the Petition.

Background. Craven previously filed a petition for reconsideration of the staff's March 29, 2011, grant of Church Planters of America's ("CPA") application for a minor modification to the licensed facilities of NCE FM station WGHW(FM), Lockwoods Folly Town, North Carolina ("April Petition").² The CPA Application was filed after the construction permit for the Craven Application expired on February 4, 2011, and would otherwise have been mutually exclusive with the Craven Application. In the April Petition, Craven argued that events beyond its control made it impossible to complete construction by February 4, 2011; that it had submitted a letter notifying the Commission of those events in December 2010, prior to expiration of the construction permit; and that because it had not received notification from the Commission that tolling had been denied, it assumed that tolling had been granted because the events that it described were beyond its control.³ The staff rejected Craven's contentions, finding that the

¹ File No. BPED-20070906AFE ("Craven Application"). On February 4, 2008, Craven was issued a construction permit, authorizing certain facility modifications to WZNB(FM). That permit was subsequently modified on May 8, 2008 (File No. BMPED-20080226AAK), and on October 20, 2009 (File No. BMPED-20091002AAE).

² File No. BPED-20110211AAK ("CPA Application").

³ April Petition at 2-5 and Attachment A.

Craven construction permit had expired by its terms on February 4, 2011, and thus denied the April Petition by letter dated May 18, 2012.⁴

In the current Petition, Craven seeks reconsideration of the announcement, in the *Staff Decision*, that the Craven construction permit expired in February 2011.⁵ Craven justifies its filing of a second petition for reconsideration by contending that the April Petition “was not directed to the status of the WZNB construction permit because, as of the date of [the April Petition], Craven was under the legitimate belief that its construction deadline was tolled as a result of the tolling notification it submitted in December, 2010.”⁶ It argues that the current Petition is thus timely and appropriate because the *Staff Decision* was “the first time the [Audio] Division has formally notified Craven of the expiration of its permit – or offered any rationale for that position”⁷

Discussion. We reject Craven’s Petition as procedurally defective. To the extent that the current Petition constitutes a petition for reconsideration of the *Staff Decision*, as Craven suggests,⁸ it is subject to dismissal as being repetitious. In the April Petition, Craven sought reconsideration of the staff’s grant of the CPA Application. Craven attempts to justify its second petition for reconsideration by arguing that it is now challenging the expiration of its construction permit. However, the expiration of Craven’s construction permit was a necessary predicate to grant of the CPA Application, and thus the fact of the construction permit’s expiration was incorporated in the *Staff Decision*. In the Petition, then, Craven presents arguments virtually identical to those advanced in the April Petition, which were already considered and rejected in the *Staff Decision*, and challenges the staff’s rejection of those arguments. Because the Petition plainly represents an attempt to persuade the staff to reconsider matters previously denied on reconsideration, it is therefore dismissed as repetitious.⁹

Moreover, the Commission’s Rules specify that petitions for reconsideration will be entertained within 30 days of public notice of a final Commission action.¹⁰ However, the *Staff Decision* did not constitute “final Commission action” with respect to the expiration of Craven’s construction permit. The expiration of a construction permit does not require affirmative action by the Commission; in the instant case, the Craven construction permit expired on February 4, 2011, by its own terms, and was automatically forfeited on that date pursuant to Section 73.3598(e) of the Rules, because Craven had not

⁴ *Craven Community College and Church Planters of America*, Letter, Ref. No. 1800B3-TSN (MB May 18, 2012) (“*Staff Decision*”).

⁵ Petition at 1.

⁶ *Id.* at 2 n.1.

⁷ *Id.*

⁸ Petition at 1 (“Craven Community College . . . hereby seeks reconsideration of the decision set forth in [the *Staff Decision*].”).

⁹ 47 C.F.R. § 1.106(k)(3). See *A.G.P., Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 4628, 4629 (1996).

¹⁰ See 47 C.F.R. § 1.106(f). When there is no Federal Register publication, nor descriptive document entitled “Public Notice” released, the public notice date is the date of action. See 47 C.F.R. § 1.4(b)(5).

completed its station modification and filed a license application.¹¹ At most, as discussed above, the *Staff Decision* merely recognized the fact of the Craven construction permit's expiration as a predicate to the staff's grant of the CPA Application. Craven is thus fundamentally mistaken when it assumes that the Commission had a duty to "formally notify" it of the expiration of its construction permit,¹² and that the *Staff Decision* commenced a period of time in which to challenge the expiration of that permit.¹³

Conclusion. For the foregoing reasons, Craven's Petition for Reconsideration IS DISMISSED.

Sincerely,



Peter H. Doyle 
Chief, Audio Division
Media Bureau

¹¹ 47 C.F.R. § 73.3598(e). Over a decade ago, the Commission ended its former practice of affirmatively acting to cancel an expired construction permit, holding that permits are subject to automatic forfeiture, without further Commission action, upon expiration of an unencumbered three-year construction period. *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes*, Report and Order, 13 FCC Rcd 23056, 23091 (1998) (“*Streamlining R&O*”), recon. granted in part, 14 FCC Rcd 17525 (1999) (“*Streamlining MO&O*”). See also 47 U.S.C. § 319(b). To the extent that Craven might argue that it did not receive an “unencumbered” construction period, based on its December 2010 tolling notification and its belief that tolling was automatically granted because Craven reported factors outside its control and did not receive a Commission response denying tolling, this argument has been considered and rejected. See *Staff Decision* at 3-5. We note further that the tolling notification (Attachment A to the April Petition) was defective, in that it did not bear required information, such as the station's frequency, the dates on which the construction permit was granted and was due to expire, or specific references to the Rules, the *Streamlining R&O*, or the *Streamlining MO&O* demonstrating that the circumstances Craven described qualified as an “approved tolling event.” See *Streamlining MO&O*, 14 FCC Rcd at 17542. We also note that, while not specifically required, experienced applicants and counsel routinely include the Commission's Facility Identification Number on all filings, so as to facilitate routing of pleadings and other notices to the proper Commission personnel. Craven did not do so here.

¹² See *Streamlining R&O*, 13 FCC Rcd at 23091.

¹³ Even assuming *arguendo* that the expiration of the construction permit on February 4, 2011, had constituted Commission action, Craven's June 18, 2012, Petition would have been late-filed, as any petition for reconsideration would have had to be filed no later than March 7, 2011, 30 days after the expiration of the permit. 47 U.S.C. § 405, 47 C.F.R. §§ 1.4(b)(5), 1.106(f).

ATTACHMENT B



Federal Communications Commission
Washington, D.C. 20554
May 18, 2012

In Reply Refer to:
1800B3-TSN

Craven Community College
c/o Harry F. Cole, Esq.
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1300 North 17th Street
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Arlington, VA 22209

Church Planters of America
c/o William Danny Hawkins, President
6704 Highway 8 South
Germanton, NC 27019

Re: Church Planters of America
WGHW(FM), Lockwoods Folly Town,
North Carolina
Facility ID No. 89986
File No. BPED-20110211AAK

**Application for Minor Modification to
Noncommercial Educational FM Station**

Dear Counsel and Applicant:

We have before us a Petition for Reconsideration ("Petition"), filed by Craven Community College ("Craven"), seeking reconsideration of the staff's grant of Church Planters of America's ("CPA") application for a minor modification to the licensed facilities of noncommercial educational ("NCE") station WGHW(FM), Lockwoods Folly Town, North Carolina.¹ For the reasons set forth below, we deny the Petition.

Background. Craven filed an application for minor modification to the licensed facilities of NCE station WZNB(FM), New Bern, North Carolina, in September 2007.² The construction permit (the "Craven CP") was granted on February 4, 2008, and expired on February 4, 2011. Craven filed two subsequent applications for modification of the construction permit, on February 26, 2008 (granted May 8, 2008)³ and on October 2, 2009 (granted October 30, 2009).⁴

¹ Although Craven is not a party to the CPA application, we find that it has shown facts demonstrating that it is potentially adversely affected by grant of the CPA application, and thus has standing to file the Petition under 47 C.F.R. § 1.106(b)(1).

² File No. BPED-20070906AFE. Specifically, Craven sought an upgrade of its facilities from Class A to Class C1, and a change in its antenna's directional pattern.

³ File No. BMPED-20080226AAK.

⁴ File No. BMPED-20091002AAE.

On December 14, 2010, Craven, through its counsel, filed with the Office of the Secretary a letter to “advise” the Commission of events Craven alleged to be out of its control that, it contended, warranted tolling of the expiration date of the Craven CP.⁵ Specifically, Craven stated that the 2008 economic recession resulted in elimination or curtailment of state and federal funding for its radio stations in mid-2009 and thereafter, causing Craven to “proceed cautiously.”⁶ Craven further stated that there was “some basis for optimism about possible economic improvement” by early 2010, that by June 2010 it began the process of soliciting information from antenna manufacturers regarding the necessary directional antenna for the facility modification, and that by November of 2010 it was able to initiate the state-mandated bidding process for the antenna.⁷ However, according to Craven, despite its belief that one manufacturer would be able to submit an acceptable bid for the necessary antenna, no acceptable bids were received, necessitating re-issue of the Invitation for Bids.⁸ The timing of the Invitation for Bids and the customary holiday break of North Carolina state institutions made it impossible for any bids to be evaluated before early January of 2011.⁹ Craven stated that these events were “beyond [its] control,” and on that basis stated its belief that tolling was warranted.¹⁰

Craven received no notification regarding any action upon the Craven Letter, and on February 4, 2011, the Craven CP expired without Craven having filed an application for license to cover the Craven CP. On February 11, 2011, CPA filed an application for modification of the facilities of its station WGHW(FM), Lockwoods Folly Town, North Carolina (the “CPA Application”).¹¹ The CPA Application, which is mutually exclusive with the expired Craven CP, was granted on March 29, 2011.

On April 27, 2011, Craven timely filed its Petition.¹² Craven repeats the arguments in the Craven Letter as justification for its belief that it was entitled to tolling.¹³ Moreover, Craven contends that it was only required to notify the Commission of the events it believed entitled it to tolling of the Craven CP construction period and that, absent any action denying tolling, it was entitled to assume that the

⁵ Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Harry F. Cole, Counsel for Craven Community College (Dec. 14, 2010) (“Craven Letter”), submitted with Attachment A (Declaration of Charles Wethington, General Manager) to the Petition. While Craven attaches a copy of this letter stamped by the Office of the Secretary, it does not bear any indication of receipt by the Audio Division.

⁶ Craven Letter at 1.

⁷ *Id.*

⁸ *Id.* at 1-2.

⁹ *Id.* at 2. *See also* Declaration of Charles Wethington, para. 7.

¹⁰ Craven Letter at 2.

¹¹ File No. BPED-20110211AAK.

¹² CPA filed a letter in opposition to the Petition on May 31, 2011. Craven filed a “Reply to Letter Response to Petition for Reconsideration” (“Craven Reply”) on June 8, 2011.

¹³ *See* Petition at 2-4.

expiration of the Craven CP had been tolled.¹⁴ Craven waited until early April of 2011 to review the Commission's records, at which time it discovered that the staff had granted a construction permit to CPA on March 29.¹⁵ It states that it had no reason to suspect that a mutually exclusive application would be granted, because it believed that it was entitled to tolling due to the fact that its failure to construct the facility modification by the Craven CP's expiration date was beyond its control.¹⁶

Discussion. The Commission increased the construction period for broadcast stations from 18 months to three years in 1998. This extended period is designed to ensure that a diligent and qualified permittee can and will complete construction by the established construction deadline. However, the Commission's rules recognize a narrow set of circumstances beyond a permittee's control for which additional time may be warranted. These include natural disasters, administrative and judicial challenges to the permit's grant, and certain related judicial proceedings.¹⁷ The Commission will toll the running of the three-year construction period in such circumstances.

Craven cites *Koor Communications, Inc.*,¹⁸ for the proposition that virtually any cause "not under the control of the grantee" justifies tolling, and that the categories listed in Section 73.3598(b) of the Rules are not exhaustive.¹⁹ This proposition misstates the law and procedures. The decision in *Koor* appears to conflate two related but distinct concepts: tolling of the construction period and waiver of that period.²⁰ The Commission has stated that tolling is limited to those causes set forth in Section 73.3598(b).²¹ It went on to state that there may be "rare and exceptional circumstances" other than those delineated in the rule, beyond an applicant's control, that would warrant the tolling of construction time. In these "very limited circumstances," the Commission stated that it will entertain requests for waiver of the strict tolling provisions.²² Thus, while tolling of a construction period is limited to those categories of events set forth in Section 73.3598(b), an applicant that cannot present facts warranting tolling may

¹⁴ *Id.* at 4 and n.3.

¹⁵ *Id.* at 4-5.

¹⁶ *Id.* at 5.

¹⁷ See 47 C.F.R. § 73.3598(b).

¹⁸ Letter, 23 FCC Rcd 13246, 13249-50 (MB 2008) ("*Koor*").

¹⁹ 47 C.F.R. § 73.3598(b).

²⁰ See *Koor*, 23 FCC Rcd at 13249-50 ("Thus, as the Letter Decision recites – and *Koor* acknowledges by filing its waiver request – the circumstances described in Section 73.3598(b)(i)(ii) are not exhaustive of those under which the Commission will toll a construction permit deadline." (emphasis added)).

²¹ See *Streamlining of Mass Media Applications, Rules, and Processes*, Report and Order, 13 FCC Rcd 23056 (1998), recon. granted in part, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17541 (1999) ("*Streamlining MO&O*").

²² *Id.* ("We realize that there may be rare and exceptional circumstances other than those delineated here which would warrant the tolling of construction time, *i.e.*, circumstances in which, for reasons not discussed here, a permittee is prevented from completing construction within three years for reasons beyond its control such that the permittee would be entitled to tolling of the construction time under [47 U.S.C. § 319(b)]. In these very limited circumstances, we will entertain requests for waiver of our strict tolling provisions.").

request waiver of the construction period, subject to the proviso that waivers are not granted for reasons that are common and routine.²³ The Craven Letter relies on economic factors outside the scope of the tolling rule. Accordingly, although Craven did not specifically request such relief, we consider Craven's Petition as a request for a waiver of the three-year construction period, which as noted above may be granted in rare and exceptional circumstances, beyond the permittee's control, that prevent construction.²⁴

It is well settled that economic reasons, except in rare cases, do not justify waiver of the construction period. Applicants must be financially qualified at the time of application, and must notify the Commission of any material changes in their qualifications.²⁵ The Commission has consistently stated that lack of funds does not ordinarily form a basis for waiver of the construction period because financial problems and responses to such problems are generally within an applicant's control.²⁶ The facts of this case do not warrant a departure from this general policy. In addition, notwithstanding Craven's sole reliance on difficult economic and state fiscal conditions for its inability to construct in a timely manner,²⁷ certain significant matters, within its control, directly contributed to delays in construction. Specifically, Craven fails to note the two applications for modification of the Craven CP, both of which included changes to the directional pattern of the proposed signal (and, thus, to the design of the antenna needed), and the second of which was filed 20 months into the 36-month construction period. Moreover, even though the staff granted the second modification application within 30 days of its filing in October of 2009, Craven states it did not initiate the process of acquiring the necessary antenna until early 2010.²⁸ In short, well over half of the construction period elapsed before Craven settled on the technical parameters of its facility modification, and two-thirds of the construction period elapsed before it began the process of acquiring the antenna. These factors were wholly within Craven's control, and belie Craven's assertion that its actions demonstrate that it was "committed to prompt initiation of service."²⁹

²³ See *Koor*, 23 FCC Rcd at 13249.

²⁴ See *Streamlining MO&O*, 14 FCC Rcd at 17541.

²⁵ 47 C.F.R. § 1.65(a).

²⁶ See *JNE Investments, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 623, 631 (2008) (no additional construction time based on cost of local zoning process); *Wendell & Associates*, Memorandum Opinion and Order, 17 FCC Rcd 18576 (2002) (applicant seeking tolling of construction period cited events of September 11, 2001, as reason for construction delay; Commission concluded that permittee's failure to construct was attributable largely to permittee's own dilatory actions prior to that date); *Texas Grace Communications*, Memorandum Opinion and Order, 16 FCC Rcd 19167, 19173 (2001) (no additional time where lender would not fund a project it considered financially risky); *Frederick Gauthier De Castro*, Letter, 22 FCC Rcd 5401 (MB 2007) (no additional construction time based on unavailability of funding and inability to sell alleged due to permit condition requiring international coordination).

²⁷ See, e.g., Petition at 6 n.5 ("[W]hile the unanticipated recession prevented it from commencing the construction process in 2009....").

²⁸ *Id.* at 2.

²⁹ *Id.* at 6 n.5. See *Streamlining MO&O*, 14 FCC Rcd at 17539 (new tolling rules were designed to "minimize instances when those who do not have the intent or foresight to ensure the prompt initiation and conclusion of construction 'tie up' the spectrum indefinitely.").

Further, Craven does not cite any authority for its assertion that it is entitled to assume that its construction period has been tolled absent advice to the contrary.³⁰ Any construction permit for which construction has not been completed, and for which no application for license has been filed, shall be automatically forfeited upon expiration without any further affirmative cancellation by the Commission.³¹ Craven states it received no staff notification following submission of the Craven Letter, and does not indicate that it checked the Media Bureau's Consolidated Data Base System ("CDBS"),³² or followed up with the staff regarding any action on the Craven Letter. Absent notification that the construction period for the Craven CP had been waived or tolled, the Craven CP expired. Given the facts of this case, any assumption by Craven that it had received additional construction time under the Craven CP was unwarranted.

Conclusion. We conclude that Craven's failure to construct its facility modification within the allotted 36-month construction period was due to its delay in finalizing the exact technical parameters of the modified facility, rather than the economic factors it cites. As the technical specifications for the station are within Craven's control, we find that Craven is entitled neither to tolling of the three-year construction period under Section 73.3598 of the Rules, nor to waiver of the tolling requirements. Accordingly, Craven's Petition IS DENIED.

Sincerely,



Peter H. Doyle *for*
Chief, Audio Division
Media Bureau

³⁰ *Id.* at 4 and n.3. *See also* Craven Reply at 2-3.

³¹ 47 C.F.R. § 73.3598(e).

³² When tolling is granted, that fact is entered in CDBS, which is the primary source of public information about broadcast stations. Additionally, when tolling is granted, a "Tolling Code" is provided on the "Application Search Details" screen associated with the construction permit application.

ATTACHMENT C

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

PLEASE STAMP
AND RETURN
THIS COPY TO
FLETCHER, HEALD & HILDRETH

In re Application of)
Church Planters of America)
For modification of the facilities of)
Station WGHW(FM), FCC Facility ID No. 89986,)
Lockwoods Folly Town, NC)

File No. BPED-20110211AAK

FILED/ACCEPTED

APR 27 2011

Federal Communications Commission
Office of the Secretary

TO: Marlene H. Dortch, Secretary

For transmission to: Peter H. Doyle, Chief
Audio Division, Media Bureau

PETITION FOR RECONSIDERATION

1. Pursuant to Section 1.106 of the Commission's rules, Craven Community College ("Craven"), licensee of noncommercial educational Station WZNB(FM), New Bern, North Carolina, hereby petitions for reconsideration of the above-captioned application of Church Planters of America for modification of the facilities of noncommercial educational FM Station WGHW(FM), Lockwoods Folly Town, North Carolina. ¹ As demonstrated below, the modified WGHW facilities are without question mutually exclusive with the facilities specified in Craven's construction permit ("WZNB Permit"), File No. BPED-20070906AFE (modified in Files Nos. BMPED-20080226AAK and BMPED-20091002AAE), modifying the facilities of Station WZNB. Because of that mutual exclusivity, grant of the WGHW application was not permissible, and that grant must be rescinded and the captioned application dismissed.

¹ The grant of the WGHW application was reflected in *Broadcast Actions*, Report No. 47456, released April 1, 2011. This Petition is therefore timely.

2. The WZNB Permit was granted in February, 2008, with an expiration date of February 4, 2011. As the Commission is doubtless aware, in mid-2008 the United States suffered a major economic recession. That phenomenon imposed unexpected restrictions on many institutions, including particularly noncommercial educational broadcast stations. By mid-2009, state funding historically provided to Craven for the operation of its broadcast stations had been eliminated; Craven experienced a substantial drop in federal funding as well. Nevertheless, Craven made appropriate and diligent arrangements to assure that construction of its modified facilities would be completed by the permit's expiration. By early 2010 – approximately a year prior to the permit's expiration – Craven had initiated the process of acquiring the necessary antenna.

3. Craven is a tax-supported institution (with trustees appointed by the Craven County School Board, the Craven County Commissioners, and the Governor of North Carolina). It is subject to state-imposed financing, bidding and contracting regulations. To place an order for equipment (including in particular the antenna specified in the WZNB Permit), Craven is required to rely on bidding processes controlled by State officials in Raleigh. Recognizing that, Craven was careful in advance to identify an equipment vendor (Jampro) and to work with representatives of that vendor to develop bidding specifications consistent with the WZNB Permit. An Invitation for Bids (“IFB”) was issued by State officials in Raleigh on November 5, 2010 – which would have permitted the bids to have been received and reviewed, and an order placed, prior to Thanksgiving, more than two months prior to expiration of the permit.

4. However, through no fault of Craven's – indeed, despite Craven's best efforts to assure that an acceptable bid would be submitted – no Jampro-based bid was received. Craven

has since determined that this was the result of an oversight by a vendor representing Jampro – a factor plainly beyond Craven’s control.

5. Craven then pressed the State bidding officials to re-issue the IFB as quickly as possible, Craven’s goal being to complete the bidding process and place the order before Christmas. While that would have led to a considerably tighter delivery and installation schedule, Craven still believed that construction could be completed prior to the WZNB Permit’s expiration. Again, however, through no fault of Craven – indeed, despite Craven’s repeated urgings – the State bidding officials failed to award the IFB prior to the end-of-year Christmas/New Year holidays. The IFB was not certified by the State Board of Award until January, 2011.

6. When Craven became aware that the IFB would not be awarded until January, Craven advised the Commission pursuant to Section 73.3598 of the Commission’s rules and Section 319(b) of the Communications Act, 47 U.S.C. §319(b). *See* Attachment A hereto. Section 319(b) provides that construction permits shall expire automatically if the authorized construction has not been completed by the specified expiration date “unless [that construction has been] prevented by causes not under the control of the grantee.” Consistent with that statutory mandate, the Commission’s rules provide for “tolling” of permits. *See* Section 73.3598.²

² While Section 73.3598(b) refers to three particular types of “causes not under the control of the permittee”, it is well-settled that those three types are *not* the only available bases for tolling. *See, e.g., Koor Communications, Inc.*, 23 FCC Rcd 13246, 13249-50 (Audio Division 2008) (“the circumstances described in Section 73.3598(b)[] are not exhaustive of the those [*sic*] under which the Commission will toll a construction permit deadline”). Nor could they be, in light of Section 319(b)’s statutory mandate creating a broad exemption from automatic permit expiration in situations where timely construction is “prevented by causes not under the control of the grantee”.

7. Having alerted the Commission to its circumstances, Craven understood the expiration date of the WZNB Permit to have been tolled. Tolling notifications are just that – notifications, *not* requests. That is consistent with Section 319(b), which does not accord the Commission any discretion to grant or deny tolling. Accordingly, the Commission is not required, or even expected, to issue any “grant” of tolling and, conversely, no such “grant” is necessary to confirm that an expiration date has been tolled.³

8. Craven proceeded with its efforts to complete construction. It readied its tower for removal of its previously-licensed antenna and installation of the antenna specified in the WZNB Permit. In January, 2010, the State Board of Awards approved a bid specifying the appropriate Jampro antenna that was submitted in response to the re-issued IFB. However, Jampro failed to meet the contractual deadline for delivery of the antenna. While the IFB (and the consequent formal order) contemplated prompt delivery (*i.e.*, within 30 days of the award of the bid, as specified in the award), the antenna still had not been delivered by April 1. Again, these circumstances were clearly beyond Craven’s control. Craven had done all it could to assure timely delivery – making prompt delivery a condition in both the IFB and the formal order, repeatedly reminding Jampro of the importance of timely installation – but to no avail.

9. In early April, a review of the Commission’s records disclosed that the Commission had not only accepted for filing, but also granted, the above-captioned application for modification of the facilities of Station WGHW. As set forth in Attachment B hereto, those

³ Of course, should the Commission, when considering a tolling notification, disagree in a particular situation that tolling is in fact warranted, the Commission could issue an order so stating. Such an order (which would be subject to standard review processes) would at least place the permittee on notice that its permit might be subject to automatic expiration notwithstanding the tolling events described in its notification. Craven received no such order from the Commission, and thus had no reason to believe that its tolling notification might not be fully effective.

modified facilities are mutually exclusive with those specified in the WZNB Permit. Craven had not been aware of the WGHW application previously because, with a valid permit in hand, Craven had no reason to believe that any mutually exclusive application would be tendered, much less accepted or granted, and Craven had thus not been reviewing Commission public notices as a protective matter to identify any potential mutually exclusive proposals.⁴

10. In view of the foregoing facts and circumstances, the grant of the above-captioned WGHW application must be reconsidered, the WGHW permit rescinded, and the above-captioned application dismissed. Presumably, the WGHW application was filed – and granted – because of the mistaken notion that the WZNB Permit had automatically expired and therefore presented no impediment to such grant. But under Section 319(b) of the Act, Craven’s failure to construct prior to the expiration date of the WZNB Permit could not and cannot trigger an automatic expiration of the WZNB Permit because that failure was beyond Craven’s control. While WGHW may or may not have been aware of Craven’s tolling notification and the circumstances described in it, the Commission certainly was, thanks to Craven’s December, 2010 notification. In other words, Craven had done all that it could, or needed to, do to assure the continued vitality of the WZNB Permit.⁵ And as long as the WZNB Permit remains

⁴ To the extent that Section 1.106 requires an explanation for the fact that a petitioner for reconsideration did not participate previously in the matter of which reconsideration is sought, Craven’s explanation is obvious: the rights accorded it by the WZNB Permit protected Craven – and continue to protect it – from such mutually exclusive applications. Because of that, Craven had no cause to be concerned about incoming applications and it was not, as a result, aware of the filing of the submission of the WGHW application. Craven notes that, upon learning that there might be any doubt about the continuing vitality of the WZNB Permit, Craven notified its equipment suppliers, including Jampro, and put a temporary hold on construction efforts pending confirmation that its permit remains extant.

⁵ It also bears noting that the facts presented here would not in any event undermine any Commission policies relative to prompt construction of facilities. In 1999, when the Commission adopted its current tolling process, the Commission indicated that its goal in that
(Footnote continued on next page)

outstanding, the Commission's rules preclude acceptance and/or grant of any proposal mutually exclusive with that permit.

Respectfully submitted,


/s/ Harry F. Cole

Harry F. Cole

Fletcher, Heald & Hildreth, P.L.C.
1300 N. 17th Street – 11th Floor
Arlington, Virginia 22209
703-812-0483

Counsel for Craven Community College

April 27, 2011

(Footnote continued from preceding page)

process was two-fold: to encourage prompt initiation of service and combat spectrum warehousing. *See, e.g., Streamlining of Mass Media Applications*, 14 FCC Rcd 17525, 17541 (1999). Here, Craven is committed to prompt initiation of service, as its actions thus far demonstrate: while the unanticipated recession prevented it from commencing the construction process in 2009, by 2010 – even though the dark economic clouds of the recession were still only beginning to part slightly – Craven was moving forward on a schedule which would have permitted completion of construction well in advance of the expiration date, until factors beyond Craven's control intervened. Craven was clearly incentivized to proceed quickly. Moreover, this history does not suggest that any spectrum warehousing is at issue here.

Attachment A

DECLARATION

I, Charles Wethington, under penalty of perjury, hereby declare the following to be true and correct:

1. I am General Manager of noncommercial educational FM Station WZNB(FM), New Bern, North Carolina, which is licensed to Craven Community College ("Craven"). I am preparing this Declaration for submission to the Federal Communications Commission in connection with a Petition for Reconsideration which Craven is filing with respect to the grant of an application for modification of the facilities of Station WGHW(FM), Lockwoods Folly Town, North Carolina.

2. Craven was granted a construction permit (File No. BPED-20070906AFE) to make changes in the facilities of Station WZNB(FM). That permit was granted in February, 2008, with an expiration date of February 4, 2011. In mid-2008 the United States suffered a major economic recession. That phenomenon imposed unexpected restrictions on many institutions, including particularly noncommercial educational broadcast stations. By mid-2009, state funding historically provided to Craven for the operation of its broadcast stations had been eliminated; Craven experienced a substantial drop in federal funding as well. Nevertheless, Craven made appropriate and diligent arrangements to assure that construction of its modified facilities would be completed by the permit's expiration. By early 2010 – approximately a year prior to the permit's expiration – we had initiated the process of acquiring the necessary antenna.

3. Craven is a tax-supported institution (with trustees appointed by the Craven County School Board, the Craven County Commissioners, and the Governor of North Carolina). It is subject to state-imposed financing, bidding and contracting regulations. To place an order for equipment (including in particular the antenna specified in the WZNB Permit), Craven is required to rely on bidding processes controlled by State officials in Raleigh. Recognizing that, I

was careful in advance to identify an equipment vendor (Jampro) and to work with representatives of that vendor to develop bidding specifications consistent with the WZNB Permit. An Invitation for Bids ("IFB") was issued by State officials in Raleigh on November 5, 2010 – which would have permitted the bids to have been received and reviewed, and an order placed, prior to Thanksgiving, more than two months prior to expiration of the permit.

4. However, through no fault of ours – indeed, despite my best efforts to assure that an acceptable bid would be submitted – no Jampro-based bid was received. I have since been advised that this was the result of an oversight by a vendor representing Jampro – a factor plainly beyond our control.

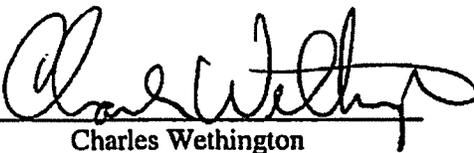
5. We then pressed the State bidding officials to re-issue the IFB as quickly as possible, our goal being to complete the bidding process and place the order before Christmas. While that would have led to a considerably tighter delivery and installation schedule, we still believed that construction could be completed prior to the WZNB permit's expiration. Again, however, through no fault of ours – indeed, despite my repeated urgings – the State bidding officials failed to award the IFB prior to the end-of-year Christmas/New Year holidays. The IFB was not certified by the State Board of Award until January, 2011.

6. When we became aware that the IFB would not be awarded until January, Craven advised the Commission of the circumstances. Having done so, I understood the expiration date of the WZNB Permit to have been tolled. Neither I nor, to the best of my knowledge, any Craven representative received any notice from the FCC advising that there might be any question about the tolling of the construction deadline.

7. We proceeded with our efforts to complete construction. Among other things, we readied the station's tower for removal of its previously-licensed antenna and installation of the new antenna specified in the WZNB Permit. In January, 2010, the State Board of Awards

approved a bid specifying the appropriate Jampro antenna that was submitted in response to the re-issued IFB. However, Jampro failed to meet the contractual deadline for delivery of the antenna. While the IFB (and the consequent formal order) contemplated prompt delivery (*i.e.*, within 30 days of the award of the bid as specified in the award), the antenna still had not been delivered by April 1. Again, these circumstances were clearly beyond our control. We had done all we could to assure timely delivery – making prompt delivery a condition in both the IFB and the formal order, repeatedly reminding Jampro of the importance of timely installation – but to no avail.

8. In early April, a review of the Commission's records disclosed that the Commission had not only accepted for filing, but also granted, the above-captioned application for modification of the facilities of Station WGHW. We had not been aware of the WGHW application previously because, with a valid permit in hand, we had no reason to believe that any mutually exclusive application would be tendered, much less accepted or granted, and we had thus not been reviewing Commission public notices as a protective matter to identify any potential mutually exclusive proposals. Upon learning that there might be any doubt about the continuing vitality of the WZNB Permit, we notified our equipment suppliers, including Jampro, and put a temporary hold on construction efforts pending confirmation that WZNB's permit remains extant.


Charles Wethington

Date: 04/26/2011



Fletcher, Heald & Hildreth

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ARLINGTON, VIRGINIA 22209

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FAX: (703) 812-0486
www.fhhlaw.com
www.commlawblog.com

PLEASE STAMP
AND RETURN
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FLETCHER, HEALD & HILDRETH

HARRY F. COLE
(703) 812-0483
COLE@FHHLAW.COM

December 14, 2010

BY HAND DELIVERY

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

FILED/ACCEPTED

DEC 14 2010

Federal Communications Commission
Office of the Secretary

RECEIVED - FCC

DEC 14 2010

Federal Communications Commission

Attention: Peter Doyle, Chief
Audio Division, Media Bureau

Re: File No. BMPED-20091002AAE

Dear Ms. Dortch:

Pursuant to Section 73.3598 of the Commission's rules, I am writing on behalf of Craven Community College ("Craven"), licensee of noncommercial educational Station WZNB(FM), New Bern, North Carolina, to transmit the attached letter from Craven advising the Commission of circumstances warranting tolling of the expiration dates of its above-referenced outstanding construction permit.

Thank you for your attention to this matter. Please contact me if you have any questions about this.

Sincerely,

Harry F. Cole

Counsel for Craven Community College

cc (w/att.): Peter Doyle, Chief (by email – peter.doyle@fcc.gov)

PUBLIC RADIO EAST

THE NEWS AND CLASSICAL MUSIC NETWORK 89.3 WTEB
THE NEWS AND IDEAS NETWORK 88.5 WZNB / 90.3 WKNS / 91.5 WBJD / 88.1 GREENVILLE

December 14, 2010

BY HAND DELIVERY

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

Attention: Peter Doyle, Chief
Audio Division, Media Bureau

Re: File No. BMPED-20091002AAE

Dear Ms. Dortch:

I am General Manager of noncommercial educational Station WZNB(FM), New Bern, North Carolina. The station is licensed to Craven Community College ("Craven"). I am writing to advise the Commission of recent events beyond Craven's control that may interfere with Craven's ability to complete construction of the facilities authorized in the above-referenced construction permit. While we are continuing to attempt to meet the current construction deadline, out of an excess of caution we hereby request that that deadline be tolled.

The construction permit in question was initially granted in early 2008, shortly before the onset of the worst recession in decades. As a result of the recession, state funding historically provided to Craven for operation of its broadcast stations was eliminated in mid-2009; a substantial drop in federal funding followed earlier this year. These set-backs caused Craven to proceed cautiously. However, by early 2010 there was some basis for optimism about possible economic improvement, and by June, 2010, we had begun the process of soliciting information from antenna companies concerning manufacture of the necessary directional antenna; that process had advanced sufficiently by Fall, 2010, to permit us to initiate the bidding process which is required by state regulations.

The bidding process – which is handled by state officials in Raleigh, not by Craven directly – was commenced on November 5, 2010 with issuance of an Invitation for Bids ("IFB"), the goal being to identify a successful bidder, place an order before Thanksgiving, and secure delivery well in advance of the current construction deadline. However, none of the bids met the required specifications. The specifications imposed severe size limitations on the filter to be installed because of space constraints at the transmitter site; no bid conformed to those

limitations. This came as a surprise to Craven, which had worked extensively with Jampro, an antenna manufacturer, in the months preceding the issuance of the IFB to assure a fully compliant bid – but no Jampro-based bid was received. Craven has since been advised that this was because of an inadvertent oversight on the part of a vendor representing Jampro, who mistakenly missed the deadline for responding to the IFB. As a result, the IFB had to be re-issued.

Despite that set-back the re-bidding process might have still been completed in time for delivery and installation of the equipment in advance of the construction deadline – but for the fact that the re-issued IFB was not processed by state officials in Raleigh in time to have the IFB issued, responses obtained, and a firm order placed prior to the Christmas holiday. The IFB has been re-issued, but with a response deadline of December 22. Because of the holiday schedule of state institutions such as Craven, no business of this nature can be transacted until the post-holiday resumption of operations, *i.e.*, on January 4, 2011. As a result, the earliest that an order might be placed will be January 4, leaving very little room for further unforeseen snags. (This is particularly so in view of the fact that construction would have to be completed during mid-winter, when weather conditions often do not permit installation and fine-tuning of directional antenna systems.)

While Craven intends to proceed on its present course with the goal of meeting the current construction deadline, we feel that factors beyond our control – including, as a general matter, the massive recession and resulting loss of funding, as well as the more recent set-back in the bidding process which has led to a substantially curtailed time frame for final construction through no fault of our own – warrant tolling of the construction period.

If you have any questions about this matter, please contact Craven's communications counsel: Harry F. Cole, 703-812-0483 or cole@fhhlaw.com. Thank you for your consideration of our request.

Sincerely,



Charles Wethington
General Manger
WZNB

Attachment B

ENGINEERING STATEMENT
prepared for
Craven Community College
WZNB(FM) New Bern, North Carolina
Facility ID 94050

Craven Community College ("Craven") is the licensee¹ of non-commercial, educational FM radio station WZNB(FM)(Ch.203A, New Bern, NC). On February 4, 2008 *Craven* was issued an FCC Construction Permit,² authorizing a change frequency to 88.1 MHz and certain power and height facility improvements. That permit was subsequently modified³ May 8, 2008 and again on October 9, 2009.

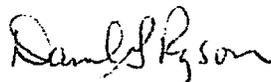
As certified in an accompanying document, *Craven* notified the Commission that construction of the proposed facility had been delayed due to circumstances beyond its control. As such, *Craven* believed the February 4, 2011 Construction Permit expiration deadline had successfully been tolled.

On February 14, 2011, the FCC accepted an Application for Construction Permit⁴ filed by *Church Planters of America*, licensee of WGHW(FM) Lockwoods Folly Town, NC seeking to significantly increase power on 88.1 MHz. That Application was granted on March 29, 2011.

As shown on the attached map, the interfering contours of the proposed WGHW facility have significant contour overlap the protected contour of WZNB, making it impossible for both facilities to operate simultaneously while complying with the Contour Protection requirements of the FCC Rules. Further, because the WGHW interfering contour encompasses New Bern, NC, the facility proposed by *Church Planters of America* precludes *Craven's* use of 88.1 MHz without changing the WZNB principal community.

This Statement was prepared on behalf of *Craven* by the undersigned and is true to the best of his knowledge and belief. Mr. Ryson's qualifications are a matter of record before the FCC.

Respectfully Submitted,



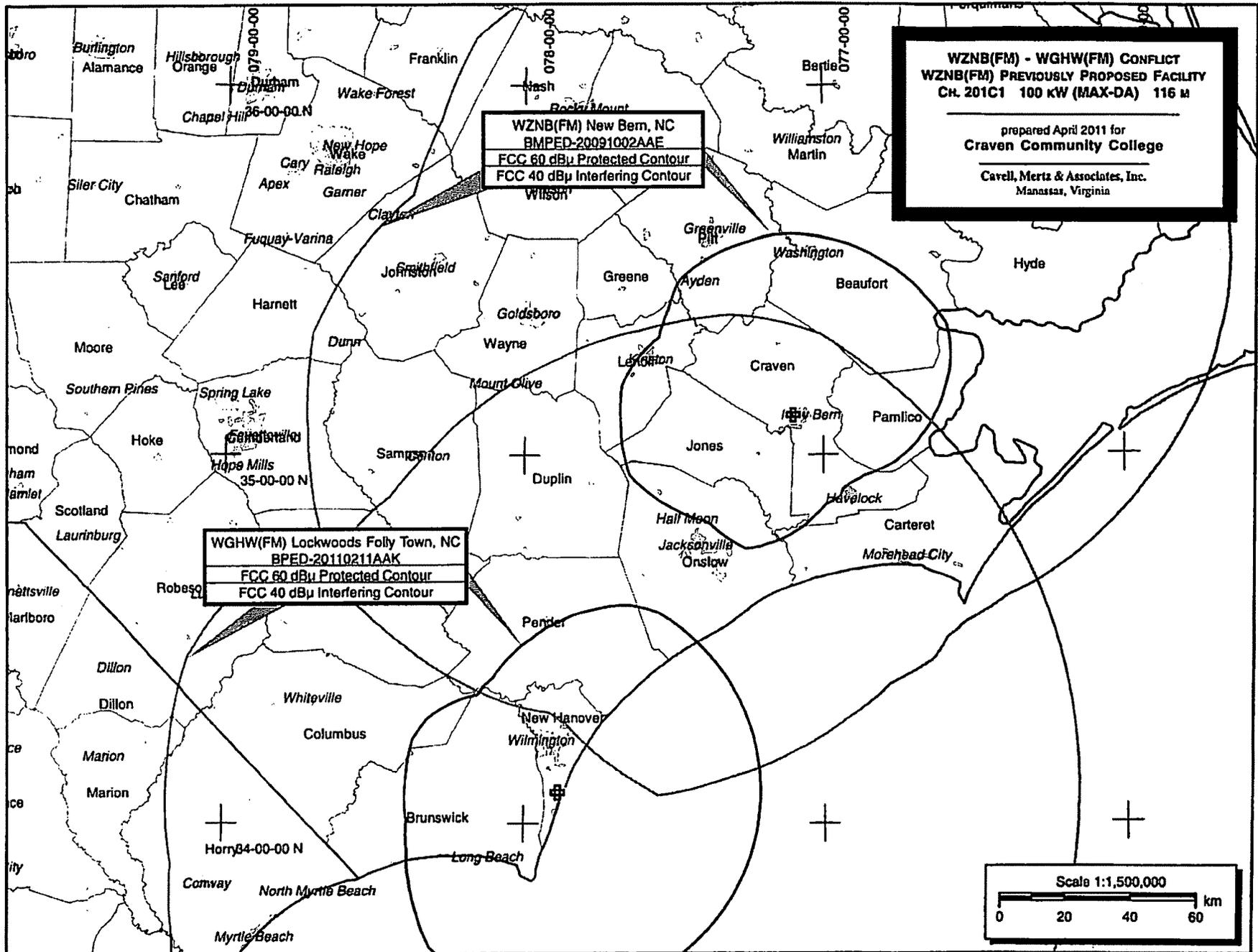
Daniel G. Ryson
Cavell, Mertz & Associates, Inc.
Manassas, VA 20109

¹ BLED-20030103ACG

² BPED-20070906AFE

³ BMPED-20080226AAK

⁴ BPED-20110211AAK



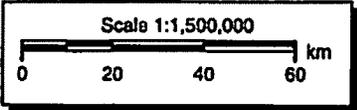
WZNB(FM) - WGHW(FM) CONFLICT
WZNB(FM) PREVIOUSLY PROPOSED FACILITY
CH. 201C1 100 kW (MAX-DA) 116 M

prepared April 2011 for
Craven Community College

Cavell, Mertz & Associates, Inc.
 Manassas, Virginia

WZNB(FM) New Bern, NC
BMPED-20091002AAE
FCC 60 dBu Protected Contour
FCC 40 dBu Interfering Contour

WGHW(FM) Lockwoods Folly Town, NC
BPED-20110211AAK
FCC 60 dBu Protected Contour
FCC 40 dBu Interfering Contour



CERTIFICATE OF SERVICE

I, Harry F. Cole, hereby certify that I caused copies of the foregoing "Petition for Reconsideration" to be placed in the U.S. mail, first class postage prepaid, or transmitted by electronic delivery (as indicated below) on this 27th day of April, 2011, addressed to the following:

Peter Doyle, Chief, Audio Division *
Media Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Joseph A. Wells, III
Church Planters of America
6690 NC 8 Hwy South
Germanton, NC 27019



Harry F. Cole

* via email

ATTACHMENT D

PLEASE STAMP
AND RETURN
THIS COPY TO
FLETCHER, HEALD & HILDRETH

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

In re Application of)
Church Planters of America)
For modification of the facilities of)
Station WGHW(FM), FCC Facility ID No. 89986,)
Lockwoods Folly Town, NC)

File No. BPED-20110211AAK

TO: Marlene H. Dortch, Secretary

FILED/ACCEPTED

For transmission to: Peter H. Doyle, Chief
Audio Division, Media Bureau

JUN 18 2012

Federal Communications Commission
Office of the Secretary

PETITION FOR RECONSIDERATION

1. Craven Community College ("Craven"), licensee of Noncommercial Educational Station WZNB(FM), New Bern, North Carolina, hereby seeks reconsideration of the decision set forth in a letter ("Division Letter"), Ref. 1800B3-TSN, dated May 18, 2012, from Peter H. Doyle, Chief, Audio Division, to Craven. A copy of the Division Letter is included as Attachment A hereto. In its letter, the Division announced for the first time that, notwithstanding Craven's proper and timely notification of tolling, Craven's construction permit to modify the facilities of Station WZNB(FM) had automatically expired some 15 months earlier. As set forth in detail below, that determination runs counter to the statutory mandate of Section 319(b) of the Communications Act, fundamental notions of due process, and the Division's own routine practices.

2. The history of this matter is set out in Craven's Petition for Reconsideration ("First Petition")¹, filed April 27, 2011, and need not be revisited here. To the extent necessary, that First Petition is hereby incorporated by reference.

3. Questions relating to the expiration of construction permits are controlled by the Communications Act. Section 319(b) of the Act provides that broadcast construction permits will be automatically forfeited if the station is not ready for operation within a time to be specified by the Commission, "unless prevented by causes not under the control of the grantee." By this language Congress made clear that, where failure to timely construct occurs for reasons "not under the control" of the permittee, the permit is *not* subject to automatic forfeiture. In so doing, Congress did not distinguish between or among the various types of "causes not under the control". Rather, presumably in acknowledgement of the undeniable fact that unforeseen and unavoidable complications can and do arise, Congress sweepingly referred simply to "causes not under the control".

4. In crafting Section 73.3598 supposedly pursuant to the mandate of Section 319(b), the Commission took a step inconsistent with that mandate. That is, the Commission identified in Section 73.3598 certain types of "causes not under the control" that

¹ Craven's First Petition was not directed to the status of the WZNB construction permit because, as of the date of that First Petition, Craven was under the legitimate belief that its construction deadline was tolled as a result of the tolling notification it submitted in December, 2010. When the Commission granted the above-captioned application that was mutually exclusive with the WZNB permit, Craven sought reconsideration of that grant. In its Letter the Division has chosen, *sua sponte*, to treat Craven's First Petition as a "request for waiver" relative to Craven's construction deadline. Division Letter at 3. Since the Division Letter is thus the first time the Division has formally notified Craven of the expiration of its permit – or offered any rationale for that position – Craven believes it is appropriate to address to the Division, in the first instance, through the instant petition for reconsideration, the following arguments relative to that rationale.

would automatically result in tolling of the construction deadline. The effect of “causes not under the control” that were *not* expressly included among those identified types was not expressly addressed in the rule, even though Section 319(b) clearly provides that any such “causes not under the control” warrant tolling of construction deadlines. Since the language of Section 319(b) is clear and unequivocal and affords no latitude for agency interpretation, the Commission’s decision to differentiate among various types of “causes not under the control” is contrary to the statute and, thus, impermissible.

5. The Commission, of course, acknowledges that there exists a wide range of “causes not under the control” that warrant tolling. *See, e.g., Koor Communications, Inc.*, 23 FCC Rcd 13246, 13249-50 (Audio Division 2008) (“the circumstances described in Section 73.3598(b)[] are not exhaustive of those [*sic*] under which the Commission will toll a construction permit deadline”). In the Division Letter, though, the Division maintains that, for some “causes not under the control”, permittees need only notify the Commission, while for other such causes permittees must affirmatively seek a “waiver”. Again, that bifurcated approach is flatly inconsistent with Congress’s language, which draws no distinctions whatsoever among possible “causes not under the control”. Having established a “notification” process for deadline tolling arising from some “causes not under the control”, the Commission cannot, consistently with the Act, apply a different process to other “causes not under the control”.

6. Craven submitted the requisite notice in a timely manner.² That could and should have sufficed to toll the WZNB construction deadline.

² In describing Craven’s notice, the Division Letter acknowledges that Craven, by including with its First Petition a copy of the notice bearing the “received” stamp of the Commission’s
(Footnote continued on next page)

7. In its notice, Craven explained that the need for tolling arose from circumstances beyond its control, circumstances that occurred in the process of ordering its antenna. The Division Letter does not dispute that explanation. Instead, the Division asserts that Craven could and should have acted earlier than it did to finalize antenna design and proceed with construction. With all due respect, the Division's analysis falls short of reasoned or reasonable.

8. As an initial matter, as Craven noted in its notice and its First Petition, the first two years of Craven's construction permit were concurrent with the worst economic recession the United States has suffered since the Great Depression. While Craven was and remained qualified to complete construction throughout the term of its permit, undertaking a major capital improvement of that nature implicated other, broader considerations of which Craven, as a part of the North Carolina educational system, had to be mindful. For that reason, Craven proceeded cautiously in the early portion of its construction term. While Craven does not assert and has not asserted that the Recession of 2008 was what necessitated the tolling, the Commission cannot ignore the effect that those economic conditions had on all sectors of the country. The caution exhibited by Craven was entirely appropriate.

9. But, again, concern about the economy was *not* the essential trigger for Craven's tolling notice. Despite its cautionary approach in the initial portion of its construction term, Craven fully expected to be able to complete construction in a timely manner. It was only when mishaps caused by others not within Craven's control – indeed, mishaps that occurred despite

(Footnote continued from preceding page)

Secretary, has established that the notice was indeed filed. Division Letter at n. 5. But the Division Letter then observes that the copy “does not bear any indication of receipt by the Audio Division.” *Id.* That further observation is odd and immaterial because receipt of the notice by the Secretary is all that is required, particularly when the notice as filed includes a clear indication that the request is to be transmitted to the Audio Division (as did Craven's notice).

Craven's best efforts – led to unforeseen delays in ordering the antenna that Craven submitted its tolling notice. Again, the Division Letter does not dispute that the crucial mishaps were not within Craven's control.

10. Ignoring that factor, the Division Letter instead harps on the “woulda-coulda-shoulda” theme, claiming that, had Craven acted sooner, it wouldn't have encountered the problems it did. That line of “reasoning” is fallacious and fundamentally inconsistent with the Commission's approach to tolling.

11. As an initial matter, a permittee's conduct prior to the tolling event does not alter the fact that, but for the tolling event, construction might have been completed. For example, if a permittee has done absolutely nothing in the way of construction for the first 24 months of its construction permit, only to suffer some “act of God” (to use the phrasing of Section 73.3598) with 12 months to go, that permittee is ordinarily entitled to tolling. Even if one might theorize that, had the permittee moved forward promptly in the first 24 months, it could have completed construction well in advance of the “act of God”, tolling would be available – because a permittee is given three years within which to construct, and it is entitled to use all three years.

12. Moreover, harping on what might have been done prior to the claimed tolling event is in any event contrary to the operation of the Commission's tolling policy. Generally, tolling takes effect only as of the date of the tolling event (following notice to the Commission of that event), and remains in effect only as long as the tolling event prevents construction. In other words, if a permittee has chosen to fritter away the first 24 months of its construction period only to encounter a legitimate tolling event in Month 25, tolling will not retrieve any of those initial 24 months. *See, e.g., Letter to Lauren A. Colby et al.*, 21 FCC Rcd 1260 (Audio Division 2006). The pre-tolling event time is lost to the permittee, and cannot be retrieved through the tolling

process. Thus, it makes no difference to the Commission what may or may not have occurred during the pre-tolling event time. The only meaningful consideration is whether the permitted facilities could be completed within the time remaining in the construction term but for the claimed tolling event. The Division Letter does not even address that all-important factor.

13. Finally, the Division Letter attempts to blame Craven for not checking with the Commission's staff relative to the status of Craven's tolling notice. But that attempt ignores the fact that tolling notices are just that – notices. As indicated in the language of Section 319(b) of the Act, a permit will not expire automatically when construction has been “prevented by causes not under the control of the grantee”. Thus, simple notice that such a “cause not under the control” has arisen is all that is required. *See* Section 73.3598(b). The Commission's rules include no provision for obtaining prior agency approval of a tolling notice. As a result, the fact that Craven did not undertake any follow-up inquiry about the status of its tolling notice is neither surprising nor blameworthy.

14. Rather, it is the Division's conduct which is both surprising and blameworthy. Craven understands that the Audio Division, as a matter of routine practice, reviews tolling notices and advises the notifying party if, for some reason, the staff does not believe that tolling is warranted. *See, e.g., Koor Communications, supra*. Craven also understands that such advisories are ordinarily given prior to the construction deadline, presumably in order to afford the permittee time to take appropriate responsive action.³ Craven never received such an advisory. Curiously, while it criticizes Craven for failing to take actions that appeared, under the

³ Possible appropriate responsive actions might include: (a) revision of the tolling notice to provide additional details; (b) development of alternative plans to complete construction within the initial construction term; or (c) voluntary relinquishment of the permit prior to its expiration, followed by near-simultaneous filing of an application for the same facilities.

circumstances, to be wholly unnecessary, the Division Letter makes no reference to the Division's failure to follow its own routine relative to such advisories.

15. The Commission and all of its component offices must treat similarly situated regulatees in similar fashion. *E.g., Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965).⁴ Agency officials cannot pick and choose among regulatees, according advantages to some while withholding those advantages from others in the same position. Had the Commission given Craven some notice, any notice, prior to its construction deadline that Craven's tolling notification – filed nearly two months prior to the construction deadline – might be somehow inadequate, Craven could and would have taken prompt responsive steps to protect its permit. Since the Commission routinely affords other similarly situated permittees that opportunity, the Commission's failure to do so in Craven's case further undermines the validity of the Division Letter.

WHEREFORE, for the reasons stated, Craven Community College submits that the Division Letter should be reconsidered, the grant of the above-captioned application should be

⁴ See also *NetworkIP LLC v. FCC*, 548 F.3d 116 (D.C. Cir. 2008) (quoting *Reuters Ltd. v. FCC*, 781 F.2d 946, 950-51 (D.C. Cir. 1986) (“[a]d hoc departures from th[e agency’s] rules, even to achieve laudable aims, cannot be sanctioned, for therein lie the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action.”)).

rescinded, the above-captioned application should be dismissed, and Craven should be accorded the appropriate remaining time within which to complete construction of the modified facilities of Station WZNB(FM).

Respectfully submitted,


/s/ Harry F. Cole

Harry F. Cole

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June 18, 2012

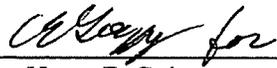
CERTIFICATE OF SERVICE

I, Harry F. Cole, hereby certify that I caused copies of the foregoing "Petition for Reconsideration" to be placed in the U.S. mail, first class postage prepaid, or transmitted by electronic delivery (as indicated below) on this 18th day of June, 2012, addressed to the following:

Peter Doyle, Chief, Audio Division *
Media Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Joseph A. Wells, III
Church Planters of America
6690 NC 8 Hwy South
Germanton, NC 27019

William Danny Hawkins
Church Planters of America
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Harry F. Cole

* via email

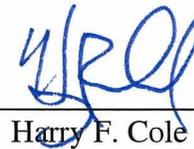
CERTIFICATE OF SERVICE

I, Harry F. Cole, hereby certify that I caused copies of the foregoing "Application for Review" to be placed in the U.S. mail, first class postage prepaid, on this 11th day of January, 2013, addressed to the following:

Peter Doyle, Chief, Audio Division
Media Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

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