

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

In the Matter of)
Church Planters of America)
Permit to Modify the Licensed Facilities of Station) File No. BPED-20110211AAK
WGHW(FM), Lockwoods Folly Town, NC and) Facility ID No. 89986
Craven Community College)
Permit to Modify the Licensed Facilities of) File No. BPED-20070906AFE
WZNB(FM), New Bern, North Carolina) Facility ID No. 94050

MEMORANDUM OPINION AND ORDER

Adopted: October 24, 2014

Released: October 27, 2014

By the Commission:

1. The Commission has before it an Application for Review filed on January 11, 2013 by Craven Community College ("Craven"), licensee of WZNB(FM), New Bern, North Carolina. Craven held a permit to modify WZNB1 but after Craven had not met the February 4, 2011 construction deadline, the Media Bureau ("Bureau") granted a modification application by Church Planters of America ("CPA") which did not protect the by-then-expired WZNB Permit.2 Craven seeks review of Bureau decision letters issued May 2012 and December 20123 which acted on two successive reconsideration petitions, filed by Craven on April 27, 2011, and June 18, 2012, respectively. The May Decision rejected a claim in Craven's first petition that grant of the CPA Application was in error because it conflicted with a still-valid WZNB Permit. In that petition, Craven claimed to have believed that the WZNB Permit expiration date had been "tolled" after it had filed a tolling notification with the Commission less than two months before the construction deadline and had received no response from Bureau staff.4 The December

1 File No. BPED-20070906AFE ("WZNB Permit").

2 File No. BPED-20110211AAK ("CPA Application"). CPA sought to modify the licensed facilities of WGHW(FM), Lockwoods Folly Town, North Carolina. WGHW and WZNB operate on second-adjacent channels in the same general area. In this case grant of one of the modification applications would preclude grant of the other.

3 See Harry F. Cole, Esq., Letter, Ref. No. 1800B3-TSN (MB Dec. 12, 2012) ("December Decision"). Harry F. Cole, Esq., Letter, Ref. No. 1800B3-TSN (MB May 18, 2012) ("May Decision").

4 The Communications Act of 1934, as amended, provides for automatic forfeiture of construction permits unless construction was "prevented by causes not under the control of" the permittee. See 47 U.S.C § 319(b). The Commission's rules provide specific grounds and procedures for obtaining tolling of the construction deadline and it will also entertain waiver requests in other "rare and exceptional circumstances beyond the permittee's control." See 47 C.F.R. § 73.3598(b). Streamlining of Mass Media Applications, Rules, and Processes, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17541 (1999) ("Streamlining"). The Bureau had no record of receiving a tolling notification that Craven filed with the Office of the Secretary, rejected Craven's contention that it was entitled to assume that the construction period had been tolled absent any advice to the contrary, and observed that Craven relied on economic circumstances which would not have justified tolling or waiver for WZNB. See May Decision at

(continued...)

Decision dismissed, as untimely and repetitious, Craven's arguments in its second petition that the *May Decision* improperly concluded that the WZNB Permit was not entitled to tolling or waiver of the construction deadline and had accordingly expired in February 2011. For the reasons discussed below, we affirm the Bureau's actions.

2. Upon consideration of the Application for Review and the entire record, we affirm the Bureau's actions with the exception of the Bureau's dismissal of the second petition as "procedurally defective."⁵ We affirm the Bureau's finding that Craven was not entitled to tolling or waiver of the construction deadline.⁶ Craven based its tolling request on a "massive recession" which it maintained triggered drops in Craven's receipt of state and federal funding, and difficulties Craven claims to have experienced in procuring an antenna.⁷ Such matters are neither specified in the tolling rule, nor of a comparable magnitude to warrant a waiver of the construction deadline.⁸ The Bureau correctly stated that a permittee's financial difficulties do not ordinarily form the basis for granting additional construction time because applicants for construction permits are required to have reasonable assurance of sufficient funding to construct at the time of application and to notify the Commission of any material changes.⁹ The Bureau properly rejected the primary case upon which Craven relied, *Koor*,¹⁰ because Craven had mischaracterized its holding. *Koor*, which Craven also relies upon on review, did not establish that virtually any cause not under the control of a permittee warrants additional construction time. To the contrary, *Koor* explicitly held that common and routine conditions, such as winter weather, do not warrant additional construction time.¹¹

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4-5. With respect to WGHW, however, the Bureau received and granted CPA's request for tolling based on administrative review of the matters raised by Craven. See 47 C.F.R. § 73.3598(b)(2).

⁵ As Craven notes in note 1 of its Application for Review, its second petition sought reconsideration of the Bureau's determination, first made in the *May Decision*, that Craven's tolling request was not meritorious and the permit had accordingly expired. As such, it was not until after the *May Decision*, of which Craven sought reconsideration in the second petition, that Craven could contest that ruling, making the second petition the first opportunity Craven had to do so. However, because we affirm the Bureau's ultimate substantive rulings here denying the arguments contained in the second petition, the Bureau's error is harmless.

⁶ Additionally, the staff properly found that the mere filing of a tolling notification is not, absent favorable staff action, sufficient to achieve tolling status. See *May Decision* at 5. Nor, as Craven argues, is the expiring permittee entitled to "advisories" of the upcoming expiration. The expiration date printed on the construction permit is sufficient notice. To the extent that Craven argues that the Bureau should have acted upon its tolling notification, and notified it of denial prior to expiration, the Bureau had not received that filing and, as the Bureau noted, Craven did not follow up to inquire of its status. Absent information to the contrary, Craven's claimed belief that the Bureau had tolled the WZNB Permit was wholly unfounded. Section 73.3598(b) provides that a permit "shall toll when construction is prevented by the [certain outlined] causes not under control of the permittee," not with the filing of a tolling notification relying on none of those, events as Craven claims. A permittee cannot avoid the consequences of its failure to diligently construct by filing a meritless tolling notification on the eve of its construction deadline and then fail to construct until staff advises it that its notification has been rejected.

⁷ See Tolling Request at 1-2. With respect to the antenna, Craven stated that: (1) it could not, as a government institution, order an antenna directly, but needed officials in the state's capital to initiate a bidding process; (2) bids received did not meet required specifications; (3) a company which Craven expected to submit a compliant bid missed the bidding deadline; and (4) state officials did not initiate a re-bidding process in time to place an order before the college closed for the Christmas holiday. *Id.*

⁸ See 47 C.F.R. § 73.3598(b); *Streamlining*, 14 FCC Rcd at 17541 ("rare and exceptional circumstances" beyond those specified in Section 73.3598(b) to justify tolling may warrant waiver of construction deadline).

⁹ See *May Decision* at 4, citing 47 C.F.R. § 1.65(a); *Texas Grace Communications*, Memorandum Opinion and Order, 16 FCC Rcd 19167, 19173 (2001); *Frederick Gauthier De Castro*, Letter, 22 FCC Rcd 5401 (MB 2007).

¹⁰ *Koor Communications, Inc.*, Letter, 23 FCC Rcd 13246, 13249-50 (MB 2008) ("*Koor*").

¹¹ *Id.* at 13249, citing *Streamlining*, 14 FCC Rcd at 17539.

3. Similarly, with respect to Craven's claimed delays in the equipment acquisition/bidding process which it characterized to have been "beyond its control" and accordingly justifying tolling, we reject Craven's argument that the Bureau should not have faulted it for not initiating the acquisition process until two years into the construction period had elapsed. Craven points out – correctly – that when a major event beyond a permittee's control, such as an "act of God," occurs, the Commission grants tolling looking forward from that event without looking back at or deducting time for anything that may or may not have occurred earlier in the construction period.¹² Such reasoning certainly holds for events, such as tornados and adverse litigation, which could not have been avoided through diligent planning. Where Craven's reasoning breaks down is its attempt to elevate ordinary construction tasks and risks – the effects of which can be mitigated by diligence and prudent planning – into valid tolling events under Section 73.3598(b). We fully expect that during the construction process, most permittees will experience some form of unanticipated delay over which they have no direct control. Such events might include, for example, winter weather, a more-lengthy-than-expected initial zoning process, and vendor/manufacturer/contractor problems. The Commission has stated, however, that such factors are not – given the expanded three-year construction period – so insurmountable that they excuse a party's lack of diligence in planning and implementation.¹³ Waivers of the construction period, if granted under such circumstances, would be so common that they could negate the underlying rule, undermining its objective of expediting service to the public.¹⁴ It was thus appropriate for the Bureau, in considering Craven's argument that antenna acquisition problems "beyond its control" prevented completion by the existing deadline, to take into account that Craven did not even begin that acquisition process until a substantial portion of the construction period had already elapsed. We observe, additionally, that we would expect a prudent permittee that knows it is subject to an external acquisition/bidding process requiring more time and coordination than a direct purchase, to compensate by taking steps within its control to initiate the process early in the construction period. The existence of an economic recession during the permit's early years is not a sufficient basis for its failure to have done so.

4. ACCORDINGLY, IT IS ORDERED that: (1) the Application for Review of Craven Community College IS DENIED, pursuant to section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and section 1.115(g) of the Commission's rules, 47 C.F.R. § 1.115(g).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹² Application for Review at 6 - 7, citing *Lauren A. Colby*, Letter, 21 FCC Rcd 1260 (MB 2006).

¹³ See *Streamlining*, 14 FCC Rcd at 17539-40; *Wendell & Associates*, Memorandum Opinion and Order, 17 FCC Rcd 18576 at 18580-81 (2002) (where permittee alleged that its inability to design and order an antenna was due to loss of a contractor for reasons beyond its control, the Commission looked beyond the alleged reason for the loss and determined that failure to construct was attributable instead to permittee's failure to take diligent actions). Craven's antenna delay is comparable to delays experienced by permittees that cannot construct while snow is on the ground. While a permittee may have no power to stop winter snowfall, it does have the ability to plan its construction activities to take advantage of seasonal construction opportunities and avoid potential seasonal impediments over the course of a three-year construction period. Thus, we reject Craven's assertion that the bidding process is a sufficient circumstance beyond its control preventing timely completion of construction. See generally *Streamlining*, 14 FCC Rcd at 17538-39.

¹⁴ See *Streamlining*, 14 FCC Rcd at 17539.