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*In Reply Refer to:*

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In re: **KCIY(FM), Helendale, CA**  
Centro de Intercesión y Adoración  
Internacional, Inc.  
Facility ID No. 176032  
File Nos. BLED-20131209WXR  
BNPED-20071022AIP

Dear Counsel:

This letter concerns: (1) Centro de Intercesión y Adoración Internacional, Inc.'s ("CIAI") application, filed December 9, 2013, for a license to cover for new noncommercial educational ("NCE") Station KCIY(FM) ("KCIY" or "Station"), Helendale, California;<sup>1</sup> and (2) CIAI's Construction Permit, issued December 8, 2010.<sup>2</sup> For the reasons set forth below, we find that CIAI's Construction Permit has expired by operation of law and is thereby forfeited.<sup>3</sup> We therefore dismiss CIAI's License Application as moot.<sup>4</sup>

**I. Background.**

On December 8, 2010, the Media Bureau ("Bureau") granted CIAI's application for a construction permit and established a construction deadline of December 8, 2013.<sup>5</sup> The Construction Permit specified an antenna height of 20 meters above ground level on a 60-meter tower.<sup>6</sup> On December

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<sup>1</sup> See File No. BLED-20131209WXR ("License Application").

<sup>2</sup> See File No. BNPED-20071022AIP ("Construction Permit").

<sup>3</sup> Upon expiration, broadcast permits forfeit automatically by operation of law. See 47 C.F.R. § 73.3598(e); 1998 Biennial Regulatory Review, Streamlining of Mass Media Applications – Streamlining of Mass Media Applications, Rules, and Processes, Report and Order, 13 FCC Rcd 23056, 23091 (1998) ("1998 Biennial Review").

<sup>4</sup> See 47 C.F.R. § 73.3566(a) (providing that "[a]pplications which are determined to be patently not in accordance with the FCC rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective and will not be accepted for filing...").

<sup>5</sup> See 47 C.F.R. § 73.3598(a); Construction Permit.

<sup>6</sup> See CIAI's FCC Form 340, Application for Construction Permit for Reserved Channel NCE Broadcast Station ("Construction Permit Application") at Section VII, Item 8 (answering "20 meters" in the field for "Height of Radiation Center Above Ground Level"); Item 6 (answering "60 meters" in the field for "Overall Tower Height Above Ground Level").

9, 2013, CIAI timely filed the License Application, certifying, *inter alia*, that KCIY was operating pursuant to automatic Program Test Authority (“PTA”), that it had fully met all the terms, conditions, and obligations in the Construction Permit, and that KCIY was constructed as authorized in its Construction Permit.<sup>7</sup>

On December 13, 2013, Enforcement Bureau field agents (“Agents”) drove to the vicinity of the Station’s authorized transmitter site to determine KCIY’s operational status. The Agents found that the KCIY signal was not detectable and ultimately determined that the Station was not broadcasting. Due to KCIY’s remote location, however, the Bureau requested that the Agents visit the authorized transmitter site to confirm their initial finding.

The Agents conducted a second field investigation on December 17, 2013, using a specialized vehicle to access the remote transmitter site. The Agents reported no evidence of radio station construction at the authorized site and observed that there were no electric power lines within several miles of the site. They also noted that the site was located in an area under the control of the Bureau of Land Management (“BLM”). The Enforcement Bureau later communicated with the BLM administrator who stated that the BLM had not authorized CIAI’s proposed construction and that such a request would have been denied because it is inconsistent with the BLM’s land use policies.

On April 10, 2014, the Bureau issued CIAI a letter of inquiry (“LOI”), directing it to provide within 30 days additional information about purported Station construction.<sup>8</sup> After multiple extensions of the deadline, CIAI ultimately submitted its response to the LOI on June 13, 2014.<sup>9</sup> In the LOI Response, CIAI states: “[t]he Station’s transmission facilities are not currently constructed.”<sup>10</sup> In response to the LOI’s request for evidence of CIAI’s authorization to construct its transmission facilities on BLM land, CIAI answers, “[t]here was no permission to operate on BLM land, and the operation only was temporary.”<sup>11</sup> In response to the Commission’s request that CIAI unequivocally affirm its License Application certification that the Station was operating pursuant to automatic PTA, CIAI states, “[t]he Station was operating pursuant to Automatic [PTA] at the time of certification.”<sup>12</sup>

CIAI appends a total of five declarations to its LOI Response: three by Rafael Porras (“Porras”), who purports to have constructed the Station, one by Antonio Perez (“Perez”), a pastor with CIAI, and one by Antonio Cesar Guel (“Guel”), the person who made the engineering certification on the License Application.<sup>13</sup> Of the three, only Porras claims personal knowledge of facts relating to the actual construction of the Station.<sup>14</sup>

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<sup>7</sup> See License Application at § I, Question 5; § II, Question 2; § III, Question 2, 5, and 7.

<sup>8</sup> See *Mr. Antonio Cesar Guel*, Letter (MB Apr. 10, 2014).

<sup>9</sup> See Letter to Raphael Sznajder from Dan J. Alpert (Jun. 13, 2013) (“LOI Response”).

<sup>10</sup> *Id.* at 3.

<sup>11</sup> *Id.* at 2.

<sup>12</sup> *Id.*

<sup>13</sup> We note that the declarations are made under penalty of perjury, but none is properly subscribed to as “true and correct.” See 47 C.F.R. § 1.16 (providing that unsworn declarations may be admitted as evidence in lieu of affidavits provided that they adhere substantially to the following form: “I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct”). See LOI Response at Attach. A, first declaration by Rafael Porras (“Porras Decl. 1”); second declaration by Porras (“Porras Decl. 2”); and at Attach. B, third declaration by Porras (“Porras Decl. 3”) (all dated May 30, 2014), declaration by Perez (“Perez Decl.”) (May 21, 2014), and declaration by Guel (“Guel Decl.”) (May 21, 2014).

<sup>14</sup> See LOI Response at Attachs. A - B, Porras Decls. 1, 2, 3..

Porras confirms that he was “in charge” of Station construction.<sup>15</sup> Porras recounts that in the first week of December, 2013, “we installed two pipes’ [sic] ten feet a side by side, we set up the antenna, we put the cable, generator, transmitter in to the small house and we used a Lap [sic] Top computer with a Verizon Hot Pot [sic] to receive internet connection and get the studio signal.”<sup>16</sup> According to Porras, on December 6, 2013, at approximately 5:00 pm, “Station KCIY-FM 91.7 FM was on the air... [t]ransmitting the signal from the studio located on 12555 Mariposa Rd., Victorville, CA 92394.”<sup>17</sup> He explains that, “[i]n that moment we apply for the Radio License.”<sup>18</sup> Guel executed the engineering certification in the License Application<sup>19</sup> and directed Mr. Alpert “to prepare the application to submit the license.”<sup>20</sup> The License Application was filed on December 9, 2013.<sup>21</sup> CIAI submits three photographs of KCIY’s facilities. None depicts a constructed station and only one specifically identifies KCIY.

However, Porras states that KCIY subsequently ceased broadcasting:

I received a call on the KCIY Studio during the morning time notifying that the station was off air and during the noon time I went to the place where we had the transmitter and I notify that the wind was tumble the tower. The antenna had considerable damage. We reconstruct the antenna and it was sending a reflector than more than 100 watts. Finally we ordered a new antenna.<sup>22</sup>

## II. Discussion

Under Section 319(b) of the Act, as amended (the “Act”), a construction permit “will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee.”<sup>23</sup> Section 73.3598(e) of the Rules (the “Rules”), which is promulgated pursuant to Section 319(b), provides that: “[a]ny construction permit for which construction has not been completed and for which an application for license has not been filed, shall be automatically forfeited upon expiration without any further affirmative cancellation by the Commission.”<sup>24</sup> The pertinent application form, FCC 302-FM, requires an applicant to certify that “all terms, conditions, and obligations set forth in the underlying construction permit have been fully met.”<sup>25</sup> Commission precedent makes clear that

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<sup>15</sup> *Id.* at Attach. B, Porras Decl. 3 at 2.

<sup>16</sup> Porras purports to have first visited the site in October, 2013, during which time he realized that the site was “without electricity and without [a] tower.” Porras claims that he then “bought a[n] electric generator and two pipes of ten feet and three inches...[and] bought a small dog house to keep the transmitter and the generator.” *Id.* at 1-2.

<sup>17</sup> *Id.* at 2.

<sup>18</sup> *Id.* at 2; Attach. A, Porras Decl. 1.

<sup>19</sup> See License Application at Section III (providing “I certify that I have prepared Section III (Engineering data) on behalf of the applicant, and that after such preparation, I have examined and found it to be accurate and true to the best of my knowledge and belief”); LOI Response at Attach. B, Guel Decl.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at Attach. H, Email from Mr. Alpert to Guel (Dec. 8, 2013).

<sup>22</sup> *Id.* at Attach. B, Porras Decl. 3 at 2.

<sup>23</sup> 47 U.S.C. § 319(b).

<sup>24</sup> 47 C.F.R. § 73.3598(e).

<sup>25</sup> *Id.* at Section 2, question 2.

construction of unauthorized facilities does not override automatic forfeiture of a permit pursuant to Section 73.3598(e).<sup>26</sup>

*Non-conforming facilities.* CIAI's submissions establish that its alleged construction was not executed in accordance with the terms of the Construction Permit. CIAI's Construction Permit authorized it to mount an antenna 20 meters above ground level, on a 60-meter-tall tower.<sup>27</sup> CIAI's submissions make clear that it did not do so. Accordingly, we find that CIAI's Construction Permit has expired by operation of law and has been forfeited.

*Temporary Construction.* We also find that the temporary nature of CIAI's alleged construction provides an independent and alternative basis for our decision. Assuming the veracity of Porras' account, the most generous interpretation of CIAI's ambiguous submissions would find the nonconforming Station to have been constructed, and was ready and able for operation from 5:00 pm on December 6, 2013, until sometime before December 11, 2013, when the Agents saw found nothing at the transmitter site.<sup>28</sup>

The Commission does not routinely license temporary initial broadcast facilities. It is evident that the Commission expects a permittee's constructed facilities to endure beyond the *de minimis* period necessary for it to file a license application. Commission precedent supports the statutory requirement that stations be, and remain, "ready for operation" before the expiration of a construction permit and filing of a covering license application. The Commission has held that, "implicit in the filing of any facility application is that the applicant stands 'ready, willing, and able' to construct and operate as proposed,"<sup>29</sup> and the Audio Division has reminded applicants of the continuing force of these obligations.<sup>30</sup> Licensing a facility which is dismantled shortly after a license application is filed or which is constructed without the site owner's permission or knowledge, is fundamentally inconsistent with this licensing principle. It would be incongruous to conclude that the filing of a license application relieves a permittee – at the very moment it is "ready" to operate – of the parallel obligation of being "able" to operate. As the Commission observed in *Pathfinder*, "[i]t is axiomatic that at the time a station files a license application and obtains [PTA]... that they have done so with the full intention of operating as such."<sup>31</sup>

The Commission's Rules requiring the maintenance, staffing, and public access to a station's main studio,<sup>32</sup> as well as for the maintenance of its transmission system,<sup>33</sup> also support the expectation that permittees construct facilities capable of providing continuous service to the communities they serve.

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<sup>26</sup> E.g., *Great Lakes Community Broadcasting, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 8239, 8245 (MB 2009).

<sup>27</sup> Construction Permit Application at Section VII, Items 6 and 8.

<sup>28</sup> The sequence of Porras' account suggests that he received notification that KCIY was off-air the very next morning, December 7, 2013, and thus that KCIY was on-air less than 24 hours.

<sup>29</sup> *Pathfinder Communication Corporation*, Memorandum Opinion and Order, 18 FCC Rcd 9272, 9279 (2003) ("*Pathfinder*").

<sup>30</sup> See, e.g., *Anthony T. Lapore, et al.*, Letter, 27 FCC Rcd 13214, 13219 (MB 2012).

<sup>31</sup> *Pathfinder*, 18 FCC Rcd at 9279.

<sup>32</sup> See 47 C.F.R. § 73.1125 (main studio rule); See also *Jones Eastern of the Outer Banks, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 3615 (1991), *clarified*, 7 FCC Rcd 6800 (1992), *aff'd* 10 FCC Rcd 3759 (1995) (interpreting the main studio staffing requirement).

<sup>33</sup> 47 C.F.R. § 73.1350 (transmission system operation rule); 47 C.F.R. § 73.1225 (station inspection by the FCC).

Mandated minimum operating schedules, which attach upon licensing,<sup>34</sup> and the obligation to have sufficient funding to operate for three months, without revenues, also promote this public interest goal of maintaining continuous service once operations commence.<sup>35</sup>

It has become apparent that some permittees, such as CIAI here, attempt to circumvent our strict enforcement of construction deadlines by erecting facilities, conforming or otherwise, with or without the site owner's permission — long enough only to file a license application before the underlying construction permit expires. We have previously found that a station not constructed in accordance with its permit cannot be declared "ready for operation" within the meaning of Section 319(b).<sup>36</sup> We clarify that temporary facilities also fail to satisfy this requirement, that in these circumstances "construction has not been completed,"<sup>37</sup> and thus, that associated construction permits are subject to automatic forfeiture.<sup>38</sup> Accordingly, we will not award licenses to permittees who have constructed temporary facilities.

The evidence from the LOI Response and from the Enforcement Bureau's field investigation conclusively demonstrates that CIAI's construction was not executed in accordance with the terms of the Construction Permit, and that any construction that did occur was unauthorized and temporary. Accordingly, we conclude that the Construction Permit expired by operation of law and is forfeited. The License Application will be dismissed as moot. As CIAI is no longer a permittee as of this date, we need not address character issues relating to the truth of the certifications in the License Application.

### III. Conclusion

Pursuant to Section 73.3598(e) of the Commission's Rules, the Construction Permit BNPED-20071022AIP for Station KCIY(FM), Helendale, CA, has EXPIRED BY OPERATION OF LAW on December 9, 2013, and is hereby FORFEITED. Accordingly, pursuant to Section 73.3566(a) of the Commission's Rules, IT IS ORDERED that CIAI's pending License Application BLED-20131209WXR for Station KCIY(FM), Helendale, CA, IS DISMISSED as moot, with the result that CIAI must terminate any operations thereon and the associated call sign will be deleted.

Sincerely,



Peter H. Doyle  
Chief, Audio Division  
Media Bureau

<sup>34</sup> 47 C.F.R. § 73.1740(b) (minimum operating schedule for commercial services); 47 C.F.R. § 73.561(a)-(d) (minimum operating schedule for NCE service) (requiring all NCE FM stations "to operate at least 36 hours per week, consisting of at least 5 hours of operation per day on at least 6 days of the week").

<sup>35</sup> See FCC Form 301 at 2 (providing, "[a]ll applicants for new broadcast facilities must have reasonable assurance of committed financing sufficient to construct the proposed facility and operate it for three months without revenue at the time they file the FCC Form 301") (citations omitted).

<sup>36</sup> *Clear Channel Broadcast Licenses, Inc.*, Letter, 21 FCC Rcd 8677, 8680 n.30 (MB 2006).

<sup>37</sup> 47 C.F.R. § 73.3598(e).

<sup>38</sup> See *Perez v. Mortgage Bankers Ass'n*, 135 U.S. 1193, 1206 (2015) (agency not required to use notice-and-comment procedures when reinterpreting rule, overruling *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (1997)).