

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

In re Application of )  
 )  
Craven Community College ) File No. BPED-20150601AFB  
 )  
For modification of the facilities of )  
Noncommercial educational FM )  
Station WZNB(FM), New Bern, North Carolina )  
FCC Facility ID No.94050 )

TO: Marlene H. Dortch, Secretary

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

**PETITION FOR RECONSIDERATION**

Harry F. Cole  
Anne Goodwin Crump

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

August 7, 2015

1. Craven Community College (“Craven”) hereby seeks reconsideration of the dismissal of the above-captioned application for minor modifications to the facilities of noncommercial educational FM Station WZNB(FM), New Bern, North Carolina. As demonstrated in detail below, the purported basis for that dismissal, which was set forth in a letter (“Dismissal Letter”) from the Audio Division (“Division”), dated July 7, 2015<sup>1</sup>, was plainly erroneous. According to the Dismissal Letter, Craven’s application was mutually exclusive with a construction permit, File No. BMPED-20150529AAB, for Station WGHW(FM), Lockwoods Folly Town, North Carolina. But that permit – actually a modification of a permit first granted in 2011, with an expiration date of 3:00 a.m., May 30, 2015 – had expired prior to the submission of Craven’s application. Any contrary assertion raises disturbing questions about the manner in which the Division apparently is choosing to ignore relevant rules, precedent and due process in its treatment of the Station WGHW(FM) application.

#### **Background**

2. The validity *vel non* of the dismissal of Craven’s application hinges on the Division’s assertion that the WGHW permit had not expired as of June 1, 2015.

3. The story of the WGHW permit begins four years ago, when Church Planters of America (“Planters”) was granted a permit (File No. BPED-20110211AAK) for modification of the facilities of Station WGHW. After some minor tolling, that permit was set to expire at 3:00 a.m. on May 30, 2015. The facilities specified in that permit were never built. Instead, in April, 2015 – more than three years from the initial grant and less than two months from the expiration date – Planters filed an application (File No. BMPED-20150402AAT) seeking

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<sup>1</sup> A copy of the letter is included as Attachment A hereto. The dismissal was reflected in a public notice, Broadcast Actions, Report No. 48528, released July 10, 2015, at page 2. This petition is therefore timely.

modification of those facilities; that application was granted two-three weeks later. The May 30, 2015 construction deadline remained in place.

4. On May 26, Planters filed an application (File No. BLED-20150526ACF) for a license to cover the modified permit. In that application Planters duly certified that “all terms, conditions, and obligations set forth in the underlying construction permit ha[d] been fully met”. Planters’ engineer similarly attested, in a document described by Planters as an “Engineer Affidavit”, that “it appear[ed] that the station’s antenna installation me[t] the terms” of the construction permit.

5. But those representations were unquestionably wrong.

6. Elsewhere in its application Planters made the startling admission that the facilities which it had constructed were *NOT* the facilities that had been authorized:

DURING CONSTRUCTION, IT WAS DISCOVERED THAT THE PROPOSED ANTENNA ARRAY WOULD NEED TO BE MOVED UP APPROXIMATELY 20 FEET TO ALLOW ENOUGH SPACE BETWEEN EXISTING ANTENNAS. A CONSTRUCTION PERMIT SHOWING THIS CHANGE WILL BE FILED AS SOON AS THE MINOR CHANGE FREEZE EXPIRES. ALL EXHIBITS FOR THE SPECIAL OPERATING CONDITIONS ARE USING THE ACTUAL CONSTRUCTED HEIGHT OF THE STATION. ONCE A CP MOD IS FILED, THIS LICENSE APPLICATION WILL BE MODIFIED TO DIRECT TOWARDS THAT APPLICATION.

*See* BLED-20150526ACF. Since the facilities that had been built were not those which had been authorized, Planters’ license application was fatally flawed. Craven expressly brought this problem to the Division’s (and Planters’) attention in a “Petition to Dismiss Or, In The Alternative, Informal Objection” filed with respect to that license application on May 28, 2015.

7. In that Petition Craven noted Planters’ reference (in the passage quoted above) to its plan to file “a construction permit [application] showing th[e] change” in its facilities; Craven explicitly alerted the Division and Planters that

For the record, Craven hereby advises the Commission and Church Planters that, in the event Church Planters attempts to file such a modification application, Craven intends to formally oppose that application at the earliest possible time.

Craven Petition at 4, n. 2.

8. The status of Planters' construction of the facilities specified in its permit was and is crucial here. Since that permit was set to expire at 3:00 a.m. on May 30, Planters was required to have completed construction of the facilities specified in that permit prior to that time. Failure to do so would result in the automatic expiration – and cancellation – of the permit.

9. It is well-established that installation of an antenna at a height other than that authorized in a permit (subject to very limited variances not relevant here, *see* Section 73.1690(c)(2)) does *not* constitute completion of construction. *E.g.*, *Danny Danhauser*, 22 FCC Rcd 8391 (Audio Division 2007).<sup>2</sup> In other words, the mere fact that Planters had constructed some facilities as of May 26 was immaterial, because those facilities did not conform to the specifications of the permit that was scheduled to expire at 3:00 a.m. on May 30. That left Planters with only two practical alternatives if it wanted to preserve its permit: (1) it could have relocated its antenna to a height on the tower in conformity with the permit; or (2) it could attempt to modify its permit to conform to the height at which the antenna had actually been installed.<sup>3</sup> Since, apparently, the first alternative was not an option, Planters had to resort to the latter, as it had indicated in its May 26 license application.

10. In view of Planters' stated plan to file a further modification application, Craven checked CDBS repeatedly from Thursday, May 28 through Friday, May 29. Undersigned counsel

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<sup>2</sup> Indeed, unauthorized installation of antennas is "strictly prohibited". *E.g.*, *Saver Media, Inc.*, DA 14-1099 (Audio Division 2014).

<sup>3</sup> As will be discussed in the text, below, the fact that seeking a modification was a practical alternative does not necessarily mean that it was a legal one.

saw no entries on CDBS reflecting the filing, much less acceptance, of any such application prior to 5:30 p.m. – the Commission’s routine closing time, *see* Section 0.403 of the Commission’s rules – on May 29.

11. At approximately 7:00 p.m. on May 29, however, we noted that CDBS was then showing acceptance of a modification application (BMPED-20150529AAB) for Station WGHW. Less than an hour later Craven electronically filed a “Petition to Dismiss Or, In The Alternative, Informal Objection” directed to that modification application. Nevertheless, the application was granted on May 29. Word of that grant quickly made it down to Planters, which then filed a separate covering license application later on May 29 (even though it had originally represented that it planned simply to amend its May 26 license application). Meanwhile, Craven’s petition remains pending.

12. Had Planters’ May 29 modification application not been granted on May 29 – or if the permit that was thereby issued were to be rescinded – Planters’ original permit would have expired at 3:00 a.m. on May 30 and that would have been that. But the Division is apparently taking the position that the May 29 modification application could and should have been granted on May 29 and that no basis for its rescission has been presented. Craven disagrees.

#### **Discussion**

13. From any perspective, the Division’s grant of Planters’ May 29 modification application and its subsequent failure to rescind that grant are counter to the Communications Act, the Commission’s rules and precedent, fundamental due process and common sense.

14. As an initial matter, the approach taken here by Planters is precisely the approach that Section 319(a) of the Communications Act was designed to prevent. Section 319(a) generally requires that an applicant obtain a permit *before* it proceeds with construction of communications facilities. Congress’s goal was to prevent applicants from proceeding, without prior authorization,

to construct facilities, and then using that prior construction as a basis for pressuring the Commission to grant the permit and thereby authorize the construction *post hoc*. E.g., *Patton Communications Corporation*, 81 FCC2d 336 (1980); *Saver Media, Inc., supra*.

15. Recognizing that it did not have authority to install its antenna where it wanted to, Planters went ahead anyway, presumably in the hope that that construction, coupled with the fast-approaching expiration date of the permit that Planters did hold, would induce the Commission's staff to accommodate Planters' needs. That is precisely what Congress sought to prevent.

16. And the staff proved to be extraordinarily accommodating, notwithstanding Section 319(a). According to a search of CDBS, of all the broadcast applications filed on May 29, 2015, Planters' was the only one to be accepted on that day. And, perhaps even more telling, Planters' was the only application filed that day that happened to be granted on that very same day. How does an applicant who has admitted engaging in unauthorized construction rate such same-day service when, apparently, no other applicant did?

17. And this was no ordinary service! According to Craven's observation based on repeated visits to CDBS, Planters' May 29 modification application wasn't accepted until sometime after the Commission's offices officially closed their doors for the day. And still later that evening the application was granted. Same-day after-hours service, on a Friday evening, to insure acceptance and grant of an application whose sole purpose was to spackle over admitted involvement in an activity (*i.e.*, unauthorized installation of an antenna) that the staff itself has characterized as "strictly prohibited". See *Saver Media, Inc., supra*.

18. Such accommodation flies in the face of Section 319(a) of the Act.

19. That accommodation is particularly extraordinary in view of the fact that Planters' application was incomplete. According to the Instructions to Form 340, applicants for minor modifications (such as Planters in this case) are required to respond to, *inter alia*, Items 18 and 19

of Section II. Planters failed to do so, and offered no explanation for – nor even an acknowledgment of – its failure. Of course, Section 73.3514 of the Commission’s rules requires that “[e]ach application shall include all information called for by the particular form.” Despite the fact that Planters’ May 29 modification application did not in fact include all the information called for by the form, the staff granted it. Since when has it been the Division’s routine practice to waive that requirement, *sua sponte* and without explanation?

20. The Division’s unseemly rush to grant Planters’ application prevented the staff from learning that the directional antenna values provided by Planters (in Section VII, Question 12) very likely bear no relationship to the antenna’s likely actual performance. That’s because, as Craven demonstrated – photographically<sup>4</sup> – to the Commission the next business day after the Planters application was filed (and accepted, and granted), a portion of a four-bay dipole antenna mounted on the same tower as the WGHW antenna is located directly in the aperture of the WGHW antenna.

21. The presence of that second antenna is of critical importance. As the Commission is aware, the installation of metal elements in proximity to a radiating antenna will ordinarily alter that antenna’s radiating pattern. *See, e.g., Station KFWR(FM), DA 15-361* (Audio Division, released March 23, 2015). That, after all, was the reason that Planters could not install its own antenna where it had originally proposed to do so: the presence of a panel antenna (used by Station WMYT) made such installation problematic.<sup>5</sup> So Planters opted, without Commission

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<sup>4</sup> *See* Craven’s “Petition To Dismiss Or, In The Alternative, Informal Objection”, filed June 1, 2015 with respect to Planters’ second covering license application, File No. BLED-20150529ADI.

<sup>5</sup> Indeed, the presence of the WMYT antenna resulted in a condition requiring that Church Planters provide a statement confirming that the WGHW antenna would have no adverse effect on WMYT’s directional pattern. *See also* Section 73.316(c)(2)(vi), requiring that a license application relative to a directional antenna include confirmation that “that no other antenna of any type is mounted on the same tower level as a directional antenna, and that no antenna of any type is

authorization, to move its antenna higher up on the tower to avoid the WMYT panel antenna. But in so doing, Planters neglected to alert the Commission to the fact that the WGHW antenna's new location resulted in a significant overlap with the previously undisclosed four-bay dipole antenna. In view of that overlap, the directional antenna values provided in Planters' modification application are dubious at best.<sup>6</sup>

22. To recap: Planters failed to construct its station for more than four years. With less than two months left on its tolling-extended permit, it proposed a new location. But Planters apparently hadn't done its homework, because the antenna height it specified was not available – a fact that should have been apparent with the exercise of even minimal diligence. But Planters seems not to have realized the problem until it attempted to install its antenna with, at most, a couple of weeks to go before its permit expired. Faced with the fact that its permit did not authorize the only construction available to it, Planters proceeded to install its antenna at an unauthorized height, in plain violation of Section 319(a) and extensive Commission precedent. Planters' only hope of legitimizing its unauthorized construction was to file a further modification application, which it did less than 24 hours prior to the expiration of its permit. But that application omitted essential information and, as it turned out, failed to acknowledge that another antenna intrudes into its directional antenna's aperture. That failure would be striking in any event; it is even more so in view of the fact that, thanks to the condition on its permit highlighting the potential problem posed by other antennas on the tower, Planters should have been acutely aware

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mounted within any horizontal or vertical distance specified by the antenna manufacturer as being necessary for proper directional operation.”

<sup>6</sup> As discussed in Craven's Petition to Deny Planters' second covering license application (File No. BLED-20150529ADI, other aspects of Planters' antenna installation on the tower further undermine the reliability of Planters' directional antenna values.



of that problem when it decided on its own to relocate its antenna. It is presumably possible that Planters' failure to mention the four-bay dipole antenna in its May 29 application was simply the result of hopeless carelessness. But the circumstances suggest that it as likely could have been a willful omission intended to avoid any concerns that might otherwise have caused the staff to hold off on granting the application the day it was filed, a turn-around time necessary to preserve the permit.

23. It is hard to imagine a case less worthy of Commission leniency. And yet, ignoring Planters' obvious lack of diligence, its unauthorized construction, its later-than-last-minute modification application and its failure to complete the necessary form, the staff afforded Planters after-hours, same-day service on a Friday in an apparent effort to give Planters what it wanted.

24. Making this situation even more extraordinary is the fact that the Division's staff was aware of Craven's opposition to Planters' initial license application (in which Planters admitted its unauthorized construction). And the staff was equally aware of Craven's intent to oppose any follow-up modification that Planters might file seeking *post hoc* ratification of that construction. And Craven acted on that intent within an hour of first learning that Planters' modification had been filed, even though that occurred after regular business hours.

25. These circumstances raise legitimate questions about the propriety of the Division's conduct here. How, after all, did Planters' modification application happen to be accepted – and its filing reflected on CDBS – only after regular business hours? And why, in view of Planters' undeserving circumstances, was that application granted so precipitously, particularly when the staff was aware of Craven's intent to oppose the application? And how did Planters happen to learn of the after-hours grant so that it could file its second license application during the evening of May 29? A reasonable observer could easily conclude from this scenario that a concerted effort was made to prevent Craven (or anybody else, for that matter) from learning of the filing (and

acceptance) of the Planters application until *after* the application had been granted. And when Craven did learn that the application had been filed and did promptly file its opposition, the staff chose to ignore it even though it was filed on the same day as the application and, therefore, could not have been more timely.

26. The deck clearly appears to have been stacked against Craven. As a matter of basic due process, an agency should not be in the business of deck-stacking in any event. But this case presents an even more powerful argument against such a practice. As demonstrated above, Planters' circumstances provide not a single basis for leniency. To the contrary, Planters was non-diligent every step of the way – it failed to construct for more than four years, it waited until less than two months remained on its permit before it proposed a site relocation, it failed to determine what height its new site could accommodate, it failed to complete its application, it failed to advise the Commission of another antenna located in its aperture on the tower.<sup>7</sup> All of those circumstances could have been avoided through simple diligence. None of them were.

27. Craven appreciates the willingness of the staff to assist regulatees in the achievement of their plans. And Craven does not want to discourage after-hours, same-day service because, sometimes, such service is regrettably necessary – and much appreciated – because of factors beyond the applicant's control. But if the staff is willing to provide that kind of service to applicants in Planters' shoes, it must be prepared to provide it to everybody under any circumstance. Having set the bar as low as it has in Planters' case, the staff cannot legitimately refuse even a marginally diligent applicant similar treatment.


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<sup>7</sup> Despite the fact that Craven has filed two separate petitions addressing these issues, Planters has chosen not to respond at all.

28. But to do so here would run counter to the Act, the rules, precedent, due process and common sense. If the staff declines to rescind the dubious after-hours grant of Planters' permit, the staff will, as a practical matter, be committing itself to a regulatory approach rife with subjectivity and gamesmanship. Craven believes that such an approach is wrong as a matter of law and plainly undesirable as a matter of policy and practice. The necessary and proper course here would be to acknowledge that the grant of Planters' modification application was an unfortunate error that can be corrected by the rescission of that grant. Rescission of the grant would leave in place Planters' modified permit granted in April, 2015 – but that permit expired at 3:00 a.m. on May 30, at which point the facilities specified therein had not been constructed. As a result, that permit expired and does not stand as a bar to Craven's above-captioned application.

WHEREFORE, for the reasons stated, the dismissal of the above-captioned application should be reconsidered and that application should be reinstated, *nunc pro tunc*, and granted forthwith.

Respectfully submitted,

/s/ Harry F. Cole   
 Harry F. Cole  
 Anne Goodwin Crump

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

*Counsel for Craven Community College*

August 7, 2015

**Attachment A**

FEDERAL COMMUNICATIONS COMMISSION  
445 12<sup>th</sup> STREET SW  
WASHINGTON DC 20554

JUL 07 2015

MEDIA BUREAU  
AUDIO DIVISION  
APPLICATION STATUS: (202) 418-2730  
HOME PAGE: WWW.FCC.GOV/MB/AUDIO

PROCESSING ENGINEER: Rudy Bonacci  
TELEPHONE: (202) 418-2722  
FACSIMILE: (202) 418-1410  
MAIL STOP: 1800B3  
INTERNET ADDRESS: rodolfo.bonacci@fcc.gov

Craven Community College  
800 College Court  
New Bern, NC 28562

In re: WZNB(FM), New Bern, NC  
Facility ID No. 94050  
Craven Community College  
BPED-20150601AFB

Dear Applicant:

This letter refers to the above-captioned minor change application to modify the directional antenna pattern, effective radiated power, and antenna height.

An engineering study of the application reveals that it is in violation of 47 C.F.R. § 73.509 with respect to the co-channel Class A construction permit (BMPED-20150529AAB) for WGHW(FM), Lockwoods Folly Town, NC.<sup>1</sup> Specifically, the proposed protected contour (60 dBu) would receive prohibited overlap from the interfering contour (40 dBu) of WGHW. Furthermore, the proposed interfering contour (40 dBu) would cause prohibited overlap to the protected contour (60 dBu) of WGHW. This constitutes an acceptance defect.

In light of the above, Application BPED-20150601AFB is unacceptable for filing pursuant to 47 C.F.R. § 73.3566(a) and is HEREBY DISMISSED. This action is taken pursuant to 47 C.F.R. § 0.283.

Sincerely,



Rodolfo F. Bonacci  
Assistant Chief  
Audio Division  
Media Bureau

cc: Harry F. Cole (via email)  
Daniel G. Ryson (via email)

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<sup>1</sup> In Exhibit 17, Statement A, Footnote 3 states that "For purposes of this study and application, WGHW Applications for Construction Permit (including BPED-20110211AAK, BMPED-20150402AAT, BMPED-20150529AAB) were presumed to have expired..." WGHW's construction permit had an expiration date of May 30, 2015. However, on May 29, 2015, WGHW filed a timely license application BLED-20150529ADI. Therefore, WGHW's construction permit did not expire and WZNB's presumption is incorrect. Finally, although there are pleadings pending against this license application, absent a dismissal of the license application and cancellation of the construction permit, WGHW's construction permit requires protection.

**CERTIFICATE OF SERVICE**

I, Harry F. Cole, hereby certify that I caused copies of the foregoing "Petition for Reconsideration" to be electronically mailed as indicated below on this 7th day of August, 2015:

Peter Doyle, Chief, Audio Division  
Media Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554  
**E-mail: [Peter.Doyle@fcc.gov](mailto:Peter.Doyle@fcc.gov)**

Rodolfo Bonacci  
Media Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554  
**E-Mail: [Rodolfo.Bonacci@fcc.gov](mailto:Rodolfo.Bonacci@fcc.gov)**

Courtesy copies:

Joseph A. Wells, III  
Church Planters of America  
6690 NC 8 Hwy South  
Germanton, NC 27019  
**E-Mail: [JoeyandKimWells@GMail.com](mailto:JoeyandKimWells@GMail.com)**

Joshua S. Hawkins  
Church Planters of America  
6704 NC 8 Hwy South  
Germanton, NC 27019  
**E-Mail: [OldPaths1611@GMail.com](mailto:OldPaths1611@GMail.com)**

  
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Harry F. Cole