ORIGINAL

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

In re Application of	)	
	)	
Church Planters of America	)	File No. BLED-20150526ACF
	)	
For license to cover a construction permit (File No. BMPED-20150402AAT) for noncommercial educational FM Station WGHW, Facility ID No. 89986, Lockwoods Folly Town, North Carolina	)	
For modification of File No. BPED-20110211AAK for Station WGHW	)	File No. BMPED-20150529AAB
	)	NAL/Acct No. MB-201641410004
	)	FRN:0003780525
and	)	
	)	
Craven Community College	)	File No. BPED-20150601AFB
	)	
For modification of the facilities of noncommercial educational FM Station WZNB, New Bern, North Carolina, Facility ID No. 94050	)	

To: Marlene H. Dortch, Secretary

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

PETITION FOR RECONSIDERATION

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SUMMARY

In a seemingly enthusiastic effort to ensure that a fast-expiring construction would avoid expiration, the staff of the Audio Division accorded the captioned applications of Church Planters of America ("Church Planters") extraordinary treatment. This occurred notwithstanding the fact that Craven Community College ("Craven") had formally objected to one of those applications and placed the Commission, and Church Planters, on notice that it would formally object to the other at the earliest possible time. True to its word, Craven did so within an hour of learning (at approximately 7:00 p.m., when acceptance was first posted on CDBS) of the acceptance of the crucial modification application which had to be filed, accepted and granted in a single day. The application was granted nevertheless.

The Memorandum Opinion and Order and Notice of Apparent Liability (MO&O/NAL) of which reconsideration is hereby sought appears designed to suggest that the processing of Church Planters' applications was simply business as usual. As far as Craven can tell, it was anything but.

The self-servingly truncated description of the surrounding circumstances provided in the MO&O/NAL fails to acknowledge that the modification application was apparently taken out of the processing queue specially, accepted for filing after the close of the Commission's regular business hours (or, at least, its acceptance was not posted on CDBS until after hours), and then granted, apparently in less than an hour after acceptance was posted. This same-day service was provided even though: Church Planters had acknowledged that it had violated Section 319 of the Communications Act by engaging in unauthorized construction (its modification application was intended to spackle over that pesky problem); Church Planters' modification application was incomplete as filed (and remains incomplete); and Church Planters' actual antenna installation

was not in any event as originally proposed or as described by Church Planters. And, consistent with its astonishingly lenient approach, the MO&O/NAL purports to penalize Church Planners with a fine based, first, on an inaccurate reading of the Commission's own rules and, secondly, on supposedly mitigating factors that are, at best, risible – while totally ignoring plainly proscribed misconduct by Church Planners that would itself ordinarily warrant severe penalty.

It is well-established that, while the Commission may waive its rules and procedures, it may not do so arbitrarily. To the contrary, special treatment is to be accorded only as warranted by "special circumstances" – and, most importantly, those special circumstances must be articulated and explained. *E.g.*, *NetworkIP v. FCC*, 548 F.3d 116 (D.C. Cir. 2008). Here, the MO&O/NAL seems to pretend that the Audio Division's treatment of Church Planters' applications was nothing but business as usual and, presumably based on that flawed notion, it offers no explanation for the "special circumstances" that justified the same-day/after-hours acceptance and grant of Church Planters' incomplete and inaccurate modification application.

But there is ample reason to believe that the Division's treatment deviated extraordinarily from the treatment ordinarily accorded to applicants.

If the treatment accorded to Church Planters was indeed totally conventional, the Division should so state, expressly, so that any and all similarly situated regulatees will be able to avail themselves of similarly generous treatment. But if Church Planters was accorded special treatment, the Division must set out the factors justifying that special treatment. Since it has not done so, its decision must be reconsidered.

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1. Craven Community College ("Craven") hereby petitions for reconsideration[1] and reversal of the Memorandum Opinion and Order and Notice of Apparent Liability, DA 16-411, released April 15, 2016 ("MO&O/NAL") by the Audio Division ("Division") in the above-captioned matter. As set forth below, the MO&O/NAL fails to explain and justify extraordinary deviations from the Commission's standard operating procedures and rules. As a long line of judicial decisions makes clear, such unexplained and unjustified deviations are not permitted. Accordingly, the MO&O/NAL should be reconsidered and reversed, the grants of the above-captioned applications of Church Planters of America ("Church Planters") must be rescinded, and the construction permit (BPED-20110211AAK) must be declared to have expired as of its expiration time and date (*i.e.*, 3:00 a.m., May 30, 2015). Further, Craven's above-captioned application, which was dismissed because of the supposed vitality of Church Planters' permit, should be reinstated *nunc pro tunc*.

Background

2. Since 2011, Church Planters had held a construction permit (BPED-20110211AAK) authorizing certain modifications to the facilities of Station WGHW(FM).[2] That permit was set to expire at 3:00 a.m. on Saturday, May 30, 2015. In other words, Church Planters

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[1] While the MO&O/NAL purports to dispose of previous Craven "petitions for reconsideration", in fact it addresses at least two informal objections which the Division has opted to treat as seeking reconsideration. The MO&O/NAL thus represents the first disposition of Craven's arguments by the Division, and Craven understands that it is entitled – indeed, obligated, to the extent that the MO&O/NAL gives rise to arguments not previously available to Craven – to seek reconsideration as an initial matter.

[2] It is important to recognize that rescission of the Church Planters permit in question will ***not*** result in the loss of the station's license. The permit at issue here merely sought modification of the licensed facilities of Station WGHW; thus, rescission of that permit would simply return the station to its original facilities.

had to complete construction of those modified facilities and submit its covering license application before 3:00 a.m. on Saturday, May 30.

3. Having sat on the permit for more than four years, on April 2, 2015 – slightly less than two months before its expiration – Church Planters applied to modify the transmitter site specified in the permit. That application was promptly (*i.e.*, in less than three weeks) granted on April 20, 2015, leaving Church Planters nearly six weeks within which to construct.

4. More than five weeks later, and a scant three days before the effective deadline for its license application, on May 26, 2015, Church Planters filed an application (File No. BLED-20150526ACF) ("First License Application") for a license to cover the April 20 permit. In that license application Church Planters expressly certified, in response to Section II, Paragraph 2, that "all terms, conditions, and obligations set forth in the underlying construction permit ha[d] been fully met." In response to Section III, Paragraph 7, it expressly certified that "[t]he facility was constructed as authorized in the underlying construction permit or complies with 47 C.F.R. Section 73.1690."

5. Both of those certifications were materially false.

6. As it turns out, for some reason that Church Planters has yet to share with the Commission, Church Planners apparently failed to notice that the position on the tower which it had specified in its April, 2015 permit application was blocked by other antennas already installed on the tower. As a result, the terms of the resulting construction permit could not in any event be met. Notwithstanding that, in its First License Application Church Planters repeatedly, and falsely, certified that the facilities it had constructed were as authorized in its permit.

7. Church Planners has addressed neither how it happened to propose an unavailable antenna height nor when (or how) it became aware of that non-availability. Presumably Church

Planters recognized the problem no later than when it sought to install its antenna at the height specified in its permit and found that position to be unavailable. When that realization occurred, it was incumbent on Church Planters to cease installation efforts, apply for a modified construction permit specifying the correct height, and *only after that modification had been approved*, proceed to install its antenna. Church Planters chose not to follow that course.

8. Instead, it went ahead with installation of its antenna at the unauthorized height, in plain violation of Section 319(a) of the Communications Act and, having done so, filed its First License Application.

9. In that application, after falsely certifying that its construction fully met the terms of its permit, Church Planters, in a statement titled "Changes During Construction", acknowledged that its antenna had had to "be moved up approximately 20 feet to allow enough space between existing antennas". It promised to file for modification of its construction permit — but, in the meantime, it asserted that "all exhibits for the special operating conditions are using the actual constructed height of the station."

10. That assertion also wasn't true. Church Planters' permit required a proof of performance based on tests reflecting "all appurtenances" on the tower. The proof included with the First License Application was made using a model of a single bay of the two-bay antenna that had been authorized. That would have been permissible had the installation of both bays been identical. But they weren't. As Craven demonstrated with photographic evidence, a portion of a four-bay dipole antenna was located directly in the aperture of the lower bay of Church Planters' antenna. So the two bays were not identically situated, and the proof was therefore invalid. Of course, the Commission could not have known that unless Church Planters had provided an accurate depiction of the antenna installation – which it didn't.

11. The submission of the First License Application became a matter of public knowledge when it was accepted for filing on May 27, the day after it was filed. On May 28, Craven formally objected to the First License Application, pointing out that Church Planters had concededly engaged in conduct that was strictly prohibited. In its objection, Craven noted that any effort by Church Planters to seek *post hoc* approval of its malfeasance through the submission of an after-the-fact modification application would be plainly inappropriate. Craven expressly advised the Commission and Church Planters that, should Church Planters submit such an application, Craven would formally oppose it at the earliest possible time.

12. Let us remind ourselves of the bind that Church Planters was in. It had to complete construction of its authorized facilities ***and*** file a license application prior to 3:00 a.m. on May 30. But since it could not construct its previously authorized facilities (thanks to the unavailability of the specified antenna height), it also had to file for and obtain a construction permit specifying an antenna height that *was* available; only after that permit had been granted would it be able to file the necessary covering license application. And, because of an auction-related freeze on modification applications[3], Church Planters could not submit such an application until May 29 at the earliest.

13. So, having violated the Communications Act and having made multiple false certifications in its First License Application, Church Planters had to file its permit modification application, get that application granted, and then file a second license application ***all on May 29*** – otherwise, its permit would expire. And bear in mind that, in addition to the formal opposition which Craven had filed relative to the First License Application, the Commission and Church

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[3] Church Planters should not have been surprised about the freeze, which precluded the submission of minor modification applications for FM stations from May 18-28, 2015. The Commission had announced that freeze on April 22, 2015. *See* DA 15-454.

Planters had been expressly advised of Craven's intention to oppose any further modification application at the earliest possible time.

14. This is where things get particularly interesting.

15. Both undersigned counsel and Craven's consulting engineer repeatedly visited CDBS throughout May 29 in order to learn of the filing of any Church Planters application at the earliest possible time. By 5:30 p.m., *i.e.*, the close of the Commission's business day, *see* Section 0.403, CDBS showed no such application as having been filed.

16. Nevertheless, out of an excess of caution we continued to monitor CDBS and, sure enough, shortly before 7:00 p.m. CDBS reflected the acceptance of a modification application filed for WGHW at some point on May 29.[4] Having not had any notice of or access to that application prior to that time, we reviewed it promptly and, at 7:58 p.m. on May 29 – approximately one hour after the filing of the application been made public and the application itself had become available for public review – Craven submitted a formal objection to Church Planters' May 29 modification application.

17. Notwithstanding Craven's objection, Church Planters' May 29 modification application was granted on May 29, despite the fact that Church Planters had failed to respond to two of the questions in the form. Notice of the grant appeared on CDBS by approximately 8:00 p.m. on May 29. Having learned of that action at some point, Church Planters thereupon filed a second license application late on the evening of May 29.

18. On June 1 Craven formally objected to Church Planters' second license application.

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[4] Craven notes that the May 29 modification application was omitted from the caption of the MO&O/NAL, even though the order purports to dispose of, *inter alia*, Craven's objection to that application. Craven has added the application to the caption of this petition.

19. For its part, Church Planters has never responded to any of Craven's pleadings, nor did it ever request any waivers for the shortcomings in its applications.

The Audio Division's Decision

20. In the MO&O/NAL, the Division provides a self-servingly truncated recitation of some, but not all, of the circumstances described above. It then cursorily dismisses Craven's various arguments with the back of the regulatory hand, even while acknowledging not only Church Planters' violation of Section 319(a), but also the fact that the processing of its May 29 modification application had been flawed. It also suggests that, as Craven had demonstrated, Church Planters' antenna installation differed substantially from the installation as described by Church Planters.

21. The MO&O/NAL recites that the May 29 modification application was granted prior to the filing of Craven's formal objection thereto, but it stops well short of addressing the precise timing of those events. It adopts essentially a "nothing to see here, folks" characterization of the situation, dismissing Craven's objections in a few short sentences.

22. But, even while pooh-poohing those objections, the MO&O/NAL acknowledges that Church Planters did violate Section 319, that it did fail to file a complete modification application, and that its actual antenna installation apparently varied from that which Church Planters had described. In other words, Craven was correct on all those points – but for some unexplained reason, the Division has deemed it appropriate to affirm the grant of the modification application and, in turn, to grant the second license application.

Discussion

23. The Commission, and its staff, have substantial discretion in their conduct of agency business. They can prioritize the various items on their agenda for processing. They can

waive their own rules on their own motion. *See* Section 1.3. They can select from a wide range of sanctions for violations of their rules.

24. But this discretion, while broad, is not unfettered. To the contrary, when the Commission deviates from its usual rules and procedures, it must both "explain why deviation serves the public interest, and articulate the nature of the special circumstances [warranting the deviation] to prevent discriminatory application and to put future parties on notice as to its operation". *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). As the U.S. Court of Appeals for the D.C. Circuit has explained,

> [t]he reason for this two-part test flows from the principle "that an agency must adhere to its own rules and regulations," and "[a]d hoc departures from those 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." [Citation omitted] … The power to waive [rules] is substantial, because it allows an agency to decide which meritorious claims get considered. The inverse is true too – the power to waive allows an agency to decide which otherwise liable parties are off the hook.
>
> The criteria used to make waiver determinations are essential. If they are opaque, the danger of arbitrariness (or worse) is increased. Complainants the agency "likes" can be excused, while "difficult" defendants can find themselves drawing the short straw. If discretion is not restrained by a test more stringent than "whatever is consistent with the public interest (by the way, as best determined by the agency)," then how to effectively ensure power is not abused? The "special circumstances" requirement is that additional restraint. Otherwise, we are left with "nothing more than a 'we-know-it-when-we-see-it' standard," and "future [parties] – and this court – have no ability to evaluate the applicability and reasonableness of the Commission's waiver policy." [Citation omitted]

NetworkIP v. FCC, 548 F.3d 116 (D.C. Cir. 2008). *See also Centro Cultural de Mexico en el Condado de Orange,* No. 16-7 (released January 28, 2016); *Michael Beder, Esq.*, DA 15-1450 (Audio Division, released December 18, 2015).

25. As outlined above, the facts of this case reflect multiple deviations from anything that might be deemed regular agency procedure. Those deviations range from finagling with routine bureaucratic steps to ultra-fast processing after the close of business to ignoring obvious

flaws in Church Planters' May 29 modification application to ignoring less obvious flaws in that application brought to the Commission's attention after the application had been precipitously granted. But the MO&O/NAL is completely devoid of even an acknowledgement of – much less any explanation of or attempted justification for – any of those deviations. Because of this, the Division's decision is fatally flawed, and it must be reversed.

26. Of particular concern to Craven are irregularities in the processing of Church Planters' May 29 modification application.

27. Recall that it was absolutely essential to Church Planters that that application not only be accepted, but also that it be granted, on May 29 – with enough time left to allow Church Planters to prepare and file a covering license application before its permit was set to expire. As matters stood as of May 28, Church Planters had failed – and was apparently unable – to construct the facilities specified in its then four-year-old construction permit. That being the case, its permit would automatically expire as of 3:00 a.m. on May 30 unless Church Planters could obtain a permit specifying the facilities it had already built.

28. Recall also that Craven had, on May 28, formally objected to Church Planters' First License Application. In so doing, Craven expressly and unequivocally put the Commission and Church Planters on notice that Craven would formally oppose any after-the-fact modification application at the earliest possible time.

29. So what happened?

The modification application gets filed.

30. Church Planters filed its modification application sometime on May 29. When, exactly, was it submitted into CDBS by Church Planters? As of now we can't say for sure, but from the suffix ("AAB") in its file number (*i.e.*, BMPED-20150529AAB) we know that it was

apparently the second application submitted into CDBS on that date, which suggests that it was submitted reasonably early in the day. But submission of the application was just the first of three necessary steps. The next: the application had to be accepted for filing by the staff.

The modification application gets accepted.

31. As noted above, while it is not clear when precisely acceptance occurred, no public disclosure of acceptance was made – through posting on CDBS – until after the close of business on May 29. That's odd for a number of reasons.

32. First, review of CDBS records indicates that applications are not routinely accepted on the day on which they are filed. Rather, the standard operating procedure appears to be that applications get accepted the day *after* they are filed. According to a search of CDBS, a total of 48 applications were submitted to CDBS on May 29; Church Planters' is the only one that was accepted that day. (All others were accepted the following business day, June 1.) We also checked applications filed on May 28. Of the 24 applications submitted on that date, none was accepted on May 28; all but two were accepted on May 29, the following business day. Noting that May 29 was a Friday, we checked June 5 (the following Friday) to see whether, perhaps, Friday-filed applications might be accorded same-day-acceptance treatment. Nope. None of the 40 applications turned up in a CDBS search of applications with file numbers indicating a June 5 submission date was accepted on June 5; all were accepted the following business day, June 8.

33. So out of a sample of 112 applications filed within the same general time frame as Church Planters' modification application, one and only one was accepted on the day it was filed: Church Planters'. That demonstrates a deviation from the standard.

34. Second, if Church Planters' application was filed relatively early in the day – as its file number indicates was the case – why was it not accepted until after the close of the Commission's offices? That question, of course, assumes that it was not accepted earlier in the day, with notice of the acceptance withheld from CDBS until after hours. Either way, it seems more than odd that acceptance, whenever it occurred, was not publicly disclosed until after the close of business.

35. Third, even if acceptance of Church Planters' application was explicably delayed, what happened to the one application that was filed *before* Church Planters'? According to CDBS, another May 29 application had the file number suffix "AAA", meaning that it was submitted prior to Church Planters'. If, in the ordinary course, applications are subjected to acceptance review in the order in which they are received, that earlier application should have been accepted on May 29 as well. It was not.

The modification application gets granted.

36. And then there's the grant. Again, we can't say for sure precisely when the grant of the May 29 modification application occurred, but notice of the grant did not appear on CDBS until sometime around 8:00 p.m. on May 29, as far as we can tell. Since, according to the MO&O/NAL, the grant occurred *before* Craven's formal opposition was filed, we know for sure that it must have been before 7:58 p.m. (since that's the time showing on the CDBS-generated confirmation page relative to Craven's objection). In any event, the hurry-up grant of the application is itself odd for a number of reasons.

37. If the modification application was not accepted until approximately 7:00 p.m., then Commission staff, working after hours, completed the processing of the application and effected the grant in less than an hour. While such prompt and efficient work would seem

laudable under other circumstances, here it raises an obvious question: Why? No other application submitted on May 29 was accorded even same-day *acceptance* service, much less same-day *disposition* service: as noted, all other May 29 applications were accepted on June 1; none was granted earlier than June 2. But Church Planters received not just same-day service, but late-night-pick-it-up-in-an-hour service.[5]

38. The apparent speed with which the staff managed to act on the modification application came at a cost.[6] As noted above, as it turned out, Church Planters hadn't bothered to answer two questions on the application (Questions 18 and 19), even though the instructions to Form 340 specify that those questions are to be answered. They remain unanswered to date. When other applicants fail to answer those questions, the staff ordinarily requires them to amend their application. We know this for sure because the MO&O/NAL expressly acknowledges that "staff erred by not requiring [Church Planters] to amend to include responses to Questions 18 and 19". Why was the application granted even though Church Planters was not required to amend?

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[5] While there is no established rule prohibiting such same-day service – and, indeed, some emergency situations may require precisely such expedition (although no such emergency is apparent in this case) – the Commission has indicated that "prompt staff action" involves situations where an application is granted "four or five days after Public Notice of its acceptance." *The Association for Community Education, Inc.*, 19 FCC Rcd 12682, ¶6 (2004). That at a minimum strongly suggests that same-day filing/acceptance/grant of applications is by no means routine.

[6] This should not come as a surprise. More than six decades ago, the D.C. Circuit warned of "the dangers of accelerated procedures which might sacrifice the careful performance of the Commission's substantive tasks to mere speed. Speed of Commission action may in some cases point to a failure to make those essential findings which the agency must make under Section 309(a) of the Act before it grants a requested license." *Federal Broadcasting System, Inc. v. FCC,* 225 F.2d 560 (D.C. Cir. 1955) (Citation and footnote omitted.)

39. The MO&O/NAL stops short of expressly confirming that the staff even noticed the unanswered questions. It states that, "prior to grant, Bureau staff was able to independently verify" the answer to the questions from Commission records. MO&O/NAL at ¶12. While that statement may indeed be true, it does not expressly say that staff actually did verify the information prior to grant. Would it have been routine for the staff to overlook the omission of required information? If not, why did it happen here? And if the staff did in fact independently verify the answers prior to granting the application, is that normal? Does the staff as a routine matter serve as proof reader to catch and correct (or overlook) errors and omissions of careless applicants? And does that routinely occur after hours on the same day the application is filed?

Post-grant developments

40. Whatever time the modification application was granted, Church Planters learned of the grant soon enough to get its second license application filed on May 29. It's not clear when notice of that grant showed up on CDBS, but Church Planters had, at most, only a few hours to (a) learn of the grant and (b) prepare and submit its license application.

41. The following day – May 30 – a Craven representative took photographs of the WGHW antenna as installed. One of those photographs was submitted to the Commission by Craven on June 1, the next business day. It demonstrated that Church Planters had failed accurately to describe its antenna installation in its First License Application, which perforce undermined the reliability of any technical information included in the later-filed modification application. The MO&O/NAL does not dispute that. Instead, it says that

> Our engineering review of the WGHW's antenna configuration does not raise any issues that would affect grant of the May 29 Modification Application or May 29 License Application. Bureau staff properly relied upon the exhibits provided by CPA (Proof of Performance, Surveyor Affidavit, Engineer Affidavit, and Antenna Manufacturer's Letter) to determine that the WGHW antenna would perform according to the manufacturer's specifications. [Footnote omitted] Going forward, however, we emphasize

that CPA is responsible for ensuring that the antenna operates in accordance with the terms of its authorization.

42. It is not clear how the staff could have evaluated WGHW's antenna configuration when Church Planters failed to provide accurate information about its installation or its equipment. As Craven demonstrated, the Proof of Performance submitted by Church Planters did not address the particular circumstances of the antenna's actual installation. Did the staff obtain its own, separate, proof of performance reflecting those actual circumstances (since Church Planters did not respond to Craven's demonstration)? If not, how could it determine that no issues would be raised? And in any event, is it standard operating procedure for the staff to overlook substantially incorrect technical information – or undertake its own independent investigation in the absence of any correction by the applicant?

Church Planters gets fined ... minimally.

43. Church Planters did not get off the hook entirely. In addition to the mild slap on the wrist quoted above[7], the MO&O/NAL imposed a $3,000 forfeiture on Church Planters for its unauthorized construction. According to the MO&O/NAL, the base forfeiture amount of such unauthorized construction is $5,000, in support of which it cites (at ¶15) Section 1.80, Note to Paragraph (b)(8). But Section 1.80 assigns a base forfeiture of $10,000, not $5,000, for unauthorized construction. *See also, e.g., Saver Media, Inc.*, DA 14-1099, ¶11 (Audio Division 2014). The note cited in the MO&O/NAL merely affords general discretion for upward or downward adjustments from that base.

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[7] That slap on the wrist – "we emphasize that CPA is responsible for ensuring that the antenna operates in accordance with the terms of its authorization" – is actually a risible statement of the obvious. It's like a traffic cop advising a motorist that "I'm not going to penalize you even though you may have been speeding just now, but remember that you're not supposed to speed."

44. So it appears that Church Planters got an initial, unexplained 50% discount on its fine, which the Division then generously discounted another 40%, taking the total down to a mere $3,000. The factors cited in support of that second reduction included the assertions that: (a) the actual installed antenna height resulted in only a "very slight increase" in the station's signal contour; and (b) Church Planters had been precluded from filing its May modification application by the Commission's freeze.

45. As to the first factor, the Division chooses to ignore the fact that the antenna was installed more than six meters higher than authorized, *i.e.*, more than three times higher than the rules permit. *See* Section 73.1690(c). If such a violation is entitled to a reduction of the base forfeiture, perhaps the Commission should reconsider the underlying two-meter limit on self-help antenna height increases; unless and until it does, though, exceeding the specified limit by a factor of three hardly seems *de minimis* or discount-worthy.

46. As to the second factor, contrary to the Division's suggestion, the freeze did ***not*** prevent Church Planters from complying with its obligations. Rather, Church Planters' blithe disregard for those obligations did.

47. Church Planters first proposed its erroneous height in its April 2 modification application. Had it simply taken the care necessary to accurately determine the antenna height available to it before filing that application, it could have avoided any problems at all. And given the time crunch in which it had placed itself by not constructing in the preceding four years, Church Planters could and should have been taking appropriate preparatory steps while its application was pending so that, once its modification application was granted, it could proceed to construct promptly. Had it done so, it presumably would have (finally) noticed that its

proposed height wasn't available, and it could have amended the April 2 application accordingly. It did not do so.

48. And even if it chose not to do anything about construction until it had the permit in hand, its April 2 modification application was granted on April 20. The freeze did not begin until May 18, almost a month later, and notice of the freeze was issued on April 22. So Church Planters had plenty of time to commence construction, learn of its self-inflicted problem, and take corrective steps long before the freeze set in. Instead, it appears that Church Planters simply dilly-dallied until the last minute, only to discover its problem after the freeze had set in. The fact that Church Planters opted to be less than diligent notwithstanding the fast-approaching expiration date of its permit is not a valid basis for leniency.[8]

49. Perhaps not surprisingly in view of the Division's obvious benevolent approach here, the MO&O/NAL said nothing about the plainly inaccurate certifications included in Church Planters' First License Application. Recall that Church Planters twice represented that its construction had been in compliance with its April permit when, in fact, it had not been – and it was obvious that Church Planters knew that when it made those representations. Ordinarily this would be the stuff of misrepresentation – a knowingly false statement – subject to the harshest of penalties. At a minimum, Church Planters violated Section 1.17, which prohibits the submission of incorrect statements that are the results of mere negligence. Violations of Section 1.17 can run into five-figure forfeitures. And yet, in meting out a monetary forfeiture, the MO&O/NAL makes no mention of these seemingly open-and-shut violations.

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[8] As the D.C. Circuit cogently observed, "procrastination plus the universal tendency for things to go wrong (Murphy's Law) – at the worst possible moment (Finagle's Corollary) – is not a 'special circumstance' [warranting favorable regulatory treatment], as any junior high teacher can attest." *NetworkIP*, *supra*.

The MO&O/NAL deviated from established rules and procedures without explanation.

50. In view of all of the foregoing, it seems clear that, for some reason, the Division was so hell-bent to make sure that the Church Planters May 29 modification application was granted before the underlying permit expired that it took serious liberties with routine rules and procedures. The Division:

- chose to ignore plainly incorrect, and arguably misrepresentative, statements in the First License Application;
- accorded the May 29 modification application extraordinary processing treatment by: accepting it on the day it was submitted; not reflecting that acceptance until after the close of Commission business; failing to require submission of required information; and granting the application with astonishing speed, also on the day it was submitted;
- declined to rescind the grant of the modification permit after being presented with photographic evidence that the facilities installed were inconsistent with the facilities described in the application;
- imposed a forfeiture which ignored the established base fine for the violation triggering the forfeiture, was subject to a drastic further reduction based on plainly inappropriate factors, and overlooked other obvious violations warranting monetary sanction.

Most disturbingly, it did all this despite the facts that: (a) a formal objection had been submitted by Craven with respect to the First License Application; ***and*** (b) the Division and Church Planters were on express notice that Craven would challenge any modification application Church Planters might submit on May 29.[9]

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[9] The submission of Craven's objection to the First License Application rendered that matter a "restricted proceeding" under the Commission's *ex parte* rules. That being the case, any application-related communications between Church Planters and members of the Division staff likely to be involved in the disposition of that application would have to have been disclosed to Craven. None have been. Craven also notes that any communications concerning the May 29 modification application would presumably have included reference to the First License Application and the ultimate disposition of Church Planters' permit. Even seeming "status" inquiries concerning the anticipated completion of processing of the modification application would have been "ex parte" communications to the extent that they involved reference to the urgent need to get that application granted sometime on the same day it was filed.

51. Of course, it may be standard operating procedure within the Division to allow permittees to build whatever facilities they choose, regardless of the specifications of their permits, comfortable in the knowledge that the Division will allow those permittees to spackle over the discrepancies with an after-the-fact modification application. And if, thanks to the permittee's unquestionable lack of diligence, the permittee finds itself on the verge of losing its permit through expiration, it may also be that the Division will routinely take extraordinary steps to provide the permittee ultra-fast, after-hours processing to accommodate its needs – even if such processing requires the staff to overlook the fact that the application to be processed is incomplete. Oh yes, and if it turns out after the application has been granted that the equipment installation is not exactly as had been represented, it may also be the Division's usual approach to leave the grant in place (although the permittee may be chided about not doing it again). And it may be that none of these conventional approaches is ever altered in any way by the knowledge that a third-party has objected, and has committed to further objections, to the underlying applications.

52. If, in fact, these are the Division's standard operating procedures, then it should so state, so that all affected regulatees will be on the same footing.

53. But if any of the steps that occurred here deviated from standard operating procedure – and Craven is confident that they did deviate, significantly – then the Division must acknowledge that and explain what special circumstances warranted the deviation(s). The record here plainly establishes that the Division went to extreme lengths, including waiving application requirements, cherry-picking an application for super-expedited consideration and ignoring conceded violation of the Act. It may be that some adequate justification exists – but if it does,

the Division must articulate it for the benefit of all to prevent what the Court of Appeals characterized as "the danger of arbitrariness (or worse)". *NetworkIP, supra.*

Conclusion

54. Craven recognizes that the Division may have been motivated to try to help a struggling noncommercial station[10] preserve a fast-expiring permit. While such compassionate motivation may seem laudable, it is not – unless the Division is ready, willing and able to announce that precisely the same generosity will be provided to every permittee who waits until the last minute, fails to make rudimentary determinations of available antenna space before seeking a permit, makes plainly inaccurate representations in its license application, omits required information from its eventual modification application (filed less than 24 hours before the permit expires), fails to describe accurately its facilities as already installed – and is already subject to formal opposition. [11]

55. Moreover, such compassion ignores the fact that, by leaving the Church Planters permit in place, the Division has prevented Craven from improving the facilities of its Station WZNB. In other words, the Division is opting to give Church Planters the golden ring, while Craven gets (in the words of *NetworkIP*) the short straw. The ability to jigger with agency rules and procedures in order to pick favorites is precisely why the Division is required to explain its

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[10] Before we start feeling too sorry for Church Planters, we should note that, according to its Ownership Reports, it has held as many as 14 FM stations.

[11] Craven also hastens to observe that, in any event, trying to help a permittee who has already, prematurely, engaged in unauthorized construction is completely contrary to Congress's purpose underlying Section 319. That provision is designed to prevent parties from proceeding with unauthorized construction and then using the fact of that completed construction as a basis for relief.

processes and demonstrate the extraordinary circumstances justify departures from established rules and procedures. *NetworkIP, supra.*

56. Notwithstanding any kind-hearted notions that may underlie the Division's approach here, that approach – unless expressly acknowledged and justified with reference to suitably extraordinary "special considerations" – is misguided and, more importantly, unlawful, as a long line of judicial decisions plainly establishes. *See, e.g., NetworkIP*. Accordingly, the MO&O/NAL must be reconsidered and reversed, the grants of Church Planters' various applications must be rescinded, its construction permit (File No. BPED-20110202AAK) must be declared to have expired as of 3:01 a.m. on May 30, 2015, and the above-captioned Craven application for modification of the facilities of Station WZNB (which application was dismissed because of the supposedly continued vitality of Church Planters' permit) must be reinstated *nunc pro tunc*.[12]

Respectfully submitted,

Harry F. Cole STC

/s/ Harry F. Cole
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May 16, 2016

[12] Craven notes that Church Planters has approached Craven with the suggestion that the two parties resolved their differences by, *inter alia*, the submission of modification applications for Stations WGHW and WZNB (licensed to Craven) which would result in some reduction of the former's signal contour and some increase in the latter's. Craven has indicated a willingness to consider that proposal but, absent some such resolution satisfactory to Craven, Craven intends to press the arguments presented herein.

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 16th day of May, 2016:

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