

**Before the
Federal Communications Commission
WASHINGTON, D.C. 20554**

In the Matter of)	
)	NAL/Acct No. MB-201641410004
Church Planters of America)	FRN:0003780525
)	
Application for License to Cover a Construction)	File No. BLED-20150529ADI
Permit for WGHW(FM), Lockwoods Folly Town,)	Facility ID No. 89986
North Carolina)	
)	
Craven Community College)	
)	
For Minor Change to WZNB(FM), New Bern,)	File No. BPED-20150601AFB
North Carolina)	Facility ID No. 94050

**MEMORANDUM OPINION AND ORDER
AND
NOTICE OF APPARENT LIABILITY**

Adopted: April 15, 2016

Released: April 15, 2016

By the Chief, Audio Division, Media Bureau:

1. We have before us: (1) a petition for reconsideration (PTA Petition) filed by Craven Community College (Craven) on June 10, 2015, seeking reconsideration of a June 9, 2015, decision¹ by the Audio Division, Media Bureau (Bureau) granting program test authority (PTA) to Church Planters of America (CPA), licensee of noncommercial educational station WGHW(FM), Lockwoods Folly Town, North Carolina (WGHW); (2) a petition for reconsideration (Dismissal Petition) filed by Craven on August 7, 2015, seeking reconsideration of a July 7, 2015, Bureau decision² dismissing a modification application filed by Craven on June 1, 2015;³ (3) an informal objection—which we construe as a petition for reconsideration—filed by Craven on May 29, 2015 (Modification Petition) (with the PTA Petition and Dismissal Petition, the Petitions), against a modification application filed by CPA on May 29, 2015;⁴ and (4) an informal objection (License Informal Objection) filed by Craven on June 1, 2015, against an application for a license to cover the May 29 Modification Application filed by CPA on May 29, 2015.⁵ For the reasons stated below, we deny the Petitions, deny the License Informal Objection, and grant the

¹ *WGHW(FM), Lockwoods Folly Town, North Carolina*, Letter Order, Ref. No. 1800B3-RB (MB June 9, 2015) (*PTA Decision*).

² *WZNB(FM), New Bern, North Carolina*, Letter Order, Ref. No. 1800B3-RB (MB July 7, 2015) (*Dismissal Decision*).

³ File No. BPED-20150601AFB (Craven Modification Application).

⁴ BMPED-20150529AAB (May 29 Modification Application). Because the Modification Petition was filed the same day that the May 29 Modification Application was granted, Bureau staff was not afforded the opportunity to review that pleading prior to grant. Therefore, we consider it here as a petition for reconsideration.

⁵ File No. BLED-20150529ADI (May 29 License Application).

May 29 License Application. We also issue a Notice of Apparent Liability to CPA for constructing WGHW's antenna facilities at variance from its authorization, in violation of Section 319(a) of the Communications Act of 1934 (Act), as amended, and Section 73.1690(c)(1) of the Commission's Rules (Rules).⁶

I. BACKGROUND

2. On February 4, 2008, the Bureau granted Craven a construction permit for a minor change to WZNB(FM), New Bern, North Carolina (WZNB).⁷ Craven did not build the proposed facilities, and the Craven Permit automatically expired on February 4, 2011.⁸ On February 11, 2011, CPA filed a modification application that was mutually exclusive to the Craven Permit, which the Bureau granted on March 29, 2011.⁹ Craven unsuccessfully appealed the expiration of the Craven Permit (and resulting grant of the CPA Permit) on the basis that the Craven Permit should have been tolled.¹⁰ On November 6, 2013, the Bureau granted tolling of the CPA Permit pending resolution of the Craven appeals. CPA's tolling ended when the *MO&O* resolving the Craven appeals became final on November 26, 2014, and a new expiration date for the CPA Permit of May 30, 2015, was established.

3. On April 2, 2015, CPA filed a minor modification to the CPA Permit,¹¹ which was granted on April 20, 2015 (CPA Modified Permit). On May 26, 2015, CPA filed an application for a license to cover the facilities proposed in the April 2 Modification Application.¹² At the time the May 26 License Application was filed, there was a freeze on the filing of minor modification applications.¹³ In the May 26 License Application, CPA disclosed that “[d]uring 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.”¹⁴ CPA further stated that it would file a construction permit application reflecting this new location as soon as the freeze was over.¹⁵ On June 9, 2015, the May 26 License Application was dismissed.¹⁶

4. On May 29, 2015—the day after the freeze ended and the day before the CPA Permit expired—the following were filed: (1) the May 29 Modification Application, seeking to move WGHW's center of radiation from 100.6 meters above ground level (AGL) to 107.3 meters AGL; (2) the

⁶ 47 U.S.C. § 319(a) (Section 319(a)); 47 CFR § 73.1690(c)(1) (Section 73.1690(c)(1)).

⁷ File No. BPED-20070906AFE (Craven Permit).

⁸ See 47 U.S.C. § 319(b).

⁹ File No. BPED-20110211AAK (CPA Permit).

¹⁰ See *WZNB(FM), New Bern, North Carolina*, Letter Order, Ref. No. 1800B3-TSN (MB Dec. 12, 2012); *WGHW(FM), Lockwoods Folly Town, North Carolina*, Letter Order, Ref. No. 1800B3-TSN (MB May 18, 2012); *Church Planters of America*, Memorandum Opinion and Order, 29 FCC Rcd 14023 (2014) (*MO&O*).

¹¹ File No. BMPED-20150402AAT (April 2 Modification Application).

¹² File No. BLED-20150526ACF (May 26 License Application). On May 28, 2015, Craven filed an informal objection to the May 26 License Application. This pleading was dismissed as moot on June 9, 2015, in CDBS when the May 26 License Application was dismissed. In any case, it raises the same issues as the other Craven pleadings addressed herein.

¹³ See *Auction 98 Freeze Announced for FM Minor Change Applications*, Public Notice, 30 FCC Rcd 3616 (MB 2015) (establishing a freeze on minor change applications during May 18–28, 2015).

¹⁴ May 26 License Application, Exhibit 8.

¹⁵ *Id.*

¹⁶ *Broadcast Actions*, Public Notice, Report No. 48510 (MB June 15, 2015).

Modification Petition; and (3) the May 29 License Application. The Bureau granted the May 29 Modification Application the same day, May 29. On June 1, Craven filed: (1) the Craven Modification Application, seeking to modify the directional antenna pattern, effective radiated power, and antenna height of WZNB; and (2) the License Informal Objection.

5. On June 9, 2015, in the *PTA Decision*, the Bureau granted CPA program test authority for WGHW. The *PTA Decision* did not address the merits of the Craven pleadings.¹⁷ On July 7, 2015, the Bureau issued the *Dismissal Decision*, in which it dismissed the Craven Modification Application because the proposed facilities would receive prohibited overlap from the interfering (40 dBu) contour of WGHW and would cause prohibited overlap to WGHW's protected (60 dBu) contour.¹⁸ In the *Dismissal Decision*, the Bureau stated that "although there are pleadings pending against the [May 29] license application . . . WGHW's construction permit requires protection."¹⁹

6. Because of the substantial overlap in Craven's various pleadings, we will consider them together. Craven's objections are primarily based on CPA's admission in the May 26 License Application that it had installed the WGHW antenna at variance from the CPA Modified Permit—specifically, at a different height than authorized.²⁰ The constructed height was not authorized until the Commission granted the May 29 Modification Application. Therefore, Craven argues, CPA violated Section 319(a) of the Act, which "generally requires that an applicant obtain a permit *before* it proceeds with construction of communications facilities."²¹ Other ramifications of CPA's premature construction, according to Craven, are: (1) the May 26 License Application was "fatally flawed" because it purported to cover facilities that had not been authorized by the underlying construction permit;²² and (2) the May 29 License Application was also flawed because the facilities specified therein were not actually constructed "pursuant to" the May 29 Modification Application but rather "prior to" it.²³

7. Craven also objects that the WGHW facilities as constructed include "metal elements of another antenna on the tower [that] extend significantly into the aperture of Planters' directional antenna."²⁴ This configuration, according to Craven, could affect WGHW's directional pattern so that the directional antenna values provided by CPA in the May 29 Modification Application might not be accurate.²⁵

8. Craven complains that the Bureau did not consider the Modification Petition before granting the May 29 Modification Application.²⁶ Likewise, Craven argues that the *PTA Decision*, in addition to containing several inconsistencies and typographical errors, does not address either the License Informal

¹⁷ See *PTA Decision* at 1.

¹⁸ *Dismissal Decision* at 1.

¹⁹ *Dismissal Decision* at 1.

²⁰ See Modification Petition at 1-3; License Informal Objection at 2-3; PTA Petition at 2-3; Dismissal Petition at 4-5.

²¹ Dismissal Petition at 5.

²² Dismissal Petition at 2.

²³ PTA Petition at 1-3.

²⁴ Dismissal Petition at 6-7; PTA Petition at 3; License Informal Objection at 4-6.

²⁵ Dismissal Petition at 6-7; PTA Petition at 3; License Informal Objection at 4-6. Craven provides photographs of the antenna configuration in support of this statement. See License Informal Objection, Exhibit 1.

²⁶ License Informal Objection at 3.

Objection or Modification Petition.²⁷ Craven also asserts that the May 29 Modification Application was filed and granted “after the Commission’s offices officially closed their doors for the day,” suggesting that it was improper for Bureau staff to act so promptly on an application whose “sole purpose” was to “spackle over” an unauthorized installation.²⁸ Finally, Craven argues that the May 29 Modification Application was not complete because CPA did not respond to Question 18 (certifying that the WGHW license was not awarded on the basis of a fair distribution of service pursuant to 47 U.S.C. 307(b)) and Question 19 (certifying that CPA did not receive a credit for superior technical parameters under the point system selection method in 47 CFR § 73.7003).²⁹

II. DISCUSSION

9. Reconsideration is warranted only if the petitioner shows an error of fact or law in the Commission’s original order, or raises additional facts not known or existing at the time of the petitioner’s last opportunity to present such matters.³⁰ Craven has failed to meet this burden. Accordingly, we deny Craven’s Petitions. Moreover, an informal objection must contain adequate and specific factual allegations sufficient to warrant the relief requested; in this case, the License Informal Objection must establish a substantial and material question of fact that grant of the May 29 License Application would be inconsistent with the public interest, convenience and necessity.³¹ In the case of a license application, as here, the applicant is entitled to a presumption that the public interest determination made during the construction permit proceeding continues in effect unless circumstances have arisen that would make operation of the station against the public interest.³² Craven has not met this stringent standard. Therefore, we deny the License Informal Objection and grant the May 29 License Application. However, we agree with Craven that CPA violated Section 319(a) of the Act and Section 73.1690(c)(1) of the Rules, as explained below.

A. Unauthorized Construction

10. Under Section 319(a) of the Act, a broadcast station must be constructed substantially as set forth in its permit. Moreover, Section 73.1690(c)(1) of the Rules requires a licensee to secure prior Commission approval for any antenna modification involving a change in height more than two meters above or four meters below authorized values. In the May 26 License Application, CPA concedes that it constructed the WGHW antenna at a height nearly seven meters higher than specified in the April 2 Modification Application. Therefore, CPA violated Section 319(a) of the Act and Section 73.1690(c)(1) of the Rules by constructing antenna facilities that substantially deviated from those described in the

²⁷ PTA Petition at 2.

²⁸ Dismissal Petition at 5.

²⁹ Dismissal Petition at 5-6.

³⁰ See 47 CFR § 1.106(c) and (d); *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964).

³¹ See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n. 10 (1990); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986).

³² 47 U.S.C. § 319(c) (requiring the Commission to issue a license where a construction permit has been granted and it appears that the terms of such permit have been met, and “that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest . . .”); *Focus Cable of Oakland, Inc.*, Memorandum Opinion and Order, 65 FCC 2d 35, 39-40, para. 11 (1977).

underlying permit without obtaining consent for modification.³³

B. Additional Arguments

11. *Time of day.* Regarding Craven's complaint that the May 29 Modification Application was granted late in the day, we clarify that Commission action on an application is manifestly not subject to challenge based on the time of day it is alleged to have occurred. An individual staff member's daily tour of duty may well extend past the Commission's standard hours set out in Section 0.403 of the Commission's rules, as was the case here.³⁴

12. *Responses to Form 340 questions.* We agree with Craven that Bureau staff erred by not requiring CPA to amend to include responses to Questions 18 and 19 of the May 29 Modification Application. However, prior to grant, Bureau staff was able to independently verify from the Commission's records that CPA received no preferences of any sort in connection with the original authorization for WGHW.³⁵ Thus, the staff's oversight was harmless error and, as such, does not warrant reconsideration of the grant of the May 29 Modification Application.

13. *Antenna configuration.* 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.³⁶ Going forward, however, we emphasize that CPA is responsible for ensuring that the antenna operates in accordance with the terms of its authorization.

C. Proposed Forfeiture

14. Under Section 503(b)(1)(B) of the Act, a person who is found to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.³⁷ Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.³⁸ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,³⁹ and the Commission has so interpreted the term in the Section 503(b) context.⁴⁰ Section 312(f)(2) of the Act provides that "[t]he term 'repeated,' when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day."⁴¹

15. The base forfeiture amount for constructing or operating facilities that exceed the authorized

³³ See 47 U.S.C. § 503(b)(1)(A) (providing for a forfeiture to be assessed for any person who has "willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission").

³⁴ See 47 CFR § 0.403.

³⁵ See *Instructions for FCC Form 340*, <https://www.fcc.gov/forms>, at 7.

³⁶ May 29 License Application, Exhibit 9.

³⁷ 47 U.S.C. § 503(b)(1)(B); see also 47 CFR § 1.80(a)(1).

³⁸ 47 U.S.C. § 312(f)(1).

³⁹ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

⁴⁰ See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

⁴¹ 47 U.S.C. § 312(f)(2).

antenna height is \$5,000.⁴² In determining the appropriate forfeiture amount, we may adjust the base amount upward or downward by considering the “the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”⁴³ Here, the height variance in WGHW’s facilities resulted in a very slight increase of the station’s predicted signal contour. The facilities appear to have been otherwise constructed in accordance with the parameters set forth in the CPA Modified Permit, and no compounding factors—such as the creation of air hazard or actual objectionable interference—were present.⁴⁴ We also take into account the short duration of the violation and that CPA voluntarily disclosed the variance to the Commission.⁴⁵ Finally, we recognize that CPA was temporarily prevented from rectifying the variance and obtaining an additional modification of the CPA Modified Permit by the Auction 98 minor change freeze. Nonetheless, we find that CPA’s nonconforming construction of the WGHW facilities is serious enough to warrant a sanction. Considering the record as a whole and all of the factors required by Section 503(b)(2)(D) of the Act and the *Forfeiture Policy Statement*, we believe that a \$3,000 forfeiture is appropriate here.

III. CONCLUSION/ORDERING CLAUSES

16. IT IS ORDERED that pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission’s Rules, that Church Planters of America is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of three thousand dollars (\$3,000) for its apparent willful and repeated violation of 47 U.S.C. § 319(a) and 47 CFR § 73.1690(c)(1).

17. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission’s Rules, that, within thirty (30) days of the release date of this Notice of Apparent Liability (NAL), Church Planters of America SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

18. Payment of the proposed forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced in the caption above. Payment by check or money order may be mailed to Federal Communications Commission, at P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank—Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank: TREAS NYC, BNF: FCC/ACV--27000001 and account number as expressed on the remittance instrument. If completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters “FORF” in block number 24A (payment type code).

⁴² 47 CFR § 1.80, Note to paragraph (b)(8).

⁴³ 47 U.S.C. § 503(b)(2)(D); 47 CFR § 1.80(b)(8).

⁴⁴ See *Multicultural Radio B’casting, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 20630, 20635 (2000) (*Multicultural Radio*) (taking into account the lack of an air hazard or actual interference where an antenna was installed higher than authorized); *Rasa Communications Corp.*, Letter Order, 11 FCC Rcd 13243, 13246 (MMB 1996) (*Rasa*) (reducing proposed forfeiture for unauthorized construction and operation where the facilities actually constructed varied little from those authorized by the Commission and presented only a “slight” threat to air navigation and a “slight” threat of radio interference).

⁴⁵ See, e.g., *Multicultural Radio*, 15 FCC Rcd at 20635 (taking into account duration of violation); *Rasa*, 11 FCC Rcd at 13246 (reducing proposed forfeiture where the permittee voluntarily disclosed the unauthorized construction and operation to the Commission); *Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17100-111 (1997) (*Forfeiture Policy Statement*) (permitting downward adjustment for good faith or voluntary disclosure).

Licensee will also send electronic notification on the date said payment is made to Christine.Goepp@fcc.gov and Lisa.Scanlan@fcc.gov.

19. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington DC 20554, ATTN: Peter H. Doyle, Chief, Audio Division, Media Bureau, and MUST INCLUDE the NAL/Acct. No. referenced above.

20. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (GAAP); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

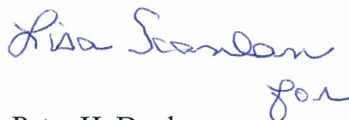
21. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director-Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, DC 20554.⁴⁶

22. IT IS FURTHER ORDERED that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to Church Planters of America, 6704 8 Hwy South, Germanton, NC 27019 and Harry F. Cole, Esq., Fletcher, Heald, & Hildreth, PLC, 1300 N. 17th Street, 11th Floor, Arlington, VA 22209.

23. IT IS FURTHER ORDERED that the petitions for reconsideration filed by Craven Community College on May 29, 2015, June 10, 2015, and August 7, 2015, ARE DENIED.

24. IT IS FURTHER ORDERED that the informal objection filed by Craven Community College on June 1, 2015, IS DENIED, and the license application filed by Church Planters of America on May 29, 2015 (File No. BLED-20150529ADI), IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION



Peter H. Doyle
Chief, Audio Division
Media Bureau

⁴⁶ See 47 CFR § 1.1914.