

FCC MAIL SECTION HEARING DESIGNATION ORDER

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

Adopted: May 5, 1992;

Released: May 14, 1992

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By the Chief, Audio Services Division:

MM Docket No. 92-110

In re Applications of

HOLY SPIRIT File No. BPED-870417MB HARVEST CHURCH, INC. (hereafter "HSHC") Macon, Georgia

For Construction Permit for a New Noncommercial FM Station on Channel 205 in Macon, Georgia

WARNER ROBINS File No. BPED-880329MA CHRISTIAN ACADEMY (hereafter "WRCA") Warner Robins, Georgia

For Construction Permit for a New Noncommercial FM Station on Channel 205 in Warner Robins, Georgia

GEORGIA FOUNDATION File No. BPED-880419MF FOR PUBLIC (Previously Returned) BROADCASTING, INC. (hereafter "GFPB")

For Construction Permit for a New Noncommercial FM Station on Channel 205 in Griffin, Georgia

GEORGIA COLLEGE File No. BPED-880420MX (Previously Returned)

For Modification of Noncommercial Station WXGC(FM), Milledgeville, Georgia

DISPA

1. The Commission has before it the above-captioned mutually exclusive applications, three for a new noncommercial, educational FM station and one for modification of an existing noncommercial FM station.

2. Preliminary matters. On April 19, 1988, GFPB tendered an application for construction permit for a new noncommercial educational broadcast station on Channel 205 to serve Griffin, Georgia. That application was returned as unacceptable for filing by staff letter on December 12, 1988. The staff explained that if the GFPB application were accepted for filing, it would have been mutually exclusive with both HSHC's application to serve Macon, Georgia and WRCA's application to serve Warner Robins, Georgia. The HSHC and WRCA applications were filed on or before March 29, 1988, the cut-off date established for the mutually exclusive application of Florida State University, file number BPED-880120MG, for Channel 205 in Tallahassee, Florida. The filing of these mutually exclusive applications created a "daisy chain" and under Kittyhawk Broadcasting Corp., 7 FCC 2d 153 (1967), appeal dismissed sub nom. Cook, Inc. v. United States, 394 F.2d 84 (7th Cir. 1968), an application is considered timely only when it is filed on or before the cut-off date established with respect to the lead application of a group of conflicting applications. GFPB's application was returned because it was filed after this March 29, 1988 cut-off date.

3. On January 3, 1989, GFPB timely filed a petition for reconsideration of our action returning its application. GFPB asserts that the staff failed to acknowledge that the GFPB application was timely filed pursuant to an "A" cutoff list, released March 16, 1988, which listed the application of HSHC for Macon, Georgia, and established an April 19, 1988 cut-off date. GFPB argues that the Commission's issuance of the HSHC "A" cut-off list "created a filing opportunity for applications mutually exclusive with that application" regardless of any other previously issued "A" cut-off lists. Petition at 4. "If there was a daisy chain created by virtue of the release of the two cut-off lists establishing cut-off dates for applications in relative geographic proximity, within three weeks of each other, that is the Commission's fault, not that of the applicants who relied on the Commission's public notices and filed applications mutually exclusive with each." Id. GFPB states that it relied on the Commission's April 19, 1988 cut-off date and had no notice or reason to believe that another application might tie the HSHC application to the Tallahassee application. GFPB contends that since there are two "A" cutoff lists in this case rather than one, the Kittyhawk case is not applicable. Further, GFPB states that since Florida State University in Tallahassee, Florida, amended its application to remove all conflicts with WRCA and with all the other applications that were mutually exclu-

1 Florida State University subsequently filed an amendment which removed the conflict. Its application was granted on November 30, 1989.

2 Another applicant, for a new noncommercial, educational

FM station in Macon, Georgia, Middle Georgia Community Radio, Inc., file number BPED-880418MX, was also returned by staff letter of December 12, 1988 for the same reason.

sive with WRCA, there is no connection between GFPB's application and the Tallahassee cut-off date of March 29, 1988.

4. GFPB's petition for reconsideration will be denied. The Court of Appeals for the District of Columbia Circuit has consistently approved of the Commission's cut-off procedures for noncommercial educational FM stations as a valid means of carrying out its mandate to afford a comparative hearing to mutually exclusive broadcast applicants. See *City of Angels Broadcasting, Inc. v. FCC*, 745 F.2d 656, 663 (1984); 47 U.S.C. § 309(e). The cut-off procedures serve two basic purposes. First, they advance the interest of administrative finality, and second, they grant timely broadcast applicants a "protected status" which "allows them to prepare for what often will be an expensive and time-consuming contest, finally aware of the competitors they will be facing." *City of Angels, supra*, at 663. Under the Commission's interpretation of its cut-off procedures, an applicant must file before the "A" cut-off date if the applicant's proposed signal will directly or indirectly conflict with an "A" list applicant's signal. An indirect conflict occurs if the applicant's proposed signal will conflict with some other new applicant's signal which in turn will conflict with an "A" list applicant's signal.

The 'Kittyhawk doctrine' is the Commission's answer to the prospect of what is called a 'daisy chain,' a series of applications, linked one to the other, with only the final one directly linked to the 'A' list application that triggered the cut-off process. If the filing deadline for each link of a daisy chain were based on the filing date of the previous link rather than that of the lead application, "[i]n theory, at least, the chain might never end, and any attempt to establish cut-off dates would be nugatory." [*Kittyhawk, supra*, at 155.]

*Florida Institute of Technology v. FCC*, 952 F.2d 549, 550 (D.C. Cir. 1992). Contrary to GFPB's contention, the *Kittyhawk* case does apply to the instant case in which two "A" cut-off lists are involved. See *Florida Institute of Technology, supra*. Although the Commission's cut-off rules have caused harsh results in particular cases, the Commission's strict enforcement is necessary to promote the purposes behind the rules. As we have stated before, "both the Commission's holding in *Kittyhawk Broadcasting Corporation* and Commission *Public Notice* cut-off lists [have] warned prospective applicants to file their applications if they would be mutually exclusive with the cut-off application, an application filed in response to the cut-off list, or with any other application on file which would itself be mutually exclusive with the lead application after the cut-off date." *Bill R. Wright*, 102 FCC 2d 1142, 1144-45 (1985). Furthermore, even though the mutual exclusivity is removed after the cut-off date through an amendment or dismissal of one or more applicants, breaking the daisy chain, the applicants retain protected cut-off status. See *Bill R. Wright, supra*, at 1147. This allows the Commission to process applications to finality "without interruption and the necessity of reprocessing because of new filings and amendments to pending applications." *Id.*

5. Georgia College tendered an application to modify the facilities of WXGC(FM), Milledgeville, Georgia. That application was returned as unacceptable for filing by staff letter on December 12, 1988 because according to the staff, Georgia College's application, if accepted for filing, would

have been mutually exclusive with HSHC's application to serve Macon, Georgia, and Georgia College's application was filed on April 20, 1988, one day after the April 19 cut-off.

6. On January 17, 1989, the Commission received Georgia College's letter of "protest" which we will treat as a petition for reconsideration. Georgia College asserts that its application was delivered to the Commission on April 19, 1988 and supplies a receipt to verify the date. Although Georgia College's file number, BPED-880420MX, indicates that the application was filed on April 20, 1988, the notation by our Secretary's Office on Georgia College's delivery receipt indicates a delivery date of "4/19/88." Accordingly, we will grant Georgia College's petition for reconsideration with respect to that matter. Georgia College's application, having been filed on April 19, 1988, is considered timely with respect to the HSHC, Macon, Georgia "A" cut-off date. However, as previously discussed, because the Florida State University application for Tallahassee, Florida, was the lead application of a group of conflicting applications creating this "daisy chain," upon further review, we have determined that the cut-off date established with respect to the Tallahassee application is the applicable cut-off date. Thus, Georgia College's application will be returned because it was filed after the March 29, 1988 cut-off date established with respect to the Tallahassee lead application.

7. *Share-time agreement*. It does not appear that the applicants have discussed a possible share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (October 24, 1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing, or at anytime during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement between themselves.

8. *HSHC*. Section 73.503(a) of the Commission's rules, 47 C.F.R. § 73.305(a), mandates that an educational broadcast license may only be issued to a nonprofit educational organization and only upon a showing that the facilities will be used for the advancement of an educational program. HSHC indicates that it is a nonprofit corporation and exempt from federal taxes under Section 501(c)(3) of the Internal Revenue Code. However, HSHC merely states that the corporation is "a religious, charitable and educational entity for the promotion of Christianity and all matters incidental thereto," but provides no documentation of its educational purpose or programs. Therefore, we find that the submitted material is insufficient to make a determination that HSHC is a qualified educational organization proposing an acceptable educational format in compliance with 47 C.F.R. § 73.503. Accordingly, an appropriate issue will be specified.

9. *WRCA*. WRCA failed to certify that it was financially qualified in Section III of FCC Form 340. Specifically, WRCA checked "No" and indicated its intent to file a later amendment with the requisite financial certifications.

WRCA failed to file such an amendment. Therefore, WRCA cannot be found financially qualified. Accordingly, a financial qualifications issue will be specified.

10. *Environmental.* Applicants HSHC and WRCA propose to locate their transmitting antennas on new towers. Our engineering study indicates that both of the applicants have failed to address the matter of how they propose to resolve any RF exposure to workers on their respective towers. See 47 C.F.R. § 1.1307(b). Consequently, we are concerned that they may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14,999 (April 12, 1986). See also, *Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. Section 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since HSHC and WRCA failed to indicate how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, both will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. See generally, OST Bulletin No. 65 (October, 1985) entitled "Evaluating Compliance With FCC-Specified Guidelines For Human Exposure to Radiofrequency Radiation," at 28. Therefore, HSHC and WRCA will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. See *Golden State Broadcasting Corp.*, 71 FCC 2d 2289 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the applicants' proposals will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted and the presiding judge shall thereafter not consider the environmental effects of the proposals. See 47 C.F.R. § 1.1308(d).

11. *Section 307(b).* The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would better provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will be specified.

12. *Areas and Populations.* Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, 10 RR 2d 215 (1967). Thus, the evidence

adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

13. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

14. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether HSHC is qualified to be a noncommercial, educational FM licensee.
2. To determine whether HSHC is financially qualified.
3. If a final environmental impact statement is issued with respect to HSHC and WRCA in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.
4. To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest, and, if so, the terms and conditions thereof; and (c) in light of 47 U.S.C. Section 307(b), which of the proposals would better provide a fair, efficient and equitable distribution of radio service.
5. To determine, in the event it is concluded that a choice between the applications should not be based solely on consideration relating to 47 U.S.C. Section 307(b), the extent to which each of the proposed operations will be integrated into the overall cultural and educational operation and objective of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.
6. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

15. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Georgia Foundation for Public Broadcasting, Inc. IS HEREBY DENIED.

16. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Georgia College IS HEREBY GRANTED to the extent indicated herein, and its application IS HEREBY RETURNED for the reasons discussed in paragraph 6 hereinabove.

17. IT IS FURTHER ORDERED, That, in accordance with paragraph 10 hereinabove, HSHC and WRCA shall submit the environmental assessment required by 47

C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

18. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

19. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

20. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief  
Audio Services Division  
Mass Media Bureau