DOCKET FILE COPY ORIGINAL

PEPPER & CORAZZINI
L. L. P.
ATTORNEYS AT LAW
1776 K STREET, NORTHWEST, SUITE 200
WASHINGTON, D. C. 20006
(202) 296-0600

VINCENT A PEPPER
ROBERT F. CORAZZINI
PETER GUTMANN
JOHN F. GARZIGLIA
NEAL J. FRIEDMAN
ELLEN S. MANDELL
HOWARD J. BARR
MICHAEL J. LEHMKUHL *
SUZANNE C. SPINK *
MICHAEL H. SHACTER
KEVIN L. SIEBERT *
PATRICIA M. CHUH

* NOT ADMITTED IN D.C.

GREGG P. SKALL
E. THEODORE MALLYCK
OF COUNSEL

FREDERICK W. FORD
1909-1986

TELECOPIER (202) 296-5572
INTERNET PEPCOR@COMMLAW.COM
WEB SITE HTTP://WWW.COMMLAW.COM

July 3, 1997

RECEIVED
JUL - 3 1997
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: Amendment of Section 73.202(b),
FM Table of Allotments
Rose Hill, Trenton, Aurora, and Ocracoke, NC
MM Docket No. 95-88

Dear Mr. Caton:

Transmitted herewith on behalf of Conner Media Corporation, the licensee of WBSY(FM), Rose Hill, North Carolina, is the original plus four copies of its Supplement To Petition For Reconsideration in the above-referenced proceeding. This submission is respectfully directed to the Chief, Allocations Branch, Policy and Rules Division.

The purpose of this submission is to report a recent development material to the disposition of this matter. Leave to file this supplement is being requested simultaneously herewith under separate cover.

Please direct any questions or correspondence in connection with this matter directly to this office.

Very truly yours,

Ellen S. Mandell

Ellen S. Mandell

Enclosure
cc (w/encl.): See Attached Service List

No. of Copies rec'd 0+4
List ABCDE

RECEIVED

JUL - 3 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of	)	MM Docket No. 95-88
	)	
Amendment of Section 73.202(b),	)	RM-8641
Table of Allotments,	)	RM-8688
FM Broadcast Stations	)	RM-8689
(Rose Hill, Trenton, Aurora,	)	
and Ocracoke, North Carolina)	)	

To: Chief, Allocations Branch
Policy and Rules Division

SUPPLEMENT TO PETITION FOR RECONSIDERATION

Conner Media Corporation ("CMC"), the licensee of WBSY(FM), Rose Hill, North Carolina, by its attorneys and pursuant to Section 1.106(f) of the Commission's rules, hereby supplements its January 17, 1997 petition for reconsideration of Rose Hill, Trenton, Aurora, and Ocracoke, North Carolina ("R&O"), 11 FCC Rcd 21223 (1996), which allotted Channel 283A to Aurora, North Carolina, and denied CMC's conflicting proposal to allot Channel 284C2 to Trenton, North Carolina and counter-proposal of Channel 221A for Aurora. The purpose of the instant supplement is to bring to the Bureau's attention a recent development material to the disposition of this matter.

Leave to file this supplement is being requested simultaneously herewith under separate cover.

In support hereof, the following is respectfully shown:

1. By the R&O, the Chief, Allocations Branch, of the Mass Media Bureau ("Bureau"), rejected CMC's counter-proposal for Channel 221A in lieu of Channel 283A at Aurora, which would have

paved the way for new allotments at both Aurora and Trenton. The Bureau ruled that Channel 221A at Aurora was blocked by (1) the construction permit of WRSV(FM), Channel 221A, Rocky Mount, North Carolina (File No. BPH-951002IB), and (2) unbuilt station WAHL, Channel 224C1, Ocracoke, North Carolina (File No. BMPH-950728IC)[1/]. Those concerns were disproved, however, by CMC's reconsideration petition, which demonstrated that (1) Channel 221A could be allotted to Aurora consistent with all spacing and coverage requirements to WRSV upon imposition of a site restriction; and (2) the WAHL construction permit was scheduled to expire on February 12, 1997 and was unlikely to be extended.

2. The Bureau has now denied the application for extension of the WAHL construction permit (File No. BMPH-970113JA). Attached hereto is a copy of a letter dated June 27, 1997 (Ref. 1800B3-DK), from the Assistant Chief, Audio Services Division, which denies the WAHL extension application, cancels the WAHL construction permit and deletes the WAHL call sign.

3. CMC respectfully submits that this development clears the way for allotment of Channel 221A to Aurora in lieu of Channel 283A, so that Channel 284C2 at Trenton can also be allotted. Such a result will be in accord with the well-established policy to accommodate conflicting allotment proposals

---

[1/]With respect to short-spacing to the application of American Family Association ("AFA") for a new noncommercial educational station on Channel 220 at New Bern, NC (BPED-960626MA), CMC had submitted a letter from Donald Wildmon, President, AFA, agreeing to change frequency at New Bern from Channel 220 to 211 to accommodate the proposal for Channel 221 at Aurora.

with alternate channels where possible. See e.g. Willcox, Arizona and Lordsburg, New Mexico, MM Docket No. 95-50, DA 96-2134 (Chief, Alloc. Br.; released December 27, 1996); Rapid City and Lead, South Dakota, 10 FCC Rcd 7715 (Chief, Alloc. Br., 1995).

WHEREFORE, the premises considered, the Bureau is respectfully requested to accord consideration to the instant supplement in connection with CMC's Petition For Reconsideration, and to grant the relief requested in CMC's reconsideration petition.

Respectfully submitted,

CONNOR MEDIA CORPORATION

By Ellen S. Mandell

Peter Gutmann
Ellen S. Mandell
Its Attorneys

Pepper & Corazzini, L.L.P.
1776 K Street, N.W., Suite 200
Washington, D.C. 20006
(202) 296-0600

July 3, 1997

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

JUN 2 7 1997

In Reply Refer To:
1800B3-DK

Vincent J. Curtis, Jr., Esquire
Fletcher, Heald & Hildreth, P.L.C.
1300 North 17th Street
11th Floor
Arlington, Virginia 22209-3801

Mark Van Bergh, Esquire
Roberts & Eckard, P.C.
1150 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20036

Peter Gutmann, Esquire
Pepper & Corazzini, L.L.P.
200 Montgomery Building
1776 K Street, N.W.
Suite 200
Washington, D.C. 20006

RECEIVED
JUL 0 2 1997

In re: WAHL(FM), Ocracoke, North Carolina
Application for Extension of Construction Permit
File No. BMPH-970113JA

Application for Assignment of Construction Permit
File No. BAPH-970121GS

Dear Messrs. Curtis, Van Bergh, and Gutmann:

We have on file: (1) the above-referenced application of Ocracoke Broadcasters ("OB") for extension of the construction permit of unbuilt station WAHL(FM), Ocracoke, North Carolina (the "Extension Application"); (2) a February 7, 1997 informal objection filed by Conner Media Corporation ("Conner"), the licensee of WBSY(FM), Rose Hill, North Carolina; (3) a March 25, 1997 informal objection filed by Eastern Carolina Broadcasting Company, Inc. ("ECB"), licensee of WRHT(FM), Morehead City, North Carolina; (4) the above-referenced application for assignment of the WAHL construction permit from OB to Bruce S. Cotton ("Cotton"); (5) a February 28, 1997 Conner petition to deny; and (6) a March 3, 1997 ECB petition to deny. Other related pleadings have also been filed. As set forth

below, we grant the informal objections, deny the application for extension of time, cancel the WAHL construction permit, and delete the WAHL call sign. As a result of these actions, we also dismiss as moot the petitions to deny and the application for assignment of the WAHL construction permit.

Background

On May 5, 1992, OB filed an application for a construction permit for a new commercial FM station to operate as a Class A facility on Channel 225 in Ocracoke, North Carolina (File No. BPH-920505ME). The Commission granted the permit application on May 21, 1993. On November 21, 1994, OB filed an application to extend the WAHL permit (File No. BMPH-941121JB). The staff granted this initial extension request on April 29, 1996. In the interim, OB filed on July 28, 1995 an application for one-step upgrade of WAHL to Class C1 facilities on Channel 224 (File No. BMPH-950728IC). On August 12, 1996, OB's upgrade application was granted and the WAHL construction permit was extended until February 12, 1997.

On January 13, 1997, OB filed the Extension Application, in which it claims that it has made substantial progress toward the construction of Station WAHL. It maintains that it has ordered over $80,000 of equipment, including a transmitter, an antenna, and coaxial cable. However, this equipment will not be delivered until the WAHL tower has been erected. OB further states that it has studio equipment on hand and that it has finalized arrangements to lease the transmitter site from Cotton. OB also claims that it was unable to complete construction of Station WAHL for the following reasons which were beyond its control: (1) prior to agreeing to lease the transmitter site, OB found out that the site "may in fact be in an area of wetlands and thus subject to federal restrictions on use," thus forcing OB to devote significant time to determining whether construction of the tower at the transmitter site was prohibited by new federal wetlands regulations which became effective on December 13, 1996; and (2) adverse weather conditions, including two hurricanes and the presence of standing water and mud at the construction site, prevented construction activity.

Conner contends in its informal objection that OB does not satisfy any of the three criteria for extension of construction permits set forth in § 73.3534(b) of the Commission's rules. First, Conner asserts that OB has not made substantial progress in the construction of Station WAHL. Specifically, Conner argues that although OB ordered equipment in December 1996, there is no indication that OB placed a deposit on or made either payment or delivery arrangements for the "ordered" equipment. Conner also claims that OB provided scant details in the Extension Application about the studio equipment which it claimed to have on hand. Conner further states that OB does not have authorization from the owner of the transmitter site for construction of the WAHL tower, because the site authorized in the construction permit is not the property owned by Cotton, but rather an adjacent piece of property owned by a Mr. Rio Hill.

Second, Conner asserts that further progress was not prevented by circumstances beyond OB's control. According to Conner, neither the new federal wetlands regulations, nor the weather during the most recent construction period were circumstances beyond OB's control which prevented it from proceeding with the construction of WAHL. Finally, Conner contends that the Commission should not extend the WAHL construction permit because OB's one-step application was technically deficient in that it did not provide for the requisite 70 dBu coverage to the community of Ocracoke from either the allotment site or the transmitter site. Thus, it is Conner's position that OB's one-step application for upgrade of WAHL was granted erroneously.

Similarly, ECB asserts that OB has neither made substantial progress nor been prevented from constructing Station WAHL by circumstances beyond its control. First, ECB claims that OB's progress is illusory, alleging that it improperly characterizes an equipment price quote as an order. ECB also questions OB's December 1996 equipment order since OB informed the Commission more than two years ago in its first extension application that it had ordered similar equipment. ECB further contends that OB's claim of purported progress lacks evidentiary support such as a lease agreement for the tower site, and new equipment price quotes. Finally, ECB avers that OB does not specify whether its alleged progress took place within the most recent construction period. It is ECB's position that the only activity during the last construction period was the acquisition of the tower site by Cotton and the procurement of a tower price quote by Edward Seeger, neither of which were actions undertaken by OB. Accordingly, ECB states that OB has acquired no equipment, erected no tower, and risked no funds during the most recent construction period. Moreover, ECB points out that OB has expended only $6,709 in the nearly four years in which it has held the WAHL permit, an amount which ECB contends barely covers filing fees and incidental expenses.

Second, ECB disputes OB's assertion that weather conditions and new federal wetlands regulations prevented construction of WAHL during the most recent construction period. ECB asserts that OB did not detail the steps it took to determine whether the site is in a wetlands area, nor did it submit any evidence of adverse weather conditions affecting the construction site. Finally, ECB contends that OB did not proceed with construction because its true interest was in selling its construction permit, rather than constructing WAHL.

In opposition, OB states that ECB's interest is to prevent the assignment of the WAHL construction permit to Cotton, since ECB was unsuccessful in its attempt to acquire the WAHL permit from OB. OB asserts that up until the point when OB reached agreement to assign the permit to Cotton, ECB did not protest the alleged deficiencies which it now asserts are so serious as to preclude extension of the WAHL permit. Thus, OB contends that ECB is a "sore loser" that does not want to see new competition in its market. It is OB's position that ECB wants either to own the WAHL permit or to ensure that no one else does.

OB further states that it has satisfied two of the "one-in-three" criteria for permit extensions, as set forth in § 73.3534(b) of the Commission's rules, because: (1) it made

progress in the construction of Station WAHL; and (2) it was prevented from making further progress by circumstances beyond its control. First, it asserts that it has ordered equipment for the transmission facilities, the delivery of which is contingent upon the erection of the tower, which is itself dependent upon favorable weather along the North Carolina coast. In addition, much of the studio equipment for WAHL is on hand, and OB has finalized arrangements for the lease of the tower site from Cotton. OB further asserts that its expenses to date amount to only $6,709 because (1) William J. Pennington, III, the General Partner of OB, has served as legal counsel and technical consultant to OB and, under the Commission's rules, he cannot be reimbursed in connection with the proposed sale of unbuilt Station WAHL for his services; and (2) much of the studio equipment which OB plans to use for WAHL is owned either by Mr. Pennington or Pamplico Broadcasters, L.P., a partnership in which Mr. Seeger is a general partner. This equipment became available when two other radio stations in which Pennington and Seeger have ownership interests upgraded their studio equipment. In addition, OB has submitted evidence showing that the Cotton site is in fact the authorized transmitter site.

Second, OB states that weather conditions, including two destructive hurricanes in 1996, Hurricane Bertha on July 12 and Hurricane Fran on September 5, impeded construction because reconstruction efforts made it difficult to contract for construction crews to erect the tower and to run electrical lines to the site. In addition, the prevalence of standing water and mud at the transmitter site make the site accessible only during warmer months. OB also states that it needed time to analyze the new federal wetlands regulations which went into effect on December 13, 1996, in order to determine whether construction at the transmitter site was still feasible. Finally, OB avers that Conner's contention that the Commission mistakenly granted OB's one-step application because the application was technically deficient is incorrect and, in any event, amounts to a late-filed petition for reconsideration which should be dismissed.

Discussion

The Commission will reinstate and extend a broadcast construction permit in only one of three circumstances: (1) construction is complete and testing is underway; (2) there has been substantial progress toward construction; or (3) there has been no progress for circumstances beyond the permittee's control and the permittee took all possible steps toward expeditiously resolving the problem and proceeding with construction. *See* 47 C.F.R. § 73.3534(b). The proper time frame for evaluating construction efforts is the most recent construction period. *See Panavideo Broadcasting, Inc.*, 6 FCC Rcd 5259, 5259 (1991).

During the most recent construction period, August 12, 1996 to February 12, 1997, OB neither made substantial progress towards the construction of Station WAHL, nor was it prevented from making further progress by circumstances beyond its control. First, while OB claims that it ordered over $80,000 of equipment, including a transmitter, an antenna, and coaxial cable during the last construction period, it neither took delivery of, nor paid for this equipment. By OB's own admission, payment for and delivery of the equipment which OB

purports to have ordered will not be made until its tower is erected, a date which "remains uncertain." Opposition to ECB Informal Objection at 2. This alleged equipment order with no indication of deposit or an arrangement of payment terms does not evidence a serious commitment to construct. *See New Orleans Channel 20, Inc.*, 104 FCC 2d 304, 314 (1986), *aff'd* 830 F.2d 361 (D.C. Cir. 1987). Nor can it constitute substantial progress. In addition, OB fails to explain why it needed to order this equipment in December 1996 when it stated in its first extension application in November 1994 that it had "ordered broadcast equipment . . . to construct the station" which would "be delivered after [OB] received a construction permit to build its Class C1 facilities" at the current antenna site. Exhibit 1 to November 21, 1994 Application for Extension of Time. OB received this permit on August 12, 1996, yet it appears that none of the equipment which it had allegedly ordered was ever delivered.

While OB contends that it has much of the needed studio equipment on hand, it fails to explain whether this equipment, none of which is owned by OB, was made available to OB during the most recent construction period. We also find that even when taking into account Pennington's role as both OB's legal counsel and its technical consultant, OB's total expenditure of $6,709 over a nearly four year period is further evidence of OB's lack of construction progress. OB has acquired no equipment, erected no tower and risked, essentially, no funds towards the construction of WAHL. We find that OB has not made substantial progress towards the construction of Station WAHL. *See Community Service Telecasters, Inc.*, 6 FCC Rcd 6026, 6028 (1991). In these circumstances, it is unnecessary for us to resolve the question whether OB's construction efforts relate to the permitted site.

Having found that OB did not make substantial progress towards the construction of Station WAHL during the most recent construction period, it is necessary to determine whether OB was unable to proceed with construction because of circumstances beyond its control, namely (1) it was forced to devote significant time to determining whether its site was in a wetlands area and whether construction of the tower at the transmitter site was prohibited by new federal wetlands regulations which became effective on December 13, 1996; and (2) adverse weather conditions, including two hurricanes and the presence of standing water and mud at the transmitter site, made it impossible to proceed with construction.

First, OB offers no definitive evidence of (1) whether the WAHL transmitter site is in fact in a wetlands area; and (2) what efforts OB made to determine what effect the revised federal wetlands regulations would have upon the construction of Station WAHL at the authorized site. The burden is upon OB to make a showing, which includes relevant documentation, that the new federal wetlands regulations constituted a circumstance beyond its control which prevented the construction of Station WAHL and that it has taken "all possible steps" to resolve the problem and proceed with construction. *See Carolyn S. Hagedorn*, 11 FCC Rcd 1695, 1696-1697 (1996); *see also Kin Shaw Wong*, 11 FCC Rcd 11928, 11934 (1996). OB's showing with regard to the new federal wetlands regulations' effect upon OB's efforts to construct Station WAHL falls short of this standard.

Second, OB offers no specific evidence that adverse weather conditions, including hurricanes, prevented construction at the transmitter site. While these storms undoubtedly damaged the North Carolina coast and taxed resources around the state, Hurricane Bertha occurred in July 1996 which was prior to the construction period. Further, OB had five months after Hurricane Fran to construct Station WAHL. While OB presents as appendices to its opposition to ECB's informal objection numerous newspaper articles detailing the devastation wrought by the hurricanes, particularly Hurricane Fran, the localities which were the subjects of these articles were at least 100 miles from Stacy, the location of the transmitter site. OB's further claim that standing water and mud effectively prevent construction at the site during "autumn, winter and early spring" would indicate that OB did not select a suitable coastal transmitter site. The selection of the WAHL transmitter site represents a business judgment on OB's part, not a circumstance beyond its control. *See Panavideo*, 6 FCC Rcd at 5259. While the Commission has recognized that it may be reasonable for a permittee to defer construction based upon weather considerations, *see Benko Broadcasting Company*, 3 FCC Rcd 6838, 6841 (1988), in this instance, OB has provided no documentation for its assertion that construction was prevented by adverse weather conditions and its aftereffects. *See Contemporary Communications*, 11 FCC Rcd 5230 (1996). As noted above, the burden is on OB to make a showing, which includes relevant documentation, to establish that the requested extension of its construction permit is justified. *See Carolyn S. Hagedorn*, 11 FCC Rcd at 1696-1697. We conclude that a permit extension under § 73.3534 is not warranted.

Finally, we note that Conner's assertion that the WAHL construction permit should not be extended because the OB upgrade application should never have been granted is not timely raised. Such allegations should have been made in the context of a petition for reconsideration of the Commission's decision granting OB's upgrade application. Under § 1.106(f) of the Commission's rules, such a petition for reconsideration must be filed within 30 days of the date of public notice of the final Commission action. 47 C.F.R. § 1.106(f); *see also* 47 U.S.C. § 405. Public notice of the grant of OB's one-step upgrade application was given on August 13, 1996. Thus, in order to raise the issue of the propriety of the grant of the upgrade application, Conner should have filed a petition for reconsideration with the Commission by September 12, 1996.

Conclusion

ACCORDINGLY, IT IS ORDERED, That the February 7, 1997 informal objection filed by Conner Media Corporation and the March 25, 1997 informal objection filed by Eastern Carolina Broadcasting Company, Inc. are GRANTED to the extent indicated herein. IT IS FURTHER ORDERED, That the January 13, 1997 application for extension of the WAHL construction permit filed by Ocracoke Broadcasters (File No. BMPH-970113JA) is DENIED, the WAHL construction permit is CANCELLED, and the WAHL call sign is DELETED. IT IS FURTHER ORDERED, That the January 21, 1997 application for consent to the assignment of the WAHL construction permit filed by Ocracoke Broadcasters (File No. BAPH-970121GS) is DISMISSED, and the February 28, 1997 petition to deny filed by

Conner Media Corporation and the March 3, 1997 petition to deny filed by Eastern Carolina Broadcasting Company, Inc. are DISMISSED.

Sincerely,

Peter H. Doyle
Assistant Chief, Audio Services Division
Mass Media Bureau

CERTIFICATE OF SERVICE

I, Tracey S. Westbrook, a secretary in the law firm of Pepper & Corazzini, L.L.P., do hereby certify that a true copy of the foregoing "SUPPLEMENT TO PETITION FOR RECONSIDERATION" was sent this 3rd date of July, 1997, by U.S. first class mail, postage prepaid, to the following:

* John A. Karousos, Esquire
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

* Peter H. Doyle, Esquire
Assistant Chief, Audio Services Division
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Vincent J. Curtis, Jr., Esquire
Fletcher Heald & Hildreth, P.L.C.
1300 North 17th Street - 11th Floor
Arlington, VA 22209

Frank R. Jazzo, Esquire
Fletcher Heald & Hildreth, P.L.C.
1300 North 17th Street - 11th Floor
Arlington, VA 22209

William J. Pennington, III, Esquire
P.O. Box 403
Westfield, Massachusetts 01086-0403

Gary S. Smithwick, Esquire
Smithwick & Belendiuk, P.C.
1990 M Street, N.W., Suite 510
Washington, D.C. 20036

Mark Van Bergh, Esquire
Roberts & Eckard, P.C.
1150 Connecticut Avenue, N.W. - Suite 1100
Washington, D.C. 20036

Tracey S. Westbrook

Tracey S. Westbrook

* Hand delivery