RECEIVED

JAN 19 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of	)	
	)	
1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules, and Processes	)	MM Docket No. 98-43
	)	
Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities	)	MM Docket 94-149

PETITION FOR RECONSIDERATION

Growing Christian Foundation ("GCF"), permittee of noncommercial educational FM broadcast station KYPL, Yakima, Washington, through counsel and pursuant to Section 405 of the Communications Act and Section 1.429(a) of the Rules, hereby petitions for reconsideration of the FCC's *Report and Order* in the above-captioned proceeding, FCC 98-281, released November 25, 1998 (published in summary form, 63 *Fed. Reg.* 70040, December 18, 1998) (the "*R&O*"), insofar as the FCC, in the *R&O*, adopted a rule limiting the period for construction of new broadcast stations to three years, with no provision for extension of construction permits where construction is delayed by reasons beyond the permittee's control, except for "acts of God" and during periods where issuance of the construction permit is the subject of FCC or judicial review. *R&O*, ¶¶ 77-90. In particular, the FCC should reconsider, and reject, the conclusion expressed in the *R&O* that delays due to the inability seasonably to secure local land use approvals do not justify extension of a construction permit.

With one hand, the FCC, in the *R&O*, has extended the period for construction from two to three years but, with the other hand, the FCC has taken away much if not all of the benefit by

precluding extension of construction permits, with only a handful of exceptions, where delays in construction are caused by reasons beyond the applicant's control. While this action is justified as necessary to expedite new service to the public and prevent warehousing of spectrum, *R&O*, ¶ 90, the FCC provides no supporting evidence and makes no finding that either of these objectives requires a change in the rules. There is every reason to believe that, as a group, the FCC's broadcast station permittees construct new stations as expeditiously as possible and no reason to believe that, in any significant numbers, permittees are delaying the completion of construction for improper purposes.

The result of the new rule will be the forfeiture of numerous construction permits in circumstances where the permittee has taken every possible, reasonable step to resolve delays and proceed with construction. The self-evident unfairness of this result will be compounded by the application of the new rule to permits, such as GCF's permit for KYPL, that have already been issued under the old rules, where permittees have already expended substantial resources in the pursuit of bringing new service to the public only to be frustrated by reasons beyond their control.

In fact, the FCC's formulation of the supposed problem demonstrates the illegitimacy of the solution. As the *R&O* states, ¶ 79, "it remains the case that a significant number of permittees do not succeed in constructing their proposed facilities prior to permit expiration. As a result, we continue to receive large numbers of extensions each year." The *R&O* does not acknowledge that the overwhelming majority of these applications are granted because (1) construction is complete and testing is underway; (2) substantial progress toward completion of construction has been made, or (3) progress has been delayed due to reasons beyond the permittee's control (including delays caused by governmental budgetary processes and zoning problems). The FCC's record of granting these

applications shows that neither unwarranted delay in inaugurating new service nor "spectrum warehousing" is a significant problem.

The real motivation behind the FCC adoption of a rule that sharply limits its own discretion to grant an exception is revealed by the further statement in ¶ 79 of the *R&O* that: "Substantial staff resources are required for fact-intensive analysis involved in processing and disposing of these applications. Our goal in this proceeding is to *substantially reduce paperwork and administrative burdens on permittees and the number of requests for additional time to construct* while promoting the expeditious construction of stations." (Emphasis added.) This purpose serves only the FCC's administrative interest and has very little, if anything, to do with the public interest. Other rules could have been adopted that would have served the FCC's objective just as well. For example, if the FCC simply extended the construction period, the number of extension applications -- and the burden on the FCC -- would be expected to decline and, when an extension was sought, the burden of showing that the failure to complete construction was due to reasons beyond the permittee's control would be more difficult to meet (thereby diminishing the possibility of manipulating the extension process to "warehouse spectrum"). Instead, the *R&O* adopts an arbitrary, fixed period for completion of construction, and in its own administrative interests -- and at the expense of the public interest -- precludes the agency from considering legitimate, even compelling, showings that the permittee has been unable to complete construction for reasons beyond its control.

The KYPL construction permit is a case in point. The permit, initially granted in October 1995 and subsequently modified, specifies that the KYPL tower will be constructed at what might be called an "antenna farm," i.e., next to an existing broadcast tower. Under such circumstances, it might reasonably be assumed that, the FCC and FAA having given their approval for the construction,

the process of securing local land-use approvals would not result in undue delay. However, that has proven to be a completely erroneous assumption.

At the time the initial application for the KYPL construction permit was filed, the antenna was to be mounted on an existing communications tower. When the time came to construct, however, that tower could no longer accommodate an additional antenna and GCF was obliged to seek another site on which it could construct a new tower and apply for a modification of its authorization. This modification application was granted on August 26, 1997. Within roughly two weeks, GCF embarked on the process of obtaining a building permit from Yakima County. Now, a year and a half later, GCF has still not received initial approval from the Yakima County Planning Commission, because of objections filed with the Planning Commission on behalf of the Washington State Department of Transportation, the local airport, the Washington Pilots Association, the Okanogan County pilots association and an individual pilot. These parties assert, apparently, that the construction of KYPL could cause interference to air navigation radio frequencies, notwithstanding that this construction has been approved by both the FCC and the FAA. The Planning Commission has delayed approval in response to these objections, relying on a Washington State statute which itself states that its provisions are not applicable to "structures required to be marked by federal regulations."[1] GCF has no doubt that, ultimately, it will prevail and receive the necessary local authorizations to proceed with construction. But it does not have this approval now, and it will not receive approval in time to complete construction before the current extension of its construction permit expires.

---

[1] GCF's record of diligent pursuit of local approvals is documented at length in various extension applications, most recently File No. BMPED-980828JB, granted October 16, 1998.

the process of securing local land-use approvals would not result in undue delay. However, that has proven to be a completely erroneous assumption.

At the time the initial application for the KYPL construction permit was filed, the antenna was to be mounted on an existing communications tower. When the time came to construct, however, that tower could no longer accommodate an additional antenna and GCF was obliged to seek another site on which it could construct a new tower and apply for a modification of its authorization. This modification application was granted on August 26, 1997. Within roughly two weeks, GCF embarked on the process of obtaining a building permit from Yakima County. Now, a year and a half later, GCF has still not received initial approval from the Yakima County Planning Commission, because of objections filed with the Planning Commission on behalf of the Washington State Department of Transportation, the local airport, the Washington Pilots Association, the Okanogan County pilots association and an individual pilot. These parties assert, apparently, that the construction of KYPL could cause interference to air navigation radio frequencies, notwithstanding that this construction has been approved by both the FCC and the FAA. The Planning Commission has delayed approval in response to these objections, relying on a Washington State statute which itself states that its provisions are not applicable to "structures required to be marked by federal regulations."[1] GCF has no doubt that, ultimately, it will prevail and receive the local necessary authorizations to proceed with construction. But it does not have this approval now, and it will not receive approval in time to complete construction before the current extension of its construction permit expires.

---

[1] GCF's record of diligent pursuit of local approvals is documented at length in various extension applications, most recently File No. BMPED-980828JB, granted October 16, 1998.

The FCC's new rules would require GCF and other noncommercial educational permittees to expend their limited resources to somehow insure against such protracted delays, by commencing local land-use approval processes long before FCC action on their applications or, alternatively, to "cut and run" in the face of local delays, abandoning superior transmitter sites in favor of others less suited for service to the community of license. This latter option will require utilization of more FCC resources, not less. Of at least equal significance, the FCC's decision to abruptly reverse its policy and to apply its new rules to already-issued construction permits will unfairly deny GCF the opportunity to fully consider its options, limited as they may be.

Perversely, the effect of the FCC's determination to ignore delays caused by local administrative procedures for implementing zoning changes and securing construction permits will be to encourage and strengthen construction opponents who lack a legitimate basis for seeking to block tower construction. To succeed, construction opponents need not make a convincing case on the merits before local zoning officials; they need only to be persistent. The longer the process can be delayed, the nearer their objective. If they succeed in "running out the clock," the FCC will accomplish their aim for them by canceling the construction permit.

The new rules, and the FCC's *ex cathedra* pronouncement that delays encountered in the local approval process will not justify extension of a construction permit, therefore have the effect -- presumably unintended -- of tilting the playing field at the local level in favor of construction opponents, even those opponents whose objections before local authorities are premised on matters that are within the exclusive jurisdiction of the FCC and the FAA.

The limited record in this proceeding does not support this result. According to the *R&O*, barely seven parties commented on this issue; six of those parties argued that delays in obtaining local

zoning authorizations should be treated the same as FCC and judicial review, and several provided anecdotal evidence in support of their arguments. *R&O*, ¶ 82. The *R&O* is utterly devoid of any illumination why the FCC made the choice reflected in the new rules. For this reason alone, and especially in view of the FCC's abrupt reversal of long-standing policy, the new rule is arbitrary and capricious in violation of the notice-and-comment provisions of the Administrative Procedure Act, 5 U.S.C. § 553(c), and rehearing is required.

The FCC's existing rules -- Sections 73.3534 and 73.3535 -- are sufficient to spur the expeditious completion of construction and prevent warehousing of spectrum. The *R&O* offers no evidence that there is any serious problem of unjustified delays in construction or of permits held without any intent to complete construction. If the FCC wishes to reduce the number of extension applications, it can do so, legitimately, by increasing the period for construction from two years to three. It cannot do so, consistent with the public interest, by adopting rules which preclude the agency from extending construction permits where the delay in completing construction is due to reasons beyond the permittee's control.

For the foregoing reasons, this Petition for Reconsideration should be granted.

Respectfully submitted,

GROWING CHRISTIAN FOUNDATION

By _____
J. Geoffrey Bentley

J. Geoffrey Bentley, P.C.
BENTLEY LAW OFFICE
P.O. Box 807
Herndon, Virginia 20172-0807
(703)793-5207

Its Attorney

January 19, 1999