

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

July 9, 2004

In Reply Refer To:
1800B3-IB/GDG

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In re: WKCV-LP, La Plume, PA
Facility No. 133966
BNPL-20010612AAZ

Dear Counsel:

This letter concerns the June 24, 2004, request (“Request”) filed on behalf of Keystone College (“Keystone”) for extension of time to complete construction of a new low power FM Station (“LPFM”) to serve La Plume, Pennsylvania on Channel 278 (103.5 MHz). For the reasons detailed below, we will treat Keystone’s request as one for waiver of the Commission’s construction period rule, 47 C.F.R. § 73.3598(a), and waive the rule to the extent detailed below.

Background. On February 14, 2003, the staff approved Keystone’s application to construct a new LPFM station, requiring completion of construction and the filing of a covering broadcast license application no later than August 14, 2004. As Keystone structured the project, it waited six months after grant, *i.e.*, to August of 2003, to retain a consulting firm to coordinate the station’s construction. That firm in turn recommended that Keystone hire Prometheus Towers to construct WKCV-LP’s tower. Prometheus’s principal, Nicholas Berg, met with Keystone in November, 2003. According to Keystone, Mr. Berg committed to begin constructing WKCV-LP in spring, 2004, upon his return from a stay in Iraq where he was helping to build that country’s telecommunications infrastructure. Keystone accepted the six month delay in utilizing Mr. Berg’s services with the understanding that Mr. Berg would complete construction on or before the permit’s August 14, 2004, expiration date. On May 11, 2004, Keystone received word that Prometheus would not be able to construct because Mr. Berg had been detained by terrorists in Iraq. Soon after, Mr. Berg was brutally murdered by his captors.

Keystone states that immediately after Mr. Berg’s death it initiated a search for a new construction company. It indicates that it has not yet located a replacement but

expects in a few weeks to hire a new firm and commence construction. Keystone asks that we add one year to the permit's construction period, thereby allowing construction be completed and a covering broadcast license application be filed no later than August 14, 2005.¹ Keystone also claims that the complexity of the proposed construction warrants the additional year requested, claiming that WKVC-LP's studios must be constructed and equipped in a manner more suitable to professional full service Class A or B radio stations. It therefore believes that it should receive a construction period closer to the period afforded full service stations (3 years). Keystone also contends that Section 73.3598(a) of the Commission's rules as printed in the October 1, 2003, edition of the Code of Federal Regulations does not distinguish the 18-month LPFM construction period from the 3-year period provided to permittees in other services.

Discussion. The Commission provides an 18-month period for LPFM permittees to complete construction and file a covering license application.² The staff may waive its construction period rule if "rare and exceptional" circumstances beyond a permittee's control prevent completion of construction by the permit's specified construction deadline.³

To the extent that Keystone's request is premised on a claim that constructing WKVC-LP will be significantly more complex than the usual LPFM project, waiver is not appropriate. The sole support for that claim is WKVC-LP's consultant's proposal of studio materials compatible with a full service Class A broadcast station but transmission facilities of an LPFM station. The manner in which Keystone chooses to equip its studio is well within its control.⁴

We recognize a direct link between Mr. Berg's death and the station's construction.⁵ According to Keystone, Mr. Berg committed to a specific construction timetable, one that Keystone believed would allow it to complete construction and file a covering broadcast license application no later than the permit's August 14, 2004, expiration date. After Mr. Berg's death, Keystone immediately took steps toward securing a replacement contractor. The circumstances of Mr. Berg's death were rare and exceptional. Given these facts, we will compensate Keystone for the two-month period between the unexpected loss of Mr. Berg's services and Keystone's projected date for

¹ *Request* at 5.

² *See* 47 C.F.R. § 73.3598(a). *See also* *Creation of Low Power Radio Service*, 15 FCC Rcd 2205, 2278 (2000), 65 FR 7616, 7636 (Feb. 18, 2000).

³ *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes*, 13 FCC Rcd 23056 (1998), *recons. granted in part and denied in part* 14 FCC Rcd 17525 (1999).

⁴ *Request* at 2.

⁵ Compare *Wendell and Associates*, 17 FCC Rcd 18576, 18580 (2002) (waiver denied due to tenuous link between inability to construct, unavailability of contractor, and events of September 11, 2001, where permittee had no firm commitment from contractor and did not immediately seek replacements when contractor accepted September 11 clean-up work instead).

retaining a replacement construction company. This compensates Keystone for the lost construction time directly attributable to Mr. Berg's death.

With respect to Keystone's observation that it has "discovered an anomaly" in the construction rules, we confirm that the October, 2003, edition of the Code of Federal Regulations mistakenly omits language in previous editions describing the 18-month LPFM construction period. Keystone concedes, however, that the Commission's Order establishing the LPFM processing guidelines, the *Federal Register* publication of these guidelines, and Keystone's permit reflect an 18-month LPFM construction period. It appears that the omission in the 2003 edition of the rules occurred inadvertently. An omnibus 2002 item concerning broadcast auxiliary stations intended solely to remove the term "broadcast auxiliary" from Section 73.3598(a) but additional words were removed in error.⁶ The Commission has since corrected the error.⁷ Keystone does not argue or demonstrate that the error somehow entitles it to a three year construction period.

Accordingly, Keystone College's request, when treated as a waiver of the Commission's construction period rule, 47 C.F.R. § 73.3598(a), IS GRANTED to the extent that the Commission's database IS MODIFIED to require that Keystone complete construction and file a covering broadcast license application no later than October 14, 2004, and DENIED in all other respects.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

⁶ *Revisions to Broadcast Auxiliary Service Rules*, 17 FCC Rcd 22979, 23050 (2002).

⁷ *Erratum, Revisions to Broadcast Auxiliary Service Rules*, DA04-2056 (OET July 8, 2004).