



Federal Communications Commission  
Washington, D.C. 20554

April 30, 2007

**DA 07-1948**

*In Reply Refer to:*

1800B3-LAS/JP

Released: April 30, 2007

Mr. Danny Danhauser  
Syracuse Community Radio  
826 Euclid Avenue  
Syracuse, NY 13210

In re: Syracuse Community Radio  
DWXXC(FM), Truxton, New York  
Facility ID: 84766  
File Nos. BPED-19961204MD  
BLED-20010116AAC  
BMPED-20010313AAX

**Petition for Reconsideration and  
Application for Modification of  
Construction Permit**

Dear Mr. Danhauser:

We have before us a Petition for Reconsideration ("Petition") filed March 12, 2001, by Syracuse Community Radio, Inc. ("SCR") seeking reconsideration of a February 12, 2001, staff action declaring the above-noted construction permit forfeited, dismissing the above-noted license to cover application, and deleting the call sign WXXC(FM).<sup>1</sup> We also have before us the above-noted March 13, 2001, application to modify the SCR construction permit. For the reasons discussed below, we deny the Petition and dismiss the modification application.

**Background.** On December 4, 1996, SCR filed an application for a construction permit for a new noncommercial educational ("NCE") FM station in Truxton, New York.<sup>2</sup> The Commission granted this application on January 14, 1998, with a construction permit expiration date of July 14, 1999. The construction permit authorized the construction of a new Class A NCE FM Station on Channel 204.<sup>3</sup> By letter dated March 27, 2000, the Commission extended the permit's expiration date to January 14, 2001.<sup>4</sup> On January 16, 2001, SCR filed the above-captioned application for a license to cover the construction

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<sup>1</sup> On March 22, 2001, the State University of New York ("SUNY") filed an Opposition to the Petition. On April 3, 2001, SCR filed a Reply.

<sup>2</sup> File No. BPED-19961204MD.

<sup>3</sup> The permit authorized construction of an NCE FM station with: (1) an effective radiated power ("ERP") of .100 kilowatts; (2) an overall height of antenna structure above ground of twelve meters; and (3) antenna coordinates of 42° 44' 24" North, 76° 00' 15" West.

<sup>4</sup> This action was taken pursuant to procedures adopted in the *1998 Biennial Regulatory Review- Streamlining of Mass Media Applications, Rules, and Processes*, Memorandum Opinion and Order, 14 FCC Rcd 17525 (1999) ("*Streamlining Order*").

permit for Station WXXC(FM). Subsequently, on January 30, 2001, an on-site inspection conducted by the Enforcement Bureau's Buffalo Field Office staff determined that WXXC(FM) was only partially constructed and not operational,<sup>5</sup> notwithstanding SCR's representations in the license application that the station had been timely constructed in accordance with its construction permit.<sup>6</sup> Accordingly, on February 12, 2001, the staff declared that SCR's construction permit was forfeited as of its expiration date of January 15, 2001, pursuant to Section 73.3598(e) of the Commission's Rules (the "Rules").<sup>7</sup> Additionally, the staff dismissed the license application and deleted the WXXC(FM) call sign. SCR timely filed the Petition seeking reconsideration of these actions on March 12, 2001. On March 13, 2001, SCR filed an application for a minor modification of the construction permit, requesting a change in the antenna coordinates.

**Discussion.** The Commission will consider a petition for reconsideration when the petitioner shows either a material error 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.<sup>8</sup> In support of its Petition, SCR states that WXXC(FM) was "fully constructed" prior to the expiration of its permit, with "the single exception" that the antenna could not be secured at the authorized height.<sup>9</sup> SCR asserts that program tests were briefly performed "on January 12 or [January] 13, [2001]."<sup>10</sup> SCR also indicates that, as a result of

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<sup>5</sup> The Enforcement Bureau's Field Report noted the presence of "a small shed" at the transmitter location and an antenna mounted 12 feet above ground level, with coaxial cable leading from the antenna to the shed. There were no visible electric power or telephone cables leading to the shed, and there were no footprints or disturbances in the snow around the shed. The Field Report further noted that a power meter located on a pole next to the shed read "00000" and the power lines from the meter ran to a vacant house, not to the shed. The SUNY Opposition also observes that, when SUNY staff visited the transmitter site on January 30, 2001, the electric meter had not registered any service since the time of its installation. SUNY Opposition at 3.

<sup>6</sup> The staff received an electronic mail objection to the license application that was not served on the applicant. The *ex parte* objection was made part of the record and forwarded to the applicant by a January 31, 2001, staff letter. *Letter to Danny Danhauser*, Ref. No. 1800B3-AB (MMB Jan. 31, 2001).

<sup>7</sup> *Letter to Syracuse Community Radio, Inc.*, Ref. No. 1800B3-JR (MB Feb. 12, 2001). 47 C.F.R. § 73.3598(e) provides for automatic forfeiture of a permit for which construction has not been completed by the expiration date. The letter also states that "the action taken herein in no way prejudices future action, if any, by the Commission's Enforcement Bureau in light of the possible misrepresentations made in the license application."

<sup>8</sup> 47 C.F.R. § 1.106. See also *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

<sup>9</sup> Petition at 2.

<sup>10</sup> *Id.* SCR explains that, as it was "unable to obtain a ladder of sufficient height to initially secure the antenna at [the authorized 12 meters above ground level], it secured [the antenna] at a level of roughly four meters" and conducted program tests. Declaration of Danny Danhauser at 2. SCR admits that it was fully aware of this deviation when it filed the license application certifying that the station had been constructed in accordance with its authorization. SCR also indicates that, when it initiated broadcast service briefly on Friday, January 12 or Saturday, January 13, it "employed an auxiliary power generator," as it was "unable to get a licensed electrician to the site in time." *Id.* SCR notes that the program source for the testing consisted of several compact mini-discs that had been pre-recorded with music and station identification announcements. *Id.* After the completion of testing (for a "brief" duration of unspecified duration), SCR removed the antenna from the tower "for security reasons and locked it inside the shed." *Id.*

the Enforcement Bureau's field inspection, it discovered that the location of the facilities as constructed differed from those authorized by five seconds of latitude and two seconds of longitude.<sup>11</sup>

*Failure to Timely Complete Construction.* SCR has not presented information sufficient to support its challenge to the Field Office's finding that WXXC(FM) was "partially constructed and not operational" on January 30, 2001, when its agents inspected the facility. To the contrary, SCR acknowledges that, at the time of the on-site inspection, "steps were underway to properly site the antenna, and to regularize the program feed and power supply."<sup>12</sup> SCR avers that the station was fully operational when it suspended program testing on January 12 or 13, 2001, and that the station is now fully operational. It maintains that any "dereliction" in its construction of the authorized facilities should not negate its effort to inaugurate a new broadcast service at Truxton, and that "discretion should be utilized to favor a new service."<sup>13</sup>

SCR advises that it attempted to complete construction by the permit expiration date by: (1) mounting an antenna at the incorrect height at a site not authorized in its construction permit; (2) powering the operation by a temporary auxiliary generator; and (3) airing pre-recorded mini-discs for an indeterminate but "brief" period on a Friday or Saturday immediately before the WXXC(FM) permit expired. SCR also claims that it immediately thereafter dismantled the facility. We find that these steps do not constitute actual completion of construction as required by the Commission or authorized by the construction permit.<sup>14</sup> Furthermore, the program tests described by SCR are insufficient to represent acceptable on-air operations as defined in Section 73.7000 of the Rules.<sup>15</sup> The Enforcement Bureau's findings during the field inspection conducted two weeks after expiration of the construction permit, including the lack of power or telephone lines running to the shed located at the transmitter site, further supports the finding that WXXC(FM) was not fully constructed. Because SCR had not completed construction by the expiration of its construction permit, the staff properly declared the permit automatically forfeited, as a matter of law, on January 15, 2001.<sup>16</sup>

*Unauthorized Construction.* Stations must be constructed in accordance with the terms of the construction permit and technical provisions of the application in order to avert air navigation hazards and interference to other broadcast stations.<sup>17</sup> The Commission may revoke, suspend, or modify program

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<sup>11</sup> Declaration of Danny Danhauser at 3-4. SCR states that the original construction permit application specified the wrong coordinates, but that the station was constructed at the desired location.

<sup>12</sup> Petition at 4.

<sup>13</sup> Petition at 2.

<sup>14</sup> See, e.g., *Idaho Broadcasting Consortium*, Letter, 16 FCC Rcd 21558, 21560 (MMB Jan. 26, 2001) ("a broadcaster cannot avoid the statutory deadline [for forfeiture of the license of a station silent for more than 12 consecutive months] when it resumes operations just prior to the expiration of the one-year silent period only through the use of substantially non-conforming facilities").

<sup>15</sup> 47 C.F.R. § 73.7000. On-air operations are defined as the "broadcast of program material to the public pursuant to Commission authority, generally beginning with program test authority, for periods of time that meet any required minimum operating schedule, e.g., § 73.561(a)." Under 47 C.F.R. 73.561(a), NCE FM stations are required "to operate at least 36 hours per week, consisting of at least 5 hours of operation per day on at least 6 days of the week."

<sup>16</sup> See 47 C.F.R. § 73.3598(e); *In re Birach Broadcasting Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 1414 (2003).

<sup>17</sup> See *id.*; 47 U.S.C. § 319(c); *Metro Program Network, Inc.*, Memorandum Opinion and Order, 5 FCC Rcd 4940 (1990).

tests by a station which was not in compliance with all the terms of the construction permit.<sup>18</sup> SCR acknowledges that a “substantive, material” discrepancy exists between certain parameters specified in WXXC(FM)’s permit and those of the facility as constructed, but maintains that the field inspection “did not adduce facts” to warrant the dismissal of WXXC(FM)’s license application. The discrepancies found during the Enforcement Bureau’s field inspection, including an antenna mounted at an unauthorized height and location, and SCR’s own admissions, conclusively indicate that WXXC(FM) was not constructed in accordance with the terms of SCR’s construction permit. Moreover, SCR failed to obtain Commission authorization to construct facilities that deviated from those described in the underlying construction permit.<sup>19</sup> As such, SCR violated Section 73.1620 of the Rules.

SCR’s Petition has failed to show a material error or omission in the staff action and did not raise additional facts unknown or not existing until after SCR’s last opportunity to present such matters and will be denied.<sup>20</sup> Additionally, because SCR no longer holds a valid construction permit, its application for modification of construction permit will be dismissed.

**Conclusion/Actions.** For the above stated reasons, the Petition for Reconsideration filed by Syracuse Community Radio is DENIED. Furthermore, the application for modification of the construction permit for former Station WXXC(FM), Truxton, New York (File No. BMPED-20010313AAX) IS DISMISSED. IT IS FURTHER ORDERED, that all broadcast operations on Channel 204 (88.7 MHz) MUST CEASE IMMEDIATELY and that the technical facilities with which station DWXXC(FM) had been operating BE IMMEDIATELY DISMANTLED.

Sincerely,

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

cc: Michael Couzens, Esq., Counsel for Syracuse Community Radio, Inc.  
Margaret L. Miller, Esq., Counsel for State University of New York  
FCC Enforcement Bureau, Buffalo Field Office

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<sup>18</sup> 47 C.F.R. § 73.1620(b). Failure to construct a station in compliance with the construction permit may lead to revocation of the permit or imposition of a forfeiture. 47 U.S.C. §§ 312(a)(2), 319(c), and 503(b)(1)(A).

<sup>19</sup> See 47 C.F.R. § 73.1635 (allowing a permittee to operate a broadcast facility at a specified variance from the terms of the construction permit for a limited time, only after authorization is sought from Commission).

<sup>20</sup> See *Infinity Broadcasting Operations, Inc.*, Memorandum Opinion and Order, 19 FCC Red 4216 (2004).