



Federal Communications Commission  
Washington, D.C. 20554

November 3, 2005

**DA 05-2898**  
***In Reply Refer To:***  
**1800B3-IB**

Cram Communications, LLC  
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Onondaga Nation  
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In re: WVOA(AM), Dewitt, New York  
Facility ID No. 135358  
File Nos. BNP-200010123AGI  
as modified by BMP-20030804AAE and BMP-  
20031124ALF

**Petitions for Reconsideration;  
Tolling Notification**

Dear Counsel:

The staff has before it three submissions concerning the deadline for Cram Communications, LLC ("Cram") to construct WVOA(AM), Dewitt, New York. There are two Petitions for Reconsideration of our May 18, 2005 grant of Cram's modification application (the "Modification Application") proposing to move the unbuilt station's daytime location to a site in LaFayette, New York (the "LaFayette Site").<sup>1</sup> The first petition, dated June 10, 2005, was timely filed by Cram and challenges the expiration date on the modified permit.<sup>2</sup> The second petition was untimely filed on June 28, 2005 by

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<sup>1</sup> FCC File No. BMP-20031124ALF. See *Public Notice, Broadcast Actions*, Report No. 45989 (May 20, 2005).

<sup>2</sup> The new expiration date of September 26, 2005 is explained in Condition 6 of the permit which reads in relevant part: "The expiration date of this modified permit reflects the 131-day period that remained on the WVOA(AM) permit on September 7, 2004. On that date, Cram filed a cause of action in the Supreme Court of New York which tolled the running of the permit's construction period that was originally set to expire on January 16, 2005. That litigation concerned Cram's ability to construct WVOA(AM) at a former site. Today's grant of this modified permit, specifying a new site, moots the basis for tolling. Accordingly, tolling ceases as of today, and the remaining 131-day construction period begins to run."

the Onondaga Nation (“Nation”).<sup>3</sup> The LaFayette Site borders on the Nation’s land, and the Nation contends that the site, which has been used as a hunting ground, likely contains cultural artifacts. Thus, the Nation argues, the transmitter move is subject to the consultation requirements of Section 106 of the National Historic Preservation Act (“NHPA”).<sup>4</sup> Also before us are two “Tolling Notifications” filed by Cram. Cram’s August 9, 2005 notification argues that the Nation’s request for a consultation forms the basis for additional construction time. Cram’s August 31, 2005 notification argues that the Nation’s petition for reconsideration of the grant of the modification application also qualifies for tolling.

For the reasons discussed below, we vacate on our own motion the May 18, 2005, grant of Cram’s Modification Application regarding the LaFayette Site, return that application to pending status, and order Cram to initiate communication with the Nation. Accordingly, the station’s previous construction permit remains in effect and tolling status associated with that permit is restored.<sup>5</sup> We dismiss Cram’s petition for reconsideration as moot and deny Cram’s requests for additional tolling treatment. As also explained below, we dismiss the Nation’s petition for reconsideration, but will consider the Nation’s submission as an informal objection to the Modification Application.

## BACKGROUND

The three-year period for constructing a broadcast station “tolls” for certain limited events that encumber construction. In particular, the construction period tolls if “grant of the permit is the subject of administrative or judicial review . . . or construction is delayed by any cause of action pending before any court of competent jurisdiction related to any necessary local, state, or federal requirement for construction.”<sup>6</sup> Prior to the staff’s May 18, 2005 action, the WVOA(AM) construction permit had benefited from tolling based on litigation affecting use of the station’s authorized daytime site in Syracuse, New York (the “Syracuse Site”).<sup>7</sup> The staff determined that such tolling ceased upon grant of the Modification Application specifying the LaFayette Site. The staff thus indicated on the modified permit issued May 18, 2005, that the 131-day period remaining in the construction period began to run as of that date, resulting in a revised permit expiration date of September 26, 2005. It is the staff’s practice to explain tolling and the resulting expiration date as a “condition” on the permit.

Cram argues that the “condition” on the modified permit for the LaFayette Site should be removed in light of the difficulty it is having obtaining local approvals needed to build at the LaFayette Site. Cram contends that the permit for the LaFayette Site should benefit from continued tolling and be considered an “interim permit,” thereby allowing Cram to retain the ability to build at the Syracuse Site if that option becomes more expeditious. Alternatively, Cram requests that the staff rescind grant of the modified permit and tender a deficiency letter to which Cram can respond. According to Cram, the Nation’s request for consultation and petition for reconsideration also establish independent grounds for tolling treatment.

## DISCUSSION

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<sup>3</sup> The Nation states that it was not able to participate earlier because the maps included with Cram’s proposal did not identify the Nation’s border. The Nation claims that it was unaware of the project’s potential adverse impact until recently, when it observed tree clearing.

<sup>4</sup> See 16 U.S.C. § 470f. The Commission’s environmental rules implement NHPA at 47 C.F.R. §§ 1.1301-1.1319 and App. C to 47 C.F.R. pt. 1. See also *infra* note 8 and accompanying text.

<sup>5</sup> See *supra* note 2 regarding tolling treatment under the previously issued permit that remains in effect.

<sup>6</sup> See 47 C.F.R. § 73.3598(b)(ii).

<sup>7</sup> See *supra* note 2.

Pursuant to the terms of the 2004 *Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission* ("NPA"), an applicant has a duty to consult with any Indian tribe that attaches religious or cultural significance to a historic property if the property may be affected by the applicant's proposed communications tower.<sup>8</sup> The record indicates that on July 25, 2005, the New York State Historic Preservation Office ("SHPO") found that a consultation with the Nation regarding the potential effect of this project may not have been conducted as required, and therefore withdrew its March 4, 2005 "no effect" determination.<sup>9</sup> The SHPO indicates that it will be unable to issue a determination until receiving notification that a consultation has been completed. These circumstances represent a material change in the information before us at the time of our May 18, 2005 action. We find it appropriate to consider complete and accurate information, including the results of communication (and, as applicable, a consultation) between Cram and the Nation as well as the SHPO's recommendation, before determining whether it is in the public interest to authorize construction of daytime facilities at the LaFayette Site. Accordingly, we set aside our grant of the Modification Application,<sup>10</sup> return the Application to pending status, and dismiss as moot Cram's and the Nation's petitions for reconsideration. We recognize, however, that the environmental issues raised by the Nation continue to be relevant. In the interest of expediency, we will treat the Nation's submission as an informal objection to the pending Modification Application.

We deny Cram's new requests for tolling without needing to reach the merits of those requests. We have restored Cram to its prior position. Therefore, Cram once again holds the Syracuse Site permit which remains tolled based on litigation.<sup>11</sup> The 131 days remaining on the WVOA(AM) construction permit will not begin to run again until the litigation is completed or until the Commission grants the Modification Application, whichever occurs first.<sup>12</sup> Even if we were to assume that the Lafayette Site matters raised by Cram in its recent submissions qualified for tolling, the construction "clock" has already stopped. Additionally, under the Commission's strict broadcast construction policy, tolling is not available based on construction impediments at alternative sites. Accordingly, we reject Cram's request to treat an authorization specifying the Lafayette Site as a mere "interim permit."

Assuming a successful communication process and reissuance of the SHPO's "no effect" determination, Cram will have less than five months to complete construction. It is well established that the Commission will not toll construction deadlines because a permittee encounters difficulties obtaining local approvals.<sup>13</sup> Accordingly, we caution Cram to complete immediately all pre-construction tasks, including obtaining all local zoning approvals not directly related to its communication with the Nation.

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<sup>8</sup> See NPA, Sec. IV, *adopted in Report and Order, Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, 20 FCC Rcd 1073 (2004) (codified at 47 C.F.R. pt 1, App. C). The duty to consult is founded in Sections 101(d)(6)(a-b) and 106 of the NHPA (16 U.S.C. §§ 470a(d)(6)(a-b) and 470f), the regulations of the Advisory Council on Historic Preservation (36 C.F.R. pt. 800), and the Commission's environmental regulations (47 C.F.R. §§ 1.1301-1319).

<sup>9</sup> See Letter from Nancy Herter to Craig Fox (July 25, 2005) (submitted as Exhibit 2 to Cram's Tolling Notification). Cram contends that the Nation had been notified of the project on two previous occasions, but also indicates that no consultation has yet been completed. See Tolling Notification at 1.

<sup>10</sup> See 47 C.F.R. § 1.113.

<sup>11</sup> See 47 C.F.R. § 73.3598(b)(ii).

<sup>12</sup> Cram must continue to request extensions of the tolling treatment at six-month intervals during the litigation, as it was notified when it originally received tolling treatment.

<sup>13</sup> See, e.g., *Streamlining of Mass Media Applications, Rules, and Processes*, 14 FCC Rcd 17525, 17539 (1999).

Because the Nation appears willing to enter into discussions with Cram, we direct Cram to initiate communication with the Nation pursuant to Section IV.G. of the NPA within 30 days of the date of this letter.<sup>14</sup> The purposes of this communication are: (1) to ascertain whether historic properties of religious or cultural significance to the tribe may be affected by the tower, such that consultation is therefore necessary; and (2) where possible, with the concurrence of the tribe, to reach an agreement on the presence or absence of effects that may obviate the need for consultation.<sup>15</sup> If the Nation confirms to Cram that it wishes to proceed with consultation, Cram will follow the procedures set forth in Section VII of the NPA.

## CONCLUSION

Accordingly, IT IS ORDERED, That the May 18, 2005 grant of Cram Communications' application for a modified permit (File No. BMP-20031124ALF) IS VACATED, and the application is RETURNED TO PENDING STATUS. The previously issued permit (File No. BMP-20030804AAE) specifying daytime facilities in Syracuse, with 131 days remaining in the construction period and tolling based on pending litigation affecting that site, remains in effect.<sup>16</sup> Cram remains subject to all notification requirements previously imposed, including the requirement to report resolution of the litigation immediately and to request extensions of tolling status at six-month intervals.

IT IS FURTHER ORDERED, That the petition for reconsideration filed by Cram Communications on June 10, 2005 IS DISMISSED, and That Cram Communications' August 9, 2005 request for tolling IS DENIED.

IT IS FURTHER ORDERED, That the petition for reconsideration filed by the Onondaga Nation on June 28, 2005 IS DISMISSED, but will be treated as an informal objection to the pending application for modified permit (FCC File No. BMP-20031124ALF), and That Cram Communications' August 31, 2005 request for tolling IS DENIED.

IT IS FURTHER ORDERED, That Cram Communications SHALL INITIATE communication with the Onondaga Nation within 30 days.

Sincerely,

Peter H. Doyle, Chief  
Audio Division  
Media Bureau

cc: Mr. Curtis Lazore, Haudenosaunee [Cultural Resource Coordinator](#)  
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<sup>14</sup> Cram should provide a copy of any written communication with the Nation to the staff.

<sup>15</sup> See NPA, *supra* note 8, Sec. IV.G.

<sup>16</sup> This action is without prejudice to Cram's pending Application for Review which argues that Cram should have received tolling for more than 131 days.