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In Reply Refer to:

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In re: **KUCU(AM), Farmington, NM**
Facility ID No. 129609
File Nos. BNP-20001023ADM
BMP-20060209ABX

**Petition for Reconsideration
Request for Tolling**

Dear Counsel:

We have before us a Petition for Reconsideration (*Petition*) filed by Western Broadcasters, Inc. (Western), permittee of unbuilt station KUCU(AM), Farmington, New Mexico.¹ Western seeks reconsideration of a *Decision*² by the Media Bureau (Bureau) denying its April 4, 2006 request for tolling of the station's construction deadline.³ Western argues that circumstances beyond its control, *i.e.*, a change in Commission policies for notifying Tribal Nations of proposed tower construction, occurred while Western was pursuing a modification of its permit, and that Western would have timely completed construction were it not required to repeat time-consuming Tribal notifications already made under a prior protocol.⁴ While its *Petition* was pending, but after permit expiration, Western filed another tolling request (*September Request*) raising new arguments apart from the Tribal notification process.⁵ For the reasons discussed below, we find no merit to either filing.

Background. The Bureau issued the KUCU(AM) permit on September 17, 2003 for a three-year term expiring September 17, 2006. The original permittee declared bankruptcy, and Western acquired the permit in an assignment consummated on October 24, 2005. Western discovered that the original

¹ Western Petition for Reconsideration of Denial of Tolling Request (filed June 19, 2006) (*Petition*).

² *Ellen Mandell Edmundson, Esq.*, Letter Order, Ref. 1800B-IB (May 19, 2006) (*Decision*).

³ Western Request for Tolling of Construction Permit (filed Apr. 4, 2006) (Tolling Request), *supplement filed*, Supplement to Request for Tolling of Construction Permit/Waiver Request (filed May 5, 2006).

⁴ *Petition* at 2.

⁵ Western contends therein that: (1) a prior permittee consumed much of the construction period; (2) Western could not construct until receiving authority to modify the permit; and (3) construction was delayed due to a serious illness of the son of its principal. Western Request for Waiver of Construction Deadline at 2 (filed Sep. 18, 2006) (*September Request*).

permittee had specified towers that were too close together, potentially causing a destructive re-radiating effect. To solve that problem, Western filed a Modification Application on February 9, 2006.⁶

The Modification Application, which proposed a new transmitter site, was subject to environmental processing requirements. Such environmental requirements include those specified in a 2004 Nationwide Programmatic Agreement (*NPA*),⁷ which streamlined the procedures for review of certain Commission-authorized undertakings under Section 106 of the National Historic Preservation Act (NHPA).⁸ Compliance with the *NPA*'s streamlined procedures satisfies the Commission's Section 106 responsibilities with respect to undertakings, such as tower construction, covered by the *NPA*.⁹ One of the Commission's obligations under the NHPA is to make reasonable and good faith efforts to identify and notify Tribal Nations of proposed construction that may affect properties of traditional religious and cultural significance.¹⁰ To fulfill its responsibilities, Section 1.1307(a)(4) of the Commission's rules mandates that applicants follow the procedures set forth in the rules of the Advisory Council on Historic Preservation (ACHP), 36 CFR Part 800, as modified by the *NPA*, to ascertain pre-construction whether their proposals may affect historic properties such that an environmental assessment must be submitted. Under the *NPA*, applicants must, "[a]s an initial step to enable the Commission to fulfill its duty of consultation," demonstrate reasonable and good faith efforts to identify and notify tribes of proposed construction that may affect historic properties to which a tribe attaches religious and cultural significance."¹¹ As set forth by the *NPA*, broadcast applicants may notify potentially interested Tribal Nations by using the Tower Construction Notification System (TCNS) administered by the Wireless Telecommunications Bureau (WTB).¹² Alternatively, applicants that have a pre-existing relationship with

⁶ File No. BMP-20060209ABX (filed Feb. 9, 2006) (Modification Application).

⁷ See *Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission* (September 2004), codified at 47 CFR Part 1 (App. C), republished at 70 Fed. Reg. 556, 580-88 (Jan. 4, 2005) (*NPA*). See also *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, Report and Order, App. B, 20 FCC Rcd 1073 at 1140-1201 (2004) (*NPA Report and Order*).

⁸ See *National Historic Preservation Act*, P.L. No. 89-665, 80 Stat 915 (1966), codified as amended at 54 U.S.C. § 300101 *et seq.*; Tribal provisions at § 302706(b). See also, 47 CFR §§ 1.1301-1319 (Commission consideration of NHPA among other environmental requirements); 36 CFR Part 800 (regulations of the Advisory Council on Historic Preservation implementing Section 106); *NPA*, 47 CFR Part 1 (App. C), Section II(A)(9)(defining "historic property" to include certain properties of religious and cultural importance to Tribal Nations).

⁹ 36 CFR § 800.14(b)(iii).

¹⁰ See *NHPA*, 54 U.S.C. § 302706(b) (in fulfilling Section 106, Federal agencies shall consult with any Tribal Nation or Native Hawaiian Organization that attaches religious and cultural significance to historic properties that might be affected by a proposed undertaking). See also *ACHP Section 106 Regulations*, 36 CFR 800.2(c)(ii) (it is the responsibility of the agency to make a reasonable and good faith effort to identify tribes and Native Hawaiian Organizations (NHOs) that shall be consulted in the Section 106 process). Section 800.2 governs the participants in the Section 106 process and is unaffected by the streamlined procedures specified in a programmatic agreement. As the *NPA* explains, based upon the federal government's historic trust relationship and fiduciary responsibilities, the duty of consultation with federally recognized Tribal Nations rests with the Commission, and cannot be delegated to its licensees or applicants. *NPA*, 47 CFR Part 1 (App. C), Section IV(A). However, the *NPA* also recognizes that identifying Tribal Nations that may attach religious and cultural significance to a historic property that might be affected by a specific undertaking is the first step to enable such consultation and that applicants, with unique knowledge of their proposed projects, are best situated to identify those Tribal Nations in the first instance. *Id.* at Sections IV(A) and (B); *NPA Report and Order*, 20 FCC Rcd at 1106-07, paras. 91-92.

¹¹ *NPA*, 47 CFR Part 1 (App. C), Section IV (B).

¹² See *NPA*, 47 CFR Part 1 (App. C), Sections IV(B), (E). TCNS uses geographic areas of interest entered into the system by each Tribal Nation, typically by county, to notify the appropriate Tribal Nations of proposed tower projects. After an applicant submits the location and other characteristics of a proposed antenna structure into

a Tribal Nation may make initial contact in the manner that is customary to that relationship.¹³ With respect to a Tribal Nation that has voluntarily provided information to TCNS, the *NPA* provides that an applicant's reference to that database constitutes reasonable and a good faith effort to identify historic properties to which Tribal Nations attach religious or cultural significance. At the same time the *NPA* offers guidance on other relevant sources of information and contacts that could also constitute reasonable and good faith efforts.¹⁴ In October 2005, the Commission issued a *Declaratory Ruling* which further clarified procedures for Tribal participation under the *NPA* that address the situation in which a Tribal Nation has not responded to an initial contact within 30 days.¹⁵

Western claims that it undertook the notification process in accordance with all procedures announced in the *NPA* and the *Declaratory Ruling*. It initially chose to identify and contact Tribal Nations without using TCNS. Beginning February 17, 2006, Western made two attempts to contact potentially interested Tribal Nations. On March 20, 2006, while Western was awaiting responses to its notification attempts, WTB issued a public notice announcing several enhancements to TCNS (*Enhancement Notice*).¹⁶ The *NPA* contemplated such processing system upgrades, characterizing TCNS as "an evolving tool."¹⁷ Western did not receive responses to its Tribal notifications and on March 29, 2006, as required under such circumstances, referred the matter to the Commission, along with details as to the proposed construction and the identity of the non-responding Tribal Nations.¹⁸ Western chose to make this referral to the Commission outside of TCNS as well, using an FCC e-mail address established for communication with WTB.¹⁹

TCNS, TCNS generates a letter to Tribal Nations that have indicated an interest in receiving notifications about projects in the location where the antenna structure would be located. TCNS also informs the applicant as to which Tribal Nations have received this letter. The Tribal Nations may then use TCNS to respond.

¹³ *Id.*; *NPA Report and Order*, 20 FCC Rcd at 1107, para. 94. See also *FCC Announces Voluntary Tower Construction Notification System to Provide Indian Tribes, Native Hawaiian Organizations, and State Historic Preservation Officers with Early Notification of Proposed Tower Sites*, Public Notice, 19 FCC Rcd 1998 (WTB 2004).

¹⁴ *NPA*, 47 CFR Part 1 (App. C), Section IV(B); *NPA Report and Order*, 20 FCC Rcd at 1107, para. 89.

¹⁵ See *Clarification of Procedures for Participation of Federally Recognized Indian Tribes and Native Hawaiian Organizations Under the Nationwide Programmatic Agreement*, Declaratory Ruling, 20 FCC Rcd 16092, 16094-96, paras. 7-9, *Erratum*, 20 FCC Rcd 17995 (2005) (*Declaratory Ruling*) (advising that if a Tribal Nation fails to respond within 30 days after the applicant's initial contact the applicant should attempt a second contact in a manner calculated to elicit a response; that if a Tribal Nation fails to respond to the second contact within 10 days, the applicant should refer the matter to the Commission for guidance; and that, consistent with the *NPA*, the Commission will inform a Tribal Nation that has not responded to two reasonable and good faith contacts initiated by an applicant that it has an additional 20 days to indicate it has an interest in participating in the Section 106 and that, if it does not, the applicant's obligations under the *NPA* are discharged).

¹⁶ See *Changes and Enhancements to the FCC's TCNS For Indian Tribes, Native Hawaiian Organizations, and the Communications Industry*, Public Notice, 21 FCC Rcd 2950 (WTB 2006) (*Enhancement Notice*).

¹⁷ See *NPA Report and Order*, 20 FCC Rcd at 1106, para. 90.

¹⁸ *NPA*, 47 CFR Part 1 (App. C), Section IV(G) ("An Applicant shall also seek guidance from the Commission . . . if an Indian tribe or NHO does not respond to the Applicant's inquiries."); *Declaratory Ruling*, 20 FCC Rcd at 16095-96, paras. 8-10 (2005) (it is consistent with the *NPA* for an Applicant to refer the matter to the Commission for guidance if a Tribal Nation has not responded to a second contact from the applicant).

¹⁹ See *Wireless Telecommunications Bureau Announces Electronic Mail Account*, Public Notice, 20 FCC Rcd 470 (WTB 2005).

The WTB staff responsible for Tribal historic preservation matters used TCNS as a resource in processing Western's referral. The staff determined that 18 Tribal Nations had, through TCNS, indicated an interest in receiving notifications of projects in the geographic area of Western's proposal, and that Western had failed to send notifications to some of them. The staff discussed this matter with Western's counsel by telephone on March 30, 2006 and April 3, 2006. The staff also informed Western of several problems in Western's notifications to the remaining Tribes, including the failure to indicate the height of the proposed tower.

Western then repeated the Tribal notification process using TCNS for the first time and, on that basis, filed its Tolling Request. Western alleged that the *Enhancement Notice* triggered (but did not give notice of) a policy shift mandating use of TCNS and that, because no such requirement existed when Western commenced its Tribal notifications, Western lost 60 days during which it was required to repeat the notification process.²⁰ Western's situation did not fit the tolling standards enunciated in the Rules,²¹ so the Bureau considered whether to waive the construction deadline. The standard for grant of additional construction time by waiver is "rare and exceptional circumstances" beyond a broadcast permittee's control that encumber construction.²² The Bureau denied any additional time in the May 2006 *Decision*, stating that the *Enhancement Notice* did nothing to change the voluntary nature of TCNS, and attributing Western's decision to repeat the notification process to defects in Western's original notifications.²³

Western sought reconsideration on June 19, 2006. On July 5, 2006, Western notified the Bureau that it had completed Tribal notifications, and the Bureau granted the Modification Application. Consistent with Bureau practice, the modified permit bore the same September 17, 2006 expiration date as the original permit. On August 11, 2006, Western's President, E. Boyd Whitney, telephoned the Bureau to state that Western did not intend to construct and would return the permit for cancellation. Western reconsidered, however. On September 18, 2006, one day after the permit's expiration date, new counsel for Western submitted the *September Request* for waiver of the three-year broadcast construction period. The *September Request* expresses Western's continued interest in pursuing the pending *Petition* and also requests additional time based on several new arguments.

Discussion. *Petition for Reconsideration.* Reconsideration is appropriate where an applicant demonstrates new facts or an error in the original decision.²⁴ Western contends that the Bureau erred in finding that circumstances preventing Western from meeting the KUCU(AM) construction deadline were within Western's control. Specifically, Western claims that it bears no responsibility for time lost

²⁰ Tolling Request at 2-3.

²¹ See 47 CFR § 73.3598(b) (tolling for natural disasters, administrative review, and judicial review).

²² The Commission can waive any of its rules if special circumstances warrant deviation from the general rule and such deviation would serve the public interest. See *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008). See also *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972). Deviation from the construction period rule may be appropriate and in the public interest where rare and exceptional circumstances beyond the permittee's control encumbered construction. *Biennial Regulatory Review—Streamlining of Mass Media Applications, Rules, and Processes*, Report and Order, 13 FCC Rcd 23056 (1998), *recon. granted in part and denied in part*, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17541, para. 42 (1999). See 47 U.S.C. § 319(b).

²³ The Bureau ordinarily would not have reached the merits of a tolling request based on difficulties moving to a site for which the applicant did not yet hold a permit. See *Steven Wendell*, Memorandum Opinion and Order, 28 FCC Rcd 4857, 4857, para. 3 (2013). The Bureau considered Western's request because Western would have encountered the same Tribal notification process even had it proposed to make the necessary modifications at its existing site.

²⁴ See 47 CFR § 1.106.

repeating the Tribal notification process because the Commission has not provided applicants with sufficient notice of that process, as required under Section 552(a)(1)(B) of the Administrative Procedure Act (APA).²⁵ Western characterizes that section as requiring agencies to publish “their procedural rules of general applicability” in the *Federal Register*.²⁶ It notes that the requirement serves to put “an end to ‘file cabinet rules’ unknown to the public and trotted out by Federal agencies on an ad hoc basis when remembered.”²⁷ Western alleges that the Tribal notification process violates the APA because parties undertaking the process outside of TCNS have no way of knowing: (1) that Tribal notices must contain tower height; and (2) which Tribal Nations have interests in particular areas.²⁸ Western also argues that the Commission failed to announce in the *Enhancement Notice* that TCNS use would thereafter allegedly become mandatory – its ostensibly voluntary nature rendered meaningless because TCNS is the only way for an applicant to fulfill its *NPA* notification obligations. Western contends that it did not learn of height requirements and Tribal interests until WTB staff personally notified it of deficiencies, and that it is unfair to hold Western accountable for time lost while satisfying unpublished requirements.²⁹ As explained below the Commission has not formulated any rule, substantive or procedural, nor is there an unwritten internal policy, beyond what is expressly stated in the *NPA*, published in the *Federal Register* and in the Code of Federal Regulations, regarding the contents of Tribal notifications and the procedures applicants should follow to identify and contact potentially affected Tribal Nations. Accordingly, Western could not have been prevented from meeting its construction deadline by some new, unpublished Tribal notification requirement that should have been published in the *Federal Register* under Section 552(a)(1)(B).

We are not persuaded that any lack of clarity in the Commission’s Tribal notification procedures was to blame for Western’s failure to meet the construction deadline. Western incorrectly faults the Commission for having “no FCC rule or published policy statement” providing sufficiently detailed requirements about Tribal notification.³⁰ Section 552(a)(1)(B), upon which Western relies, requires only that the agency must publish a description of the “method by which [the agency’s] functions are channeled and determined, including the nature and requirements of all formal and informal procedures available.”³¹ By publishing the *NPA* in the *Federal Register*, the Commission, in accordance with Section 552(a)(1)(B), has provided adequate public notice about Tribal notifications.³² Having done so, the Commission had no obligation to promulgate a rule or issue further guidance detailing the essential elements of, or procedures for, tribal notifications unless or until it changes the procedures and policies established in the *NPA*.³³

²⁵ *Petition* at 5-6, citing 5 U.S.C. § 552(a)(1)(B).

²⁶ *Id.*

²⁷ *Petition* at 6, citing *Advanced Electronics*, Memorandum Opinion and Order, 21 FCC 2d 239, 244, para. 7 (Rev. Bd. 1970).

²⁸ *Id.* at 5-6.

²⁹ *Id.* at 1, 6-7.

³⁰ *Id.* at 5.

³¹ 5 U.S.C. § 552(a)(1)(B).

³² The purpose of 5 U.S.C. § 552(a)(1)(B) is to “guide the public in determining where and by whom decisions are made, as well as where they may secure information and make submissions and requests.” S. Rep. No. 89-813, at 6 (1965).

³³ See *Hudson v. U.S.*, 766 F.2d 1288, 1291 (9th Cir. 1985). (IRS Commissioner did not violate the APA by failing to publish guidelines that were unnecessary to give the appellant notice that his actions violated the law; *City of Santa Clara v. Andrus*, 572 F.2d 660 (9th Cir. 1978) (Section 552 requires the publication and promulgation of established agency rules and policies). Additionally, an applicant with actual notice of a requirement cannot claim

The Commission's published guidance to the public about Tribal notification meets APA requirements. While the Rules do not contain a specific list of Tribal notification elements, Section 1.1307(a)(4) specifies that "an applicant shall follow the procedures set forth in the Advisory Council on Historic Preservation, 36 CFR Part 800, as modified and supplemented by the [NPA] . . . [t]o ascertain whether a proposed action may affect properties that are listed or eligible for listing in the National Register of Historic Places such that preparation of an Environmental Assessment is required.³⁴ The NPA, which is included as an Appendix to Part 1 of the Rules, provides a means of streamlining the identification and notification process *vis-à-vis* Tribal Nations that may attach religious and/or cultural significance to a proposed antenna site that satisfies the Commission's Section 106 responsibilities and expressly imposes affirmative obligations on FCC applicants.³⁵ The specific procedures applicants must follow are set forth in considerable detail in Section IV of the NPA.³⁶ The text of the NPA,³⁷ and the accompanying *NPA Report and Order*, published together in the *Federal Register*,³⁸ include the requirements to identify potentially affected Tribal Nations, and to provide them with "all information reasonably necessary"³⁹ to evaluate any effect on properties of religious and cultural significance.⁴⁰

Western acknowledges the NPA's requirements, but contends that nothing therein would suggest that tower height is essential information. We disagree. Section IV(F)(3) of the NPA specifies that "an applicant shall provide [in its Tribal notifications] all information reasonably necessary for the Indian tribe or NHO to evaluate whether Historic Properties of religious and cultural significance may be affected." The NPA identifies indirect visual effects as potentially adverse⁴¹ and establishes tower heights and distances as a starting point for analysis.⁴² It is thus evident from the NPA that any potential visual

exemption due to faulty APA publication. *See* 5 U.S.C. § 552(a)(1). Western acknowledges that it was aware of general Tribal notification requirements outlined in the NPA and *Declaratory Ruling*. *Petition* at 2-4. However, it claims that it was affected by subsequent unpublished requirements that can be satisfied only by using TCNS. *Id.*

³⁴ 47 CFR §1.1307(a)(4)(i).

³⁵ *See* NPA, 47 CFR Part 1 (App. C), Section IV.

³⁶ *Id.* at Sections IV(B) (TCNS and non-TCNS methods to identify potentially affected Tribal Nations), IV(C) (contacting Tribal Nations through TCNS or non-TCNS methods depending on Tribal preferences), IV(E) (role of pre-existing Tribal relationships in selecting a contact method), IV(G) (referral of matters to the Commission).

³⁷ *Id.*, Section IV(F).

³⁸ "Nationwide Programmatic Agreement for Review Under the National Historic Preservation Act; Final Rule," 70 Fed. Reg. 556 (Jan. 4, 2005) (providing notice of revisions to the Commission's rules that implement the NPA, of the addition of Appendices B and C to 47 CFR Part 1, and a summary of the *NPA Report and Order*).

³⁹ *Id.*, NPA, 47 CFR Part 1 (App. C), Section IV(F)(3).

⁴⁰ An undertaking has an "effect" when the undertaking "may alter characteristics of the property that may qualify the property for inclusion in the National Register ... [including] alteration to features of a property's location, setting, or use...." 36 CFR § 800.5(a)(1). An "effect" is "adverse" when it may "diminish the integrity of the property's location, ... setting ..., feeling, or association." *Id.* Examples of "adverse effects" include physical destruction, and the introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting.

⁴¹ *See* NPA, 47 CFR Part 1 (App. C), Sections II(A)(3) (defining Area of Potential Effects) and VI(C)(3) and (4) (visual effects). Such effects can "introduce visual elements that diminish or alter the setting." *Id.* at Section VI(C)(3).

⁴² NPA, 47 CFR Part 1 (App. C), Section VI(C)(4). *See* *NPA Report and Order*, 20 FCC Rcd at 1114-15, paras. 112-113. In particular, the NPA recognizes that each undertaking has one Area of Potential Effects (APE) for direct

effect of a tower cannot be evaluated without information about tower height. Regarding the visual effects of a proposed tower on Historic Properties to which a tribe or NHO attaches religious and cultural significance, a tribe or NHO could not reliably evaluate such effects if it did not know the height of the applicant's tower. When an agency revises its rules to specifically mandate compliance with written, detailed procedures in an agreement referenced in the rule and publishes the amended rule and the full text of the agreement in the Code of Federal Regulations and in the *Federal Register*, the agency has given sufficient notice of applicable pre-construction environmental requirements an applicant must complete under section 1.1307(a)(4) and the *NPA*.⁴³ Moreover, the *NPA* and *NPA Report and Order* amply explain the nature and purpose of the Tribal notification process, how TCNS can be useful if the applicant voluntarily chooses to use it,⁴⁴ and the opportunity of applicants to seek guidance and additional information from the Commission in order to complete the process.⁴⁵ Western's complaint about lack of notice thus lacks merit.⁴⁶

Similarly flawed are Western's related claims that the Commission violated the APA by: (1) not publishing the identities of Tribal interests in particular geographic areas;⁴⁷ (2) making such information available only after an applicant uses TCNS; and (3) adopting an unpublished policy mandating use of TCNS.⁴⁸ Western's continued claim of a TCNS mandate triggered by the *Enhancement Notice* is not only repetitious but erroneous. As stated in the *Decision*, "there were no policy changes requiring Western to repeat any portion of the [Tribal notification] process."⁴⁹ The *Enhancement Notice*, which describes TCNS as "voluntary," merely added some new user-friendly features that improve its utility but in no way establish that TCNS is mandatory or the only effective means to identify Tribal Nations that are interested in particular areas.⁵⁰ Now that all federally recognized Tribal Nations voluntarily participate in

physical impacts and another for indirect visual effects. *NPA Report and Order*, 20 FCC Rcd at 1114, para.112. The APE for visual effects varies depending on height of the tower. There is a rebuttable presumption that the APE is the area from which the tower will be visible within ½ mile of the proposed tower for a tower that is 200 feet or less in height, ¾ mile for a tower more than 200 feet but no more than 400 feet in height, and 1.5 miles for a taller tower. *Id.* The Commission has stated that "the height of a tower will be a factor in determining whether to depart from the presumed APE." *Id.* at 1115, para. 116. In particular, these presumed heights and distances are "a starting point for analysis" and "departure may more often be warranted for the tallest towers." *Id.*

⁴³ See *Malkan FM Assoc. v. FCC*, 935 F.2d 313 (D.C. Cir. 1991) (APA did not require that the Commission publish notice in the *Federal Register* that the height limit prescribed by the US-Mexico Treaty is lower than that prescribed by the Commission's rules where the rules referenced the treaty's existence and explicitly stated that antenna height is "limited in certain cases by international agreement" so as to afford notice applicants should consult the treaty).

⁴⁴ *NPA Report and Order*, 70 Fed. Reg. 556, 561, para. 39 (Jan. 4, 2005).

⁴⁵ *NPA*, 47 CFR Part 1 (App. C), Section IV(G) ("Applicants shall [] seek guidance from the Commission . . . if the Indian Tribe or NHO does not respond [and] are strongly advised to seek guidance from the Commission in cases of doubt."

⁴⁶ See *Bamford v. FCC*, 535 F.2d 78, 82 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 895 (1976).

⁴⁷ *Petition* at 5-6.

⁴⁸ *Id.* at 3.

⁴⁹ *Decision* at 2-3.

⁵⁰ *Enhancement Notice*, 21 FCC Rcd at 2950-52. For example, WTB added functions making it possible for Tribal Nations to respond to multiple applicants as a single batch and for applicants to specify whether their Commission referrals were preceded by attempts to notify Tribal Nations independently. To the extent that Western is suggesting that its Tribal notification/referral outside of TCNS was adequate prior to the *Enhancement Notice* but somehow transformed into a deficient filing thereafter, Western is incorrect. Its notification was equally deficient before and after the *Enhancement Notice* because notification requirements were unchanged.

TCNS, an applicant seeks information directly from every Tribal Nation when it elects to use TCNS to satisfy its notification responsibilities under Section 1.1307(a)(4) of the Rules.⁵¹ When an applicant voluntarily enters the location and other basic information about proposed tower construction into TCNS, the system automatically forwards the information to any Tribal Nation that has indicated an interest in tower construction in a particular geographic area.⁵² Thus, use of TCNS eliminates the possibility that an applicant will overlook any Tribal Nation that may be interested in participating in the historic preservation review for that site or will omit information that precludes a Tribal Nation from reasonably evaluating the effects on Historic Properties of religious and cultural significance to a notified Tribal Nation. In this manner TCNS provides a safe harbor by which an applicant can satisfy its Tribal notification requirements under Section 1.1307(a)(4). Nevertheless, a broadcast applicant's decision to use or not to use TCNS remains voluntary and Western points to nothing that eliminates an applicant's explicit option under the text of the *NPA* not to utilize TCNS to fulfill its identification and notification responsibilities.⁵³

Western's desire for a Commission-published list of specific Tribal interests that applicants might use before or instead of using TCNS, fails to recognize that TCNS is a "double-blind" system.⁵⁴ Tribal Nations that participate in TCNS express an interest in being contacted regarding proposed tower construction in a particular geographic area but do not disclose to the Commission the precise location of sites of religious and cultural significance to the Tribal Nation. Moreover, no applicant -- including one that voluntarily uses TCNS -- can ascertain the geographic areas of interest of any Tribal Nation. Rather, an applicant that elects to rely on TCNS learns the identity of those Tribal Nations that might have an interest in participating in the Section 106 process for its proposed construction through a TCNS-generated confirmation that identifies the Tribal Nations to which TCNS has forwarded the proposal for that one project, based on general (and confidential) information that Tribal Nations voluntarily submitted to the Commission through TCNS.

As recognized by the *NPA*, there are certain restrictions against the public disclosure of information submitted to the Commission regarding the location of sensitive historic resources under the Commission's rules, the NHPA and applicable federal laws.⁵⁵ Apart from the confidential nature of this information, release of information from which the public might learn locations of Tribal cultural and religious sites would discourage Tribal Nations from voluntarily participating in TCNS and seriously undermine the system's utility in fulfilling the Commission's Section 106 responsibilities.⁵⁶ Western asserts no legally plausible theory under the APA that would require the publication of confidential, sensitive, and private information internal to TCNS.

⁵¹ See 47 CFR § 1.1307(a)(4).

⁵² *NPA Report and Order*, 20 FCC Rcd at 1106, para. 89.

⁵³ See *Tower Construction Notification System Industry Handout* (WTB March 2006) available at http://wireless.fcc.gov/outreach/notification/TCNS_industry.pdf (last accessed May 20, 2016) (TCNS allows tower builders "to voluntarily submit a notification to the Commission of a proposed tower construction").

⁵⁴ See *infra*. n.56.

⁵⁵ *NHPA*, 54 U.S.C. § 307103 (formerly Section 304) (the federal agency, after consultation with the Secretary, shall withhold disclosure from the public information about the location of a historic resource if it is determined that disclosure may cause a significant invasion of privacy, risk harm to the historic resources, or impede the use of a traditional religious site by practitioners); *NPA*, Section IV(I).

⁵⁶ Tribal Nations may have privacy concerns about locations of sacred places and the disclosure of such information. See generally 36 CFR §§ 800.4(b)(i) and 800.11(c)(1). Accordingly, TCNS is a secure "double-blind" system that protects the confidentiality of both applicants' and Tribal Nations' information from third parties.

Nor does the Commission have an obligation under the APA to publish the information that is accessible electronically to applicants that do use TCNS because, as the Commission has made clear, TCNS is not the only repository of such information or the only permissible means for an applicant to contact a Tribal Nation. Applicants opting not to use TCNS receive additional guidance through the *NPA*. For example, the text of the *NPA* and the related *NPA Report and Order*,⁵⁷ acknowledge the benefits offered by TCNS, but also provide guidance on other sources that might be consulted by applicants that choose not to use TCNS.⁵⁸ In doing so, the *NPA* cautions applicants of the need to consult a combination of secondary sources because “frequently, Historic Properties of religious and cultural significance to Indian tribes are located on ancestral, aboriginal or ceded lands,” far removed from the Tribal Nation's modern location.⁵⁹ Similarly, the Commission has specifically stated that “an Applicant’s initial attempts at making these [Tribal] contacts should be undertaken through TCNS or as otherwise authorized under the [NPA].”⁶⁰ In turn, Section IV(E) of the *NPA* provides that “[a]n Applicant that has a pre-existing relationship with an Indian tribe” has the option to make such contacts “in the manner that is customary to that relationship or in such other manner as may be accepted by the Indian tribe”⁶¹ The decision to identify and contact Tribal Nations without using TCNS was Western’s choice alone. Notably, Western has not shown or alleged that, as contemplated by the *NPA*, it has any pre-existing relationships with the Tribal Nations it contacted, or that the contact methods and truncated information it provided were customary or acceptable within any such relationships.

The *NPA* places the burden on the applicant to submit substantially complete information needed for the Commission to satisfy its obligations under Section 106.⁶² Western omitted information regarding tower height, which was a material omission that delayed completion of the Section 106 process prescribed by the *NPA* and the Commission’s final determination as to the effects on historic properties of Western’s proposed tower. The Bureau then afforded Western an opportunity to provide missing tower height and to notify Tribal Nations that Western had not contacted. Western’s initial decision to proceed

⁵⁷ *NPA Report and Order*, 20 FCC Rcd at 1110, para. 100 (noting that voluntary use of TCNS will facilitate the identification of Tribal Nations that may attach religious and cultural significance to Historic properties that may be affected by proposed construction in a particular geographic area but that the *NPA* provides guidance regarding other means of identifying potentially affected Tribal Nations).

⁵⁸ *NPA*, 47 CFR Part 1 (App. C), Section IV(B) (“[Other] reasonable and good faith efforts [to identify potentially affected Tribes or organizations] may include, but are not limited to, seeking relevant information from the relevant [State/Tribal Historic Preservation Officers], Indian tribes, state agencies, the U.S. Bureau of Indian Affairs (BIA), or, where applicable, any federal agency with land holdings within the state (e.g., the U.S. Bureau of Land Management). Although these agencies can provide useful information in identifying potentially affected Indian tribes, contacting BIA, the [State Historic Preservation Officer] or other federal and state agencies is not a substitute for seeking information directly from Indian tribes that may attach religious and cultural significance to a potentially affected Historic Property . . .”).

⁵⁹ *Id.*

⁶⁰ *Clarification of Procedures for Participation of Federally Recognized Indian Tribes and Native Hawaiian Organization Under the Nationwide Programmatic Agreement*, 20 FCC Rcd 16092, 16094, para. 7 (2005), citing *NPA* Sections IV(B) and IV(E).

⁶¹ *NPA*, 47 CFR Part 1 (App. C), Section IV(E).

⁶² See *Wireless Properties, LLC*, Order, 30 FCC Rcd 7707, 7717, para. 24 (2015) (finding that an applicant’s failure to list all historic properties potentially affected by a proposed tower in its Submission Packet to the SHPO filed pursuant to Section VII(A) of the *NPA* was a material omission that warranted the Commission reopening the Section 106 process for the applicant’s tower because the incomplete submission had precluded the informed determination as to historic property effects contemplated by Section 106).

outside of TCNS and the omissions in its notifications resulted from its own choices. The *Decision* correctly found that Western's repetition of the Tribal notification process was not a circumstance beyond its control for purposes of waiving the construction deadline.

September Request. Next we address the *September Request*, which was filed after the permit expired. Whether considered as a new request for tolling⁶³ or as a supplement to the Petition for Reconsideration, the *September Request* was untimely and is, therefore, dismissed. However, for the sake of a complete record, we consider these arguments and conclude that they are without merit.

Western argues that the construction deadline should toll because: (1) the staff was considering the pending petition for reconsideration of tolling denial; (2) Western had little time to construct because the previous permittee's bankruptcy coupled with the Tribal notification process consumed most of the construction period; and (3) the son of Western's Vice President and 80 percent equity-holder, Douglas Scharbauer, was in a near-fatal accident in August 2006 (the final month of the permit) and Mr. Scharbauer had to focus his attention on his son's medical care. None of these circumstances qualify for tolling which, as described earlier, is limited to encumbrances caused by natural disasters, petitions for reconsideration of the permit's grant, and certain court proceedings.⁶⁴ Nor, as explained below, would Western's circumstances warrant a waiver of the three-year construction period.

As stated above, the standard for grant of additional construction time by waiver is "rare and exceptional circumstances" beyond a broadcast permittee's control that encumber construction. It is well settled that a permittee's own request for review of a Commission action warrants no additional construction time.⁶⁵ With respect to Western's argument that it had little time to construct because it obtained the permit late in the term after the former permittee experienced difficulties, a former permittee's circumstances or assignment of the permit to a new party do not provide an independent basis for waiver.⁶⁶ Waivers of the construction period are intended to replace time lost for encumbrances beyond a permittee's control, not to afford a successor permittee additional time to construct.⁶⁷ Finally,

⁶³ 47 CFR § 73.3598(e) ("Any construction permit for which construction has not been completed and for which an application for license has not been filed, shall be automatically forfeited without any further affirmative cancellation by the Commission."). Cf. *Clear Channel Broad. Licenses, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 7153 (2011) (affirming staff's *sua sponte* waiver of Section 73.3598(e) and acceptance of license application filed two days late where the facilities authorized in the construction permit were fully built by expiration of the permit).

⁶⁴ 47 CFR § 73.3598(b). See *Texas Grace Commc'ns*, Memorandum Opinion and Order, 16 FCC Rcd 19167, 19172, para. 13 (2001) (*Texas Grace*) (illness of permittee's principal not a basis for tolling).

⁶⁵ See *Texas Grace*, 16 FCC Rcd at 19173, para. 16. Unlike "administrative review" (defined as a petition for reconsideration or application for review of the *grant of a construction permit*), a permittee's unilateral petition for reconsideration of *denial of tolling* does not call the validity of the underlying permit into question and is not a third party action beyond the permittee's control encumbering construction. See 47 CFR § 73.3598(b)(ii); *Birach Broad. Corp.*, Memorandum Opinion and Order, 23 FCC Rcd 3141, 3146, para. 15 (2008) (citing *Texas Grace*, 16 FCC Rcd at 19172, para. 13)).

⁶⁶ See *Birach Broad. Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 1414, 1416, para. 6 (2003), *recon. denied*, 20 FCC Rcd 5764 (2005) (rejecting request for additional time where former permittee had done little and new permittee acquired permit only one day prior to expiration). Moreover, Western did not raise these waiver arguments in a timely manner. Requests for waiver must be filed as soon as practicable after the event forming the basis for the request, generally within 30 days. See 47 CFR § 73.3598(c); *Birach Broad. Corp.*, 23 FCC Rcd at 3142, para. 9.

⁶⁷ See *Cram Commc'ns*, Memorandum Opinion and Order, 23 FCC Rcd 658, 663, para. 14 (2008); *KWFA(AM), Tye, Texas*, Letter Order, 23 FCC Rcd 4786, n.9 (MB 2008).

the injury to Mr. Scharbauer's son, while unfortunate, provides no basis for waiver. The Commission expects permittees to delegate matters they are unable to carry out themselves.⁶⁸ Nothing in the record demonstrates circumstances making it impossible for Western's President or another person authorized by Western to have moved construction forward during the limited period of time the Vice President was not available. Accordingly, we find the *September Request* without merit.

Conclusions/Actions. Accordingly, Western's petition for reconsideration IS DENIED and its September request for additional time IS DISMISSED as late-filed. The KUCU(AM) construction permit has expired on its own terms and will be deleted from the Commission's database.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

⁶⁸ Accordingly, the Commission has declined to grant additional time based on delays allegedly due to health problems of a sole proprietor. See *Texas Grace*, 16 FCC Rcd at 19168, para. 3.