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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL FILE
Communications Commission
Office of the Secretary

In re Applications of)	MM Docket No. 92-2
)	
DRY PRONG EDUCATIONAL)	
BROADCASTING FOUNDATION)	File No. BPED-900305MF
)	
For Modification of Noncommercial)	
Station KVDP(FM), Dry Prong,)	
Louisiana)	
)	
MISSIONARY ACTION PROJECTS)	File No. BPED-900905MK
)	
For Construction Permit for a)	
New Noncommercial FM Station on)	
Channel 210, Alexandria, Louisiana)	

MOTION FOR SUMMARY DECISION

Comes now Missionary Action Projects (MAP), by counsel, which moves for Summary Decision of Issue No. 1 of the Hearing Designation Order pursuant to Section 1.251 of the rules. As required, this motion is filed 20 days before the commencement of the hearing. In support of this motion MAP states:

MAP submitted a Motion for Summary Decision on the eligibility issue on April 17, 1992.¹ The presiding officer

¹ Although this is the second such submission, it is in no way a frivolous pleading. Presumably the eligibility issue will be the only remaining issue in this case since the other applicant has moved to dismiss its application. Possible resolution of this issue without the need for an evidentiary hearing greatly conserves the resources of the Commission and the applicant and expedites the onset of new FM service.

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denied that motion in Memorandum Opinion and Order, dated May 7, 1992 (FCC 92M-521), citing Way of the Cross of Utah, Inc.² and finding that MAP had not explained in detail how the station would be used to primarily serve the educational needs of the community, advance educational programs, and further a nonprofit, noncommercial service.

Attached to this Motion as Exhibit 1 is a further Declaration of William D. Franks, president of MAP, which details the applicant's educational goals and objectives in providing a new noncommercial radio service to Alexandria, Louisiana; sets forth a number of plans, policies and programs which will be employed by the Applicant to reach out to the community; and describes sample broadcast programs which address the educational needs of the community and meet the educational objectives and goals of the applicant.

MAP will not reprise all the arguments made in its prior Motion for Summary Decision but instead will request that they be incorporated herein by reference. Suffice it to say that MAP has shown beyond question that it is properly organized and recognized as a Louisiana nonprofit corporation with the stated purpose of operation of a noncommercial radio station.³ As such

² 58 RR2d 455, 460-1 (1985).

³ See Exhibits D and E to MAP's Motion for Summary Decision dated April 17, 1992.

an entity, MAP meets the initial licensing criteria of Section 73.503(a) of the Commission's Rules.⁴

Eligibility questions based on the formation of the applicant entity were considered by the Commission in Lower Cape Communications, Inc.⁵ where the Commission found that an entity incorporated as a nonprofit corporation in Massachusetts with the stated purpose of establishing a nonprofit, noncommercial educational radio station in Provincetown was qualified to operate a station in the reserved band.

Other than the previously quoted passage from Section 73.503 and a brief reference in that section to the fact that accreditation may be considered in determining eligibility, the rules give no further guidance to the noncommercial applicant as to eligibility requirements. Accreditation has been held not dispositive and the Commission has evolved a set of internal guidelines for educational eligibility which have not been revised since the 1970's despite critical comments in a number of cases. The staff's written standards were reprinted in Way of the Cross⁶, citing to a pending Notice of Inquiry in MM Docket No. 78-164.⁷ Of course, the Inquiry was seeking comments to determine if the standards required revision. Instead of

⁴ Section 73.503(a) reads "A noncommercial educational FM broadcast station will be licensed only to a nonprofit educational organization and upon a showing that the station will be used for the advancement of an educational program."

⁵ 47 RR 2d 1577 (1980).

⁶ Supra. at 457-458, fn. 5.

⁷ 43 FR 30842 (1978).

revising the eligibility standards or addressing concerns raised in decisions relating to use of the noncommercial spectrum, the Commission abandoned the Inquiry without resolution in 1990.

In addition to being nonprofit, an "organizational" applicant was required to demonstrate an educational goal and a commitment to the advancement of an educational program. At one time, the staff scrutinized all noncommercial applications and the particular program offerings proposed to attempt to determine whether the programs could be qualified as "instructional" or "general educational" and the amount of such programs. As might be expected, there was disagreement about the desirability of the staff review of programs and the nonspecific standards for making determinations of eligibility.⁸

Way of the Cross required the applicant to demonstrate that its broadcast programs include general educational programs as and required it demonstrate goals and policies to meet its stated educational objectives. In the prior MO&O on the eligibility issue, the presiding officer noted that William D. Franks indicated that MAP would do educational programming but that he had not explained in detail the programming proposed and the relationship of the programming to MAP's educational objectives.

In his new Declaration attached hereto, Mr. Franks lists nine specific educational goals and objectives for the station which range from general raising of the educational level of the

⁸ Moody Bible Institute, 40 RR2d 1264 (1977). In a concurrence in Moody, Commissioner White went to some length to display a staff worksheet for evaluation of programs and questioned the validity of this analysis. Moody Bible Institute was found eligible to hold a noncommercial license.

minority segments of the Alexandria population to providing an additional service for the operation of small businesses in that community. He describes representative programs proposed to be aired on a daily and weekly basis which MAP believes will address its specific goals and objectives.

Mr. Franks has stated in his earlier declarations that he would operate his station with the advice and consent of a group of community and educational leaders in the Alexandria area who would advise him on programs desired and needed by the population. In his new declaration, Mr. Franks explains that this process has already begun with his canvassing of individuals in the service area to pinpoint specific objectives for the station. Mr. Franks has indicated that MAP would attempt to fulfill as many of these needs as possible.

The Commission's most recent pronouncement on noncommercial eligibility, Palm Bay Public Radio, Inc. notes the demise of the required program list as a necessity for the determination of noncommercial eligibility.⁹ In this case, MAP has submitted a representative list of proposed programs to support its statement of proposed programming policies from its application (and Mr. Franks' prior declarations) and to facilitate the determination of educational purpose of the corporation.

In Palm Bay, the Commission approved of Palm Bay's promise "to provide educational programming responding to the needs and

⁹ 68 RR2d 1566, 1570 (1991) (required list of proposed weekly programs replaced with statement of proposed programming policies in 1985 revision to FCC Form 340). Attached hereto as Exhibit 2.

interests of the Palm Bay community."¹⁰ Mr. Franks has made the same promise in his declarations on behalf of MAP.

The Commission further allowed that it "has routinely granted construction permits to applicants for educational radio stations whose stated purpose was to develop educational programming for their community of license" in Palm Bay.¹¹ Mr. Franks has also make that pledge in this case.

Missionary Action Projects has demonstrated its organizational status as a nonprofit Louisiana corporation with language in its charter authorizing the operation of a noncommercial FM radio station. It has detailed realistic educational objectives for the station and has demonstrated how the policies, programs and the broadcast offerings proposed will address the perceived educational needs of Alexandria, and thus meet its educational objectives. It has also stated that it will operate the station in strict compliance with Commission policies. MAP will provide a station whose primary objective is to meet the educational needs of the community of license, and thus meets the eligibility requirements of Section 73.503 of the Commission's Rules. MAP has made these showings by declarations made under penalty of perjury and other evidence and believes that there is no genuine issue of material fact to necessitate a hearing on this issue.

¹⁰ Supra. at 1569.

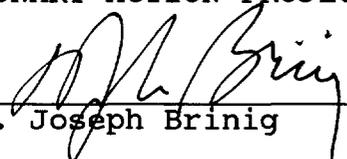
¹¹ Id.

Missionary Action Projects respectfully requests that the
Issue Number 1 of the instant Hearing Designation Order BE
RESOLVED in its favor.

Respectfully submitted,

MISSIONARY ACTION PROJECTS

By:


F. Joseph Brinig

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Washington, D.C. 20036
(202) 331-7050

May 14, 1992

EXHIBIT 1

DECLARATION OF WILLIAM D. FRANKS

DECLARATION OF WILLIAM D. FRANKS

I, William D. Franks, president of Missionary Action Projects hereby declare under penalty of perjury that this statement is true and correct to the best of my knowledge. I will not restate the matter addressed in my prior declarations given in this case dated December 20, 1990 and April 16, 1992 except to say that all the information therein remains correct.

In preparing our application for a non commercial radio station in Alexandria, MAP has examined the community of license and the potential audience in the community and has determined that we will set a number of educational objectives for the station. Our educational objectives are:

1. To raise the educational level of the black and other minority segments of the population.
2. To raise the awareness of the role of and the problems confronting black and minority families.
3. To raise the awareness of the role of and the problems facing the black woman in society today.
4. To present noncommercial public affairs programming to the community.
5. To present noncommercial programs of historical importance especially dealing with the specific minority groups in our community.

6. To present business and financial information concerned with the maintaining of a successful business in our area which has been hard hit by the recession and the general failure of the economy in central Louisiana.
7. To present education on social services available from federal and local service centers, and also to present this information in Spanish.
8. To present information on the structure and availability of law enforcement agencies in the community, especially to those who have come from a different social/legal system and may have language difficulties.
9. To present religious, family and cultural programs to the community.

As a nonprofit entity, MAP believes that we can utilize the FM radio station in Alexandria, to bring quality programming to the residents of the area without the need for heavy and intrusive commercial support. In order to meet our educational objectives we plan to use the station to enter into dialogue with local churches, community leaders and schools to promote their activities and to ascertain the educational needs of the community. We will determine what additional educational programs are needed in the area, and we will attempt to provide them.

We intend to provide educational programming to the black population of Alexandria and Spanish language programming to the Hispanic population.

We will also broadcast specific programs to the community to address our objectives and the educational needs of the community.

During the two year pendency of the MAP application for Alexandria, I have taken the opportunity to meet with a number of residents of the community of license and the proposed service area and some of the leaders in the Alexandria area. We have discussed the possible uses of the new radio station that MAP is applying for and we have entertained a dialogue with these local residents and leaders as to the needs and interests of the local area and the specific educational goals which we could address with the station. It is from these discussions and my background in educational and charity work that we have derived realistic educational goals and objectives for the station. As the needs of the broadcast community change, we will react to them.

I have had the opportunity to discuss the proposed station with:

Linda Garoutte
Activities Director
Tioga Manor Nursing Home
Organizer of community events
Alexandria, Louisiana

Rev. Jimmy Pyles
Pastor of First Methodist Church
Pineville, Louisiana

Rev. Raymond Cheeks
State Coordinator for Church of God
Pollock, Louisiana

Jeff Strahn
Cenla Christian Singles
Tioga, Louisiana

Bob Galloway
 Pastor Faith Baptist Church
 Businessman
 Alexandria, Louisiana

Here is a sample of the types of programs we will air:

<u>TITLE</u>	<u>DESCRIPTION</u>	<u>LENGTH</u>	<u>CATEGORY</u>
<u>DAILY PROGRAMS</u>			
Focus on Black Women	Interview program hosted by a local black woman, preferably an educator, presenting opportunities and role models.	15 min	Gen. Ed.
Carl Rowan Report	Commentary by nationally syndicated Black columnist giving views from the Black perspective.	5 min	Public Affairs
Inside Gospel (Black produced)	Historical Analysis and background description of successful Black musicians and artists.	5 min	Gen. Ed.
Today in Black History	Chronicle of events in Black History.	5 min	Gen. Ed.
News	News from a national network.	5 min approx 10/day	Gen. Ed.
Focus on The Family	Hosted by Dr. James Dobson, noted psychiatrist and author. Interviews and commentary dealing with family situations and problems in modern society.	30 min	Gen. Ed.
Focus on Women	Teaching program for women. Sample subjects: Physical fitness, national Black women, raising children, etc.	5 min	Gen. Ed.

<u>TITLE</u>	<u>DESCRIPTION</u>	<u>LENGTH</u>	<u>CATEGORY</u>
<u>WEEKLY PROGRAMS</u>			
Law Enforcement Works for you	Law enforcement officer explaining your rights, methods of self protection and drug awareness aimed at youth.	30 min	Gen. Ed.
Black Business report	Black business leaders discussing weekly events and accomplishments.	15 min	Gen. Ed.
Inspiration across America	Music and interviews with national artists. A different theme is used for for each program.	2 hrs.	Light Ent./ Gen. Ed.
Odyssey USA	Childrens instructional program.	30 min	Gen. Ed.
Focus on the Family Weekend	Expanded version of daily program dealing with family issues.	1 hr	Gen. Ed.
Your Social Security	Representative from Social Security office explaining benefits and how system works.	15 min	Gen. Ed. Public Affairs
La Hora de Hermanidad Cristiana	Nationally produced teaching and music program for the Hispanic community. (Spanish Language)	30 min	Gen. Ed. Rel.

MAP was incorporated as a Louisiana nonprofit corporation in 1987. Our affiliation with the Church of God of Anderson, Indiana, permits us to accept donations pursuant to Section 501(c)(3) of the Internal Revenue Code and our Charter, which has been submitted to the Commission for review, reflects the appropriate limitations.

In conclusion, MAP is organized as a nonprofit corporation and will operate the station as a noncommercial educational licensee. MAP has clearly defined educational objectives and a plan to meet those objectives by establishing and maintaining close contacts with the community to determine areas of concern and to evaluate the success of our broadcast operations. We have a proposed set of broadcast offerings which we believe will meet the needs of the community and which we will modify as feedback comes from listeners. We will operate the station on a nonsectarian basis and abide by all FCC rules and policies.

William D. Franks
William D. Franks
May 12 - 92
Date

PALM BAY PUBLIC RADIO, INC.

68 RR2d 1566 (1991)

could not be kept entirely within the SMSA (or NECMA).⁵ In evaluating the explanation, we take a variety of factors into account, such as the terrain and population of the area in question, the shape of adjoining boundaries and any extenuating engineering problems. In analyzing applications which propose contour extensions, we look first to see if the extension is minor, and then to see if there is a specific engineering explanation. See, e.g., *Saco River Cellular Telephone Co.*, 2 FCC Rcd 2009 [62 RR 2d 999] (Mob Serv Div 1987); *Metroplex Telephone Co.*, 2 FCC Rcd 7301 (Mob Serv Div 1987); *GTE Mobilnet of South Texas Ltd. Partnership*, 4 FCC Rcd 1657 [66 RR 2d 83] (Mob Serv Div 1989).

5. The proposed extension here is small in size, amounting to only 5.06 percent of the total cell area,⁶ and only 3.9 percent of the MSA.⁷ Although the MSA boundaries are straight, GTE indicates that there is no technically feasible way to serve all portions of the rectangularly shaped MSA without some extension beyond the MSA boundary. Furthermore, GTE will not serve a significant number of RSA customers as its proposed extension does not cover any major population centers in the RSA, and covers only 0.6 percent of the total RSA population. As to coverage along I-65, we note that the Carey contour shows no coverage beyond the MSA, the alternative study shows only three miles of such coverage, and a contour reduction near I-65 will significantly decrease service elsewhere in the MSA. Finally, the application states that the cell 1 modification is necessary to serve specific areas and highways within the MSA, and includes a map showing the areas and highways mentioned, the current and proposed 39 dBu contours and the MSA boundary. We find that this explanation is sufficiently specific to meet the requirements set out in *Procedures Update*, 52 RR 2d at 726.⁸ Based on these considerations, we find that the extension is *de minimis* and permissible.⁹

6. In addition, we find GTE fully qualified to effectuate its proposal and that granting the instant application to make modifications to cellular station KNKA593 would serve the public interest, convenience and necessity.

III. Ordering Paragraphs

7. Accordingly, it is ordered that the application (File No. 04902-CL-MP-90) of GTE Mobilnet of Indiana Ltd. Partnership is granted. This authorization does not include the right to any interference protection in any areas outside the Lafayette, IN, MSA and is conditioned upon coordinating with the current and future co-channel licensees in the areas outside the MSA. The licensee herein is put on notice that in the event current or future MSA/RSA licensees encounter interference from any extensions, the licensee herein will have to change frequencies in those cells, or pull back its 39 dBu contours to eliminate any interference due to an extension.

8. It is further ordered that the petition to deny filed by Indiana RSA 4 Ltd. Partnership is denied.

FCC 91-77

In re Application of

PALM BAY PUBLIC RADIO, INC.
Palm Bay, Florida

For a Construction Permit for a New
Noncommercial Educational FM Station on
Channel 212A in Palm Bay, Florida

File No. BPED-841113MA

Adopted: March 14, 1991
Released: March 29, 1991

[10:309(A)(1), 10:309(B), 10:309(I)(1)] Broadcast applications; 30-day waiting period.

Nothing in Section 309(b) of the Act requires the Commission to accept applications that are mutually exclusive with a pending application. The purpose of the 30-day

5. *Procedures Update*, 52 RR 2d at 726.

6. See, e.g., *Houston Cellular Telephone Co.*, 5 FCC Rcd 7140 (Mob Serv Div 1990) (19.8 percent cell extension is *de minimis*); *Rhys G. Mussman*, 3 FCC Rcd 6808, 6811 (Com Car Bur 1988) (19 percent cell extension is *de minimis*); *South Carolina Metronet, Inc.*, DA 91-168, released Feb. 19, 1991 (16.7 percent cell extension is *de minimis*).

7. See, e.g., *Saco River*, 2 FCC Rcd at 2009 (6 percent of New England County Metropolitan Area (NECMA) is *de minimis*); *New York Cellular Geographic Service Area, Inc.*, 5 FCC Rcd 3819 (Mob Serv Div 1990) (5 percent of MSA is *de minimis*).

8. See, e.g., *GTE Mobilnet of South Texas*, 4 FCC Rcd at 1657. Cf., *Round IV Cellular Applications*, 103 FCC 2d 171, 177-83 (1986) (statements which did not specify particular cells, or particular areas needing coverage, failed to provide adequate explanation for proposed 39 dBu contour extensions), *aff'd mem.*, 813 F2d 472 (DC Cir 1987).

9. ILP also argues that GTE refused to agree to reciprocal cell extensions, and that this refusal indicates GTE is actually trying to serve parts of the RSA. GTE responds that a formal request for reciprocal extensions was not made until after the petition was filed. For the reasons indicated herein, we find that GTE's proposed extension results from efforts to provide service within the MSA. Any proposed extensions by ILP will be considered when formally presented to the Commission.

waiting period specified in Section 309(b) is to allow for the submission of petitions to deny, not competing applications. *Palm Bay Public Radio, Inc.*, 68 RR 2d 1566 [1991].

[53:503, 53:561] NCE-FM applicants; eligibility as educational organization; statement of educational purpose.

The processing standards for noncommercial educational FM applications do not dictate specific educational goals that must guide applicants seeking to be qualified as educational organizations (as opposed to educational institutions). Accordingly, an NCE applicant established its eligibility as an educational organization by simply including a statement that it would ascertain and develop educational programming for its community of license. This statement was an acceptable and consistent manifestation of the applicant's educational goal. In addition, to further indicate its commitment to an educational goal, the applicant stated that it would create programming to educate and to develop local performing artists and to educate its listeners with respect to veterans' benefits and procedures. Moreover, nothing in the applicant's illustrative weekly program schedule or in its Issues/Programs Statement raised any substantial and material question of fact regarding compliance with current rules and policies. *Palm Bay Public Radio, Inc.*, 68 RR 2d 1566 [1991].

MEMORANDUM OPINION AND ORDER

By the Commission:

1. The Commission has before it an application by Palm Bay Public Radio, Inc. ("Palm Bay") for a new non-commercial educational FM Station in Palm Bay, FL; a petition to deny filed by The Florida Institute of Technology ("FIT"); an opposition by Palm Bay and a reply by FIT.
2. By way of background, on Aug. 17, 1984, Central Florida Educational Network ("Central") filed an application for a new noncommercial educational FM station on Channel 212A at Melbourne, FL (File No. BPED-840817IA). On Oct. 12, 1984, Central's application was placed on a *Public Notice* (Report No. A-91) which announced an established "A" cut-off date of Nov. 14, 1984 for the filing of applications mutually exclusive with the Central application.¹ In response to the "A" cut-off date, Palm Bay filed the captioned application on Nov. 13, 1984. Subsequently, Central's application was dismissed by letter of the Chief, FM Branch, dated March 20, 1986.² Despite the dismissal of Central's application, the Palm Bay application should have subsequently been placed on a "B" cut-off list pursuant to 47 CFR §73.3573(d). However, the staff inadvertently placed Palm Bay's application on a second "A" cut-off list (Report No. A-119), which established Oct. 23, 1986 as the cut-off date for, and erroneously solicited the filing of, applications that were mutually exclusive with Palm Bay's application. On Oct. 23, 1986, FIT filed its application in response to the "A" cut-off list on which Palm Bay's application had been erroneously placed. On Jan. 16, 1987, the Chief, FM Branch, returned FIT's application as untimely, pursuant to the policy stated in *Kittyhawk B/casting Corp., et al.*, 7 FCC 2d 153 [9 RR 2d 709] (1967). In *Kittyhawk*, the Commission held that in order for an application to be considered timely filed for purposes of the cut-off rule, a proposal must be timely filed with the lead application of a group of conflicting applications. FIT's application was returned as inadvertently accepted for filing as the application was filed well beyond Central's initially specified "A" cut-off date of Nov. 14, 1984 and, therefore, was not entitled to comparative consideration. On Feb. 13, 1987, FIT filed an application for review of this action. In *Florida Institute of Technology, Inc.*, 4 FCC Rcd 1549 [65 RR 2d 1864] (1989), the Commission denied FIT's application for review.³
3. On Sept. 27, 1985, Palm Bay amended its application to comply with the TV Channel 6 interference provisions adopted in the *Memorandum Opinion and Order*. This amendment appeared on a *Public Notice* issued Oct. 11, 1985 (Report No. 13481). Subsequently, on Feb. 28, 1989, Palm Bay's amended application was placed on a "B" cut-off list (Report B-106) with a petition to deny cut-off date of April 4, 1989. On April 4, 1989, FIT filed the instant petition to deny.
4. Initially, FIT had alleged in its petition, *inter alia*, that Palm Bay's proposed facilities would cause objectionable interference to the reception of television Channel 6, WCPX(TV), Orlando, FL. In its opposition, however, Palm Bay calls attention to its Sept. 27, 1985 amendment (BPED-850927MW) filed pursuant to the

1. Under the cut-off procedures, applications accepted for filing are placed on an "A" cut-off public notice which provides a thirty-day period for the filing of applications that are directly in conflict with those listed or that are indirectly interlinked with those listed by new applications filed prior to the expiration of the thirty-day period. The procedure is designed to permit the Commission to cease accepting applications from new parties so that a choice can be made between timely filed applicants. See, e.g., *RKO General, Inc. (WVAC-TV)*, 89 FCC 2d 297, 320 [50 RR 2d 1597] (1982). After any such competing applications are filed, these applications are placed on a "B" cut-off notice which provides for a 30-day period for the filing of petitions to deny, as well as minor change amendments to the applications.

2. Pursuant to para. 54 of the *Memorandum Opinion and Order* in Docket 20735, 50 FR 27954 [58 RR 2d 629] (1985) ("*Memorandum Opinion and Order*"), those parties having before the Commission a pending application for a construction permit for a new station or a modification of an existing station had until Oct. 1, 1985, to amend their application to comply with the then new TV Channel 6 interference rules adopted therein or provide a showing that the existing application was in compliance with those rules. On Nov. 22, 1985, Central had requested an extension of time to Dec. 31, 1985 to comply with this requirement. When Central ultimately failed to comply, its application was dismissed in accordance with 47 CFR §§73.3566(b) and 73.3568(b) for failure to prosecute.

3. FIT has appealed this decision to the U.S. Court of Appeals for the District of Columbia Circuit (DC Cir No. 89-1187). The appeal has been held in abeyance by the Court pending Commission action on FIT's petition to deny Palm Bay's application. Favorable action by the Commission on FIT's petition could moot its appeal. See para. 5, below.

Commission's directive in para. 54 of the *Memorandum Opinion and Order*. This amendment reduced Palm Bay's proposed operation from 655 watts ERP at 78 meters HAAT to 100 watts ERP at 31 meters and thus brought its application into compliance with the new TV Channel 6 interference rules. For the first time, in its reply, FIT notes that the amendment would result in a greater than 50% change in Palm Bay's proposed service area and would therefore constitute a major change pursuant to 47 CFR §73.3573(a)(1).⁴ FIT contends that once an application is amended so as to effect a major change, 47 CFR §73.3573(b) clearly describes the procedures to be followed.⁵

5. Under the Commission's processing rules, 47 CFR §73.3573, a major change amendment affects the filing status of the application which it amends. It requires the assignment of a new file number, return to the beginning of the processing line and, in the case of applications for new noncommercial educational FM stations, the placement of the amended application on a new "A" cut-off list subject to competing applications. FIT contends that the Commission therefore should have either dismissed Palm Bay's amended application as untimely with respect to Central's "A" cut-off date, or assigned a new file number to Palm Bay's application keyed to the major change amendment date, and acknowledged the erroneous second "A" cut-off date set by Report No. A-119 as a valid cut-off date for the amended Palm Bay application. In either event, FIT asserts, the Sept. 27, 1985 amendment voided Palm Bay's protective cut-off status and FIT's application should therefore be reinstated.

6. In para. 54 of the *Memorandum Opinion and Order* in Docket 20735, the Commission modified its cut-off rules with respect to pending applications:

Pending applications for construction permits for new stations or modifications of existing stations have until Oct. 1, 1985, to amend their application to comply with the new rules adopted herein or provide a showing that the existing application is in compliance. After this date, all applications that are not in compliance or have not responded may be returned *Applications will not be returned to the beginning of the processing line due to the filing of these amendments.* (Emphasis added.)

50 FR at 27960. By indicating that such applications would not be returned to the beginning of the processing line, and therefore would not be reprocessed as new applications subject to competing applicants pursuant to an "A" cut-off list, the Commission simply modified its cut-off rules for this class of applicants. It is well within our authority to adopt such a modification of our cut-off rules by Rulemaking. See 47 USC §§154(i), 154(j), 303(r). Indeed, not to have done so here would have been to penalize applicants for making amendments required by the Commission.⁶

7. FIT contends that Section 309 of the Communications Act prohibits application of para. 54 of the *Memorandum Opinion and Order* in the present case. In support, FIT cites *Northern Television, Inc.*, 53 FCC 2d 320 [33 RR 2d 1269] (1975).⁷ That case, however, simply indicates that Section 309(b) requires public notice and a 30-day waiting period to permit petitions to deny before action on certain applications. It does not state that Section 309(b) requires the acceptance of competing applications. Indeed, as is apparent from the face of Section 309, the purpose of the 30-day public notice period is to permit petitions to deny, not necessarily competing applications. As the U.S. Court of Appeals for the District of Columbia Circuit recently stated (in another context) in *National Ass'n for Better B/casting v. FCC*, 849 F2d 665 [64 RR 2d 1570] (DC Cir 1988):

. . . Section 309 requires the Commission upon the filing of an application for "any substantial amendment" of a license, 47 USC §309(b), to determine "whether the public interest, convenience and necessity will be served" by allowing the application. 47 USC §309(a) (1962 & Supp 1987). In the process of that determination, public notice must be given, 47 USC §309(b); 47 CFR §73.3580. Interested parties may file petitions for denial of such applications, 47 USC §309(d); 47

4. Pursuant to 47 CFR §73.3573(a)(1), an amendment constitutes a major change in facilities if it proposes, *inter alia*, a reduction in coverage of more than 50% of the area proposed in the application as originally filed.

5. While FIT's petition to deny addressed the issue of Palm Bay's potential objectionable interference to television Channel 6 station WCPX(TV), Orlando, FL, this allegation was factually wrong, as indicated in Palm Bay's opposition. In its reply pleading, FIT raises a new matter heretofore unaddressed in the petition - the impropriety of the Commission not establishing a new "A" cut-off list in response to Palm Bay's Sept. 27, 1985 amendment. Section 1.45 of the Commission's Rules defines what issues may or may not be raised in a reply pleading. In this respect the Review Board has previously stated: "A reply pleading to the extent that it contains wholly new and previously unmentioned allegations of fact, will be dismissed. To allow the reply to serve the purposes of the original petition would be either to effectively render meaningless provisions of the rules for a fair opportunity by another party to respond to allegations, or to compel the addition of supplementary pleadings not ordinarily contemplated by the rules." *Industrial Business Corp.*, 26 RR 2d 1447 (Rev Bd 1973). Since a copy of the Palm Bay application file is readily available to the public, and the Commission published notice on Oct. 11, 1985 of Palm Bay's amendment, the arguments contained in FIT's reply would have been more appropriately raised in FIT's petition. However, the underlying matters referred to in FIT's reply pleading had their origins more than five years earlier and have, until the instant proceeding, never been directly addressed by the Commission. Therefore, because the substantive issues raised in FIT's pleading merit clarification, we have responded to them in this Order.

6. It should also be noted that the rules generally contemplated amendments reducing, not increasing, coverage of proposed facilities so no new areas of potential mutual exclusivity were created. Such was the case here.

7. FIT further contends that, by deleting the horizontal component of its proposed output signal and either using filters or reducing power, Palm Bay could have submitted a minor change amendment which would have also complied with the new TV channel six interference rules. It is Commission policy to consider only the proposal before us; we do not undertake to consider hypothetical or alternative proposals. See, e.g., *WSET, Inc.*, 80 FCC 2d 233 [47 RR 2d 1609] (1980). Of course, if a minor amendment were filed, FIT would have no argument that its rights were violated. In any event, the Commission did not limit the manner in which applicants could seek to comply with the new TV Channel 6 requirements, and we find that Palm Bay's response to those requirements was reasonable.

CFR §73.3584. The Commission must hold hearings where appropriate. 47 USC §309(e); 47 CFR §73.3593.

849 F2d at 670. In the instant case, because the amendment was a "major" amendment under the Commission's rules, the Commission complied with Section 309(b) by issuing a public notice establishing a "B" cut-off date for petitions to deny. We are aware of no court or Commission decisions holding that the Commission was also required to establish a new cut-off date for the filing of additional competing applications despite its decision in the Docket 20735 Rulemaking not to do so.

8. In its petition to deny, FIT also contends that the Palm Bay application is fatally defective in several respects, thus rendering it unacceptable for filing. In essence, FIT contends that (a) Palm Bay fails to establish its eligibility to operate as a noncommercial licensee as required by 47 CFR §73.503; (b) the applicant's proposed weekly programming schedule fails to meet the minimum operating requirement as set forth in 47 CFR §73.561; (c) Palm Bay's Issues/Program exhibit does not reflect the significant needs and problems of the community; and (d) Palm Bay failed to comply with the Commission's reporting rule, 47 CFR §1.65.

9. Section 309(d)(1) of the Communications Act requires a two-step analysis for judging the sufficiency of FIT's petition. We must first determine whether the petition and its supporting affidavits contain specific allegations of fact sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest. 47 USC §309(d)(1). The *prima facie* sufficiency determination assumes that the specific facts set forth by the complaining party are true without reference to contrary evidence, and we are limited to consideration of the petition and its supporting affidavits during this initial inquiry. *Astroline Communications Co. v. FCC*, 857 F2d 1556, 1561 [65 RR 2d 538] (DC Cir 1988). Allegations within these documents that consist "of ultimate, conclusory facts or more general allegations on information and belief, supported by general affidavits . . . are not sufficient." *Gencom, Inc. v. FCC*, 832 F2d 171 [64 RR 2d 97], n. 11 (DC Cir 1987). If we determine that the petition satisfies the threshold standard, the inquiry proceeds to a second phase. Having found that the petitioner has alleged a *prima facie* inconsistency with the public interest, the Commission must then determine whether, on the basis of the application, the pleadings filed, or other matters which it may officially notice, a substantial and material question of fact is presented. 47 USC §309(d)(2). Should the Commission conclude that such a question of fact has been raised, or if it cannot, for any reason, find that grant of the application would be consistent with the public interest, it must conduct a hearing in accordance with 47 USC §309(e). See 47 USC §309(d)(2).

10. We find no basis to designate the application for hearing on any of these issues. Following Commission action in *Moody Bible Institute*, 66 FCC 2d 162 [40 RR 2d 1264] (1977), the staff formulated processing standards for use in analyzing applicants for the educationally reserved FM frequencies. These processing standards were later published as Appendix A to the *Notice of Inquiry* in Docket 78-164, 43 FR 30842 (1978). The standards state that an applicant for a noncommercial, educational FM license may qualify as either an educational institution or as an educational organization -- the standards for qualification as an organization requiring additional information from the applicant. Organizational applicants must demonstrate that they have an educational goal and are committed to the advancement of an educational program. In evaluating compliance with these standards, emphasis is given to those programs that are instructional (for credit) and general educational (no formal credit).

11. Palm Bay has applied for its proposed facility as an educational organization. FIT has questioned Palm Bay's qualifications based on the insufficiency of its programming proposal and the lack of a definitive goal or purpose specified within the application. However, the processing standards do not dictate the specific goals required of an organizational applicant. The Commission has routinely granted construction permits to applicants for educational radio stations whose stated purpose was to develop educational programming for their community of license. See, e.g., construction permits issued to KBUT(FM) Crested Butte, Co (BPED-8411051B, granted Dec. 13, 1985), and to WNZN(FM), Lorain, OH (BPED-881215MJ, granted March 2, 1990). Hence, Palm Bay's statement that it will ascertain and develop educational programming for its community of license is an acceptable and consistent manifestation of its educational goal. Indicative of its commitment to an educational program, Palm Bay has stated that it will create programming to educate and to develop local performing artists and to educate its listeners with respect to veterans' benefits and procedures.

12. It also asserts that Exhibit 5, the weekly program schedule provided by Palm Bay, is not illustrative of an educational purpose and that the limited amount of programming shown in the application, 10.75 hours, fails to meet the minimum operating schedule for a noncommercial, educational FM station as set forth in 47 CFR §73.561. FIT further asserts that Exhibit 6, the Issues/Programs Statement, does not reflect the significant needs and problems of Palm Bay.

13. In opposition, Palm Bay states that its application did not show programming for every minute of its operating schedule but, rather, presented an illustrative program list. As Palm Bay asserts that it will provide educational programming and programming responding to the needs and interests of Palm Bay community, we find that the pleadings do not raise a substantial and material question of fact that Palm Bay is ineligible to operate a noncommercial station, would operate in violation of the provisions of 47 CFR §73.561, or will not provide issue-responsive programming. Moreover, on June 27, 1984, the Commission adopted the *Report and Order* in BC Docket 81-496, 98 FCC 2d 746 [56 RR 2d 1157] (1984) which eliminated the requirement for educational



licensees to conduct a formal ascertainment and afforded licensees wide discretion to determine how community needs should be ascertained and met. The rule changes enunciated in the Report and Order in BC Docket 81-496, were reflected in a December 1985 revised application form for noncommercial educational FM broadcast stations (FCC Form 340). The requirement to provide a list of proposed weekly programming was eliminated from Form 340 and replaced with a requirement to provide a statement of proposed programming policies. Palm Bay's application was filed on January 1983 edition of FCC Form 340; therefore it would be unfair to process its application utilizing information Palm Bay was no longer required to provide at the time it filed its application. Moreover, nothing contained on these portions of the applications raise substantial and material questions of fact regarding Palm Bay's compliance with current Commission rules and policies. Accordingly, FIT's objections to both Palm Bay's proposed weekly program schedule (Exhibit 5) and its Issues/Programs Statement (Exhibit 6) are without merit.

14. Finally, FIT alleges that Palm Bay's application should be dismissed because the applicant has violated 47 CFR §1.65 by failing to report its correct address, its corporate status, and the current address of several members of its board of directors. In opposition, Palm Bay details the difficulty it incurred receiving mail in care of the Palm Bay Baptist Church; this difficulty necessitated the renting of a post office box. Palm Bay acknowledges that some of its directors have moved since 1984, and admits that it had failed to timely provide their current address. FIT replies that Palm Bay's claim of the Postal Service failing to deliver mail at the church is hearsay and that Palm Bay's relationship to the church arouses the possibility that the church may be a real party in interest.

15. However, FIT has failed to provide supporting evidence to sustain its allegation that Palm Bay Baptist Church is a real party in interest in the Palm Bay application and we, therefore, determine that it does not present a prima facie real-party-in-interest issue. The applicant's failure to timely provide a current address for itself and its board of directors was a relatively minor rule violation and constitutes an isolated instance of noncompliance. Accordingly, no substantial and material questions of fact regarding Palm Bay's qualifications are raised by the §1.65 violation. We also note that on Nov. 13, 1989, Palm Bay filed a minor curative amendment which provided both its current mailing address as well as those of its directors and, thus, has remedied these deficiencies.

16. Accordingly, for the reasons set forth above, the petition to deny filed by the Florida Institute of Technology is hereby denied and the application of Palm Bay Public Radio, Inc. (BPED-841113MA) is hereby granted.

FCC 91R-24

In re Applications of)	
PALMETTO COMMUNICATIONS CO.)	MM Docket No. 89-357
WDIX, Yadkinville, North Carolina)	File No. BP-870331BK
For a Construction Permit for a Modification of Facilities)	
TRIAD NETWORK, INC.)	File No. BP-870928AA
Greensboro, North Carolina)	
For a Construction Permit for a New AM Station)	

Adopted: March 1, 1991
Released: March 15, 1991

[10:307(F), 53:24(A)(1), 53:24(A)(7), 53:24(A)(9)] Section 307(b) analysis; applicability of *Huntington* doctrine; applicability of "quiet village" doctrine.

An ALJ correctly awarded a dispositive Section 307(b) preference to an AM applicant seeking to modify an existing station licensed to Yadkinville, North Carolina over an applicant proposing Greensboro as its community of license. The Yadkinville proposal would provide the first complete nighttime transmission service to Yadkinville. Since the station's currently authorized nighttime power provided service to only 43% of its area and population, it could not be said that the station already provided adequate nighttime service to Yadkinville. Further, the contention that it was technically possible for the station to provide full-time service to Yadkinville on its present frequency if it increased its power or relocated its transmitter was irrelevant; the Commission is not bound to consider hypothetical technical proposals in making licensing decisions. The *Huntington* doctrine was not applicable since there was no evidence regarding the inseparable relationship of Yadkinville to any larger city. Nor was application of the "quiet village" doctrine warranted since Yadkinville had sufficient hallmarks of a community, and no community was shown to have a greater need for a new service. *Palmetto Communications Co.*, 68 RR 2d 1570 [Rev. Bd., 1991].

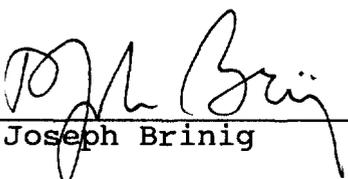
CERTIFICATE OF SERVICE

I hereby certify that on May 14, 1992, a true copy of the foregoing Motion for Summary Decision was mailed, first class, postage prepaid to:

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