

FCC MAIL SECTION
Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554
FCC 92M-720
03265

JUN 29 4 09 PM '92

In re Applications of

MM Docket No. 92-704

SABLE COMMUNITY
BROADCASTING CORPORATION
Channel 217A
Hobson City, Alabama

DISPATCHED File No. BPED-851003MB

TRINITY CHRISTIAN ACADEMY
Channel 217A
Oxford, Alabama

File No. BPED-860512MB

For Construction Permit for a
New Noncommercial FM Station
on Channel 217

MEMORANDUM OPINION AND ORDER

Issued: June 25, 1992 ; Released: June 29, 1992

1. Under consideration are: (a) a Motion for Acceptance Nunc Pro Tunc of Late-Filed Notice of Appearance, filed on June 4, 1992, by Sable Community Broadcasting Corporation ("Sable"); (b) an Erratum to (a), filed on June 5, 1992, by Sable; (c) an Opposition to (a), filed on June 10, 1992, by Trinity Christian Academy ("Trinity"); (d) a Motion to Dismiss, filed on May 29, 1992, by Trinity; (e) an Opposition to (d), filed on June 9, 1992, by Sable; (f) an Erratum to (e), filed on June 10, 1992, by Sable; and (g) a Reply to (e), filed on June 16, 1992, by Trinity.

Motion for Acceptance

2. By Order, FCC 92M-614, released May 28, 1992, a Notice of Appearance filed by Sable on May 19, 1992 ("NOA"), was dismissed because it was late-filed and no petition to accept, for good cause shown, such late-filed NOA was filed.¹ In its Motion for Acceptance, Sable requests that its May 19 NOA be accepted on a nunc pro tunc basis as if it was filed by the May 6, 1992, due date. Sable claims that the NOA was not filed in a timely manner because, at the time of such filing, it was effectively acting without counsel on a pro se basis, and was not "versed in the minutiae of communications law." In this connection, although its NOA was filed with the name and address of the law firm of Reid & Thomas appearing in the salutation, Sable alleges that the document was actually prepared by its president, Maudine J. Holloway, "a lay person," for her signature and that of attorney Marcus Reid. Sable argues that Reid became involved in the notice of appearance process because he is a member of the Board of Directors of Sable, not because he is an attorney. Sable next contends that

¹ In addition, it was noted that Sable's Notice of Appearance was not served on any of the parties to this proceeding.

its "slow" reaction to the Hearing Designation Order, DA 92-412, released April 15, 1992 ("HDO"), "is particularly understandable" in light of the fact that its application has been pending since 1985, and that the dismissal of its application would be harsh. Further, Sable maintains that acceptance of its late-filed NOA will not prejudice the other parties, that equitable considerations should be taken into account, that it has not engaged in "gamesmanship" in order to obtain an unfair advantage, and that it is "a relatively unsophisticated applicant." Finally, Sable avers that the Commission is more lenient, flexible and understanding with respect to noncommercial applicants than it is with commercial applicants.

3. In its opposition, Trinity argues that Sable has failed to demonstrate good cause for the acceptance of its NOA. Trinity contends that an untimely filing should be considered only if Sable's tardiness was caused by a calamity of a widespread nature that even the best of planning could not have avoided, and that Sable cannot point to any such circumstances. In addition, Trinity claims that Sable's decision to attempt to prosecute its application without the benefit of communications counsel was made at its own risk and does not warrant acceptance of its late-filed NOA. Trinity also alleges that Sable is not an unsophisticated applicant, that the notice of appearance directive in the HDO was clear, and that it did not require any particular legal expertise or knowledge of the Commission's rules to comply with that directive. Trinity further maintains that the length of time the applications were pending prior to designation for hearing is irrelevant, that the Commission's filing deadline rules are equally applicable to commercial and noncommercial applicants, and that it is in the public interest to eliminate unnecessary delays in the licensing process. Moreover, Trinity avers that acceptance of Sable's NOA would prejudice the other applicants and the public because, absent such acceptance, Trinity's application could be granted, resulting in the prompt initiation of a new service.

4. Sable's motion will be granted, and its May 19, 1992, NOA will be accepted nunc pro tunc. Section 1.221(c) of the Commission's Rules provides, in pertinent part:

Where an applicant fails to file ... a written appearance within the time specified, or has not filed ... a petition to accept, for good cause shown, such written appearance beyond expiration of [the time specified], the application will be dismissed with prejudice for failure to prosecute.

In determining whether "good cause" exists in these circumstances, the Commission held in Nancy Naleszkiewicz, 7 FCC Rcd 1797, 1800 (1992), that the standards enunciated in Comuni-Centre Broadcasting, Inc. v. FCC, 856 F.2d 1551 (D.C. Cir. 1988), should be utilized. These standards are: (a) the applicant's proffered justification for the failure to comply, (b) the prejudice suffered by other parties, (c) the burden placed on the administrative system, and (d) the need to punish abuse of the system and to deter future misconduct. Comuni-Centre, supra at 1554.

5. Applying the Comuni-Centre standards to the instant situation, Sable has, on balance, established good cause. Although Sable's proffered

justification for its failure to timely file its NOA is weak,² it has met all of the other elements of the standard. Thus, no recognizable prejudice or substantial procedural disruption is attributable to the fact that the NOA was filed 13 days late.³ Further, the delay in filing did not necessitate the significant postponement of any scheduled procedural event,⁴ and there is no indication that the delay in filing induced detrimental reliance on the part of any of the other parties to this proceeding. In addition, no party has complained of any cognizable prejudice on account of the delay in filing. In this regard, the fact that Trinity may now face competition for the facility in question is not the type of public interest prejudice the Commission recognizes. Finally, the filing of a notice of appearance 13 days late is not such an egregious abuse of the system as to warrant the imposition of the "ultimate" sanction as a deterrent to others. This is especially true where Sable has gained no conceivable advantage by virtue of the late filing. See Nancy Naleszkiewicz, supra.

Motion to Dismiss

6. Trinity seeks the dismissal of Sable's application. In support, Trinity relies upon the following: (a) the late-filing of Sable's NOA and the Presiding Judge's dismissal thereof; (b) the failure of Sable to respond to a November 26, 1991, letter from the Chief, FM Branch, Audio Services Division, to all applicants directing them to file an environmental statement and warning that the failure to respond could result in the dismissal of the application; (c) the failure of Sable to respond to paragraphs 4 and 16 of the HDO, which required it to notify the Presiding Judge within 30 days as to whether it complied with Section 73.3580 of the Rules concerning publication of local notice of the filing of its application; and (d) the failure of Sable to respond to paragraphs 10 and 21 of the HDO, which required it to submit the environmental assessment required by Section 1.1311 of the Rules within 30 days. Trinity contends that dismissal is warranted because Sable has offered no explanation for its repeated failures to comply with the Commission's directives, alleges that the parties to this proceeding have been prejudiced because Sable's dilatory tactics have delayed this proceeding, asserts that Sable's failures have burdened the administrative system, and argues that dismissal is necessary to deter similar misconduct in the future.

7. In its opposition, Sable claims that it has not engaged in a pattern of repeated and unexplained failures to comply with procedural deadlines, and contends that neither the parties nor the Commission's processes have been unduly prejudiced by its conduct. Sable maintains that it has rectified its

2 Even assuming, arguendo, that Sable was proceeding pro se, this would not excuse its non-compliance with the Commission's rules. Silver Beehive Telephone Co., 34 FCC 2d 738, 739-40 (1972). In addition, paragraph 23 of the HDO, relating to the filing of written appearances, was sufficiently clear so as to be understood by "a lay person" such as Holloway. In this regard, one does not have to be "versed in the minutiae of communications law" to know from paragraph 23 that something had to be done within a specific period of time.

3 Although an additional prehearing conference may be necessary, this resulted from the failure of counsel for both Trinity and Sable to appear at the June 18, 1992, conference.

4 See the final ordering clause.

failure to file a timely notice of appearance by showing good cause for its acceptance. Sable further avers that its failure to respond to the directives of the HDO have also been cured in a simultaneously filed Petition for Leave to Amend and amendment. Sable also claims that it never received the FM Branch's November 26, 1991, letter, and submits the declaration under penalty of perjury of its president, Maudine J. Holloway, supporting that assertion.

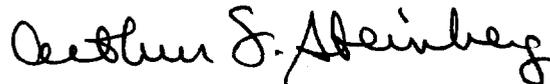
8. Trinity's motion to dismiss will be denied. "[D]ismissal is an extreme remedy to be employed when an applicant's conduct is so disruptive, contemptuous, or prejudicial that no lesser measure will reasonably protect the proceedings." The Dunlin Group, 6 FCC Rcd 4642, 4643 (Rev. Bd. 1991), citing Comuni-Centre, supra. In evaluating whether the asserted grounds for dismissal for procedural derelictions are sufficient, the Commission has utilized the Comuni-Centre standards enumerated in paragraph 4, above. Nancy Naleszkiewicz, supra at 1800; see also HS Communications, Inc., 6 FCC Rcd 3609, 3610 (Rev. Bd. 1991). As discussed in paragraph 5, above, the application of those standards to the instant situation establishes that dismissal is not appropriate given the nature and extent of Sable's actions. This is true even considering the additional factors relied on by Trinity in its motion, namely, the failure to respond to a staff letter and to certain portions of the HDO. The failure to respond to the staff letter has been satisfactorily explained, and Sable's tardiness in filing its Petition for Leave to Amend and amendment is not so egregious in light of the relevant circumstances that it can stand alone as a basis for dismissal.⁵ Nancy Naleszkiewicz, supra.

Accordingly, IT IS ORDERED that the Motion for Acceptance Nunc Pro Tunc of Late-Filed Notice of Appearance filed by Sable on June 4, 1992, IS GRANTED and the Notice of Appearance filed by Sable on May 19, 1992, IS ACCEPTED nunc pro tunc.

IT IS FURTHER ORDERED that the Motion to Dismiss filed by Trinity on May 29, 1992, IS DENIED.

IT IS FURTHER ORDERED that counsel for the parties SHALL CONFER for the purposes stated in paragraphs 1(b) and (c) of Order Prior to Prehearing Conference, FCC 92M-493, released April 24, 1992, within 5 days of the release of this Memorandum Opinion and Order, and SHALL SUBMIT the Joint Report contemplated in paragraph 1(d) of the Order Prior to Prehearing Conference within 2 days after such conference.

FEDERAL COMMUNICATIONS COMMISSION



Arthur I. Steinberg
Administrative Law Judge

⁵ It is also noted that the Petition for Leave to Amend filed by Sable on June 9, 1992, is unopposed.