

**ORIGINAL  
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August 3, 1992

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Donna R. Searcy  
Secretary  
Federal Communications Commission  
Washington, D.C. 20554

ATTN: The Honorable Edward J. Kuhlmann  
Administrative Law Judge

RE: Central Florida Educational Foundation, Inc., et. al., MM  
Docket No. 92-33

Dear Ms. Searcy:

Transmitted herewith, on behalf of Central Florida Educational Foundation, Inc., is an original and six copies of its "Opposition to Petition to Enlarge Issues" filed in connection with the above-referenced docketed proceeding.

Should any questions arise concerning this matter, kindly contact the undersigned directly.

Respectfully submitted,

**MAY & DUNNE, CHARTERED**

By: Joseph E. Dunne III  
Joseph E. Dunne III  
Attorney for Central Florida  
Educational Foundation, Inc.

JED:gmcA41  
enclosures

xc: All Per Attached Certificate of Service  
James S. Hoge

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

BEFORE THE

**Federal Communications Commission**

WASHINGTON, D.C. 20554

In re Applications of	)	MM Docket No. 92-33
	)	
CENTRAL FLORIDA EDUCATIONAL	)	File No. BPED-881207MA
FOUNDATION, INC.	)	
Channel 203C3	)	
Union Park, Florida	)	
	)	
BIBLE BROADCASTING NETWORK, INC.)	)	File No. BPED-890412MJ
Channel 202C2	)	
Conway, Florida	)	
	)	
SOUTHWEST FLORIDA COMMUNITY	)	File No. BPED-891127MC
RADIO INC.	)	
Channel 202C2	)	
Conway, Florida	)	
	)	
MIMS COMMUNITY RADIO, INC.)	)	File No. BPED-891127MD
Channel 202C1	)	
Oak Hill, Florida	)	
	)	
HISPANIC BROADCAST SYSTEM, INC.)	)	File No. BPED-891128ME
Channel 202C3	)	
Lake Mary, Florida	)	
	)	
For Construction Permit for a	)	
New Noncommercial Educational FM)	)	
Station	)	

TO: The Honorable Edward J. Kuhlmann  
Administrative Law Judge

**OPPOSITION TO PETITION TO ENLARGE**

Central Florida Educational Foundation, Inc. (CFEF), by its undersigned attorney and pursuant to section 1.294 of the Commission's Rules, 47 C.F.R. §1.294 (1992), hereby submits this opposition to the Petition to Enlarge Issues (Petition) filed by Hispanic Broadcast System, Inc. (Hispanic) on July 27, 1992. As grounds for its opposition CFEF shows and states as follows.

1. At the outset, CFEF notes that Hispanic's Petition is grossly untimely. Section 1.229 (b) of the Commission's Rules

provides, in pertinent part, that petitions to enlarge must be filed within 30 days of the publication of the Hearing Designation Order in the Federal Register, or 15 days after the facts giving rise to the petition are discovered. Hispanic alleges that the evidence that supports its Petition was not discovered until it received a letter from Mr. Diehl, the Chief Engineer for First Media Corporation, the licensee of WCPX-TV, channel 6, Orlando (Hereinafter "WCPX") dated July 10, 1992. The gist of Mr. Diehl's letter, however, that there was no room on the WCPX tower for other antennas, is precisely the same information as was conveyed to Bible Broadcasting Network (BBN) in a letter dated February 17, 1989, to Hispanic in a letter dated June 29, 1989, and to Southwest Florida Community Radio, Inc. in a letter dated November 13, 1989. The fact that WCPX represented that it had no room on its tower was therefore known to Hispanic for over three years. The facts upon which Hispanic relies, therefore, have either been public knowledge, viz., that CFEF specified the channel 6 site in its original application, or known to Hispanic, i.e., that channel 6 was denying other applicants permission to use the tower because of lack of room, for over three years. It is not a mischaracterization to label evidence as "grossly untimely" which Hispanic submits on the eve of the filing of findings in this case which it has had in its files for over three years, and for four

and one-half months after the Hearing Designation Order. See, e.g., Great Lakes Broadcasting, Inc., 6 FCC Rcd 4331, 69 R.R.2d 946 (1991)

2. Section 1.229(c) of the rules permits the grant of an untimely filed petition to enlarge "only if it raises a question of probable decisional significance and such substantial public interest importance as to warrant consideration in spite of its untimely filing." Id. at 947. This standard requires the proponent "...to establish the likelihood of proving the respective allegations therein is so substantial as to outweigh the public interest benefits inherent in the orderly and fair administration of the Commission's business."(emphasis supplied) The Edgefield-Saluda Radio Co., 5 F.C.C. 2d 148, 148-49 (Rev. Bd. 1966). See also, Great Lakes Broadcasting, Inc., supra, 69 R.R.2d at 947, note 6. Hispanic has totally failed to shoulder this burden. The facts upon which it relies, three letters which refuse other applicants permission to use the tower, does not prove that Channel 6 did not grant that permission to CFEF. At most it creates an inference, and an equally plausible inference from Mr. Diehl's letters is that he didn't have sufficient space on the WCPX tower for an FM antenna in addition to CFEF's. In point of fact, Mr. Diehl granted CFEF WCPX' express permission to specify its tower prior the filing of

CFEF's application. Attached as Exhibit A is a Verified Statement signed by Mr. Robert Diehl which attests to the fact that he granted CFEF permission to specify the Channel 6 site in its application without any mention of diplexing ( CFEF filed its application on December 7, 1988). That conversation, recalls Mr. Diehl, was even confirmed in writing, although he no longer has a copy of the letter (neither does CFEF). Moreover, the Hispanic's allegation ( see page 5), that Mr. Diehl's statements in its letters that the approval of the co-owners would be required "on all tower matters," does not call into question CFEF's good faith reliance ( or for that matter, BBN or Southwest's reliance ) on Mr. Diehl's permission to use the site. Great Lakes Broadcasting, Inc., supra, 69 R.R.2d at 948.

3. Hispanic in its pleading complains that none of the applicants " were afforded the opportunity to diplex until after the B cut-off date, too late to obtain 307 (b) parity with Central Florida." (petition, page 3). Hispanic further alleges that by allowing only one applicant permission to collocate, "channel 6 has in effect preempted the Commission's processes." (petition page 4). The record shows these charges simply are inaccurate. Channel 6 has not refused any party permission to diplex on its tower, three applicants have been granted permission to do so. If CFEF has

garnered any advantage it is the advantage which goes to the diligent. After receiving the letters denying them permission to use the WCPX tower there is no evidence that Hispanic, BBN or Southwest ever approached channel 6 again until after CFEF's amendment showed that diplexing was technically feasible. None of these applicants did what CFEF did, which was to keep in constant touch with Mr. Diehl, to research the possibilities of diplexing using the channel 6 antenna, and to perform the technical and other studies which showed Mr. Diehl and WCPX that diplexing was not only technically possible but technically superior in terms of reducing the possible interference to channel 6 and reducing the load on the WCPX tower. Hispanic, and other applicants in this proceeding, should not be allowed to claim that CFEF was given an unfair advantage because it did the work the other applicants did not.

4. Finally, Hispanic argues that "even if" CFEF was given permission to specify the channel 6 tower, the Commission should investigate "the facts surrounding" the grant of permission to CFEF to specify the site and the denial of such permission to the other applicants. There is no precedent cited which supports this novel proposition, however, because there is none. This is not a renewal proceeding, and the WCPX site, while seemingly superior, is not "unique." No Commission case stands for the proposition that an

independent site owner must grant permission to all applicants which request use of the site, or that a qualifying issue should be added to a proceeding because one applicant sought and secured a superior antenna site. Site owners are not common carriers or subject to the Commission's rules concerning pole attachments. In fact, in South Florida Broadcasting Co., 99 F.C.C.2d 840, 57 R.R.2d 495 ( Rev. Bd. 1984) the Commission decided that a site owner had the right to condition his consent to use the site as he wished, granting the right to one and denying the right to others as the site owner wished.

5. Hispanic even argues that the use by channel 6 of the same engineering firm implies that CFEF and WCPX are acting in concert. Hispanic's argument seems to be that CFEF couldn't have WCPX' permission to use the site, but if CFEF did it is proof that CFEF and WCPX are "acting in concert," as if an applicant acting in concert with its antenna site owner is deleterious to the public interest." Not only is this charge legally irrelevant it is wholly unsupported. In actuality, CFEF and WCPX are not using the same engineering firm. Kevin Fisher provided engineering analysis for First Media Corporation in its opposition to the petition for leave to amend filed by Mims Community Radio, Inc. Glen Clark has been CFEF's consulting engineer since its application was filed.

By the same twisted logic presumably all the applicants in this proceeding are likewise acting "in concert" with WCPX because Kevin Fisher prepared the Joint Coverage Study submitted by all the applicants in this proceeding.

6. Hispanic's petition should be denied speedily because it is grossly untimely, relying as it does on documentation that is over 3 years old. The petition does not provide sufficient facts to show the likelihood that it can prove a fact of decisional significance, i.e., that CFEF did not have reasonable assurance of its transmitter site when it filed its application, and, moreover, CFEF provides herein verified proof that it did have such reasonable assurance when it filed its application. Hispanic cites no case in which the Commission required a site owner to make its site available to every applicant, and, moreover, there is no evidence, as opposed to speculation, which shows that CFEF had any advantage in its dealings with Channel 6 other than diligence. CFEF worked to secure a superior site and the technical advantages of diplexing prior to the B cut-off, the other applicants did not. There is no case cited, nor is CFEF aware of one, which holds that an applicant should be penalized for its diligence.

**WHEREFORE**, the foregoing premises considered, Central Florida Educational Foundation, Inc. respectfully urges the expeditious denial of the Petition To Enlarge submitted by Hispanic Broadcast System, Inc.

**CENTRAL FLORIDA EDUCATIONAL  
FOUNDATION, INC.**

By:

  
Joseph E. Dunne III  
Its Attorney

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**CENTRAL FLORIDA EDUCATIONAL FOUNDATION, INC.**

**EXHIBIT A**

**VERIFIED STATEMENT OF ROBERT K. DIEHL**

**VERIFIED STATEMENT**

I, Robert K. Diehl, make the following statement under penalty of perjury of the laws of the United States and the State of Florida.

1. I am the Chief Engineer for WCPX-TV, and am normally the one contacted by parties who wish to secure space on the WCPX-TV tower.
2. In early December, 1988, I had a telephone conversation with Jim Hoge, the president of Central Florida Educational Foundation, Inc.(CFEF). We discussed CFEF's application at that time, and I gave Mr. Hoge permission to specify the WCPX-TV tower in CFEF's application. No diplexing was discussed at that time.
3. Mr. Hoge confirmed this agreement in writing a few days after our telephone conversation. I have recently emptied my files, however, and no longer have a copy of the letter.

  
\_\_\_\_\_

Robert K. Diehl

Executed this 30 day of July, 1992.

CERTIFICATE OF SERVICE

I, Brian R. Claydon, a law clerk in the law offices of May & Dunne, Chartered, hereby certify that I have caused to be sent this 3rd day of August 1992, via first class U.S. mail, postage prepaid, a true and correct copy of the foregoing OPPOSITION TO PETITION TO ENLARGE to the following:

\*The Honorable Edward J. Kuhlmann  
Administrative Law Judge  
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By:   
Brian R. Claydon

\*Hand Deliver  
\*\* Via Telecopier