DOCKET FILE COPY ORIGINAL

ORIGINAL

RECEIVED
MAR 15 1993
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In re Applications of	)	**MM No. 93-41**
	)	
TRIAD FAMILY NETWORK, INC. **Winston-Salem, North Carolina** **Channel 207C3**	))))	**BPED-910227MD**
POSITIVE ALTERNATIVE RADIO, INC. **Asheboro, North Carolina** **Channel 207A**	))))	**BPED-911119MC**
For Construction Permit for a **New Noncommercial Educational** **FM Station**	)))	

TO: Chief, Audio Services Division

PETITION FOR RECONSIDERATION OF HDO

Comes now Positive Alternative Radio, Inc. ("Radio" or "Petitioner"), an applicant for authority to construct a new educational FM station to operate at Asheboro, North Carolina, through its counsel, and petitions that the Chief, Audio Services Division ("Chief") reconsider that portion of his Hearing Designation Order ("HDO") released March 9, 1993 contained in paragraph 4, to wit:

> 4. In addition, on February 9, 1993, Radio submitted an engineering amendment proposing to change its transmitter site. In its cover letter, Radio claims "good cause" for its post-"B" cut-off amendment. It states that, in securing "reasonable assurance" for its original WKXR(AM) site, Radio was assured, with respect to costs, that "I'll treat you right." Subsequently, Radio was informed that the site rent would be $1200 per month, which exceeds its financial means. Because we do not find this showing sufficient to demonstrate good cause for the amendment, see Erwin O'Conner Broadcasting

No. of Copies rec'd 0+4
List A B C D E

Co., 22 FCC 2d 140, 143 (Rev. Bd. 1970), we will return the amendment.

Section 1.106(a)(1) of the Commission's rules provides in part:

> A petition for reconsideration of an order designating a case for hearing will be entertained if, and insofar as, the petition relates to an adverse ruling with respect to petitioner's participation in the proceeding.

The above-quoted paragraph 4 of the HDO goes directly to petitioner's participation in this proceeding, in that it in effect inevitably results in the dismissal of petitioner's application by the presiding judge, since the original site proposed by Radio is no longer available.

Background

Petitioner's principal (and director) Vernon H. Baker ("Baker") commenced preparation of Radio's application in the late fall of 1991. Mindful of the need to secure "reasonable assurance" of use of a site for Radio's transmitter, and after its engineer outlined an acceptable area, Baker concluded that an optimum site would be to mount Radio's FM antenna on the North tower of AM Station WKXR, licensed to Asheboro. To that end, he spoke with Edward F. Swicegood II, president of Randolph Broadcasting, Inc., licensee of WKXR, outlining the proposed use of a WKXR tower. Swicegood readily agreed to use of his North tower as outlined by Baker, and even mentioned the possibility that he (Swicegood) might in some manner serve as agent for the FM facility. As to proposed space rental charges, Swicegood assured Baker that he would "treat him right" or with a similar expression.

Thus, Baker was satisfied that he had secured "reasonable assurance" of a site for Radio's transmitter and antenna, prior to filing Radio's application November 19, 1991. Indeed, the same day that he had contacted Swicegood, Baker addressed a letter in confirmation to him. A copy is attached to this petition as Exhibit A. No reply was received (or expected).

Accordingly, it is beyond doubt that Radio had "reasonable assurance" when it filed its application for Asheboro, North Carolina.

Some five months after Radio's application was filed, Triad Family Network, Inc. ("Triad"), the applicant mutually exclusive with Radio, tendered a Petition to Deny Radio's application, based upon alleged engineering problems arising from use of the WKXR antenna tower.[1] Neither Baker nor Radio received any word or comment from Swicegood.

Subsequently, Student Educational Broadcasting, Inc., licensee of WXYG(FM), Chapel Hill, North Carolina, and Eton College, licensee of WSOE(FM) filed identical, carbon-copy informal objections to Radio's application.[2] Still no comment from Swicegood.

On or about December 15, 1992, Baker received the attached undated letter (Exhibit B) from Swicegood, demanding "out of a clear sky" tower use payments of $1200 per month and $14,400

---

[1] This Petition to Deny was dismissed by the HDO (par. 13).

[2] These, too, were dismissed by par. 13 of the HDO.

advance payment by December 20th, and requiring that there be no refunds. Unless payment was made by December 20th, the previously agreed to use of the WKXR site would be cancelled.[3]

The terms and conditions required by Swicegood were beyond the means of Radio, a non-commercial applicant. Baker, an experienced broadcaster in southwest Virginia and North Carolina, was (and is) thoroughly familiar with tower space rental charges in the area, and had anticipated payment in the neighborhood of the going rate, that is, $150 to $200 per month. The price demanded by Swicegood was shocking to Baker, and sent the message that Swicegood intended but to dissolve the previously understanding, and leave Radio without a site. Radio stayed ready, willing, able and eager to pay a reasonable charge for use of Swicegood's tower, but Radio's directors now felt that they had been no more than the victim of an effort to require them to seek another site.

Upon receipt of Swicegood's demand letter and realizing that they were unable to meet its unreasonable terms, Radio's principals immediately sought a new site, and were able to secure reasonable assurance of use of space on the center tower of WZOO(AM), Asheboro. The agreed cost of this space is $200.00 per month, to commence with the start of construction, all in keeping with similar charges in the Virginia-North Carolina area. (See Exhibit C attached). Radio anticipated filing an amendment application

---

[3] Obviously, somebody had "gotten to" Swicegood, and had advised him to establish a price so high and terms so onerous that Radio would be unable to comply and thus lose its site.

within the 30-day period following loss of its previous site, but the intervention of Christmas-New Year's holidays delayed briefly the completion of engineering studies. Its amendment was tendered February 9, 1993, along with a copy of the WKXR demand letter and explanation to justify acceptance of the amendment and to substantiate loss of its previous site.

The HDO rejected Radio's site amendment, citing Erwin O'Conner. As a result of denial of acceptance of its said amendment, Radio is now without a site. The December 20, 1992 deadline demanded by Swicegood for payment of $14,400 in advance rent[4] or cancellation of the agreement has passed, so the WKXR site is no longer available, and with denial of Radio's site change amendment, it is indeed without a site, hence the HDO has effectively terminated Radio's participation in the captioned proceeding. This petition for reconsideration of the HDO is accordingly permitted by §106(a)(1) of the rules.

Argument

The concept of reasonableness permeates (and must permeate) Commission considerations of site availability for an applicant before the Commission. Indeed, the terms "reasonable assurance" is the mark by which the Commission determines whether an applicant has secured authorization to use a transmitter site it proposes. There is no doubt that there was a "meeting of the minds" of Baker

[4] For the first year's tower space rent. Should this hearing continue for two or three additional years (as it well may with appeals), Radio would have been obligated for $14,400 more each year - all non-refundable!

and Swicegood when they discussed use of a WKXR tower for Radio's antenna. Genessee Communications, Inc., 3 FCC 3595 (Rev. Bd. 1988). Details were generally agreed to, but no specific charge per month was specified, Baker (and presumably Swicegood) leaving the matter of a reasonable charge for the final contract after Radio had received a construction permit. The criteria of National Innovative Programming Network, Inc., 2 FCC Rcd 5641, 5643 (1987) were more than met:

> 11. We have long held that a broadcast applicant need not have a binding agreement or absolute assurance of a proposed site. What an applicant must show, and what National has shown, is that it has obtained reasonable assurance that its proposed site is available, with some indication of the property owner's favorable disposition toward making an arrangement with the applicant, beyond simply a mere possibility. Low Power Television Service, 57 RR 2d 234, 242 (1984) (Filing Windows). This reasonable assurance may be acquired by informal telephone contacts by counsel for the applicant, and rent and other details may be negotiated at a yet undetermined future date. See Puopolo Communications, Inc., 60 RR 2d 964 (Rev. Bd. 1986). The applicant, at the time it files its application, should have "obtained sufficient assurances in response to justify its belief that the . . .site [is] suitable and available until advised otherwise . . ." Id. at 966

The requirements of Erwin O'Conner Broadcasting Co., 22 FCC 2d 140, 143 (Rev. Bd 1970) have indeed been fulfilled:

> Radio acted with due diligence is submitting its site amendment. Upon learning in mid-December that Swicegood had proposed thoroughly unreasonable terms, its Director Baker immediately set about to locate a new site and directed Radio's consulting engineer to prepare the amendment, which he dated February 1, 1993. It was signed by Baker February 5 and filed four days later, February 9, 1993.
>
> The Radio amendment was precipitated by Swicegood's shocking terms, and was in no wise the voluntary act of Radio.

> No addition of issues will be required upon acceptance of Radio's amendment, which is resubmitted with this petition.
>
> Acceptance will not disrupt the orderly conduct of the hearing. Unless Radio's amendment is accepted, there will be no hearing and the opportunity for Asheboro, North Carolina to receive a first local non-commercial educational broadcasting service will be precluded.
>
> Triad, the only other party to this proceeding, will not be unfairly prejudiced by acceptance of Radio's site change amendment.
>
> Nor will Radio gain a comparative advantage; in fact, the contrary is true, to the extent that from its original site (WKXR tower) Radio proposed to serve 1208 km^2 and 75,207 listeners; from the amended site it will serve 931 km^2 and 62,366 listeners.

Nor could Radio have reasonably foreseen, pursuant to Section 73.3522(b)(1)(i), that Swicegood would impose charges and conditions excessive in the extreme, for use of his tower.[5]

In Alegria I, Inc., 4 FCC Rcd 587, 65 RR 2d 1502 (1988), the Commission examined a disagreement between a site owner and an applicant which held a purchase option requiring that the price for the property be determined by an independent appraisal, but owners were attempting to induce applicant to pay the higher price offered by a third party. After applicant attempted to exercise the

---

[5] Moreover, in Anax Broadcasting Inc., 87 FCC 2d 483 (1981), the Commission held:

> . . .we have not required a showing that an amendment is occasioned by an involuntary or unforeseen act in cases where the amendment tends to remove a disqualifying defect and confers no comparative advantage.
>
> fn: William R. Gaston, 35 FCC 2d 615 (Rev. Bd. 1972) rev. denied FCC 72-828, released September 20, 1972. See generally Sands Broadcasting Corp., 22 RR 106 (ALJ 1961)

purchase option, owners notified applicant that they did not intend to sell the property because the option was not timely exercised. The purchase option was mutually terminated some two months later and applicant was permitted to amend to a new site.

A somewhat similar case, 62 Broadcasting, Inc., 4 FCC Rcd 1768 (Rev. Bd 1989) involved an applicant who proposed use of a to-be-constructed tower, the owner of which demanded $150,000 to $200,000 from the applicant for tower strengthening, up front and prior to hearing. Applicant understandably sought other alternatives.

In the instant case, the HDO contained only the above-quoted paragraph 4 as justification for denial of Radio's amendment, and mentioned only the $1200 per month charge demanded by Swicegood. Apparently the year-payment-in-advance and the non-refundability were not taken into consideration. Nor was the likelihood of the hearing extending for an additional year or two, with a total of non-refundable charges of $28,800 or $43,200 to be paid by Radio on the chance that its application would be ultimately granted. Indeed, it is difficult to envision a more purposeful denial of a site previously assured.[6]

Conclusion

The Chief, Audio Services Division, should reconsider paragraph 4 of his HDO, and accept Radio's site amendment, which is

---

[6] If Swicegood had demanded $10,000 per month, or $50,000, would the Commission have refused Radio's amendment? As shown hereinabove, and by the statement of Radio's director attached, the demand of Swicegood was at least 6 times the going rate, plus additional payments of possibly up to $45,000, non refundable.

resubmitted with this Petition; the Alternative is unavoidable dismissal of Radio's application, a result contrary to every aspect of the public interest.

Respectfully submitted,

POSITIVE ALTERNATIVE RADIO, INC.

By _____
Julian P. Freret
Its Counsel

BOOTH, FRERET & IMLAY
1233 20th Street, N. W.
Suite 204
Washington, D. C. 20036
(202) 296-9100

March 15, 1993

EXHIBIT A

VERNON H. BAKER registered professional engineer P.O. BOX 889, BLACKSBURG, VIRGINIA 24063

11-16-91

Mr. Edward F. Swicegood #, WKXR-am
1115 Eastview Drive
Ashboro, N.C. 27203

Dear Edward. Eddie,

Thanks for talking to me today by phone concerning the use of WKXR-ams north tower for a possible new FM station in the Educational Band.

The name of our non-profit Co is positive Alternative Radio Inc. a N.C. non profit corp. me, my wife and son are the Directors. Our sons name is "Eddie" for Edward. He manages the paging business.

I gathered from you that we have reasonable assurance that the north tower of WKXR would be available. We would be responsible for all cost regarding the DA antennas adjustment if necessary and installing isocouplers etc.

Your mention that your Co. could possibly act as agent for the new station has possibilities!

We discussed "ham" radio briefly! Mr Chris Imlay of Booth, Freret & Imlay has represented our FCC interest for many years. He is Counsel for ARRL. 73's & Thanks

Vern Baker Ex W4LMU
Trying for reinstatement

Telephones: Office (703) 961-2377; (703) 552-4252 · Home (703) 552-4252 · Fax (703) 951-5282

WKXR Radio

5,000 WATTS • 1260 AM • 919-625-2187 • 1115 EASTVIEW DRIVE • ASHEBORO, N. C. 27203

EXHIBIT B

OUTLINE & TERMS FOR AGREEMENT BETWEEN
PAR AND VERNON H. BAKER AND RANDOLPH BROADCASTING, INC.

AGREEMENT TO INCLUDE:

RENT OF $1,200.00 PER MONTH FOR RENTAL OF TOWER SPACE TO BE PAID YEARLY IN ADVANCE BY PAR BY DECEMBER 20th OF THE PREVIOUS YEAR.

PAYMENT FOR THE YEAR 1993 SHALL BE PAID IN ADVANCE BY DECEMBER 20, 1992 IN THE AMOUNT OF $14,400.00.

IF PAR BUILDS, THIS AGREEMENT RUNS FOR FIVE (5) YEARS FROM THE START OF CONSTRUCTION.

IF FOR ANY REASON, ENGINEERING CANNOT BE WORKED OUT TO ENSURE WKXR'S SIGNAL INTEGRITY, THIS AGREEMENT BECOMES VOID, AND ALL RENTS PAID BY PAR, SHALL BE RETAINED BY RANDOLPH BROADCASTING, INC.

SHOULD PAR CANCEL AT ANY TIME BEFORE CONSTRUCTION BEGINS, ANY AND ALL RENT PAYMENTS MADE TO RANDOLPH BROADCASTING, INC. SHALL BE RETAINED BY RANDOLPH BROADCASTING, INC.

PAR SHALL PAY FOR ALL ENGINEERING FEES, CONSTRUCTION COSTS, ETC. INVOLVED IN ASSURING THE ACCURACY OF WKXR RADIO'S PATTERN, ETC.

INSURANCE AND HOLD HARMLESS CLAUSES MUST BE INCLUDED IN ANY AGREEMENT.

AGREEMENT FORM MUST BE APPROVED BY RANDOLPH BROADCASTING'S ATTORNEY, WADE HARGROVE.

ANY LEASE AGREEMENT CONCERNING THIS MATTER MUST BE SIGNED AND THE FIRST YEAR'S RENT PAID ON OR BEFORE DECEMBER 20, 1992 OR RANDOLPH BROADCASTING, INC. WITHDRAWS ANY OFFER OF TO LEASE TOWER SPACE TO PAR.

ACKNOWLEDGE RECEIPT BY VERNON H. BAKER: _____

DATE: _____

EXHIBIT C

STATEMENT OF VERNON H. BAKER

I, Vernon H. Baker, make this statement under penalty of perjury.

I am a director of Positive Alternative Radio, Inc. ("Radio"), an applicant before the Federal Communications Commissions for authority to construct and operate a new educational FM station at Asheboro, North Carolina. I have read the Petition for Reconsideration of HDO prepared on behalf of Radio and aver that the facts therein are true and correct to my best knowledge and belief.

I state further that I telephoned to Edward F. Swicegood, President of Randolph Broadcasting, Inc., licensee of Radio Station WKXR, Asheboro, North Carolina, March 12, 1993 and asked if he would reconsider his letter received by me on or about December 15, 1992, regarding lease of space on his tower, and he informed me that he did not want the Radio antenna on his WKXR tower under any conditions.

After receipt of Mr. Swicegood's said letter of mid-December 1992, I contacted Mr. D. W. Long, President of Faith Enterprises, Inc., licensee of WZOO, Asheboro, who assured me that I could install the Radio antenna on one of his towers. I called Mr. Long again March 12, 1993 and confirmed the previous assurances, and asked what charges he proposed to make for use of his tower. He replied that $200.00 per month would be satisfactory. He wanted no payment prior to the start of construction, nor any prohibition against refund.

That figure is approximately the same or perhaps a little higher than my understanding of charges normally made in the North Carolina-southwestern Virginia area. I base this conclusion on my experiences as licensee, director, applicant, or professional engineer for stations in Hickory, Mint Hill, Lewisville, Wake Forest, Oxford, and Claremont, North Carolina, and stations in Salem, Pulaski, Dublin, Bluefield, Fieldale, Culpeper, Galax, Martinsville, Waynesboro and Earlysville, Virginia.

In my opinion, the charges and conditions proposed by Mr. Swicegood in his said letter to me were extremely excessive and deliberately designed to preclude the use of his tower by Radio.

Dated this 15th day of March, 1993.

Vernon H. Baker

Vernon H. Baker

CERTIFICATE OF SERVICE

I, Margaret A. Ford, Office Manager of the law firm of Booth, Freret & Imlay, do hereby certify that copies of the foregoing PETITION FOR RECONSIDERATION OF HDO were mailed this 15th day of March, 1993, to the offices of the following:

*Chief, Audio Services Division
Mass Media Bureau
Federal Communications Commission
1919 M Street, N. W., Room 302
Washington, D. C. 20554

B. Jay Baraff, Esquire
Baraff, Koerner, Olender
& Hochberg, P.C.
5335 Wisconsin Avenue, N. W.
Suite 300
Washington, D. C. 20015-2003

Margaret A. Ford

Margaret A. Ford

* Via Hand Delivery