

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

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APR 5 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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

TO: Administrative Law Judge  
Joseph P. Gonzalez

REPLY TO OPPOSITION TO  
PETITION FOR LEAVE TO AMEND

Positive Alternative Radio, Inc. ("Radio"), through its counsel, replies to the Opposition filed by competing applicant Triad Family Network, Inc. ("Triad") to Radio's Petition for Leave to Amend its application.<sup>1</sup>

Faced with the loss of its transmitter site, Radio tendered an amendment to its application February 9, 1993, specifying a new site. The Hearing Designation Order ("HDO"), released March 9, 1993, proposed to return Radio's amendment based solely upon the grounds that a rental charge of \$1200.00 per month for use of an

<sup>1</sup> The Mass Media Bureau has filed Comments in support of Radio's Petition for Leave to Amend.

*DTB*

existing tower by Radio's FM antenna was not a "showing sufficient to demonstrate good cause for the amendment." (HDO, par. 4).

Radio filed with the Presiding Judge the aforementioned Petition for Leave to Amend and refiled with its Petition the amendment previous submitted<sup>2</sup> March 17, 1993. Triad's Opposition attempts to make three points (1) under no circumstances can an Administrative Law Judge amend an HDO; (2) Radio had no assurance that its original site would be available to it, and (3) the site specified in Radio's February 9, 1993 amendment, although specifying use of the WZOO tower and coordinates in Commission files, is incorrect. Response to these contentions is as follows: (1) Amendment of HDO by a Presiding Judge.

Triad contents that an HDO is inviolate and once released, cannot be changed by the Presiding Judge, citing Anax Broadcasting Co., 87 FCC 2d 483, 486 and n. 11 (1981); Atlantic Broadcasting Co., 5 FCC 2d 717, 721 (1966) and Bennet Gilbert Gaines, Interlocutory Receiver for Magic 680 Inc., FCC 93R-3 (Rev. Bd. released March 5, 1993) at para. 23. As a generality, Triad is correct in that as a general rule, an ALJ should not presume to reconsider a decision made by delegated authority in designating an application for hearing.

Initially, it may be noted that Anax presented the converse of the Radio situation: there, ALJ Miller had dismissed an application which had been designated, rather than add financial

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<sup>2</sup> Additionally, the HDO stated ". . .we will return the amendment" but apparently it has been retained by the Commission.

and legal incompleteness issues, and Gaines stood for the position that "where there has been a thorough consideration of a particular question in a designation order (HDO), the ALJ and the Review Board are expected to follow the HDO's judgment as the law of the case. In Atlantic, the Commission held that if new facts or circumstances to support a request to modify issues are provided, or if matters relied upon by a party seeking to modify issues have been overlooked by the Commission, then issues could be changed by the Board (which at that time, 1966, had authority to modify issues). The Commission opined:

In the future, we suggest that subordinate officials should look to see whether specific reasons are stated for our action or inaction in a designation order, rather than merely considering whether the petitioner relies on new facts or whether we were aware of the general matter upon which he relies. If our designation order contains a reasoned analysis of a particular matter, we are confident that, in the absence of additional information on the subject previously unknown to us, the subordinated officials will have no difficulty in adopting that analysis and denying the relief requested. But where the designation order contains no reasoned analysis with respect to the merits of that particular matter, the subordinate official should make such an analysis and rule on the merits of the petition so that the hearing may be conducted in an orderly and expeditious manner. (p. 721) (Emphasis supplied).

Other cases cited by Triad, Empire State Broadcasting Corp., The Gene Sudduth Co., Inc., Merrimack Valley Broadcasting, Inc., and Golden State Broadcasting Corp. merely confirm that an HDO cannot be modified by an ALJ, if there was a thorough consideration in the HDO of the matter sought to be revised by the Presiding Judge.

The brief and cursory manner in which the HDO treated Radio's site amendment (was it because the staff thought a charge of \$1200.00 per month was not exorbitant, or whether it felt that Radio did not have initial assurance of site availability, or whether some unspecified element of Erwin O'Conner Broadcasting Co. was omitted; or what?) was superficial at best. The HDO contains no analysis, much less a reasoned one, much less a thorough one. The Presiding Judge is amply supplied with reasons justifying grant of Radio's petition for acceptance of its site change amendment.

(2) Availability of Radio's Original Site.

Triad has attempted to raise the question of whether Radio had reasonable assurance of use of the WKXR(AM) tower. It will be remembered that Radio principal Baker stated that before filing the Radio application, he contacted WKXR(AM) owner Swicegood and was assured that he could use his tower, and would be treated "right" as concerned rental charges. Baker confirmed this assurance with a friendly letter November 16, 1991. If Triad would now claim that Radio lacked site assurance, why has it not attached a statement from Swicegood that he never intended to make his tower available, that there was no meeting of the minds, etc.?

Lacking that vital evidence, Triad seeks refuge in the argument that since Swicegood and Baker had not agreed upon a rental charge when they conferred, there could not have been "reasonable assurance".<sup>3</sup> Triad is as wrong in law as it is in

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<sup>3</sup> It is ironic that Triad, in its application, has submitted as evidence of assurance for use of its proposed site a letter from the owner/controller stating "an appropriate lease or other

fact. The Commission has repeatedly concluded that "reasonable assurance" does not require a dotting of I's and crossing of T's. Reasonable assurance is exactly that: if the Commission required "absolute assurance" applicable cases would have eschewed the term "reasonable". Natural Innovative Programming Network, Inc., 2 FCC Rcd 5641, 5643 (1987), cited by Radio in its Petition, and Elijah

Accordingly, Radio will amend to correct any discrepancy in coordinates and site elevation.

In Section V-B-FM Broadcast Engineering Data of its amendment, Radio has used the correct coordinates for WZ00, 35-45-50 N and 79-50-04, but in depicting the location of the WZ00 No. 2 tower on Figure 1, Radio's engineer mislocated the WZ00 tower by 03 seconds, which resulted in a site height AMSL of 195 meters (not 194 as recited by Triad) rather than the 198 meters reflected by Commission files. Thus, the proposed antenna height of Radio was in error by 3 meters, or 9 feet. This will be corrected by an amendment to be filed concurrently herewith, reducing the height of Radio's antenna by 3 meters AGL.<sup>4</sup>

No change in contours, area or population to be served will occur, and the correction thus will be both technical and de minimis.

Triad also complains that Radio has not provided certain technical information concerning the directional antenna proposed by Radio. Triad and Radio have proposed the identical, same antennas, CETEC JLCP-4DA, listed by Triad as ". . .a stock directional antenna for this manufacturer." Triad describes this antenna as:

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<sup>4</sup> Triad is confronted by a similar problem. Its engineering statement concedes that the tower on which it proposes to locate its FM antenna (that of WBFJ-AM) is mislocated in Commission files "the original WBFJ engineering would place its tower in the curb of Trade Street!" The need for an amendment is indicated "WBFJ may have to have its site coordinates corrected at some point."

This antenna is well known to the Commission and should be in its database of 'stock' directional antennas. (Triad application, Exhibit C).

and inconvenient undertaking at best," are not only speculative, but go only to finances and not to alleged engineering deficiencies.<sup>5</sup>

#### Conclusion

The Presiding Judge should grant Radio's Petition for Leave to Amend, since its constructive loss of transmitter site resulted from no act by Radio's principals, and it has fully met the test of Erwin O'Conner. The HDO did not thoroughly or seriously consider the facts before the Commission's staff when the HDO was drafted; under these circumstances, the Presiding Judge is empowered to accept the Radio amendment and permit the hearing to proceed.

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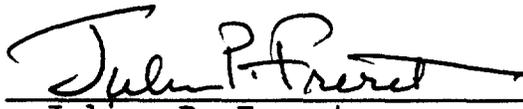
<sup>5</sup> Again, Radio is reluctant to resort to an tu quoque observation, but Triad nowhere in its application deals with the same pattern-distortions, ground system descriptions, or sampling system replacements that it accuses Radio of neglecting.

The Triad objections should be overruled, since as the Bureau observed in its Comments in support of Radio's Petition for Leave to Amend:

Moreover, no applicant has a vested interest in the disqualification of a competing applicant. Azalea Corp., 31 FCC 2d 561 (1971).

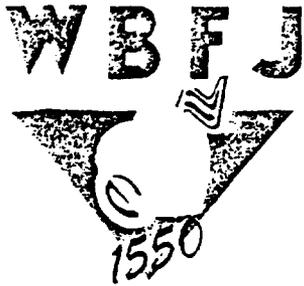
Respectfully submitted,

POSITIVE ALTERNATIVE RADIO, INC.

By   
Julian P. Freret  
Its Counsel

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April 5, 1993



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MUSIC FROM THE HEART

January 31, 1991

Triad Family Network, Inc.  
1249 Trade Street  
Winston-Salem, NC 27101

Gentlemen:

This letter is to confirm that Philip T. Watson and Jean B. Watson, positive control owners of Word of Life Broadcasting, Inc, intends to make available the tower space of WBFI (AM) to Triad Family Network, Incorporated for the mounting of it's proposed 4-bay FM antenna at the 38 meter level. Enclosed please find a copy of our North Carolina General Warranty Deed confirming our ownership.

An appropriate lease or other instrument securing this agreement will be negotiated and concluded at the grant of the Triad Family Network application.

Should there be inquiry please communicate directly with the undersigned.

Very Truly Yours,

Philip T. Watson

**ORIGINAL**  
**PETER V. GURECKIS & ASSOCIATES**

This Engineering Statement has been prepared on behalf of POSITIVE ALTERNATIVE RADIO, INC. (PAR), which is requesting Channel 207A at Asheboro, North Carolina (File No. BPED-911119MC). This is in response to the Engineering Statement filed by Triad Family Network (TFN), an applicant for Channel 207 at Winston-Salem, North Carolina.

TFN states that the antenna site location is incorrect as shown in PAR's amendment of February, 1993. This is correct and an amendment has been prepared to show the correct location.

However, the ground elevation above mean sea level at the correct site is 650 feet or 198 meters. 198 meters is being used as the correct height since the topographic map is the most reliable data. The height as suggested by TFN of 213 meters is raw data which has no accuracy at all.

It should be noted that TFN proposes a Cetec JLCP-4DA, stock pattern "C", the same identical antenna proposed by PAR. Attached is Exhibit C contained in TFN's application. PAR's amendment of April, 1993 supplies additional information in regards to Section 73.316 of the Rules.

~~In paragraph 13 of TFN's statement it states that constructive steel masts~~

**PETER V. GURECKIS & ASSOCIATES**

PAR will accept Special Conditions (which is mandatory) for its CP whereby PAR shall be responsible to prevent any adverse effects upon the WZOO directional radiation pattern. Further, a report of the before and after construction measurements on Station WZOO will be filed with the F.C.C. in advance of PAR's 302 application.

I, PETER V. GURECKIS, do hereby certify and declare under penalty of perjury:

That I am a Consulting Engineer with offices located at 10410 Windsor View Drive, Potomac, Maryland and that my qualifications are a matter of record with the Federal Communications Commission.

That the foregoing statements and computations made in this report were made by myself or under my direct supervision and that all facts and information contained herein are true and correct to the best of my knowledge, except where stated to be on belief, and as to that information, I believe it to be true.



---

PETER V. GURECKIS  
PETER V. GURECKIS & ASSOCIATES

DATE: APRIL 3, 1993

EXHIBIT C  
TRIAD FAMILY NETWORK, INCORPORATED

DISCUSSION OF PROPOSED DIRECTIONAL ANTENNA SYSTEM

**CERTIFICATE OF SERVICE**

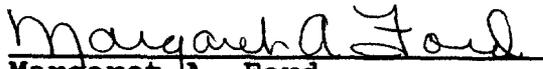
I, Margaret A. Ford, Office Manager of the law firm of Booth, Freret & Imlay, do hereby certify that copies of the foregoing REPLY TO OPPOSITION TO PETITION FOR LEAVE TO AMEND were mailed this 5th day of April, 1993, to the offices of the following:

\*Administrative Law Judge  
Joseph P. Gonzalez  
Federal Communications Commission  
2000 L Street, N. W., Room 221  
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\*Norman Goldstein, Esquire  
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Margaret A. Ford

\* Via Hand Delivery