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April 8, 1993

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APR - 8 1993
FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: MM Docket No. 93-41
File No. BPED-910227MD
Winston-Salem, NC

Dear Ms. Searcy:

Transmitted herewith, on behalf of Triad Family Network, Inc. ("Triad"), applicant in the above-referenced comparative proceeding, are an original and six (6) copies of its "First Petition to Enlarge Issues Against Positive Alternative Radio, Inc."

Should further information be desired in connection with this matter, please communicate with the undersigned.

Very truly yours,



Lee J. Peltzman
Counsel for
TRIAD FAMILY NETWORK, INC.

LJP:bpt
Enclosures
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Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Application of)	MM Docket 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: The Honorable Joseph P. Gonzalez
Administrative Law Judge

FIRST PETITION TO ENLARGE ISSUES AGAINST
POSITIVE ALTERNATIVE RADIO, INC.

TRIAD FAMILY NETWORK, INC.

B. Jay Baraff
Lee J. Peltzman
Its Attorneys
BARAFF, KOERNER, OLENDER
& HOCHBERG, P.C.
5335 Wisconsin Ave., N.W.
Washington, D.C. 20015

April 8, 1993

SUMMARY

Positive Alternative Radio, Inc. ("Radio") has accumulated construction permits for nine different non-commercial educational FM stations. Its failure to construct as promised constitutes an abuse of the Commission's processes. An appropriate issue must be added.

Radio holds nine authorizations for unbuilt stations and has four pending applications. Prior Commission precedent holds that the filing of that many broadcast proposals raises questions as to the validity of the applicant's financial certification. As such, issues as to Radio's financial qualifications and certification candor must be specified.

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Asheboro, North Carolina)	
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)	
For Construction Permit for a)	
New Noncommercial Educational)	
FM Station)	

To: The Honorable Joseph P. Gonzalez
Administrative Law Judge

**FIRST PETITION TO ENLARGE ISSUES AGAINST
POSITIVE ALTERNATIVE RADIO, INC.**

Triad Family Network, Inc. ("Triad"), by its attorneys and pursuant to Section 1.229 of the Commission's rules, respectfully request enlargement of the hearing issues in this proceeding against Positive Alternative Radio, Inc. ("Radio") to determine whether Radio has abused the Commission's processes by warehousing non-commercial educational construction permits; whether Radio is financially qualified to construct and operate its proposed station in view of its other construction commitments; whether Radio lacked candor in certifying its financial ability to construct and operate and whether it is basically qualified to be a Commission licensee. In support whereof, the following is shown:

ABUSE OF PROCESS -- WAREHOUSING ISSUE

Radio is a non-stock corporation controlled by its three

directors, Vernon H. Baker, Virginia L. Baker and Edward A. Baker. Radio and its principals have acquired authorizations for ten (10) non-commercial educational FM stations:

WPAR(FM), Hickory, North Carolina - Positive Alternative Radio, Inc.

WXRI(FM), Winston-Salem, North Carolina - Positive Alternative Radio, Inc.

WPVA(FM),¹ Waynesboro, Virginia - Positive Alternative Radio, Inc.

WPKV(FM),² Culpeper, Virginia - Positive Alternative Radio, Inc.

WPRH(FM), Galax, Virginia - Golden Rule Organization Workshop, Inc.

WPIR(FM), Bluefield, West Virginia - Positive Alternative Radio, Inc.

WPIB(FM), Salem, Virginia - Positive Alternative Radio, Inc.

WPGB(FM), Blountville, Virginia - Blountville Educational Association, Inc.

WPBI(FM), Martinsville, Virginia - Martinsville Community Workshop, Inc.

WPKW(FM), Dublin, Virginia - Positive Alternative Radio, Inc.

Although Radio and its principals have acquired ten (10) non-commercial educational FM construction permits, they have actually constructed only one station, WPAR, Hickory, North Carolina. A total of nine (9) stations, some with construction permits issued as far back as six years ago, have yet to be constructed and operated by Radio.

¹Formerly WCQR-FM.

²Formerly WCFL-FM.

Further, Radio and its principals are applicants for four additional non-commercial educational FM stations:

BPED-911119MC Asheboro, North Carolina - Positive Alternative Radio, Inc.

BPED-920327MH, Port Pleasant, WV - Positive Alternative Radio, Inc.

BPED-920821MB, Union City, Tennessee - Positive Alternative Radio, Inc.

BPED-910507ME. Oxford, North Carolina - Grantville Vance Community Radio, Inc.³

Abuse of the Commission's processes is generally defined as the use of a Commission process, procedure or rule to subvert the underlying purpose of that process, procedure or rule. See Silver Star Communications - Albany, Inc., 65 RR 2d 761, 774 (Rev. Bd. 1988). The Commission issues construction permits with the intent that the underlying stations be constructed and operated so the public interest may be served. Applicants are not permitted to acquire authorizations and then not construct. Such warehousing has been held to be contrary to Commission policy. See Mobile Radio Service, 89 FCC 2d 1199, 1202 (1982). Warehousing occurs when an applicant applies for a station in order to ensure that it will have the station available in the future should a need develop or to prevent the station from being acquired by a potential competitor. cf. Domestic Public Land Mobile Radio

³Grantville-Vance Community Radio, Inc. is a non-stock company in which Radio principals, Vernon Baker, Virginia Baker and Edward A. Baker comprise a controlling majority on the Board of Directors. Its address is the same as Radio lists in its Asheboro application. See Exhibit 1.

Service, 53 RR 2d 191, 193 (1983).

While up to now the warehousing of construction permits has not been an issue in broadcasting, that has mainly been due to the fact that there is a limit to the amount of authorizations a commercial broadcaster may hold. This case however, presents a matter of first impression -- a non-commercial operator which has failed to construct nine (9) authorizations, yet, amazingly, seeks four (4) additional ones, including the instant application.

The Commission issued a construction permit for Station WPVB(FM), Culpeper, Virginia to Golden Rule Organization Workshop, Inc. ("Golden Rule"), a predecessor to Radio (with principals common to Radio) on April 16, 1987. See Exhibit 2. Six years later and that station, now authorized to Radio, has never been constructed.⁴ The Commission issued a construction permit for Station WPVA(FM), Waynesboro, Virginia on August 19, 1987. See Exhibit 3. Almost six years have passed, yet Waynesboro is still without non-commercial educational service. On October 28, 1989, the Commission issued a construction permit for Station WBKW(FM), formerly WBHH(FM), Dublin, Virginia to Golden Rule. See Exhibit 4. Over five years and three construction extensions later and that station, now in Radio's name, has still not been constructed. On April 2, 1990, the Commission issued a construction permit

⁴The permits for Stations WPVB and WPVA were assigned to Radio on October 1, 1988.

for Station WPGB(FM), Blountville, Tennessee to Blountville Educational Associates, Inc., an organization with principals common to Radio. Three years later and that station has never been on the air. The Commission, on April 18, 1990, issued a construction permit to Radio for Station WPIB(FM), Salem, Virginia. See Exhibit 5. Three years and three extensions later and that station has yet to be constructed. On May 3, 1990, the Commission issued a construction permit to Golden Rule, which subsequently assigned the permit to Radio, for Station WPRH(FM), Galax, Virginia. See Exhibit 6. Almost three years have past and that station has never been made operational. On May 3, 1990, the Commission also issued a construction permit for Station WPIR(FM), Bluefield, West Virginia, to Virginia-West Virginia Community Radio, Inc., another predecessor to Radio (with principals common and with an address the same as Radio). See Exhibit 7. Three years and three extensions later and that permit, which has subsequently been assigned to Radio, has never been implemented. No non-commercial educational FM station is on the air as promised in Bluefield, West Virginia. On November 14, 1991, the Commission issued a construction permit to Martinsville Community Workshop, Inc. ("MCW") for Station

construction permit for Station WXRI(FM), Winston-Salem, North Carolina to Radio. See Exhibit 9. Not surprisingly, that station has also not yet been made operational.

It can scarcely serve the public interest for one entity and its principals to hold nine construction permits, yet not construct any of them. Such actions ensure that no station will be constructed either by Radio and its principals or a potential competitor. It also distorts the Commission's application processes, which are premised on the notion that applicants who file applications are sincerely motivated to construct and operate those stations. Thus, the Commission's application processes are compromised and the public interest is harmed by Radio's actions, or more properly stated, inaction.

Radio may claim that each of its requests for additional time to construct have been granted by the Commission and that this protects it from further review. That simply is not so. In the first place, the Commission may have found Radio's explanations individually acceptable in the context of those specific factual situations. However, the facts that are presented here compel the Commission to consider the entire situation -- nine construction permits issued and none constructed.⁵ The failure to designate an issue against Radio under these circumstances will ensure that Radio will continue

⁵cf. Trinity Broadcasting of Florida, Inc., FCC 93-148.

to accumulate permits without having any real obligation to construct them, thereby penalizing the public and other qualified applicants.

In sum, if the Commission is to protect its own administrative processes, it must designate an issue against Radio to determine whether it has abused the Commission's processes by failing to construct as promised with respect to nine different authorizations.

FINANCIAL QUALIFICATIONS/FINANCIAL CERTIFICATION ISSUES

Another question raised by Radio's ownership of nine (9) unbuilt construction permits and its filing of four additional applications is whether Radio's financial qualifications are sufficient to simultaneously construct and operate all thirteen (13) proposed stations. It is well established that, where an applicant proposes to construct multiple facilities, it must be able to demonstrate that it is financially qualified as to all of its proposals. In numerous cases, as here, where an applicant has filed several proposals for new broadcast stations that has been found to constitute a prima

Broadcast Group, FCC 90M-1347, Chief Judge Stirmer added a financial qualifications/financial certification issue against an applicant which, as here, had proposed to construct thirteen (13) new FM stations. A copy of that decision is attached as Exhibit No. 10. Likewise, in Warner Robins Christian Academy, FCC 87M-3159, released December 4, 1987, Administrative Law Judge Frysiak added a financial qualifications issue against a non-commercial educational applicant which had proposed to construct a total of five (5) different non-commercial educational FM stations. A copy of that decision is attached as Exhibit No. 11. In Susan Lundborg, FCC 87M-2185, released September 14, 1987, former Chief Judge Fitzpatrick added, on his own motion, a financial qualifications/false certification issue against an applicant which had proposed to construct twelve (12) FM stations. Chief Judge Fitzpatrick concluded that "certainly the filing of twelve (12) FM applications for communities throughout the United States raises questions as to the possible validity of Lundborg's financial certifications." Id., para. 4. See Exhibit 12. In Belfry Broadcasting Company, Inc., FCC 87M-2171, released September 11, 1987, Administrative Law Judge Chachkin added financial qualifications and false certification issues against an applicant which had proposed to construct numerous FM stations. See Exhibit 13. In Leonard James Giacone, FCC 87M-512, released March 9, 1987, Administrative Law Judge Chachkin also added financial

qualifications and false certification issues against an applicant which had proposed to construct a number of broadcast stations. See Exhibit 14.

In each of the above cases, a Presiding Judge or the Review Board concluded that given the cost of constructing and operating numerous stations, a substantial question must be raised as to whether the applicant before them had sufficient net liquid assets available from committed sources to implement the construction and operation of its proposed facilities. The Commission itself has also expressed its serious concern with the financial qualifications of applicants who have "a large number of pending broadcast applications." See Certification of Financial Qualifications by Applicants for Broadcast Station and Construction Permits, 2 FCC Rcd. 2122 (1987).

In view of the excessive number of educational non-commercial FM facilities which Radio has certified to the Commission that it will construct and operate, and given the concern expressed by the Commission, its Review Board, and its Judges with the financial certifications made by multiple-filing applicants, Radio should be required to demonstrate its ability to finance the construction and operation of its thirteen (13) station proposals -- nine (9) construction permits and four (4) applications. In fact, given Radio's inability to successfully implement any of its present construction permits since 1987, the Commission's concerns

must be especially heightened. Clearly, an issue is warranted to explore whether in view of its many other commitments, Radio had a reasonable basis at the time it filed its Asheboro application to certify that it was financially qualified, and, if not, whether its financial certification was false.

Wherefore, in view of the foregoing, Triad respectfully requests that the issues in this procedure be enlarged as follows:

1. To determine whether Positive Alternative Radio, Inc. has abused the Commission's processes by warehousing non-commercial educational FM construction permits;
2. To determine whether Positive Alternative Radio, Inc. has sufficient net liquid assets available to construct and operate its proposed Asheboro station in view of the other broadcast financial commitments of its principals;
3. To determine, in light of the evidence adduced under the preceding issue, whether Positive Alternative Radio, Inc. misrepresented facts or lacked candor in certifying its financial abilities to construct and operate the proposed station and the impact thereof on its basic qualifications to be a Commission licensee; and
4. To determine, in light of the evidence addressed in the foregoing issues, whether Positive

Alternative Radio, Inc. possesses the basic qualifications to be a Commission licensee and/or should be subject to a \$25,000.00 forfeiture

- (e) written agreements between Radio or any of its principals and any other person or entity concerning the furnishing of funds for use by the applicant including, but not limited to any loan agreement.

2. All documents which relate to any efforts by Radio and/or its agents to obtain and/or document a reasonable assurance of financing for the applications and stations listed above, including but not limited to:

- (a) All documents received by Radio or its agents from any bank or other financial institution.
- (b) All documents submitted by Radio and/or its agents to any bank or other financial institution for the purpose of applying for a loan or letter of commitment or willingness to provide a loan with respect to Radio's proposed FM stations.
- (c) All documents, including but not limited to telephone records, calendars, diaries, and notes, reflecting the date or substance of any conversation between Radio or its agents and any person relating to any effort to obtain a loan or gift, or a commitment or willingness to provide a loan or gift, to Radio.

(d) All documents received by Radio or its agents from any natural person reflecting such person's willingness to give or lend funds to Radio in connection with its proposed FM stations and any documents in the possession or control of Radio or its agents that bear in any way upon the financial ability of any such natural person to give or lend such funds to Radio.

3. All documents relied upon to support the assertion that Radio and/or its principals were financially qualified to construct and operate the applications and FM stations specified in Request No. 1.

4. All documents which evidence the liabilities of Vernon H. Baker, Virginia L. Baker and Edward A. Baker as of the date that the applications for those stations specified in Request No. 1 were filed.

5. Any personal financial statements for Radio's principals prepared within the year immediately preceding or following the filing of applications for those stations specified in Request No. 1.

Triad intends to take the deposition of Vernon H. Baker, Virginia L. Baker and Edward A. Baker. Depending on the source of Radio's proposed financing, Triad may take the deposition of any bank official or private lender upon whom

Radio is relying for its broadcast financing. Triad reserves the right to request further documents and request additional depositions based upon the information contained in the documents initially provided to it or secured as a result of the above depositions.

Respectfully submitted,

TRIAD FAMILY NETWORK, INC.

By: B. Jay Baraff (YD)
B. Jay Baraff

By: Lee J. Peltzman
Lee J. Peltzman
Its Attorneys

**BARAFF, KOERNER, OLENDER
& HOCHBERG, P.C.
5335 Wisconsin Ave., N.W.
Washington, D.C. 20015**

April 8, 1993

23190.00\Pleading.A82

EXHIBIT 1

APPLICATION FOR CONSTRUCTION PERMIT FOR
NONCOMMERCIAL EDUCATIONAL BROADCAST STATION
(Carefully read instructions before filing form) Return only form to FCC

RECEIVED

For Commission Use Only
File No. **BPED-910507ME**

Section 1 - GENERAL INFORMATION **MAY - 7 1991**

1. Name of Applicant GRANVILLE-VANCE COMMUNITY RADIO, INC.			Federal Communications Commission Office of the Secretary			Send notices and communications to the following person at the address below: same, with copy to:		
Street Address or P.O. Box Post Office Box 889			City Blacksburg			State VA		
Telephone No. (Include Area Code) (703) 552-4252			ZIP Code 24063-0889			Name BOOTH, FRERET & IMLAY		
Street Address or P.O. Box 1920 N Street, N. W., Suite 150			City Washington			State DC		
Telephone No. (Include Area Code) (202) 296-9100			ZIP Code 20036			Name		

2. This application is for: AM FM TV

(a) Channel No. or Frequency
216

(b) Principal Community	City	State
	Oxford	NC

(c) Check one of the following boxes:

- Application for NEW station
- MAJOR change in licensed facilities; call sign: _____
- MINOR change in licensed facilities; call sign: _____
- MAJOR modification of construction permit; call sign: _____
File No. of construction permit: _____
- MINOR modification of construction permit; call sign: _____
File No. of construction permit: _____
- AMENDMENT to pending application; application file number: _____

NOTE: It is not necessary to use this form to amend a previously filed application. Should you do so, however, please submit only Section 1 and those other portions of the form that contain the amended information.

3. Is this application mutually exclusive with a renewal application? Yes No

If Yes, state:	Call letters	Community of License	
		City	State

SECTION VI - EQUAL EMPLOYMENT OPPORTUNITY PROGRAM

1. Does the applicant propose to employ five or more full-time employees?

Yes No

If Yes, the applicant must include an EEO program called for in the separate Broadcast Equal Employment Opportunity Program Report (FCC 396-A).

SECTION VII - CERTIFICATION

1. Has or will the applicant comply with the public notice requirements of 47 C.F.R. Section 73.3580?

Yes No

The APPLICANT hereby waives any claim to the use of any particular frequency as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests an authorization in accordance with this application. (See Section 304 of the Communications Act of 1934, as amended.)

The APPLICANT acknowledges that all the statements made in this application and attached exhibits are considered material representations, and that all exhibits are a material part hereof and incorporated herein.

The APPLICANT represents that this application is not filed for the purpose of impeding, obstructing, or delaying determination on any other application with which it may be in conflict.

In accordance with 47 C.F.R. Section 1.65, the APPLICANT has a continuing obligation to advise the Commission, through amendments, of any substantial and significant changes in information furnished.

**WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND IMPRISONMENT.
U.S. CODE, TITLE 18, SECTION 1001.**

I certify that the statements in this application are true and correct to the best of my knowledge and belief, and are made in good faith.

Name of Applicant GRANVILLE-VANCE COMMUNITY RADIO, INC.	Title Director
Signature <i>Vernon H. Baker</i>	Date May 6, 1991

**FCC NOTICE TO INDIVIDUALS REQUIRED BY THE PRIVACY ACT
AND THE PAPERWORK REDUCTION ACT**

The collection of personal information requested in this application is authorized by the Communications Act of 1934, as amended, and the

DIRECTORS

Alma Husketh	3577 Brassfield Rd. Creedmoor, Granville County, NC 27522	- Teacher*
Vernon H. Baker	201D Alleghany St. Blacksburg, Montgomery County, VA 24063	- Engineer
Virginia L. Baker	201D Alleghany St. Blacksburg, Montgomery County, VA 24063	- Accountant
Max Mathis	526 Cotton St. Creedmoor, Granville County, NC 27522	- Manager
Edward A. Baker	400 Alleghany St. Blacksburg, Montgomery County, VA 24063	- President Communications Company

*Vance-Granville Community College

EXHIBIT 2

FEDERAL COMMUNICATIONS COMMISSION

FM BROADCAST STATION CONSTRUCTION PERMIT



Official Mailing Address:

POSITIVE ALTERNATIVE RADIO INC.
P. O. BOX 889
BLACKSBURG, VA 24060

Authorizing Official

Penelope A. Dade

Penelope A. Dade
Supr Applications Examiner, FM Branch
Audio Services Division
Mass Media Bureau

Grant Date: April 16, 1987

Call sign: WPVB

This permit expires 3:00 am.
local time: October 16, 1988

Permit File No.: BPED-84103110

This authorization re-issued to reflect a call sign change from
WPAV to WPVB effective 8/01/90.

Subject to the provisions of the Communications Act of 1934, as amended, subsequent acts and treaties, and all regulations heretofore or hereafter made by this Commission, and further subject to the conditions set forth in this permit, the permittee is hereby authorized to construct the radio transmitting apparatus herein described. Installation and adjustment of equipment not specifically set forth herein shall be in accordance with representations contained in the permittee's application for construction permit except for such modifications as are presently permitted, without application, by the Commission's Rules.

This permit shall be automatically forfeited if the station is not ready for operation within the time specified (date of expiration) or within such further time as the Commission may allow, unless completion of the station is prevented by causes not under the control of the permittee. See Sections 73.3598, 73.3599 and 73.3534 of the Commission's Rules.

Equipment and program tests shall be conducted only pursuant to Sections 73.1610 and 73.1620 of the Commission's Rules.

Name of permittee:

GOLDEN RULE ORGANIZATION WORKSHOP INC.

Station Location:

VA-CULPEPER

Frequency (MHz): 89.9

Call sign: WPVB

Permit No.: BPED-841031IO

Channel: 210

Class: B1

Hours of Operation: Unlimited

Transmitter location (address or description):

U.S. HWY. 29, 1.4 MILES SOUTH OF THE CITY LIMITS, WARRENTON,
VA. (WQRA-FM SITE).

Transmitter: Type accepted. See Sections 73.1660, 73.1665 and 73.1670
of the Commission's Rules.

Transmitter output power: As required to achieve authorized ERP.

Antenna type: (directional or non-directional): Directional

Antenna coordinates: North Latitude: 38 40 42.0
West Longitude: 77 47 18.0

	Horizontally Polarized Antenna	Vertically Polarized Antenna
Effective radiated power in the horizontal plane (kW) :	12.0	12.0
Height of radiation center above ground (meters) :	40.0	40.0
Height of radiation center above mean sea level (meters) :	210.0	210.0
Height of radiation center above average terrain (meters) :	78.0	78.0
<u>Overall height of antenna structure above ground (including obstruction</u>		