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

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

MEMORANDUM OPINION AND ORDER

Issued: July 14, 1993; Released: July 15, 1993

Under consideration is the Second Petition to Enlarge Issues Against Positive Alternative Radio, Inc., filed by Triad Family Network, Inc. (Triad), on May 13, 1993; the Opposition to Triad's Second Petition to Enlarge Issues Against Positive Alternative Radio, Inc., filed by Positive Alternative Radio, Inc. (Radio), on May 28, 1993; and the Reply to Opposition to Second Petition to Enlarge Issues Against Positive Alternative Radio, Inc., filed by Triad on June 24, 1993.

Triad seeks to enlarge the issues designated against Radio's application to include the following:

1. To determine whether Positive Alternative Radio, Inc., possessed reasonable assurance of its proposed transmitter site at the time it filed its application;
2. To determine whether Positive Alternative Radio, Inc., made a misrepresentation or lacked candor by proposing a site to the Commission without having reasonable assurance;
3. To determine whether Positive Alternative Radio, Inc., lacked candor in its statements made in various pleadings filed with the Commission regarding its efforts at obtaining reasonable assurance of its proposed site; 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.

It also sets forth, in its Petition, the discovery requested, which includes an identification of the documents needed to pursue the requested inquiry as well as a statement of its intention to take the deposition of Vernon H. Baker, Virginia L. Baker, and Edward A. Baker.

Triad again raises the question of whether or not Radio had a reasonable assurance of the availability of its originally designated antenna site. The Presiding Judge previously considered similar argument advanced by Triad in response to a Petition for Leave to Amend, filed by Triad on March 17, 1993, and found its arguments to be without merit. Triad seeks to reargue its position under the guise of having acquired "newly discovered evidence" in the form of a sworn statement from Edward Swicegood, the individual with whom Vernon H. Baker spoke regarding the availability of Radio's originally designated antenna site. Such a statement was not submitted by Triad as part of its opposition statement to the petition for leave to amend referenced above, although it clearly knew or should have known at the time that Radio's claim of the availability of its original antenna site was based on discussions Mr. Baker had with Mr. Swicegood. Triad's so-called "newly discovered evidence", therefore, could have been discovered several months ago with a minimum of diligence on the part of Triad. The petition under consideration here, is, therefore, found to be procedurally defective, and it is subject to dismissal on that ground alone.

However, even if we consider the Second Petition on its merits, the argument and materials submitted in support of its request do not warrant the requested inquiry. The materials referenced above, to the contrary, demonstrate that Mr. Baker, on behalf of Radio, dealt with Mr. Swicegood in good faith, and that he believed at all times that the site was available to Radio for its intended use. Mr. Baker's letter, dated November 16, 1991, confirms the availability of the site. Mr. Swicegood's letter to Mr. Baker dated November 13, 1992 (Second Petition, Exhibit A), recognizes that the parties had agreed upon the availability of the site. Mr. Baker acknowledged the letter a short time later and submitted a proposed contract. Mr. Swicegood's counter proposal was rejected by Mr. Baker, and Mr. Swicegood, in his letter to Mr. Baker dated January 6, 1993 (Second Petition, Exhibit E), states that he expects Mr. Baker to present an acceptable proposal by January 4, 1993. It is clear, therefore, that the parties during this period of time considered the site as available to Radio for its antenna. The parties, however, were unable to agree on a rental price, and Radio timely sought and acquired a new antenna site.

The Presiding Judge concludes that Mr. Swicegood provided Radio with a reasonable assurance that its proposed site would be available to Radio. Disagreements developed over time between the parties, and Radio sought leave to amend to a new site which was granted. In conclusion, Triad's Second Petition is found to be without merit, and, if it was not subject to dismissal on procedural grounds, it would be denied in its entirety for failure to show good cause. It is noted that Triad, in its reply statement, agrees with the conclusion that no material and substantial questions remain with respect to the matters raised in its Second Petition, and it asks that it be denied or dismissed.

IT IS ORDERED, that the Second Petition to Enlarge Issues Against Positive Alternative Radio, Inc., filed by Triad Family Network, Inc., on May 13, 1993, IS DISMISSED as procedurally defective.

FEDERAL COMMUNICATIONS COMMISSION



Joseph P. Gonzalez
Administrative Law Judge