



Federal Communications Commission
Washington, D.C. 20554

November 16, 2010

In Reply Refer to:
1800B3-TH

Mr. Steve Busch
City of York
50 W. King Street
York, PA 17401

Malcolm G. Stevenson, Esq.
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1233 20th Street, N.W.
Suite 610
Washington, DC 20036-7322

In re: New FM Station, Spring Grove, PA
Facility ID No. 173893
File No. BNPED-20071018AXJ

Petition to Deny

Dear Mr. Busch and Mr. Stevenson:

This letter concerns: (1) the referenced application (the "Application") filed by Four Rivers Community Broadcasting Corp. ("Four Rivers") on October 18, 2007, for a construction permit for a new noncommercial educational ("NCE") FM station at Spring Grove, Pennsylvania; (2) a Petition to Deny filed by the City of York, Pennsylvania ("York") on September 2, 2010 ("Petition"); and (3) related pleadings.¹ For the reasons set forth below, we deny the Petition and grant the Application.

Background. In a decision released on August 3, 2010, the Commission chose the Application filed by Four Rivers as the tentative selectee out of the six competing applications in noncommercial educational ("NCE") MX Group 408.² In its Petition, York, a competing applicant from that group, argues that Four Rivers' Application must be dismissed for failure to propose a directional antenna pattern in compliance with Section 73.316 of the Rules.³ York also argues that the Application did not

¹ Four Rivers filed an Opposition to Petition to Deny on September 15, 2010 ("Opposition"), and a Supplement to Petition to Deny on September 20, 2010. The latter pleading is dismissed as an unauthorized pleading under Section 1.45 of the Commission's Rules (the "Rules"). 47 C.F.R. § 1.45. See, e.g., *Colorado RSA 7(B)(2) Ltd. Partnership*, Order, 15 FCC Rcd 3403 (WTB 2000) (declining to consider unauthorized pleadings). York SDA Church ("Church"), which filed an application that was mutually exclusive with the Application filed by Four Rivers, filed a Petition for Reconsideration of the dismissal of its application as comparatively inferior to the Four Rivers Application, citing the pendency of the Petition. Because we are denying the Petition, we are dismissing the Petition for Reconsideration filed by Church.

² See *Comparative Consideration of 26 Groups of Mutually Exclusive Applications in the October 2007 Filing Window*, Memorandum Opinion and Order, FCC 10-142 (Aug. 3, 2010) (the "Order").

³ Petition at 3-5, citing 47 C.F.R. § 73.316.

properly claim diversity of ownership points to obtain credit for maintaining local control because it provided text from its bylaws in the Application rather than providing a copy of the bylaws.⁴

In its Opposition, Four Rivers argues that Section 73.316 of the Rules applies to commercial FM applications rather than to NCE FM applications. Four Rivers argues that even if the Rule did apply, the Commission's practice is to apply the restriction of the Rule – requiring a directional antenna not to vary more than 2 dB per 10 degrees – only in the arc of the protected contour of the station(s) requiring the use of a directional antenna to prevent contour overlap. Four Rivers argues that its Application complies with this requirement. With respect to York's argument about the copy of the Four Rivers bylaws, Four Rivers argues that it did copy the bylaws by electronically cutting and pasting the relevant section of the bylaws into the Application. Four Rivers also points out that York fails to provide any basis to question the certification by Four Rivers' President that the statements in the Application were "true, complete and correct. . .".⁵

Discussion. Section 309(d)(1) of the Communications Act of 1934, as amended,⁶ provides that any party in interest may file a petition to deny an application. In order to assess the merits of a petition to deny, a two-step analysis is required.⁷ First, the petition must make specific allegations of fact sufficient to demonstrate that the petitioner is a party in interest and that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity.⁸ This threshold determination is made by evaluating the petition and the supporting affidavits. If the petition meets this threshold requirement, the Commission must then examine all of the material before it to determine whether there is a substantial and material question of fact calling for further inquiry and requiring resolution in a hearing.⁹ If no such question is raised, the Commission will deny the petition and grant the application if it concludes that such grant otherwise serves the public interest, convenience, and necessity.

Section 73.316 Argument. As an initial matter, we reject Four Rivers' claim that only Section 73.509, and not Section 73.316, of the Rules applies to NCE FM applications. Section 73.510(a) of the Rules explicitly applies the requirements of Section 73.316 to NCE FM applications.¹⁰

As to the question of whether the Application complies with Section 73.316(b)(2), we agree with Four Rivers that the Rule, as applied by the Commission, only prohibits a variance of more than 2 dB per 10 degrees of azimuth in the arc of the station(s) being protected.¹¹ The Application included a statement

⁴ Petition at 2-3, citing FCC Form 340.

⁵ Opposition and Statement in Support of Opposition to Petition to Deny.

⁶ 47 U.S.C. § 309(d)(1).

⁷ See, e.g., *Artistic Media Partners, Inc.*, Letter, 22 FCC Rcd 18676, 18676 (MB 2007).

⁸ See *id.*; *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

⁹ 47 U.S.C. § 309(d)(2).

¹⁰ 47 C.F.R. §73.510(a).

¹¹ The Commission addressed this issue in April 2010 in another NCE FM decision. See *Comparative Consideration of 32 Groups of Mutually Exclusive Applications in the October 2007 Filing Window*, Memorandum Opinion and Order, 25 FCC Rcd 5013, 5021 (2010) (although the application in question proposed a directional pattern that exceeded 2 dB per 10 degrees in several directions, what "made [the] application unacceptable for filing under Section 73.510(a) was a variation of the antenna pattern by 2.15 db per 10 degrees between the azimuths of 170 and 180 degrees").

that the proposed directional antenna pattern did not exceed 2 dB per 10 degrees in the directions of the stations being protected, which are WCRH(FM), Williamsport, Maryland, and WVMM(FM), Grantham, Pennsylvania. Our review of the Application confirms that the proposed antenna pattern complies with Sections 73.316(b)(2) and 73.510(a) of the Rules, as applied by the Commission.¹² Accordingly, we reject York's argument on this front.

Diversity of Ownership Argument. We agree with Four Rivers that there is no relevant distinction between electronically cutting and pasting the relevant section of the bylaws and providing a hard copy of the bylaws. In each case, the applicant is providing a copy of the relevant document, as required by our application form.¹³ York's failure to present any question about the validity of Four Rivers' certification of the Application as "true, complete, and correct" requires that we deny the Petition for failure to present a *prima facie* question about Four Rivers' diversity of ownership certification.¹⁴

We have evaluated the Application and find it fully compliant with all pertinent statutory and regulatory requirements. We further find that grant of the Application will further the public interest, convenience, and necessity.

Conclusion/Actions. Accordingly, for the reasons set forth above, the Supplement to Opposition to Petition to Deny filed by Four Rivers Community Broadcasting Corp. on September 20, 2010, and the Petition for Reconsideration filed by York SDA Church on October 15, 2010, ARE DISMISSED.

IT IS FURTHER ORDERED that the Petition to Deny filed by City of York, Pennsylvania on September 2, 2010, IS DENIED and the application of Four Rivers Community Broadcasting Corp. (File

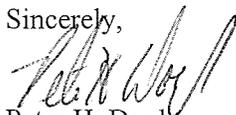
¹² York attempts to analogize Four Rivers' proposed use of a directional antenna pattern that meets the standard of Section 73.316(b)(2) in the direction of the protected stations to the Media Bureau's public notice concerning compliance with Section 73.525. See Petition at 5, citing *Media Bureau Provides Guidance to NCE FM Stations Regarding Television Channel 6 Protection Requirements*, Public Notice, 24 FCC Rcd 3916 (MB 2009). However, that situation involved our interpretation of that specific rule and our practice of not allowing consent letters from affected Channel 6 stations to include contingencies or conditions. The current case involves a completely different rule and is not analogous.

¹³ See Instructions to FCC Form 340, Section IV – Point System Factors, Question 1: Established Local Applicant ("An applicant claiming points as an established local applicant, must place supporting documentation in a local public inspection file and submit to the Commission copies of the documentation. Examples of acceptable documentation include corporate material from the secretary of state, lists of names, addresses, and length of residence of board members, copies of governing documents requiring a 75% local governing board, and course brochures indicating that classes have been offered at a local campus for the preceding two years, etc.").

¹⁴ See Application, Section VI.

No. BNPED-20071018AXJ) for a construction permit for a new NCE FM station in Spring Grove, Pennsylvania IS HEREBY GRANTED, conditioned upon Four Rivers Community Broadcasting Corp.'s compliance with Section 73.7005 of the Commission's Rules, 47 C.F.R. § 73.7005, which sets forth a four-year holding period for applicants that are awarded permits by use of a point system, and also provides that an applicant receiving a Section 307(b) preference that is decisive over another applicant must operate technical facilities substantially as proposed for a period of four years of on-air operations.¹⁵

Sincerely,



Peter H. Doyle
Chief, Audio Division
Media Bureau

cc:

Four Rivers Community Broadcasting Corp.
Mr. Todd Urick
Donald E. Martin, Esq.

¹⁵ See 47 C.F.R. § 73.7005.