

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In re Applications of)	
)	
POJOAQUE HIGH SCHOOL)	File No. BPLIF-920608DD
)	
For Construction Permit and License in the)	
Instructional Television Fixed Service on the A)	
Group Channels, Santa Fe, New Mexico)	
)	
HISPANIC INFORMATION AND)	File No. BPLIF-930107DA
TELECOMMUNICATIONS NETWORK, INC.)	
)	
For Construction Permit and License in the)	
Instructional Television Fixed Service on the A)	
Group Channels, Santa Fe, New Mexico)	

ORDER ON RECONSIDERATION

Adopted: September 24, 2003

Released: September 26, 2003

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On May 21, 1997, the Hispanic Information and Telecommunications Network, Inc. (HITN) filed a petition seeking reconsideration¹ of the April 21, 1997 dismissal² of its application to construct and operate a new Instructional Television Fixed Service (ITFS) station on the A Group Channels in Santa Fe, New Mexico.³ HITN therefore seeks reconsideration of the April 21, 1997 grant of a mutually exclusive application filed by Pojoaque High School (PHS).⁴ For the reasons discussed below, we grant in part and deny in part the PFR.

II. BACKGROUND

2. On June 8, 1992, PHS filed an application seeking authority to construct and operate a new ITFS station on the A Group Channels in Santa Fe, New Mexico.⁵ On December 12, 1992, PHS

¹ Petition for Reconsideration (May 21, 1997) (PFR).

² Pojoaque High School, *Memorandum Opinion and Order*, 12 FCC Rcd 24454 (1997) (*1997 MO&O*).

³ FCC File No. BPLIF-930107DA (Jan. 7, 1993) (HITN Application).

⁴ FCC File No. BPLIF-920608DD (June 8, 1992) (PHS Application).

⁵ PHS is part of the Pojoaque Valley Schools (PVS) system. On the same date of June 8, 1992, PVS filed an application seeking authority to construct and operate a new ITFS station on the C Group Channels in Santa Fe, New Mexico. FCC File No. BPLIF-920608DB (June 8, 1992) (PVS Application). We may hereinafter collectively refer to PHS and PVS as the “Pojoaque applicants.”

amended its application.⁶ Subsequently, on January 7, 1993, HITN filed an application that was mutually exclusive to the PHS application. On January 25, 1993, PHS filed a request for waiver of the Commission's Rule⁷ limiting the assignment of no more than four channels to a licensee for use in a single area of operation.⁸ PHS supplemented its waiver request on its own initiative on November 29, 1993,⁹ and at the request of the staff on June 10, 1994¹⁰ and June 23, 1994.¹¹

3. The Video Services Division (Division) of the former Mass Media Bureau granted the Pojoaque applicants' request for waiver of the four-channel limitation based on its finding that the requested channels were necessary to provide the wide range of educational and instructional programming proposed.¹² The Division noted that the Pojoaque applicants' proposal reflected an average of 40 hours of ITFS programming per channel per week.¹³ The Division further noted that both PHS and PVS amended their excess capacity leases with Ruralvision South, Inc. (Ruralvision) to require a minimum of 40 hours per channel per week to be devoted to formal educational programming.¹⁴ The

⁶ FCC File No. BPLIF-920608DD (Dec. 12, 1992). PVS also amended its application on the same date. FCC File No. BPLIF-920608DB (Dec. 12, 1992).

⁷ 47 C.F.R. § 74.902(d)(1) (1993). In interpreting this provision, the Commission has found parties under common control to be the same applicant, even though the applications were filed under the name of separate parties. In this instance, PHS is a high school under the control and supervision of PVS, whose Superintendent, Arthur R. Blea, signed both of the applications on behalf of the applicants. Because these applications were filed under the aegis of the same county public school system, the Pojoaque applicants' requested a waiver of the four-channel limitation.

⁸ Letter from Arthur R. Blea, Superintendent, Pojoaque High School, to Clay Pendarvis, Acting Chief, Distribution Services Branch, Mass Media Bureau, FCC (filed Jan. 25, 1993) (Waiver Request).

⁹ Letter from Peter D. Shields, Esq., Gardner, Carton, and Douglass, to Mr. William Caton, Acting Secretary, Federal Communications Commission (filed Nov. 29, 1993).

¹⁰ Letter from A. B. Cruz, III, Esq., Gardner, Carton, and Douglass, to Mr. William Caton, Acting Secretary, FCC (filed June 10, 1994); *see also* Letter from Clay Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau, FCC, to Pojoaque High School and Pojoaque Valley Schools (May 17, 1994) (requesting additional information from applicants).

¹¹ Letter from A. B. Cruz, III, Esq., Gardner, Carton, and Douglass, to Mr. William Caton, Acting Secretary, FCC (filed June 23, 1994); *see also* Letter from Clay Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau, FCC, to Pojoaque High School and Pojoaque Valley Schools (June 20, 1994) (requesting additional information from applicants).

¹² *1997 MO&O*, 12 FCC Rcd at 24456 ¶ 5.

¹³ *Id.* The Division rejected the contention that the waiver requests were untimely. *Id.* at 24456 n.3. The Division explained that the Commission has consistently allowed ITFS applicants to perfect their four-channel waiver requests by filing amendments after the "B" cut-off date because the supplemental information is used only for the purpose of evaluating the four-channel waiver request, an analysis that involves no comparison with competing applicants. *Id.* (internal citations omitted). However, the Division also noted that, in its comparative analysis, it would examine the Pojoaque applications as of the "B" cut-off date to determine the number of merit points to be awarded for programming. *Id.*

¹⁴ *Id.*

Division explained that, whereas PHS will provide programming for students in high school, with an emphasis on foreign language and advanced placement programming, PVS will provide programming for students at the elementary and middle school levels.¹⁵ The Division found no repetition among the programs and noted that the programming on all eight channels will be presented simultaneously throughout most of the school day.¹⁶ The Division concluded that such a comprehensive schedule for over twelve different grade levels would not be possible on only four channels.¹⁷ The Division therefore concluded that grant of the waiver was warranted.

4. Under the rules in effect at that time, in cases of mutually exclusive applications - where applicants were competing for the same or adjacent channels in the same geographic area - each application was reviewed pursuant to the Commission's comparative process. This procedure awarded a maximum of twelve merit points based on five criteria deemed to have been most relevant to determining the applicant best qualified to provide the service for which the ITFS spectrum had been allocated.¹⁸ First, four points were awarded to local applicants. Second, three points were awarded to applicants which were accredited schools, educational institutions, or school boards and school districts applying within their jurisdictions. Third, two points were awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may have been awarded to applicants for specified levels of proposed ITFS programming.¹⁹ Fifth, one point was awarded to applicants which were existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants showed an established need for an expanded service that could not have been accommodated on their grandfathered E or F facilities. The tentative selectee was the applicant with the highest score.

5. In this instance, the Division found PHS to be the tentative selectee.²⁰ Whereas HITN was awarded a total of two points for observing the four-channel limitation, PHS was awarded a total of eight points - four points for being local; three points for being accredited; and one point for proposing at

¹⁵ *Id.* In addition, the Division noted that the Pojoaque applicants stated that the channels will also be used to provide formal educational programming to students who cannot physically attend classes or are home schooled. *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See Amendment of Part 74 of the Commission's Rules and Regulations in Regard to the Instructional Television Fixed Service, *Second Report and Order*, 101 FCC 2d 49, 65-72 (1985) (*Second R&O*); 47 C.F.R. § 74.913 (1993).

¹⁹ One point was awarded for a proposed weekly schedule of at least twenty-one average hours per channel of formal educational programming or of at least forty-one average hours per channel of other ITFS programming. See 47 C.F.R. § 74.913(b)(4) (1993). Two points were awarded for a proposed weekly schedule of at least forty-one average hours per channel of formal educational programming or at least sixty-one hours per channel of ITFS programming where at least twenty-one of those hours were formal educational programming. See 47 C.F.R. § 74.913(b)(4) (1993).

²⁰ *1997 MO&O*, 12 FCC Rcd at 24459 ¶ 7. PVS was found to be the tentative selectee for the C Group Channels in Santa Fe, New Mexico. *Id.*

least twenty-one hours of formal educational programming per channel per week.²¹ The Division further found that grant of PHS's application would serve the public interest, convenience, and necessity.²² HITN's application was dismissed.²³

III. DISCUSSION

6. Section 74.902(d)(1) of the Commission's Rules limits a licensee "to the assignment of no more than four channels for use in a single area of operation, all of which should be selected from the same [channel] Group"²⁴ Applicants shall not apply for more channels than they intend to construct within a reasonable time, simply for the purpose of reserving additional channels.²⁵ Rather, the number of channels authorized to an applicant will be based on the demonstration of need for the number of channels requested.²⁶ The Commission will take into consideration such factors as the amount of use of any currently assigned channels and the amount or proposed use of each channel requested, the amount of, and justification for, any repetition in the schedules, and the overall demand and availability of ITFS channels in the community.²⁷

7. In the PFR, HITN contends that PHS is not basically qualified to be an applicant. According to HITN, the initial waiver request filed by PHS on January 25, 1993 fails to satisfy the "heavy burden imposed by Commission precedent and regulatory criteria to secure a waiver of the four-channel rule."²⁸ HITN contends that the Commission may only consider the waiver request as initially filed by PHS on January 25, 1993 because any supplements that were filed by PHS after the "B" cut-off date violate the Commission's Rules and confer a comparative advantage to PHS in the mutually exclusive selection process.²⁹ Moreover, HITN argues that PHS had not committed to serving its own students by the "B" cut-off date and therefore was required to provide documentation of proposed receive sites that

²¹ *Id.* at 24457-24459 ¶ 7. Neither HITN nor PHS was awarded one point for being the current licensee of an E or F channel seeking to relocate on other channels. *See id.*

²² *Id.* at 24460 ¶ 9. PHS was granted a license to operate under call-sign WNC853.

²³ *Id.* at 24460 ¶ 10.

²⁴ 47 C.F.R. § 74.902(d)(1) (1993). In interpreting this provision, the Commission has found parties under common control to be the same applicant, even though the applications were filed under the name of separate parties. In this instance, PHS is a high school under the control and supervision of PVS, whose Superintendent, Arthur R. Blea, signed both of the applications on behalf of the applicants. Because these applications were filed under the aegis of the same county public school system, the Pojoaque applicants requested a waiver of the four-channel limitation.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ PFR at 13. In this respect, HITN argues that the extent of the repetition of the programming in this instance is "100%" because both PHS and PVS proposed "identical programming." *Id.* HITN further contends that PHS failed to "supply a statement of need with any type of substantive showing." *Id.*

²⁹ *Id.* at 14-15 (citing Unified School District #511, *Memorandum Opinion and Order*, 8 FCC Rcd 7060 (1993); Fishburne Military School, *Memorandum Opinion and Order*, 11 FCC Rcd 18589 (1996)).

were intending to use PHS's formal educational programming.³⁰ HITN concludes that, because PHS failed to establish its basic eligibility by the "B" cut-off date for the reasons noted above, the Division should have dismissed the PHS application.

8. HITN argues that, even if PHS is basically qualified, the Division erroneously found PHS to be the superior applicant.³¹ First, HITN contends that PHS is not local because it is not physically located in the community where service is proposed.³² HITN notes that PHS is neither located nor has any receive sites in Santa Fe, New Mexico.³³ According to HITN, the Division's finding that PHS qualified as being a local applicant because Pojoaque was located in the Santa Fe metropolitan area is erroneous.³⁴ HITN asserts that Pojoaque is not a suburb of Santa Fe because it is located approximately 15 miles from Santa Fe and because it maintains a separate school system.³⁵ HITN argues that the Division created a new definition for the term "metropolitan area" in this instance.³⁶ HITN therefore concludes that the Division's action is arbitrary and capricious because it is a substantive change of the Commission's Rules requiring adoption via a rulemaking proceeding.³⁷ Second, HITN contends that the Division should not have awarded PHS points for being accredited because PHS "made no concrete commitment to provide educational programming to its own students."³⁸ Third, HITN asserts that PHS also should not have received any points for its proposed programming.³⁹ According to HITN, the Division improperly considered amendments that PHS filed after the "B" cut-off date.⁴⁰ Based on the above, HITN calculates that the Division should have awarded it the license because the two points that HITN received for observing the four-channel limitation exceeds the zero points that PHS should have received had the Division correctly applied the comparative criteria.⁴¹

9. We affirm the Division's grant of PHS's request for waiver of the four-channel limitation. We reject HITN's contention that the Division improperly considered supplements to the

³⁰ *Id.* at 16-17.

³¹ *Id.* at 17.

³² *Id.* at 17-18.

³³ *Id.* at 18.

³⁴ *Id.*

³⁵ *Id.* HITN further notes that Pojoaque cannot be considered a suburb of Santa Fe because the definition of a suburb embodies the concept of contiguous communities and there are communities between Pojoaque and Santa Fe. *Id.* at 18-19.

³⁶ *Id.* at 19.

³⁷ *Id.*

³⁸ *Id.* at 19-20.

³⁹ *Id.* at 20.

⁴⁰ *Id.*

⁴¹ *Id.* at 21.

waiver request that were filed by PHS.⁴² As noted above, the Pojoaque applicants initially requested a waiver of the four-channel limitation on January 25, 1993, prior to the “A” cut-off date in this proceeding, and supplemented their waiver request on their own initiative on November 29, 1993 and at the request of the staff on June 10, 1994 and June 23, 1994. The Commission has consistently allowed ITFS applicants to perfect their four-channel waiver requests by post “B” cut-off amendments because the supplemental information is used only for the purpose of evaluating the four-channel waiver request, an analysis that involves no comparison with competing applicants.⁴³ HITN’s reliance on *Unified School District #511* and *Fishburne Military School* for a proposition to the contrary is misplaced because those cases addressed amendments to applications and not supplements to requests for waiver of the four-channel limitation.⁴⁴ In this matter, the Division was very careful to note that, while it was accepting the supplements in its consideration of the waiver request, it would nevertheless “look to the Pojoaque applications as of the ‘B’ cut-off date to determine merit points for programming.”⁴⁵

10. We find that the Division correctly determined PHS to be the superior applicant.⁴⁶ First, we further find that the Division correctly awarded PHS three merit points for being accredited. HITN does not contest that PHS is accredited by the New Mexico State Board of Education. Rather, HITN argues that the Division should not have awarded PHS points for being accredited because PHS “made no concrete commitment to provide educational programming to its own students.”⁴⁷ We disagree. PHS indicated in its application that it would be providing service to its own students.⁴⁸ As noted by the Division, PHS was not required to submit letters of intended use because it proposed to serve its own students.⁴⁹ HITN mistakenly assumes that letters of intended use that were submitted by PHS on June 10,

⁴² Because we find that the Division properly considered the supplements, we need not address HITN’s contention that the waiver request, as initially filed, was inadequate to warrant granting a waiver of the four-channel limitation. Moreover, HITN does not argue in the PFR that the waiver request, as supplemented, is inadequate to warrant granting a waiver of the four-channel limitation.

⁴³ See Board of Regents, Eastern New Mexico University, *Memorandum Opinion and Order*, 10 FCC Rcd 3162 (1995); Northern Arizona University Foundation, *Memorandum Opinion and Order*, 7 FCC Rcd 5943 (1992); School District No. 1, *Memorandum Opinion and Order*, 3 FCC Rcd 6392 (1988) (*School Dist. No. 1*).

⁴⁴ *Unified School District #511*, 8 FCC Rcd at 7061 n.4; *Fishburne Military School*, 11 FCC Rcd at 18591-18593 ¶¶ 4-8.

⁴⁵ *1997 MO&O*, 12 FCC Rcd at 24456 n. 3. Under the traditional “A/B” cut-off approach, applicants triggering the “A” cut-off list, such as the Pojoaque applicants, were allowed to make major changes to their proposal prior to the end of the “A” cut-off period. Applicants on the “A” and “B” cut-off list are permitted to file minor amendments until the “B” cut-off date, but no comparative advantage will derive from amendments filed after the “B” cut-off date. See *Second R&O*, 101 FCC 2d at 72-75.

⁴⁶ As noted above, HITN was awarded a total of two points for observing the four-channel limitation. See *1997 MO&O*, 12 FCC Rcd at 24457-24459 ¶ 7. However, PHS was awarded a total of eight points - four points for being local; three points for being accredited; and one point for proposing at least twenty-one hours of formal educational programming per channel per week. See *id.* Neither HITN nor PHS was awarded one point for being the current licensee of an E or F channel seeking to relocate on other channels. See *id.*

⁴⁷ PFR at 19-20.

⁴⁸ See PHS Application, Section II, Question 3.

⁴⁹ *1997 MO&O*, 12 FCC Rcd at 24455 n.2.

1994 “form[ed] the basis of PHS’s showing of accreditation.”⁵⁰ As a result, HITN’s contention that the Division conferred PHS a comparative advantage by “accepting” the submission of such letters of intended use subsequent to the “B” cut-off date is inaccurate.⁵¹

11. Second, we affirm the Division’s finding that PHS was entitled to one point for proposing at least twenty-one hours of formal educational programming per channel per week.⁵² All ITFS applicants are required to detail their formal educational and other ITFS programming proposals in both a programming grid and an illustrative schedule.⁵³ When PHS filed its original application on June 8, 1992, it specified a total of four hours of formal educational programming per channel per week in its programming grid. However, PHS detailed an average of 24.375 hours of programming per channel per week in the submitted programming schedule.⁵⁴ On December 12, 1992, prior to the “B” cut-off date in this proceeding,⁵⁵ PHS amended its application to correct the discrepancy with regard to the total hours of formal educational programming. PHS therein stated that “the total number of hours of formal educational programming on the proposed ITFS station will be 24.375 hours per week” and attached a revised programming grid showing an average of 24.375 hours of formal education programming per channel per week. The amendment explained that the grid submitted with the original application filed on June 8, 1992 erroneously proposed four hours of formal educational programming.⁵⁶ We therefore agree with the Division’s conclusion that, based on the application, as amended, PHS was entitled to one

⁵⁰ PFR at 15.

⁵¹ *See id.*

⁵² *Id.* at 24457-24459 ¶ 7.

⁵³ Question 5 of FCC Form 330 states, in pertinent part, that for each channel requested, the applicant must complete the chart on the following page to provide “a proposed weekly schedule of ITFS programming together with a brief description of programs not recognizable by their titles.” Applicants must also “[i]ndicate by “F” [for formal] those programs which are delivered to enrolled students for academic credit.” Question 6 sets out a program grid which requires that the applicant summarize, among other things, both the “[t]otal hours [of] formal education programming for credit for enrolled students on [each] channel” and the “[t]otal hours [of] other ITFS service (see 47 C.F.R. § 74.931(b)) on [each] channel.”

⁵⁴ However, none of the programs was designated as formal educational programming.

⁵⁵ HITN is correct that ITFS applicants are permitted to file amendments to their applications upgrading their comparative status until the “B” cut-off date. *See PFR at 20; see also Second Report and Order*, 101 FCC 2d at 74. HITN also correctly notes that the “B” cut-off with regard to the PHS Application was July 20, 1993. *See PFR at 4.* As noted above, PHS amended its application prior to that date. We therefore reject HITN’s contention that the Division improperly considered amendments that PHS filed after the “B” cut-off date.

⁵⁶ PHS intended the actual formal educational proposal to be “the number indicated by [the] illustrative programming schedule, *i.e.*, . . . an average of 24.375 hours per channel per week.” PHS did not submit a new page 8 to the application with an “F” typed next to the program titles. However, the text of the amendment indicated that the program schedule proposed formal educational programming. As a result, we find that, prior to the “B” cut-off date, PHS resolved the original application’s inconsistency concerning the total number of hours of formal educational programming being proposed.

programming merit point for proposing at least twenty-one hours of formal educational programming per channel per week.⁵⁷

12. However, we agree with HITN that the Division erred in awarding PHS four merit points for being a local applicant. The Division found that PHS is entitled to four points because it is local to Santa Fe and proposes to offer formal educational programming to its own students.⁵⁸ The Commission's Rules define an institution or organization applying for an ITFS construction permit and license as "local" if it is "physically located in the community, or metropolitan area, where service is proposed."⁵⁹ It is undisputed that PHS is not physically located in Santa Fe. The issue is whether PHS is within the Santa Fe metropolitan area. While we recognize that the Commission adopted the term "metropolitan area" to afford the staff flexibility where facts warranted a broader interpretation,⁶⁰ we disagree with the Division that, "[g]iven the relative size and proximity of Pojoaque and Santa Fe," Pojoaque is physically located in the Santa Fe metropolitan area.⁶¹ The Division did not provide the basis for its definition of the Santa Fe metropolitan area. By contrast, HITN posits that Pojoaque is not a suburb of Santa Fe and that there are no communities between Santa Fe and Pojoaque.⁶² Further, HITN notes that PHS is in the Pojoaque School district as opposed to the Santa Fe school district.⁶³ Finally, HITN notes that Pojoaque is not part of the Santa Fe metropolitan area as defined by Rand McNally.⁶⁴ We find these factors combined to be decisionally significant and conclude that PHS therefore should not have been awarded four merit points for being a local applicant.

13. Even though we reverse the Division's finding that PHS was a local applicant, we nevertheless affirm the Division's conclusion that PHS was the superior applicant. Whereas HITN was awarded a total of two points for observing the four-channel limitation, PHS was entitled to four points - three points for being accredited; and one point for proposing at least twenty-one hours of formal educational programming per channel per week. The Division therefore correctly determined PHS to be the tentative selectee for the A Group Channels in Santa Fe, New Mexico.

IV. ORDERING CLAUSES

14. ACCORDINGLY, IT IS ORDERED that, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by the Hispanic Information and Telecommunications Network, Inc. on May 21, 1997 IS GRANTED IN PART and is otherwise DENIED.

⁵⁷ 1997 MO&O, 12 FCC Rcd 24459 ¶ 7.

⁵⁸ 1997 MO&O, 12 FCC Rcd 24457 ¶ 7.

⁵⁹ 47 C.F.R. § 74.932, Note 1; *see also Second R&O*, 101 FCC 2d at 59.

⁶⁰ *School Dist. No. 1*, 3 FCC Rcd at 6394 ¶ 14.

⁶¹ 1997 MO&O, 12 FCC Rcd 24457 ¶ 7.

⁶² Petition at 18-19.

⁶³ *Id.* at 18.

⁶⁴ *Id.* at 19. *See* Rand McNally Commercial Atlas 1996 at 97 (HITN Petition, Exhibit 4).

15. This action is taken under designated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau