



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

April 27, 2007

**DA 07-1935**  
*In Reply Refer to:*  
1800B3-JWR  
Released: April 27, 2007

Mr. William Konopnicki  
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In re: NEW(FM), Pinetop, Arizona  
Facility ID No. 78413  
William Konopnicki  
File No. BPH-19951109MG

**Petition to Deny**

NEW(FM), Pinetop, Arizona  
Facility ID No. 78349  
Nitchi'i Binagodi'e d/b/a Apache Radio  
Broadcasting Corporation  
File No. BPED-19951108MB

MX Group 951101

**Joint Request for Approval of  
Settlement Agreement**

Dear Applicants:

This letter concerns: (1) the captioned application of William S. Konopnicki ("Konopnicki") for a new commercial FM station at Pinetop, Arizona; (2) the February 28, 1996, "Petition to Dismiss or Deny" ("Petition to Deny") Konopnicki's application submitted by Navajo Broadcasting Company, Inc. ("Navajo");<sup>1</sup> (3) the captioned application of Nitchi'i Binagodi'e d/b/a Apache Radio Broadcasting Corporation ("Apache") for a new noncommercial educational ("NCE") FM station at Pinetop; and (4) the February 15, 2002, "Joint Request for Approval of Settlement Agreement" ("Joint Request") filed by Konopnicki and Apache. For the reasons set forth below, we deny Navajo's Petition to Deny, approve the

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<sup>1</sup> Konopnicki filed an Opposition to the Petition to Deny on March 13, 1996, to which Navajo filed a Reply on March 25, 1996.

Joint Request to the extent indicated, dismiss the Apache application, and grant the Konopnicki application.

**Background.** The filing window for applications for the non-reserved FM band construction permit here at issue, Channel 294C1 at Pinetop, Arizona, closed on November 8, 1995.<sup>2</sup> Konopnicki, a commercial applicant, and Apache, an applicant that proposed to provide NCE service, were the only two applicants for the permit. Their proposals were designated mutually exclusive (“MX”) Group 951101. On December 14, 1995, Konopnicki and Apache filed a “Joint Request for Amendment of Application, Approval of Settlement Agreement, and Dismissal of Application” (“First Settlement”), pursuant to which Apache agreed to dismiss its application in return for receiving \$25,000 from Konopnicki.<sup>3</sup> Navajo<sup>4</sup> tendered an “Opposition to Joint Request for Approval of Settlement Agreement” on February 28, 1996, the same date on which it filed its Petition to Deny Konopnicki’s application. Navajo argued that the applicants were ineligible to take advantage of the Section 73.3525 waiver policy set forth in the *1995 Settlement Public Notice* allowing settlements among MX applicants for a limited period without a limit on the amount of consideration that could be paid a dismissing applicant because their November 1995 applications were not pending at the time the *Public Notice* was released. In response, on April 5, 1996, Konopnicki and Apache filed a “Termination of Settlement Agreement and Withdrawal of Joint Request” regarding the First Settlement.<sup>5</sup>

In light of this termination of the First Settlement, and because MX Group 951101 is a “mixed group” containing both a commercial and an NCE applicant, these applications remained in pending status while the Commission devised licensing rules for mixed groups.<sup>6</sup> As part of that process, the staff opened another mixed group settlement window during which the limitation on consideration was waived

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<sup>2</sup> See Report No. CF-33 (rel. Oct. 5, 1995).

<sup>3</sup> On September 15, 1995, the Commission announced a 90-day period for universal settlements of comparative broadcast pending cases without regard to the limitation contained in 47 C.F.R. § 73.3525 on the amount of payments to dismissing applicants. *See FCC Waives Limitations On Payments To Dismissing Applicants in Universal Settlements of Cases Subject To Comparative Freeze Policy*, Public Notice, 10 FCC Rcd 12182 (1995) (“1995 Settlement Public Notice”). Section 73.3525(a)(3) restricts the consideration paid to a dismissing mutually exclusive applicant to the applicant’s documented reasonable and prudent expenses incurred in preparing, filing, and prosecuting an application.

<sup>4</sup> Navajo was the licensee of commercial Stations KDFI(AM) and KZUA(FM), Holbrook, Arizona, at the time the subject applications were filed. It assigned the stations in 2002 to Petracom of Show Low, LLC, pursuant to Commission approval of the sale (File No. BAL-20020109AAJ).

<sup>5</sup> We will dismiss the Navajo Opposition as moot as a result of Konopnicki’s and Apache’s request to withdraw the First Settlement.

<sup>6</sup> The Commission initially determined that “mixed groups” should be resolved via competitive bidding. *Reexamination of the Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000). On July 3, 2001, however, the United States Court of Appeals for the District of Columbia Circuit in *National Public Radio, Inc. et al., v. FCC*, 254 F.3d 2256 (D.C. Cir. 2001) vacated the portion of the Commission’s *Noncommercial Report and Order* that required noncommercial educational (“NCE”) entities that applied for authorizations in certain non-reserved broadcast spectrum to participate in auctions with mutually exclusive commercial applicants.

for mutually exclusive applicants entering into agreements to dismiss their proposals.<sup>7</sup> The February 15, 2002, Joint Request between Konopnicki and Apache that is at issue here was filed during that settlement window.

**Discussion. Petition to Deny.** Navajo claims that, in his application, Konopnicki misrepresented his media interests and failed to submit a “duopoly” study to demonstrate compliance with the Commission’s local radio ownership rule.<sup>8</sup> Navajo also alleges that Konopnicki’s proposal does not comply with the Commission’s radio frequency (“RF”) radiation standards<sup>9</sup> or the Commission’s “rudimentary” rules pertaining to Konopnicki’s existing stations. Navajo maintains that, because of these alleged deficiencies, the Commission cannot rely on Konopnicki’s statements. Navajo also contends that Konopnicki’s past actions prove he will not serve the needs and interests of the community of Pinetop. In its Reply, Navajo also opposes a minor amendment to his application filed by Konopnicki on March 13, 1996.<sup>10</sup>

In order to assess the merits of a petition to deny, a two-step analysis is required. First, Section 309(d)(1) of the Communications Act of 1934, as amended (the “Act”), requires that the petition to deny contain specific allegations of fact that, if true, are sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity.<sup>11</sup> 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 requiring resolution in a hearing.<sup>12</sup> Based on the following, we find that Navajo has not established a *prima facie* case that grant of the subject application would be inconsistent with the public interest.

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<sup>7</sup> *Window Opened to Permit Settlements for Closed Groups of Mutually Exclusive Broadcast Applications*, Public Notice, 16 FCC Rcd 17091 (MMB 2001) (the “2001 Settlement Window”). The settlement period was extended through February 15, 2002 in *Extended Settlement Period for Closed Groups of Mutually Exclusive Broadcast Applications Announced*, Public Notice, 16 FCC Rcd 22047 (MMB 2001).

<sup>8</sup> See 47 C.F.R. § 73.3555(a).

<sup>9</sup> *RF exposure guidelines of the American National Standards Institute (ANSI) for evaluating the potential environmental significance of RF radiation emitted by FCC-regulated transmitters*, discussed in OST Technical Bulletin No. 65, “Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation.”

<sup>10</sup> Navajo also adds that Konopnicki’s Opposition contains further misrepresentation, lack of candor, and “carelessness.” Referencing *Tri-State Communications, Inc.*, Decision, 2 RR 2d 297, 299 (Rev. Bd. 1964), Navajo argues that the “negligence, carelessness, and ineptness” in preparation of the Pinetop application, in maintaining the KTHQ(FM) public file, and Konopnicki’s “disregard” for the rules, “coupled with his non-disclosure of material facts” about when the file was available for public inspection and his “untrue” compliance with the quarterly issues/programs lists mandate at least a hearing. Navajo also argues that negligent preparation of an application is grounds for disqualification, referencing *American International Development, Inc.*, Decision, 75 FCC 2d 109, 115-16 (Rev. Bd. 1977).

<sup>11</sup> See 47 U.S.C. §§ 309(d)(1) and (d)(2).

<sup>12</sup> See *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988).

*Misrepresentation/Lack of Candor.* Question 7(a) of Section II of the version of FCC Form 301 in effect when the Konopnicki application was filed asked whether the applicant has an interest in any other broadcast facility. Question 9(a) asked whether the principal community contour of the proposed station overlaps that of any other station in which the applicant has an interest. Konopnicki initially responded “No” to both, and Navajo alleges that, in so responding, he materially misrepresented his broadcast interests, which included Station KTHQ(FM), Eager, Arizona. We disagree with Navajo’s analysis.

The Commission and the courts have recognized that “[t]he FCC relies heavily on the honesty and probity of its licensees in a regulatory system that is largely self-policing.”<sup>13</sup> Misrepresentation is “a false statement of fact made with intent to deceive.”<sup>14</sup> Lack of candor is “concealment, evasion, or other failure to be fully informative, accompanied by intent to deceive.”<sup>15</sup> Intent to deceive is established if a licensee knowingly makes a false statement,<sup>16</sup> and also can also be inferred when the surrounding circumstances clearly show the existence of intent to deceive.<sup>17</sup> The Commission may disqualify an applicant who deliberately makes misrepresentations or lacks candor in dealing with the agency.<sup>18</sup>

While Konopnicki’s initial answers to these questions in his application were inaccurate, he repeatedly disclosed his interest in KTHQ(FM) elsewhere in the application.<sup>19</sup> These disclosures refute Navajo’s misrepresentation argument.<sup>20</sup> Accordingly, we conclude that Konopnicki did not intentionally

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<sup>13</sup> See *Commercial Radio Service, Inc.*, Order to Show Cause, 21 FCC Rcd 9983, 9986 ¶ 12 (2006) (“CRS Order”) citing, e.g., *Contemporary Media, Inc.*, v. FCC, 214 F.3d 187, 193 (D.C. Cir. 2000) (“Contemporary Media”).

<sup>14</sup> CRS Order, 21 FCC Rcd at 9986 ¶ 12 , citing *Policy Regarding Character Qualifications in Broadcast Licensing Amendment of Rules of Broadcast Practice and Procedure, Relating to Written Responses to Commission Inquiries and the Making of Misrepresentation to the Commission by Applicants, Permittees, and Licensees, and the Reporting of Information Regarding Character Qualifications*, Report, Order, and Policy Statement, 102 FCC 2d 1179, 1210-11 (1986) (“1986 Character Policy Statement”).

<sup>15</sup> *Id.* at 9986 ¶ 12 (citing *Fox River Broadcasting, Inc.*, Order, 93 FCC 2d 127, 129 (1983)). A false certification may also constitute a misrepresentation. *Id.* at 9986 n.15 (citing *San Francisco Unified School District*, Hearing Designation Order and Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 13326, 13334 ¶ 19 nn. 40-41 (2004)).

<sup>16</sup> *Id.* at 9986 ¶ 12 (citing *Leflore Broadcasting, Co., Inc. v. FCC*, 636 F.2d 454, 462 (D.C. Cir. 1980)).

<sup>17</sup> *Id.* at 9986 ¶ 12 (citing *American International Development, Inc.*, Memorandum Opinion and Order, 86 F.C.C. 2d 808, 816 n.39 (1981), aff’d sub nom. *KXIV, Inc. v. FCC*, 704 F.2d 1294 (D.C. Cir. 1983)).

<sup>18</sup> *Contemporary Media*, 214 F.3d at 196.

<sup>19</sup> In Exhibit 1, Konopnicki noted his ownership interest in KTHQ(FM) . Exhibit E-3 indicated that the proposed tower site is also the location of “co-owned” KTHQ(FM). Moreover, Konopnicki indicated at page 5 of his Engineering Statement that there are no primary facilities nearby “except for co-located and co-owned station KTHQ.”

<sup>20</sup> See e.g., *New Ulm Telecom, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 2705, 2706-07 (1995).

attempt to conceal his broadcast interests,<sup>21</sup> and we find no basis for further inquiry regarding Navajo's misrepresentation allegations.<sup>22</sup>

*Multiple Ownership Rules Study and Compliance with RF Standard.* As noted above, when he submitted his application, Konopnicki was the licensee of Station KTHQ(FM), Eagar, Arizona.<sup>23</sup> The principal community contour of the proposed Pinetop facility and that of KTHQ(FM) overlapped. In the Petition to Deny, Navajo points out that the application, as initially tendered, lacked a "duopoly" showing demonstrating compliance with the Commission's local radio ownership rule.<sup>24</sup> Navajo maintains that Konopnicki failed to include all information called for in FCC Form 301, as required by Section 73.3514(a) of the Commission's Rules (the "Rules"),<sup>25</sup> and therefore the application should be dismissed. We reject Navajo's contentions. The failure to include a duopoly study is not an omission that renders Konopnicki's application fatally defective.<sup>26</sup> Moreover, on March 12, 1996, subsequent to the filing of the Petition to Deny, Konopnicki submitted an amendment containing, among other things, a duopoly showing. An examination of the amendment reveals that his application complies with our local radio ownership provisions and, as amended, includes all requested information.

Navajo also argues that Konopnicki did not demonstrate compliance with RF radiation limits and that his application contained "insufficient and conflicting" information.<sup>27</sup> However, the staff has determined that the proposed Konopnicki facility does, in fact, comply with the RF standards. Further, the March 13, 1996, amendment resolves a discrepancy in the application identified by Navajo.

*Compliance with Commission Rules Pertaining to Konopnicki's Existing Stations.* Navajo argues that Konopnicki's past operation of KTHQ(FM) demonstrates his "cavalier attitude" toward compliance

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<sup>21</sup> Konopnicki filed an amendment to his application on March 13, 1996 to correct his "errors" in his responses to Questions 7(a) and 9(a). The amendment also includes a duopoly study showing principal contours "in the common KTHQ-Pinetop FM coverage contours."

<sup>22</sup> See *Greater Muskegon Broadcasters, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 15,464 (1996) (intent to deceive is necessary and essential element of misrepresentation).

<sup>23</sup> Pursuant to the Commission's February 2, 2000, grant of his application for approval of his assignment of the KTHQ(FM) license to Country Mountain Airwaves, LLC (File No. BALH-20000119AAL), he assigned the license to that entity, of which he is the sole shareholder.

<sup>24</sup> 47 C.F.R. § 73.3555(a)(1). As noted above, Question 9 of Form 301, in pertinent part, first asks whether the principal community contour of the proposed station would overlap that of any other station owned by the applicant. Initially, Konopnicki answered "No." If the answer is "Yes," Question 9 then asks whether the applicant certifies that the ownership interests resulting from a grant comply with Section 73.3555(a). In response, Konopnicki checked neither the box labeled "Yes" nor "No." Instead, he responded "N/A." Third, if the previous answer is "Yes," Form 301 directs the applicant to attach an exhibit demonstrating that ownership of the proposed and existing stations would be consistent with the multiple ownership rule. Again, Konopnicki responded, "N/A."

<sup>25</sup> See 47 C.F.R. § 73.3514(a).

<sup>26</sup> See 47 C.F.R. § 73.3564(a).

<sup>27</sup> Navajo points out that Konopnicki's Engineering Statement specifies a radiation center above ground at 49.5 meters (at page 7), whereas 47.5 meters is specified on page 19 of Form 301. Konopnicki characterizes the discrepancy as a "typographical error" which is corrected in the March 13, 1996 amendment.

with the rules, “especially as they relate to community service” to Eagar. Specifically, Navajo maintains that KTHQ(FM) failed to provide a local or toll free number for the residents of Eagar, failed to establish a local public file in Eagar, and did not air local news or information specific to Eagar. Navajo argues that it appears that, for a period of approximately three months, the station’s public file was not located in Eagar, as required by the then-applicable version of Section 73.3526(c) of the Rules<sup>28</sup> and that ownership and employment reports were not timely filed.<sup>29</sup> Konopnicki maintains in his Opposition that he complied with the main studio and local inspection file provisions of the Commission’s rules and submitted copies of the file’s contents evidencing his compliance. We believe that Konopnicki’s submissions and responses to staff inquiries sufficiently rebut Navajo’s charges.<sup>30</sup> While other public file violations may or may not have occurred,<sup>31</sup> Navajo’s allegation of these rule violations at KTHQ(FM)

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<sup>28</sup> The Commission subsequently revised its public file rule, 47 C.F.R. § 73.3526. The amended rule requires a licensee to maintain its public file at the station’s main studio, even where the studio is located outside its community of license. *See Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations, Report and Order*, 13 FCC Rcd 15691 (1998).

<sup>29</sup> Navajo alleges that reports for KTHQ(FM) and for Konopnicki’s other stations, KHIL(AM) and KWCX-FM, Wilcox, Arizona, and KCYN(FM), Moab, Utah were not filed. According to Navajo, a February 9-14, 1996, review of Commission records revealed no ownership or employment reports (Petition, Attachment C). Konopnicki does not deny this allegation but merely argues that the fact that they could not be located does not prove they were not filed. We note that the station licenses for these three facilities were subsequently assigned, that the actions granting those assignments are now final, and that Navajo did not raise this issue in connection with those license assignments. In these circumstances, we conclude that further inquiry into these matters is unwarranted.

<sup>30</sup> *See Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399 (D.C. Cir. 1996); *Astroline Communications Co. L.P. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). Further, referencing the declaration of the editor of the *Apache County Observer* and his January 4, 1996, editorial (Petition, Attachment A), as well as two phone directories covering Eagar (Reply, Exhibit D), Navajo alleges that KTHQ(FM) did not have a local telephone number as required by 47 C.F.R. § 73.1125(e). We note, however, Konopnicki’s assertion that KTHQ(FM) has had an Eagar telephone number since it began operation in October 1995 (Opposition at p. 5). Significantly, we further note that the referenced directories were published in April 1995, and inasmuch as Navajo’s petition is dated February 28, 1996 and the editorial and declaration are dated January 4 and February 28, 1996, respectively, neither Navajo nor the editor would have been able to look up the number for KTHQ(FM) in either directory. Thus, there is insufficient evidence from which to conclude that KTHQ(FM) failed to maintain a local or toll-free telephone number.

Moreover, in Konopnicki’s February 11, 2003, response to the January 13, 2003, staff inquiry letter, Konopnicki declared that KTHQ(FM) established a local public file at the Eagar public library in 1988, at the time he filed the application for KTHQ(FM)’s construction permit, and relocated the file to KTHQ(FM)’s main studio in Show Low, Arizona when KTHQ(FM) commenced operation in 1995. Konopnicki declared that as of January 6, 1996, the public file contained all of the required issues/programs lists, ownership, employment and political reports, and that the file contained all the required documents as of the date of his response. In response to the February 25, 2003, staff inquiry letter, Konopnicki submitted, on April 30, 2003, copies of: KTHQ(FM)’s issues/programs lists, for the period of 1996 to 2002, KTHQ(FM)’s EEO reports for the period of 1996 to 2000, and KTHQ(FM)’s ownership reports and supplements.

<sup>31</sup> Referencing the declaration of a salesman for another market station (Reply, Exhibit C), Navajo asserts that although KTHQ(FM) broadcast political ads on March 11, 1996, its own sales manager’s check of the public file three days later revealed no record of these ads nor of any candidate requests for air time (Reply, Exhibit B). Navajo also alleges that the sales manager found that the public file lacked a political file, contrary to the mandates of 47 C.F.R. §§ 73.1943 and 73.3526(a)(4).

and at other Konopnicki-controlled stations would not ordinarily warrant further inquiry regarding Konopnicki's Pinetop application.<sup>32</sup> It is well established that a public file violation in and of itself generally does not put in issue a licensee's basic qualifications to hold a broadcast license.<sup>33</sup> Further, there is no showing that the number, nature, and extent of the alleged public file rule violations indicates that Konopnicki cannot be relied upon to operate the proposed Pinetop facility in accordance with its authorization and our rules.<sup>34</sup>

*March 13, 1996, Amendment.* Finally, Navajo argues that Konopnicki's March 13, 1996, amendment must be dismissed because as it was filed more than 30 days after the application was accepted for tender and because it lacked a good cause showing pursuant to Section 73.3522(a)(6) of the Rules.<sup>35</sup> Again, we disagree. Pursuant to the Commission's rule making proceeding modifying the strict "hard look" approach to applications processing,<sup>36</sup> commercial FM applicants whose filings would otherwise be dismissed were afforded additional opportunities to correct perceived application deficiencies. Specifically, after an initial 30-day amendment as-of-right period, there is a second stage during which, in response to another 30-day period specified in a staff deficiency letter, applicants may submit curative amendments correcting both tender and acceptance defects. In the instant situation, although no deficiency letter has been issued to Konopnicki, his amendment was clearly tendered to address deficiencies in his application. These putative deficiencies, if identified by the staff, would not have required the dismissal of the application, but rather would have resulted in a deficiency letter, and he would have been allowed 30 days thereafter to amend to correct them. We believe that Commission policy, as reflected in the *Report and Order*, is to afford a "more lenient approach." In this regard, we note that, had a deficiency letter been issued addressing the items dealt with in Konopnicki's amendment, we would have accepted the amendment without a "good cause" showing. Based on the foregoing, we find that Navajo has not established a substantial or material question of fact to warrant further inquiry into Konopnicki's qualifications to be a Commission licensee.

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<sup>32</sup> See, e.g., *Joseph W. Bollinger and Donna M. Bollinger*, Memorandum Opinion and Order, 16 FCC Rcd 22977, 22978 (2001) (allegation of violations at other stations will not cause re-evaluation of assignor's qualifications unless issues related to the assignor's basic qualifications have been designated for hearing or have been sufficiently raised in petitions to warrant the designation of a hearing.) See also *HHT/Estate Of Robert D. Hanna*, Memorandum Opinion and Order, 8 FCC Rcd 6638 (CCB 1993) (citing *Character Policy Statement*, 102 FCC 2d at 1223 (rejecting presumption that misconduct at one station is necessarily predictive of the operation of the licensee's other stations)).

<sup>33</sup> See *License Renewal Applications of Commercial Radio Stations Serving Philadelphia, Pennsylvania*, Memorandum Opinion and Order, 8 FCC Rcd 6400 (1993).

<sup>34</sup> See *Heart of Black Hills Stations*, Decision, 32 FCC 2d 196, 198 (1971). See also *Mark R. Nalbone, Receiver*, Memorandum Opinion and Order, 6 FCC Rcd 7529 (MMB 1991) (assignment application granted despite finding that proposed assignor violated operating and public file rules).

<sup>35</sup> 47 C.F.R. § 73.3522(a)(6). Section 73.3564(b) provides, in pertinent part, that acceptance of an application for tender does not preclude its subsequent dismissal if later found patently not in accord with the rules. Former Section 73.3522(c)(2) provided, in pertinent part, that an applicant meeting minimum filing requirements but whose application is not complete and acceptable has a period, as specified in a staff deficiency letter, in which to correct all deficiencies.

<sup>36</sup> *Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial FM Broadcast Applications*, Report and Order, 7 FCC Rcd 5074 (1992) ("Report and Order").

*Other Matters.* Navajo further argues that grant of Konopnicki's commercial station application would deprive the area of an NCE facility. According to Navajo, Apache's NCE proposal would better serve the public interest. Navajo, however, cites no precedent for the proposition that approval of a settlement resulting in dismissal of an NCE proposal and grant of a commercial application for the same community is contrary to the public interest, and we are aware of none. Moreover, Navajo does not demonstrate that approval of the instant settlement proposal is inconsistent with Commission procedures or otherwise contrary to the public interest.<sup>37</sup>

*Sanctions Request.* Konopnicki argues that Navajo filed its Petition to Deny solely to delay competition with its own stations and should be sanctioned for abusing Commission processes. We reject this contention. To support a strike petition allegation, the charging party must make a strong showing of an improper purpose.<sup>38</sup> In this regard, the Commission considers a number of factors, including statements of principals or officers admitting an inappropriate purpose, the withholding of relevant information, the absence of factual support, economic motivations indicating an improper purpose, and other petitioner conduct.<sup>39</sup> Here, there is nothing attributable to Navajo's principals or officers that supports a strike petition finding here.<sup>40</sup> While Navajo, theoretically, could gain economically from delaying the institution of a new commercial service at Pinetop, Konopnicki has not provided substantial evidence establishing that Navajo's primary purpose in opposing his application and proposed settlement was one of delay.<sup>41</sup>

*Settlement Request.* The instant Pinetop applications are mutually exclusive and comprise MX Group 951101. Konopnicki and Apache seek to resolve the conflict between their proposals pursuant to their February 15, 2002, settlement agreement submitted with the Joint Request. Specifically, they request that we dismiss Apache's application, grant Konopnicki's application, and grant an application to modify the facilities of Apache's existing NCE Station KNNB(FM), Whiteriver, Arizona,<sup>42</sup> an application which will be filed in the "near future." As consideration for the dismissal of Apache's Pinetop application, Konopnicki will pay Apache fifty thousand dollars (\$50,000) as well as its costs, up to five thousand dollars (\$5,000), for preparing and prosecuting this future KNNB(FM) modification application. Konopnicki also would pay the "reasonable and prudent" costs of Apache to construct and install a new KNNB(FM) tower, antenna, transmitter, and transmission facilities.

In the declarations contained with the Joint Request, and in the Joint Request itself, the applicants argue that effectuation of their proposed settlement would benefit the public interest by avoiding potential litigation between them, by conserving Commission resources, and by expediting the provision of service

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<sup>37</sup> See *Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000), on reconsideration, 16 FCC Rcd 5074 (2001). See also *Window Opened to Permit Settlements for Closed Groups of Mutually Exclusive Broadcast Applications*, Public Notice, 16 FCC Rcd 17091 (2001).

<sup>38</sup> See *Dubuque T.V. Limited Partnership*, Memorandum Opinion and Order, 4 FCC Rcd 1999, 2000 (1989), citing *Radio Carrollton*, Memorandum Opinion and Order, 69 FCC 2d 1139, 1149 (1978).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Apache would relocate the KNNB(FM) transmitter and increase power to the maximum allowed at the new site

by a new Pinetop station and of enhanced KNNB(FM) service. Both declare that their applications were not filed for the purpose of reaching or carrying out a settlement and that, other than as specified, no consideration has been paid or promised to Apache for dismissal of its Pinetop proposal.

**Conclusion/Actions.** After careful consideration of the proposed settlement agreement and attached declarations, we determine that the agreement complies with Commission policy. Approval thereof and grant of Konopnicki's application would conserve Commission and applicant resources and enable the expeditious implementation of a new broadcast service at Pinetop. Further, it appears that neither party to the Joint Request filed its Pinetop application in order to reach or carry out a settlement.<sup>43</sup> Nevertheless, because Apache has not yet filed a modification application, we make no determination on the merits of such a proposal. Rather, we will consider the promised KNNB(FM) modification application when it is appropriately before us. Finally, we find that Konopnicki is fully qualified and that grant of his application would serve the public interest by expediting a new FM service to Pinetop, Arizona.

Accordingly, in light of the above, and pursuant to Section 0.283 of the Commission's Rules, the February 28, 1996, "Petition to Dismiss or Deny" filed by Navajo Broadcasting, Inc. IS DENIED; the February 15, 2002, "Joint Request for Approval of Settlement Agreement" filed by William Konopnicki and by Apache Radio Broadcasting Corporation IS APPROVED TO THE EXTENT INDICATED; the application of Apache Radio Broadcasting Corporation for a new noncommercial educational radio station at Pinetop, Arizona (File No. BPED-19951108MB) IS DISMISSED; and the application of William Konopnicki for a new FM station at Pinetop, Arizona (File No. BPH-19951109MG) IS GRANTED. The authorization will follow under separate cover.

Sincerely,

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

cc: Melodie A. Virtue, Esquire, counsel for Navajo Broadcasting Company, Inc.  
Jeffrey D. Southmayd, Esquire, counsel for William Konopnicki  
David G. O'Neil, Esquire, counsel for Apache Radio Broadcasting Corporation

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<sup>43</sup> See 47 C.F.R. § 73.3525(a).