



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

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In Reply Refer to:

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In re: New FM Station, Evans City, PA
Facility ID No. 172344
File No. BNPED-20071022BNT

Petition to Deny

Dear Counsel:

This letter concerns: (1) the referenced application (the "Application") filed by Fourteen Hundred, Inc. ("Fourteen Hundred")¹ on October 22, 2007, for a construction permit for a new noncommercial educational ("NCE") FM station at Evans City, Pennsylvania, as amended on August 15, 2008, and October 28, 2008; (2) a Petition to Deny filed by New Testament Baptist Church of Butler ("New Testament") on July 30, 2008 ("Petition"); and (3) related responsive pleadings.² For the reasons set forth below, we dismiss Fourteen Hundred's Motion, dismiss New Testament's Motion for Leave and accompanying Response, deny the Petition, and grant the Application.

¹ Fourteen Hundred, Inc. is a non-profit corporation established and operated by local members of the Knights of Columbus, a Catholic men's fraternal organization. In its pleadings, Fourteen Hundred refers to itself as "the Knights" while New Testament refers to it as "Fourteen Hundred." Because "Fourteen Hundred, Inc." is the entity listed as the applicant, we will use that name in this letter.

² Fourteen Hundred filed an Opposition to Petition to Deny ("Opposition") on August 13, 2008. New Testament then filed a Reply on August 29, 2008. Fourteen Hundred subsequently filed a "Motion to Strike, Petition for Leave to Supplement, and Supplemental Opposition to Petition to Deny" ("Motion") on October 28, 2008. New Testament filed a Motion for Leave and an accompanying Response on November 17, 2008. Fourteen Hundred filed an Opposition and Reply ("Opposition and Reply") on December 12, 2008.

Background. Fourteen Hundred filed the Application on October 22, 2007. In its Petition, New Testament argues that Fourteen Hundred’s Application must be dismissed for failure to propose a directional antenna pattern in compliance with Section 73.316 of the Commission’s Rules (the “Rules”); it also argues that the Application proposes “a highly unusual directional pattern that cannot be implemented.”³ Additionally, New Testament argues that expansion of the directional pattern in any direction will cause impermissible interference and any reduction of power would likely leave Evans City without service from the proposed facility.⁴ In its Opposition, Fourteen Hundred argues that the proposed pattern complies with Section 73.316 of the Rules and that “[a]n opinion that a pattern may prove difficult to achieve is not a colorable argument here.”⁵ It also provides a statement from its technical consultant that adequate coverage of Evans City could be achieved with a 36% reduction in effective radiated power, should that prove necessary.⁶ At the same time it filed its Opposition, Fourteen Hundred submitted an amendment to the Application, explaining that “in an abundance of caution, [Fourteen Hundred is] submitting an amendment to further clarify that its proposal is grantable, in part by slightly adjusting the proposed coverage pattern.”⁷

In its Reply, New Testament argues that Fourteen Hundred’s new pattern would not provide sufficient service to the community of license and that Fourteen Hundred fails to show that even the new antenna pattern could be implemented. New Testament further argues, for the first time, that Fourteen Hundred’s Application should be dismissed for failure to obtain a reasonable assurance that the site specified in the Application was available for its use.

In its Motion, Fourteen Hundred requests that the Commission strike New Testament’s site availability argument on the grounds that it was improperly raised for the first time in the Reply. It also states that it “has provided sufficient evidence that the proposed facility will adequately cover Evans City.”⁸ Fourteen Hundred also requests that it be permitted to supplement its Opposition to respond to the site availability argument raised by New Testament. In its Response, New Testament argues that Fourteen Hundred’s Motion was flawed in that the Rules prohibit the combining of pleadings into one filing and should therefore be dismissed.

Discussion. Both parties have raised procedural objections to the opposing party’s pleadings. We address those first before addressing the substantive matters raised in the pleadings.

Site Availability Argument. New Testament first raised the site availability issue in its Reply, in which it argues that Fourteen Hundred’s application should be dismissed for failure to obtain a reasonable

³ Petition at 1-2.

⁴ Petition at 3.

⁵ Opposition at 2.

⁶ Id. at Declaration of Technical Consultant C. Michael Adkins.

⁷ Opposition at 3.

⁸ Motion at 4.

assurance of site availability. The Rules plainly limit replies to “to matters raised in the oppositions.”⁹ Accordingly, we have consistently stricken arguments where wholly new claims are raised for the first time in a reply pleading.¹⁰ We therefore decline to consider New Testament’s site availability argument on the ground that it was improperly raised.

Pleadings filed subsequent to the Reply. Fourteen Hundred’s Motion; New Testament’s Motion for Leave and Response; and Fourteen Hundred’s Opposition and Reply are unauthorized pleading and are subject to dismissal without consideration.¹¹ In light of our determination that New Testament’s site availability argument was procedurally improper, we will dismiss these pleadings.

Substantive Matters. Section 309(d)(1) of the Communications Act of 1934, as amended,¹² 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.¹³ 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.¹⁴ 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.¹⁵ 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(b). New Testament’s Petition first argues that the Commission should deny Fourteen Hundred’s Application because it violates Section 73.316(b) of the Rules.¹⁶ The Petition was accompanied by an Engineering Statement which claims that the proposed pattern violates Section

⁹ 47 C.F.R. § 1.45(c).

¹⁰ See, e.g., *New Jersey Public Broadcasting Authority*, Letter, 24 FCC Rcd 2835, 2838 (MB 2009). See also *Living Proof, Inc.*, Letter, 24 FCC Rcd 2382, 2386 (MB 2009) (declining to consider site availability argument when it was improperly raised for the first time in the Reply).

¹¹ See 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).

¹² 47 U.S.C. § 309(d)(1).

¹³ See, e.g., *Artistic Media Partners, Inc.*, Letter, 22 FCC Rcd 18676, 18676 (MB 2007).

¹⁴ See *id.*; *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

¹⁵ 47 U.S.C. § 309(d)(2).

¹⁶ 47 C.F.R. § 73.316(b)(2) (“[d]irectional antennas used to protect short-spaced stations pursuant to § 73.213 or § 73.215 of the rules, that have a radiation pattern which varies more than 2 dB per 10 degrees of azimuth will not be authorized”).

73.316(b)(2) by having 4 radials with more than 2 dB change and 10 radials with the maximum change permitted by the Rules.¹⁷ The Engineering Statement further states that, apart from violating Section 73.316(b)(2) of the Rules, it is unlikely such an antenna could be constructed.¹⁸ In its Opposition, Fourteen Hundred argues that the proposed pattern complies with the Rules, although it does not deny that the pattern would be difficult to implement. Fourteen Hundred argues that it should be afforded the opportunity to implement its proposed plan or amend it if necessary. Fourteen Hundred simultaneously submitted its first amendment to its Application, which modified its proposed coverage pattern.

The Media Bureau's staff has reviewed Fourteen Hundred's Application as amended and determined that New Testament's proffered analysis is incorrect and that the proposed pattern does not violate the Rules. Specifically, the staff has determined that the maximum rate of change does not exceed 2 dB at any point on the antenna pattern. Moreover, New Testament's claim that it is "unlikely" that such an antenna could be constructed amounts to speculation and does not raise a substantial and material question of fact.¹⁹ We therefore reject New Testament's allegations regarding Section 73.316 of the Rules.

Section 73.515. New Testament notes that Fourteen Hundred "claimed in its Opposition that the proposed facility will serve Evans City with the amended directional pattern."²⁰ New Testament responds that Fourteen Hundred's amended Application fails to comply with Section 73.515 of the Rules, which requires that a minimum field strength of 60 dBu be provided over at least 50% of the station's community of license.²¹ The Reply contains an engineering exhibit that purports to demonstrate that Fourteen Hundred's proposal does not provide adequate community coverage of Evans City. This exhibit uses the Longley-Rice contour prediction methodology. It concludes that Fourteen Hundred's proposed facility would not provide Evans City with the required community coverage due to substantial terrain blockage between the proposed tower site and the community of Evans City.

In 1997, the Commission clarified its guidelines for considering supplemental showings in the context of coverage of the community of license.²² In order for such showings to be considered, the following information must be included:

¹⁷ See Engineering Statement, attached to Petition. The radials identified in the table attached to the Engineering Statement as having a pattern change exceeding 2dB are along the 50, 190, 230 and 310 degree azimuths.

¹⁸ See July 29, 2008, Letter from ShivelyLabs, attached to Petition.

¹⁹ The performance of Fourteen Hundred's antenna will, of course, be evaluated if and when Fourteen Hundred files a covering license application for the facility.

²⁰ Reply at 3. In contrast to the site availability issue, this portion of the Reply addresses Fourteen Hundred's amended antenna proposal, which New Testament did not have a prior opportunity to address.

²¹ 47 C.F.R. § 73.515.

²² *Certain Minor Changes Without a Construction Permit*, Report and Order, 12 FCC Rcd 12371, 12401- 12403, ¶¶ 67-72) (1997) ("*Minor Changes R&O*").

- (1) an explanation of why use of a supplemental showing is warranted (*e.g.*, very flat, very rough, or anomalous terrain), and a showing how the terrain departs widely from the average terrain assumed for the F(50,50) propagation curves in 47 C.F.R. Section 73.333 for FM stations (*see* 47 C.F.R. Section 73.313(e));
- (2) a showing that the distance to the community of license as predicted by the supplemental method is at least 10% different than the distance predicted by the standard contour prediction method (47 C.F.R. Section 73.313(c));
- (3) a map showing community coverage contours predicted using both the standard and supplemental contour prediction methods;
- (4) a list of assumptions and an explanation of the method used in generating the supplemental analysis;
- (5) sample calculations using the supplemental procedure.

New Testament's exhibits fail to provide a map depicting contours, a list of assumptions used, and sample calculations as required by the *Minor Changes R&O*. To justify submission of a supplemental showing, New Testament must provide *all* of these required items; the Audio Division will not refer supplemental showings to the Commission's Office of Engineering and Technology for evaluation and verification without this information. On the basis of the information provided, New Testament has not demonstrated that use of a supplement showing is warranted. Therefore, it has failed to raise a substantial and material fact calling for further inquiry regarding the Application's compliance with Section 73.515 of the Rules.

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 Motion to Strike, Petition for Leave to Supplement, and Supplemental Opposition to Petition to Deny filed on October 28, 2008 by Fourteen Hundred, Inc.; the Motion for Leave and the Response filed on November 17, 2008 by New Testament Baptist Church of Butler; and the Opposition and Reply filed on December 12, 2008 by Fourteen Hundred, Inc. ARE DISMISSED.

IT IS FURTHER ORDERED that the Petition to Deny filed on July 30, 2008, by New Testament Baptist Church of Butler IS DENIED and the application of Fourteen Hundred, Inc. (File No. BNPED-20071022BNT) for a construction permit for a new NCE FM station in Evans City, Pennsylvania IS HEREBY GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: New Testament Baptist Church of Butler
Fourteen Hundred, Inc.