



Federal Communications Commission
Washington, D.C. 20554

May 4, 2009

DA 09-1003

In Reply Refer To:

1800B3-SS

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Rev. David P. McAfee
Trinity Baptist Church of Tucumcari
823 S. First Street
P.O. Box 667
Tucumcari, NM 88401

Dan J. Alpert, Esq.
2120 N. 21st Road
Arlington, VA 22201

Re: **NEW(FM), Tucumcari, NM**
Facility ID No. 174833
File No. BNPED-20071018AXG
Informal Objection

Dear Counsel and Rev. McAfee:

We have before us the above-referenced application of Iglesia Shekira ("Iglesia") for a construction permit for a new noncommercial educational ("NCE") FM station to serve Tucumcari, New Mexico (the "Application"). We also have before us a November 27, 2007, Informal Objection ("Objection") to the Application filed by Trinity Baptist Church of Tucumcari ("Trinity").¹ For the reasons set forth below, we deny the Objection and grant the Application.

Background. On October 18, 2007, Iglesia tendered its Application for a new NCE-FM station on Channel 213 at Tucumcari, New Mexico. On November 27, 2007, Trinity submitted the Objection alleging that the Application should not be granted because Iglesia violated the local public inspection and local notice requirements of Sections 73.3527 and 73.3580, respectively, of the Commission's Rules (the "Rules").² In the Opposition, Iglesia argues that the Objection constituted an unlawful *ex parte* communication because it was never served upon Iglesia or its attorney and that the Objection should be denied on its merits.³ In Reply, Trinity argues that Iglesia does not deny that it failed to comply with the requirements of Section 73.3527 and 73.3580. It also states that dismissal of the Application would permit Trinity to modify its outstanding construction permit⁴ to specify a preferred transmitter site.⁵

Discussion. Procedural Matter. In the Opposition, Iglesia claims that the Objection was not

¹ Iglesia filed an Opposition to the Objection on January 9, 2009, to which Trinity replied on January 27, 2009.

² 47 C.F.R. §§ 73.3527 and 73.3580.

³ The Opposition also contains a request, to the extent that one is necessary, for waiver of Section 73.3580 of the Rules.

⁴ File No. BNPED-20071018AHP (granted April 22, 2008).

⁵ Reply at 2.

served upon it or its attorney, and therefore, the Objection constituted a prohibited *ex parte* communication.⁶ The *ex parte* rules require service on all parties of filings addressing the merits or outcome of restricted proceedings, such as this one.⁷ While Iglesia does not state how or when it eventually received the Objection, it clearly did receive it. Although Trinity was required to serve Iglesia with a copy of the Objection at the time of filing,⁸ we note that Iglesia was not prejudiced by Trinity's lack of service. Iglesia did receive the Objection, and we are considering its Opposition to that pleading. While we caution Trinity to conform to these requirements in the future, we find no basis for further action on this issue.⁹

Substantive Matters. Informal objections must, pursuant to Section 309(e) of the Communications Act of 1934, as amended (“Act”),¹⁰ provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the Application would be *prima facie* inconsistent with Section 309(a) of the Act,¹¹ which governs our evaluation of new construction permit applications. Specifically, Section 309(a) provides that we are to grant an application if, upon consideration of the application and pleadings and other such matters of which we may officially take notice, we find that the public interest, convenience, and necessity will be served by the granting of such application. If, however, the applicant fails to meet that standard, the Commission may deny the application after notice and opportunity for a hearing under Section 309(e) of the Act.

In the Objection, Trinity alleges that Iglesia failed to provide public access to the Application, in violation of Section 73.3527 of the Rules.¹² However, Trinity has not provided any details as to how Iglesia denied Trinity – or anyone else -- access to the Application. In fact, the record indicates that an e-mail request sent by Trinity to Iglesia on November 15, 2007, seeking public access to the Application was answered within four hours by an e-mail from Iglesia to Trinity stating that the Application could be viewed by the public “at the Tucumcari Public Library”¹³ in accordance with the Rules.¹⁴ Accordingly, this allegation is without merit.

Next, Trinity contends, again without providing any details, that Iglesia violated Section 73.3580

⁶ 47 C.F.R. § 1.47(g) lists the requirements for valid proof of service.

⁷ See 47 C.F.R. §§ 1.1202(b), 1.1208.

⁸ See 47 C.F.R. § 1.47.

⁹ See *John F. Garziglia, Esq., and Donald E. Martin, Esq.*, Letter, 22 FCC Rcd 8409, 8414 (MB 2007) (admonishing NCE licensee, not represented by FCC counsel, for apparent violation of the *ex parte* Rules due to ignorance of the Rules).

¹⁰ 47 U.S.C. § 309(e).

¹¹ 47 U.S.C. § 309(a). See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff'd sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *rehearing denied* (Sep. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (informal objections, like petitions to deny, must contain adequate and specific factual allegations sufficient to warrant the relief requested).

¹² Objection at 1.

¹³ See Opposition at Attachments 3, 4, and 5.

¹⁴ See 47 C.F.R. § 73.3527(b) which states in pertinent part: “An applicant for a new station . . . shall maintain its file at an accessible place in the proposed community of license”

of the Rules by not providing local public notice of the filing of the Application.¹⁵ In its Opposition, Iglesia acknowledges that although public notice should have been completed by November 18, 2007, it did not occur until “November 21, 24, 28 and December 1, 2007.”¹⁶ The record indicates that local public notice of the filing of the Application was published in the Quay [New Mexico] County Sun, the local Tuumcari daily newspaper, on the aforementioned dates.¹⁷ The Commission requires one form of local public notice of a pending application for an authorization to construct a new broadcast station -- publication in a local newspaper.¹⁸ The Commission also requires that local public notice be completed “within 30 days of the tendering of the application.”¹⁹ Although Iglesia was approximately two weeks tardy in meeting the requirements of the rule, we find that its twice-weekly publication notices provided substantial compliance with the rule.²⁰ Accordingly, Trinity fails to raise a substantial and material question on this issue warranting further consideration.

Conclusion/Actions. Based on the record before us, we conclude that Iglesia is qualified to hold an NCE-FM authorization and grant of the Application would serve the public interest, convenience and necessity. The terms of the grant will be made part of the authorization issued to this applicant.

Accordingly, IT IS ORDERED that the unsigned Informal Objection filed by Trinity Baptist Church of Tuumcari against the application of Iglesia Shekira, IS DENIED. IT IS FURTHER ORDERED, that the application of Iglesia Shekira (File No. BNPED-20071018AXG) for a new noncommercial educational FM station at Tuumcari, New Mexico, IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Iglesia Shekira

¹⁵ Objection at 1.

¹⁶ Opposition at 2.

¹⁷ See Opposition at Attachments 1 and 2.

¹⁸ See 47 C.F.R. § 73.3580(c)(1).

¹⁹ See 47 C.F.R. § 73.3580(c).

²⁰ See, e.g., *John Svadbik, et al.*, Letter, 23 FCC Rcd 5837, 5839 (MB 2008); *Timothy Welch, Esq.*, Letter, 21 FCC Rcd 692 (MB 2006); *WHDH-AM, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 4329 (1991) (late airing of broadcast notices of assignment application “substantially complied” with Section 73.3580).