

Before
Federal Communications Commission
Washington, D.C. 20054

In re Applications of)
)
MARRI BROADCASTING, L.P.) File No. BPCT-960718KQ
) Fac. ID No. 83270
and)
)
ANTHONY J. FANT) File No. BPCT-961119KI
) Fac. ID No. 84818
For a Construction Permit for a New)
Television Station on Channel 43,)
Charlotte Amalie, St. Thomas USVI)

MEMORANDUM OPINION AND ORDER

Adopted: May 15, 2001

Released: May 17, 2001

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it for consideration: (i) the above-captioned mutually exclusive applications of Marri Broadcasting, L.P. (“Marri”) and Anthony J. Fant (“Fant”) for a construction permit for a new commercial television station on Channel 43 in Charlotte Amalie, St. Thomas, Virgin Islands; (ii) a Joint Request for Approval of Settlement Agreement filed by Marri and Fant; (iii) Marri’s request to operate the station as a satellite pursuant to the exception to the duopoly prohibition for satellite operation as set forth in Note 5 of Section 73.555 of the Commission’s rules and; (iv) a petition to deny filed by Sylvester H. Julien, J.D.

Marri-Fant Settlement Agreement

2. On August 20, 1999, the applicants filed a joint request for approval of a settlement agreement. Pursuant to the settlement agreement, the application of Marri will be granted. In addition, Fant has requested that the Commission dismiss his application with prejudice, and in exchange Marri will reimburse Fant for his legitimate and prudent expenses. The proposed settlement complies with the requirements of Section 73.3525 of the Commission’s rules. The applicants have submitted declarations stating that their applications were not filed for the purpose of reaching or carrying out this agreement, and that they have not received or promised any consideration or reimbursement of expenses in excess of applicants’ legitimate and prudent expenses. Furthermore, Fant has documented legitimate and prudent expenses in the amount of \$10,635.12. We, therefore, find that the settlement is in the public interest.

3. Marri is under common ownership with Alpha Broadcasting Corporation (“Alpha”), the licensee of station WSVI(TV), Channel 8 (IND) Christiansted, St. Croix, Virgin Islands. Channel 43, Charlotte Amalie and WSVI(TV), St. Croix are both located in the Virgin Islands, which operates as the functional equivalent of a market. However, Marri requests to operate the station as a satellite pursuant to the exception to the duopoly prohibition for satellite operations as set forth in Note 5 of Section 73.555 of the Commission’s rules.

Request for Satellite Status

4. The Commission’s television satellite policy, as set forth in *Television Satellite Stations*, 6 FCC Rcd 4212 (1991) (subsequent citations omitted), provides that an applicant for satellite status is entitled to a presumption that the proposed satellite operation is in the public interest if it meets the following three criteria: (1) there is no City Grade overlap between the parent and the satellite; (2) the proposed satellite would provide service to an underserved area; and (3) no alternative operator is ready and able to construct or to purchase and operate the satellite as a full-service station. If an applicant does not qualify for the presumption, the Commission will evaluate the proposal on an *ad hoc* basis, and grant the application if there are compelling circumstances that warrant approval. *Id.* at 4214.

5. As to the first criterion, Marri submits an engineering study which demonstrates that although the City Grade contour of Channel 43 will overlap that of WSVI(TV), the overlap will occur entirely over water. Thus, there is no population in the overlap area and we find under these special circumstances that Marri has satisfied the first prong of the presumptive satellite standard. Under the second criterion, an area is deemed underserved if, under the “transmission test,” there are two or fewer full-service stations already licensed to the proposed satellite community of license, or, under the “reception test,” 25 percent or more of the area within the proposed satellite’s Grade B contour, but outside the parent’s Grade B contour, receives four or fewer services, not including the proposed satellite service. *Television Satellite Stations*, 6 FCC Rcd at 4215. Here, Marri demonstrates that Channel 43 meets the transmission test, because only two stations are authorized to serve Charlotte Amalie, WTJX-TV, a noncommercial educational station, and WVXF(TV). We agree with Marri that Channel 43 provides service to an underserved community, thereby meeting the second prong of the presumptive criterion.

6. With respect to the third criterion, an applicant must show that no alternative operator is ready and able to construct, or to purchase and operate, the proposed satellite as a full-service station. 6 FCC Rcd at 4215. An applicant seeking satellite status for an existing television station would typically satisfy the third criterion with evidence to demonstrate its inability to sell the station. In this case, however, where the applicant is applying to construct a new station, alternative economic showings, such as a history of television failures in the market, are acceptable. 6 FCC Rcd at 4215. Such factors would ensure that there is an economic justification for the television satellite operation. *Id.*

7. In support of its satellite request, Marri first points out that Channel 43 was assigned to Charlotte Amalie in 1965, but remained vacant for 31 years. Marri also submits a statement from James W. Blackburn, Chairman of Blackburn & Company, Inc., a media brokerage and appraisal firm. Blackburn contends that “Channel 43 could not survive economically as a full-service station.” As described by Blackburn, the US Virgin Islands is an unranked and unrated television market. Consequently, Blackburn explains that stations are dependent almost exclusively on local

sales revenue. Further, Blackburn asserts that the market is geographically fragmented, sparsely populated, and subject to economic downturns, with tourism and the United States government being the main employers. Blackburn states that over the years the only television operations with any profits have been WBNB, Channel 10, on St. Thomas and WSVI-TV on St. Croix. However, Blackburn points out that WBNB was destroyed in 1989 by Hurricane Hugo and was never rebuilt, and the Commission subsequently cancelled the license. According to Blackburn, there has been no operational commercial television station on St. Thomas since 1989, other than WVXF(TV), which has never been on the air consistently. Based on the market characteristics of the US Virgin Islands, Blackburn concludes that he does not think that there would be any market whatsoever for the sale of Channel 43 as a full service station on St. Thomas.

8. Based on the applicant's representations, we find that the market fragmentation, sparse population and lack of economic base in the US Virgin Islands are significant factors warranting approval of Marri's request for satellite status. We are persuaded by Marri's assertion that operation of Channel 43 would not be viable as a stand-alone facility. As the Commission stated in *Sidney T. Warner*, 3 FCC Rcd 4034 (1988), "[i]n the past, we have authorized satellite stations . . . as a means of providing television service to small communities having an insufficient economic base to support a full-service television operation." (footnote omitted). *See also*, *Milton S. Maltz*, 13 FCC Rcd 15527 (1998) ("[T]he record strongly suggests that [the] . . . community of license . . . lacks the population and economic base to sustain full-service operations.") We conclude that Marri has satisfied the third criterion, and that the proposed operation of Channel 43 as a satellite would be in the public interest.

Petition to Deny

9. We next address a petition to deny filed by Sylvester H. Julien, J.D. ("Julien"), a resident of St. Croix, on November 18, 1996. As a preliminary matter, we note that Julien's petition is procedurally defective, because it is not supported by an affidavit of personal knowledge of the facts alleged. Section 309(d)(1) of the Communications Act of 1934, as amended, and Section 73.3584 of the Commission's rules, require that petitions to deny be supported by affidavits or declarations under penalty of perjury from persons with personal knowledge of the facts set forth in the petition. Therefore, we will dismiss the petition and treat it as an informal objection pursuant to Section 73.3587 of the Commission's rules.

10. Julien alleges that Marri failed to publish local notice of its application as required by Section 73.3580 of the Commission's rules. Julien asserts that local notice was not published in either of the two daily newspapers located in the Virgin Islands, *The St. Croix Avis* or *The Virgin Islands Daily News*. Julien further states that he only became aware of Marri's pending application while perusing the Internet website of Broadcasting and Cable Magazine. He argues that by failing to publish the required notice, Marri has demonstrated a clear intention to violate the law, and has made an effort to significantly reduce the likelihood of public comment, competing applications or petitions to deny. He also argues that Marri made a willful false statement on its application, regarding compliance with the publishing requirement, which constitutes a violation of criminal law as codified in Title 18 U.S.C. § 1001.

11. In opposition, Marri submitted a Declaration from its president, David P. Lampel, stating that around July 23, 1996, he directed an employee of Alpha, Marri's sister company, to place the required public notice. It was to be published in *The Virgin Islands Business Journal*, a

weekly newspaper published in Charlotte Amalie. Lampel indicates, however, that subsequent attempts to confirm the placement of the advertisement have been rendered impossible, as the newspaper has ceased publication and is no longer in business.¹ Lampel further states that he did not receive a copy of Julien's petition, and that he only became aware of it on October 1, 1999, when a Commission staff member notified his counsel. Upon receiving a copy of the filing, Lampel asserts that he instructed an employee of Alpha to place appropriate local notice of the application in the Charlotte Amalie edition of *The Virgin Islands Daily News*.²

12. We find Julien's objection to Marri's application due to noncompliance with the public notice requirement to be unavailing. Because Julien does not refute Lampel's claim that such notice was published in the weekly paper, and the newspaper is no longer in business, we will accept Lampel's declaration as uncontroverted. However, Marri's initial publication in a weekly newspaper was incorrect, because the Commission's rules required publication of local notice in a daily newspaper, and there were two daily papers located in the Virgin Islands. 47 C.F.R. § 73.3580(c). However, this sole defect does not warrant dismissal of the application. To the contrary, in cases where an applicant has failed to publish or improperly published the required local notice, the Commission generally requires the applicant to correctly republish the local notice and advise the Commission when it has done so.³ Consistent with this policy, Marri has informed the Commission that it has properly republished notice of its application in a daily newspaper in Charlotte Amalie.

13. We are cognizant that Marri is correcting its defective publication some time after its application was filed. However, Marri explains that because it was not served with a copy of the petition, it did not become aware of its defective notice until recently. In view of the fact that Marri made immediate efforts to remedy this deficiency once notified, the totality of these circumstances warrant excusal of Marri's untimely republication of local notice. Moreover, the Commission published a public notice announcing acceptance of the application on October 3, 1996. The Commission has stated that, "Of primary importance among our public notice requirements is the Commission's own issuance of a public notice, a process specified by statute."⁴ In *WHDM-AM, Inc.*, 6 FCC Rcd 4329 (1991), the Commission declared that:

While our rules regarding local public notice are intended to more fully assure that the local community is apprised of the filing of an application, an applicant's failure to

¹ Alpha, the licensee of Station WSVI(TV) St. Croix, Virgin Islands, had an ongoing advertising trade agreement with the Virgin Islands Business Journal, and the publication of local notice is believed to have been placed pursuant to that agreement. However, Lampel states that neither Alpha nor Marri received a certificate of publication from the newspaper.

² Lampel notes that local notice of the application was published on November 1, 3, 4, 5, 8, & 10 of 1999.

³ See, e.g., *Voice of Calvary Educational Ministries, Inc.*, 4 FCC Rcd 1203 (1989) (where one broadcast applicant failed to publish required notice and the other mutually exclusive applicant failed to include all required information in its notice, both applicants required to correctly publish notice and inform the Commission when they have done so); see also, *Helen Broadcasting Company Limited Partnership*, 5 FCC Rcd 2829 (1990).

⁴ *In re Application of Northwest Broadcasting, Inc.*, 12 FCC Rcd 3289 (1997).

comply with the requirements of the rule in a timely fashion does not invalidate the public notice issued by the Commission pursuant to statute.

See 47 U.S.C. § 309(b). Indeed, Julien became aware of Marri's application from a trade press article based on the Commission's public notice. Therefore, it does not appear that the public has been prejudiced by Marri's defective notice and, in fact, Julien filed a timely objection. In addition, Anthony J. Fant filed a timely mutually exclusive application within the 30-day statutory period after the Commission's public notice.

14. With regard to Julien's argument that Marri's failure to publish the required notice demonstrates a clear intention to violate the law, and constitutes a willful false statement on its broadcast application, we also find these arguments meritless. Julien provides no evidence of Marri's "intention" to violate the law or to make a willful false statement besides the obvious fact that Marri failed to publish the required notice. This allegation is not a specific fact, but an inference, and it is well settled that a dispute over the proper inferences to be drawn from agreed-upon facts is not sufficient to support a petition to deny. *See California Public Broadcasting Forum v. FCC*, 752 F.2d 670 (D.C. Cir. 1985). Moreover, in *Ojeda Broadcasting*, 8 FCC Rcd 1648 (1993), the Commission rejected the argument that an applicant "intended" to avoid its obligation to comply with Section 73.3580, where the applicant certified compliance with its broadcast application but failed to publish local notice within 30 days of tendering of the application. The Commission concluded that the applicant's publication of local notice after the 30-day time period was not a disqualifying defect. *Id.* Similarly, in this case Marri has not only properly republished local notice of its application, but has also provided a reasonable explanation for the substantial delay in correcting its prior publication error. In view of the foregoing, we find that Julien has failed to raise a substantial and material question of fact warranting further inquiry.

Conclusion

15. ACCORDINGLY, IT IS ORDERED THAT, the petition to deny filed by Sylvester H. Julien, J.D. is dismissed, and when considered as an informal objection, IS DENIED.

16. IT IS FURTHER ORDERED, that the request of Marri Broadcasting L.P. to operate new Channel 43 as a satellite of WSVI(TV) pursuant to the satellite exception to the duopoly rule, Note 5 to 47 C.F.R. § 73.3555, IS GRANTED.

17. IT IS FURTHER ORDERED, that the settlement agreement between Marri and Fant IS APPROVED.

18. IT IS FURTHER ORDERED, that the application of Anthony J. Fant (BPCT-961119KI) IS DISMISSED, subject to the condition that payments to Fant do not exceed \$10,635.12.

19. IT IS FURTHER ORDERED, that having found the applicants qualified in all respects, the application of Marri Broadcasting, LP (BPCT-960718KQ) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Services Division
Mass Media Bureau