



Federal Communications Commission
Washington, D.C. 20554

July 7, 2005

DA 05-1939
In Reply Refer To:
1800B3-ALL

John Garziglia, Esquire
Peter Gutmann, Esquire
Womble Carlyle Sandridge & Rice, PLLC
1401 I Street NW
Seventh Floor
Washington, DC 20005

John S. Neely, Esquire
Miller and Neely, PC
6900 Wisconsin Avenue
Suite 704
Bethesda, MD 20815

In re: **WKVE(FM), Semora, NC**
Facility ID No. 26296
Southern Entertainment Corporation
Application for Renewal of License
File No. BRH-20030801AJL

Dear Counsel,

We have before us an Application for Renewal of the License of WKVE(FM) ("Application") filed by Southern Entertainment Corporation ("Southern") on August 1, 2003.¹ Also before us is a Petition to Deny the Application ("Petition"),² filed by Piedmont Broadcasting Corporation ("Piedmont") on November 3, 2003. Southern filed an Opposition to the Petition ("Opposition") on December 3, 2003.³

¹ File No. BRH-20030801AJL.

² Section 73.3516 of the Commission's rules states that a petition to deny an application for renewal of a license will be considered timely filed if it is filed by the end of the first day of the last full calendar month of the expiring license term. 47 C.F.R. § 73.3516(e). Since the first day of the last month of the license term fell on a nonbusiness day, Piedmont's Petition was timely filed. *Id.* Moreover, Piedmont's stations are in competition with WKVE(FM), and competitors have standing as parties in interest. *Waterman Broadcasting*, 17 FCC Rcd 15742, 15744 n.2 (2002), citing *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940). For the above reasons, Piedmont has standing as a party in interest to file a Petition to Deny.

³ Piedmont filed a Motion for Extension of Time ("Motion") to file a Reply to the Opposition on December 19, 2003. Southern filed an Opposition to the Motion on December 24, 2003. Piedmont, claiming that it received no response regarding the Motion from the staff, filed its Reply to Opposition on January 6, 2004. Southern thereafter filed a Motion for Leave to File a Response to Reply to Opposition ("Motion for Leave") on January 22, 2004, and submitted a Response to Reply to Opposition along with its Motion for Leave. Piedmont then filed a Motion for

Southern's Application was filed on August 1, 2003.⁴ In its Petition, Piedmont challenges the Application, making three claims that are warranting consideration:⁵ 1) Southern failed to file a Biennial Ownership Report in 2003; 2) Southern failed to properly maintain its public inspection file; and 3) Southern changed its answer to Section III, Question 3 of its Application in an amendment in order to demonstrate compliance with the Commission's public inspection file rules, even though WVKE(FM)'s file was not in fact compliant with the rules.

Discussion. Procedural Issues. Piedmont's Motion sought additional time to file its Reply to Opposition to Petition to Deny because one of the critical pieces of information – Southern's purported 2003 Ownership Report – had only recently become publicly available,⁶ and Piedmont requested additional time to investigate the pleading's accuracy. Southern opposed the Motion, arguing that assuming *arguendo* the Ownership Report was only publicly available as of November 17, Piedmont still had more than 30 days to review the Report and prepare its Reply and should not be granted additional time.

We will grant Piedmont's motion and accept its Reply. Pursuant to Section 1.45 of the Commission's rules, Southern's Opposition was due on November 13, 2003, and Piedmont's Reply would be due on November 18, 2003.⁷ Southern did not file its opposition until December 3, 2003 – Commission records do not reveal a motion for extension of time from Southern -- and Piedmont filed its Motion more than two weeks later, on December 19, 2003, not submitting the actual Reply until January 6, 2004. Southern is correct that requests for extension of time are not routinely granted,⁸ and Piedmont may have had sufficient opportunity to examine WKVE(FM)'s November 2003 ownership report after Southern's opposition alerted it of that filing. However, in order to develop a fuller understanding of the record, and to attempt to resolve finally the longstanding dispute regarding WKVE(FM), we will accept and consider both Southern's and Piedmont's untimely responsive pleadings.⁹ However, in light of our action below, we do not

Leave to File Opposition to Response to Reply to Opposition on February 4, 2004, submitting the referenced pleading simultaneously.

⁴ According to Section 73.3539 of the Commission's rules, an application for renewal of a license must be filed the first day of the fourth full month prior to the expiration of the license. Section 73.1020 of the rules states that North Carolina stations' licenses expire on December 1, 2003. Therefore, Southern's August 1, 2003, filing was timely.

⁵ Piedmont makes other claims in its Petition: 1) WKVE(FM) has no license to renew because the permit underlying the license is invalid; 2) the Chief, Audio Division, previously erred in finding Southern to be an innocent party that would be injured if the applications filed by Southern's predecessor, HarryCo, were denied and HarryCo's permits were canceled; 3) Southern was not entitled to the equitable relief granted by the Chief, as it held a 24% interest in HarryCo and had "unclean hands" as a result of this connection with HarryCo; and 4) Southern has unresolved character issues, including questionable accounting by its predecessor, involvement in an allegedly forged lease, and manipulation of the dates on letters from community members attesting to WKVE(FM)'s service to the community of Semora. As all of these issues have been considered and resolved by the Commission, they will not be further examined in this letter. *Applications for Station WKVE, Semora, North Carolina*, 18 FCC RCD 23411 (2003).

⁶ Piedmont states that apparently the 2003 ownership report became available only on November 17, 2003, after Piedmont filed its Petition to Deny.

⁷ Under Section 1.4(h) of the rules, Piedmont would be accorded three additional days – until November 21, 2003 -- to file its Reply.

⁸ 47 C.F.R. § 1.46.

⁹ *Family Vision Ministries, Inc.*, 18 FCC Rcd 1418 n. 2 (2003).

believe that the public interest warrants consideration of any pleadings beyond Piedmont's reply. We will therefore deny the Southern and Piedmont motions and dismiss Southern's "Response to Reply to Opposition to Petition to Deny and Piedmont's "Opposition to Response to Reply to Opposition to Petition to Deny" as unauthorized.¹⁰

Southern's 2003 Biennial Ownership Report. In its Petition, Piedmont claims that Southern never filed a Biennial Ownership Report for 2003 ("2003 Report") with the Commission. However, the 2003 Report was filed on August 1, 2003, in accordance with the requirements of Section 73.3615 of the Commission's rules.¹¹ The 2003 Report was correctly filed with the Commission, and Piedmont's claim regarding the 2003 Report is without merit.¹²

In its Reply, Piedmont claims that the information contained in the 2003 Report is inaccurate. Piedmont claims that Sam Cooper, listed as a 50% shareholder and director of Southern in the 2003 Report, actually sold his entire ownership in Southern to James Hill in 1998; therefore, states Piedmont, Southern's 2003 ownership report is false,¹³ and it conceals an unauthorized transfer of control of station WKVE in violation of Section 310(d) of the Communications Act. Piedmont supports its claim with an affidavit from Frank Wimmer, Piedmont's Vice President, to the effect that he received a voicemail message from Sam Cooper at 4:13 p.m. on December 9, 2003 stating that he had "sold [his] interest in the Southern Entertainment Corporation to Jim Hill¹⁴ and an application was filed with the FCC after that."¹⁵ Mr. Wimmer also recounts several subsequent phone calls with Mr. Cooper "during which he

¹⁰ In its Reply, Piedmont claims that the representation of the owners of Southern's shares made in the 2003 Report is incorrect. Piedmont's Reply to the Opposition at 3-4. Section 1.45(c) of the Commission's rules states that "[t]he reply shall be limited to matters raised in the opposition[.]..." We believe that Piedmont's argument is sufficiently related to matters raised in Southern's Opposition – *i.e.*, that the allegedly missing 2003 Ownership Report for WKVE had in fact been filed – that the charge does not constitute "new matter" inappropriately raised in a Reply pleading.

On the other hand, the public interest is also served by the rejection of the further, unauthorized pleadings, as consideration of the numerous later pleadings in this case would unduly hinder the process of resolving the longstanding dispute here. Expedient Commission proceedings are in the public interest. *1998 Biennial Regulatory Review*, 14 FCC Rcd 17525, 17544 (1999). *See also Amendment of Part 25 of the Commission's Rules*, 12 FCC Rcd 915, 916 (1997).

¹¹ File No. BOA-20030801AJJ. 47 C.F.R. § 73.3615 requires ownership reports to be filed on the date the license renewal application is due and biannually on the anniversary date of the license renewal thereafter. Therefore, Southern's ownership report was timely filed.

¹² In its Petition, Piedmont only alleges that this Report does not exist; no representation-of-ownership claim was made. As stated in Note 5 of this letter, allegations relating to deception in the 2003 Report or the lack of ownership reports from 1999 and 2001 were made by Piedmont only in its Reply.

¹³ Because Mr. Cooper had no interest in Southern since 1998, Piedmont speculates that, had biennial ownership reports been filed for 1999 and 2001, they also would have been false.

¹⁴ Jim Hill is listed in the 2003 Report as Southern's other 50% stockholder, President, and Director.

¹⁵ Piedmont Reply, Declaration Under Penalty of Perjury of Frank Wimmer.

[Mr. Cooper] said that he was still trying to find the papers demonstrating that he had sold his interest to Mr. Hill in 1998.”¹⁶

The evidence proffered by Piedmont in support of its claim that Mr. Cooper sold his 50% interest in Southern in 1998 is inadmissible, and we reject it. Initially, Mr. Wimmer’s affidavit recounting a voice mail allegedly left by Mr. Cooper in December of 2003 must be rejected, as it is clearly not the “best evidence” of the content of that message. The best evidence rule provides that the original of a “writing, recording, or photograph” is required to prove the contents thereof.¹⁷ Additionally, Mr. Wimmer’s recounting his alleged subsequent conversations with Mr. Cooper constitute hearsay. Although hearsay that is relevant and material is admissible in administrative proceedings if it bears satisfactory indicia of reliability,¹⁸ the weight to be accorded it depends on its truthfulness, reasonableness, and credibility.¹⁹ A prime indicium of probity is whether the declarant is a disinterested witness.²⁰ Mr. Wimmer, Vice President of Piedmont, which has been involved in longstanding administrative litigation with the past and present owners of WKVE(FM), is not in any way a “disinterested witness.” His accounts of his alleged conversations with Mr. Cooper are properly excluded. In light of these conclusions, Piedmont has provided no authenticated evidence to support its claim that the 2003 Report was false or inaccurate. We therefore reject that argument, as well as the false certification and unauthorized transfer of control arguments based on the premise that the 2003 Report was false.

Public inspection file rule violation: Section 73.3526 of the Commission’s rules requires each commercial broadcast station to maintain a public inspection file containing materials related to the station’s operation.²¹ In its Petition, Piedmont claims that several items were missing from WKVE(FM)’s public inspection file when Mr. Wimmer went to view the file. Piedmont states that the file contained no ownership reports dated after 1995,²² no copy of the pending renewal application or any documentation related to pre-filing announcements, and no copy of “The Public and Broadcasting” procedural manual.²³ In its Opposition, Southern admits

¹⁶ *Id.*

¹⁷ Fed.R.Evid. 1002. *See, e.g., United States v. Morales-Madera*, 352 F. 3d 1, 9 (1st Cir. 2003) (best evidence rule requires production of the tape rather than transcript); *David N. Smith*, 34 F.C.C.2d 741, 742 ¶5 (1972). Additionally, although Mr. Wimmer’s statement appears to quote the voicemail message, this purported transcript of the tape is not authenticated and Southern provides no other indicia of validity or reliability.

¹⁸ *Echostar Communications Corporation v. FCC*, 292 F.3d 749 (D.C. Cir. 2002); *Johnson v. United States*, 628 F.2d 187 (D.C. Cir. 1980) (“*Johnson*”).

¹⁹ *See Johnson*, 628 F.2d at 190-91. *See also Wine Country Radio*, 11 FCC Rcd 2333, 2334 (1996) (“*Wine Country*”).

²⁰ *Johnson* and *Wine Country*, *id.*

²¹ 47 C.F.R. § 73.3526.

²² 47 C.F.R. § 73.3526 requires that only the most recent, complete ownership report be retained in the public inspection file. Therefore, this claim is without merit.

²³ Piedmont’s Petition at 7-8, Frank M. Wimmer’s Declaration Under Penalty of Perjury. 47 C.F.R. §§ 73.3526(e)(2), (5), and (8) require the above-referenced items, with the exception of the old ownership reports, to be in the station’s public inspection file.

that “The Public and Broadcasting” manual was missing from the public inspection file as of November 1, 2003, and claims that the manual has been replaced.²⁴

When lapses occur in the maintenance of the public inspection file, neither negligent behavior of station employees, nor subsequent remedial actions, excuse the rule violation.²⁵ Substantial compliance with Commission public inspection file requirements is not achieved by reconstruction at a later date.²⁶ However, an incomplete public inspection file does not necessarily raise substantial and material questions related to a license renewal application.²⁷ “In and of itself, a violation of the ‘public file’ rules should, on the surface, not be so repugnant as to require a severe sanction.”²⁸ Moreover, in its Opposition, Southern admits its failure and states that the problem has been corrected.²⁹

We emphasize that we do not in any way condone Southern’s noncompliance with our rules. In this case, however, Southern has admitted to the violation in its Opposition³⁰ and has corrected the violation. Given the specific violations (both admitted and alleged) and the fact that they do not appear willful, we do not find the problems with WKVE(FM)’s public inspection file to be of such significance as to deny the Application or to issue a forfeiture. In light of these facts, we believe that an admonishment is appropriate.³¹

Misrepresentation in Section III, Question 3 of Southern’s Amendment to its Application. Piedmont also claims that when Southern amended its Application on October 14, 2003, to change its answer to Section III, Question 3 of the renewal application, it misrepresented the completeness of its public inspection file within the amendment.³² Southern does not address the misrepresentation claim in its Opposition.

²⁴ Southern’s Opposition at 3. Southern also claims that the other allegedly missing documents were in the public inspection file but were not seen by Wimmer perhaps “because he failed to review the entire Public File carefully” and “rejected several offers [by WKVE staff] to assist in looking for a particular document.” *Id.* In its Reply, Piedmont does not press the issue of the WKVE(FM) public file’s deficiencies. We will, therefore, assume for the purposes of this decision that the WKVE(FM) public inspection file did not contain “The Public and Broadcasting” – the omission admitted by Southern -- and that the other material was present in the file.

²⁵ See *Padre Serra Communications, Inc.*, 14 FCC Rcd 9709, 9714 (1999), citing *Gaffney Broadcasting, Inc.*, 23 F.C.C.2d 912, 913 (1970) and *Eleven Ten Broadcasting Corp.*, 33 FCC 706 (1962).

²⁶ See *Pacifica Foundation*, 95 F.C.C.2d 750, 763 (1983).

²⁷ See *Letter to Kathleen N. Benfield, Glenn C. Benfield, and M. Anne Swanson, Esq.* 13 FCC Rcd 4102, 4106 (1997), citing *Kaye-Smith Enterprises*, 71 F.C.C.2d 1402, 1413 (1979), *aff’d* 90 F.C.C.2d 27 (1982).

²⁸ *Catoctin Broadcasting Corp. of New York*, 2 FCC Rcd 2126, 2137 (Rev.Bd. 1987), *aff’d* 4 FCC Rcd 2553, *recon. denied* 4 FCC Rcd 6312 (1989) (the applicant for renewal did not allow members of the public to view the public inspection file, among other serious file violations, and its renewal application was denied).

²⁹ Southern’s Opposition at 3, Bob Donaghey’s Statement.

³⁰ Southern also acknowledged its failure to properly maintain the file at appropriate times in a December 4, 2003, amendment to its Application.

³¹ See *Tabback Broadcasting Company*, 15 FCC Rcd 11899, 11900 (2000).

³² Piedmont’s Petition at 8-9.

However, on December 4, 2003, Southern again amended its Application. In this amendment, Southern admitted its failure to maintain a complete public inspection file, stating that “The Public and Broadcasting” manual was missing from the file at a point.³³ Southern also stated that it was “unable to certify with absolute certainty that the documentation required...has been placed in the station’s public inspection file at exactly the appropriate time over the entire license period.”³⁴ By filing an additional amendment to an amended application, an applicant in effect replaces its first amended application with a new amended application.³⁵ Accordingly, we will consider Southern’s renewal application in light of the December 2003 amendment. Therefore, Piedmont’s misrepresentation argument concerning the language in the original Application and the language in the October 2003 amendment is moot.

License Renewal Application. In evaluating an application for license renewal, the staff’s decision is governed by Section 309(k) of the Communications Act of 1934, as amended. This section provides that if, upon consideration of a renewal application and pleadings, we find that (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations of the Communications Act or the Commission’s Rules; and (3) there have been no violations that, taken together, show a pattern of abuse, we will grant the renewal application.³⁶

The Commission’s public inspection file rules serve the critical function of making available to the public important station information, including ownership, community service, “The Public and Broadcasting” manual, etc.³⁷ Though Southern admittedly failed to constantly maintain a copy of the manual in WKVE(FM)’s file, on balance, we do not find its violation of Section 73.3526 to be a serious violation. As to Piedmont’s other above-referenced allegations (no pending renewal and no pre-filing announcements), we remind Southern that its public inspection file should be organized so that the public can access and readily locate items in the file.³⁸ WKVE(FM)’s staff should also continue to make itself available for questions about the file, pursuant to Section 73.3526(c)(2)(iii) of the Commission’s rules.

Moreover, we find no evidence of violations that, when considered together, evidence a pattern of abuse.³⁹ Further, we find that WKVE(FM) served the public interest, convenience, and necessity during its past license term. We will therefore grant the Application below.

³³ Southern’s December 4, 2003, Amendment to Application for Renewal of the License of WKVE(FM), Exhibit 11.

³⁴ *Id.*

³⁵ See *Columbia Communications Corp.*, 16 FCC Rcd 10867, 10877 (2001).

³⁶ 47 U.S.C. § 309(k)(1). The renewal standard was amended to read as described by Section 204(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). See *Order*, “Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures),” 11 FCC Rcd 6363 (1996).

³⁷ 47 C.F.R. § 73.3526.

³⁸ 47 C.F.R. § 73.3526(c)(2)(iii).

³⁹ For example, we do not find that WKVE(FM)’s operation was “conducted in an exceedingly careless, inept and negligent manner and that the licensee is either incapable of correcting or unwilling to correct [any] operating deficiencies.” *Heart of the Black Hills Stations*, 32 F.C.C.2d 196, 198 (1971). “[T]he number, nature and extent” of

Conclusions/Actions. In light of the above discussion, Southern Entertainment Corporation IS HEREBY ADMONISHED for its apparent violation of 47 C.F.R. § 73.3526, and we caution the licensee to be and remain more diligent in the future regarding the completeness of WKVE(FM)'s public inspection file.

Additionally, Piedmont Broadcasting Corporation's December 19, 2003 Motion for Extension of Time IS GRANTED, and its January 6, 2004, Reply IS ACCEPTED to the extent indicated herein. Southern's January 22, 2004, Motion for Leave to File Response to Reply to Opposition to Petition to Deny IS DENIED, and its Response to Reply to Opposition to Petition to Deny IS DISMISSED. Similarly, Piedmont's February 4, 2004, Motion for Leave to File Opposition to Response to Reply to Opposition to Petition to Deny IS DENIED, and its Opposition to Response to Reply to Opposition to Petition to Deny IS DISMISSED. Finally, Piedmont's August 1, 2003, Petition to Deny the Application for Renewal of the License IS DENIED, and the Application of Southern Broadcasting Corporation (File No. BRH-20030801AJL) for Renewal of the License of WKVE(FM), Semora, North Carolina, IS GRANTED.

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau

cc: James K. Edmundson, Esquire
1818 N Street NW
Suite 700
Washington, DC 20036

Southern's violations also do not indicate that "the licensee cannot be relied upon to operate [WKVE(FM)] in the future in accordance with the requirements of its licenses and the Commission's Rules." *Id.* at 200.