



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

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In Reply Refer to:

1800B3-TSN

Mr. Benjamin L. Stratemeyer
2 Magnolia Drive
Centralia, Illinois 62801

Ms. Janet Jensen
1401 South 16th Street
Apartment K-4
Herrin, Illinois 62948

Re: FM Broadcast Auction No. 37
Janet Jensen
New(FM), La Center, Kentucky
Facility ID No. 164199
File No. BNPH-20050103AEZ

**Petition for Reconsideration of Grant of
Application for Construction Permit**

Dear Petitioner and Applicant:

We have before us a "Motion for Petition for Reconsideration" ("Petition") filed April 25, 2005, by Benjamin L. Stratemeyer ("Stratemeyer").¹ Stratemeyer seeks reconsideration of the March 24, 2005, decision of the Audio Division, Media Bureau ("Staff Decision")² denying Stratemeyer's petition to deny the application of Janet Jensen ("Jensen") for a new FM broadcast construction permit at La Center, Kentucky ("Jensen Application").³ Jensen was the winning bidder in FM Broadcast Auction No. 37 for the La Center permit.

¹ Also before us are Jensen's May 4, 2005, Opposition to Petition for Reconsideration, and Stratemeyer's May 13, 2005, Response to Opposition to Motion for Petition for Reconsideration.

² *Letter to Benjamin L. Stratemeyer, Samuel K. Stratemeyer, and Janet Jensen*, Decision, Ref. No. 1800B3-TSN (MB Mar. 24, 2005). Samuel K. Stratemeyer also filed a petition to deny, but does not seek reconsideration of the Staff Decision.

³ File No. BNPH-20050103AEZ. The Jensen Application was granted on October 7, 2005.

In his original petition to deny, Stratemeyer alleged that Jensen made a false certification in the Jensen Application, that she was not eligible for the claimed 35 percent new entrant bidding credit, and that she was not financially qualified to be a Commission licensee. More specifically, Stratemeyer intimated that the real party in interest behind the Jensen Application was an unspecified third party, possibly one of Jensen’s then-employers, Withers Broadcasting (“Withers”) or Dana Communications (“Dana”). In the Staff Decision, we found that Stratemeyer and his brother, Samuel K. Stratemeyer (who has not petitioned for reconsideration of the Staff Decision) failed to present evidence sufficient to raise a substantial and material question of fact as to Jensen’s qualifications or her entitlement to the bidding credit.⁴

Stratemeyer cites several reasons why he believes the Staff Decision was in error. At the outset, we note that the Petition suffers from most of the same defects as Stratemeyer’s original petition to deny. Specifically, Stratemeyer provides no facts in support of his speculative conclusions. Additionally, Stratemeyer makes several misstatements regarding the nature of the Staff Decision and Commission law and its rules.

For example, as Jensen points out in her Opposition, Stratemeyer mischaracterizes the Staff Decision as denying Stratemeyer’s petition to deny because his sponsoring affidavit was unsworn. This is not the case. Rather, Stratemeyer’s filing was defective because he failed to support the assertions in his affidavit with credible evidence. As we noted, “[a]lthough both the Stratemeyers, in their Responses to Jensen’s Consolidated Opposition, purport to verify their allegations ‘to the best of [their] knowledge, information, and belief,’ nowhere does either Stratemeyer set forth the source of that knowledge, information, and belief.”⁵ Stratemeyer insists, however, that merely stating his suspicions regarding Jensen should put the onus upon her to defend herself, and asserts that we “mistakenly put the burden of proof” on him to show that Jensen engaged in the behavior he suspects.⁶ We reject this mischaracterization of a petitioner’s pleading burden under the Communications Act of 1934, as amended, the Commission’s Rules, and applicable precedent. A petitioner must present sufficient evidence to raise a substantial and material question of fact as to whether grant of an application would be in the public interest.⁷ For the reasons stated in the Staff Decision, the evidence presented by Stratemeyer failed to rise to that level.

Stratemeyer also reiterates his contention that Jensen is ineligible for a new entrant bidding credit: first, because of her “ongoing business relationship with another broadcaster in the same market;”⁸ and second, because “[o]ther media entities have an interest in Jensen’s application.”⁹ Just as in his original

⁴ Staff Decision at 2-4.

⁵ *Id.* at 2.

⁶ Petition at 3. *See also* Petition at 4 (“In its ruling the FCC has put all burdens of investigation and proof beyond a reasonable doubt upon the petitioner.”).

⁷ *See* 47 U.S.C. § 309(d)(1) (“The petition shall contain specific allegations of fact sufficient to show that . . . grant of the application would be prima facie inconsistent with [Section 309(k)]. Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof.”); 47 C.F.R. § 73.3584(b); *Citizens for Jazz on WRVR v. F.C.C.*, 775 F.2d 392, 395 (D.C. Cir. 1985).

⁸ Petition at 8.

⁹ *Id.* at 3.

petition to deny, however, Stratemeyer misstates the law pertaining to what constitutes an attributable interest. In determining eligibility for the new entrant bidding credit, we look to whether an applicant holds attributable interests in any other media of mass communications.¹⁰ The standards for determining whether a party holds an attributable interest are set forth in Note 2 to Section 73.3555 of the Commission's Rules.¹¹ Yet Stratemeyer continues to insist that Jensen holds attributable interests in other broadcast licensees, or they in her facility, because she allegedly used her employer's facsimile machine,¹² contracted with professionals (attorneys and engineers) also used by her employers,¹³ and had, as mentioned previously, an "ongoing business relationship" with another broadcast licensee.¹⁴ These points were all addressed and rejected in the Staff Decision, precisely because the activities Stratemeyer alleges, even if true, do not confer in Jensen an attributable interest in a broadcast licensee.¹⁵ Moreover, Stratemeyer's conclusory statement that Jensen enjoys an "ongoing business relationship"¹⁶ is so vague as to be meaningless. He has presented no evidence that any business relationship between Jensen and any other party is ongoing, nor has he specified the party or parties (other than Dana and Withers) with whom she allegedly has such relationships, nor does he state the nature of that relationship beyond what has already been considered and rejected. Stratemeyer thus provides no reason to reconsider the Staff Decision on these grounds.

¹⁰ 47 C.F.R. § 73.5007(a).

¹¹ *Id.* § 73.3555, Note 2.

¹² In the case of Jensen's alleged use of her employer's fax machine, Stratemeyer states that such misuse of company resources evidences a "serious lack of character." Petition at 3. While Mr. Stratemeyer may choose to litigate against his own employees to the fullest extent of the law for personal use of company business equipment, the Commission has traditionally required more, such as a felony conviction or adjudicated criminal misconduct relating to fraud or broadcast-related activities, before finding an individual unqualified to be a Commission licensee. See *Policy Regarding Character Qualifications in Broadcast Licensing*, Policy Statement and Order, 5 FCC Rcd 3252 (1990), *modified*, 6 FCC Rcd 3448 (1991), *further modified*, 7 FCC Rcd 6564 (1992).

¹³ Petition at 6-8. Stratemeyer devotes substantial space to challenging the level of involvement of Dennis Kelly, an attorney who Stratemeyer alleges also represents Withers and Dana, in prosecuting Jensen's application. As established in Commission precedent cited in the Staff Decision, sharing of common counsel does not constitute conclusive evidence of a real party in interest issue (Staff Decision at 3 n.13). Even if Mr. Kelly had represented Jensen throughout the application process, the fact that he also represents her employers does not demonstrate that they have an attributable interest in her application. Further, and as pointed out by Jensen in her Opposition, Stratemeyer totally misapprehends the nature of the Commission's anti-collusion rule (47 C.F.R. § 1.2105(c)). See Petition at 6. The anti-collusion rule is designed to prevent collusion between auction participants bidding on the same permit(s) so as to preserve the integrity and competitiveness of the auction process. See *Mercury PCS II, LLC*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 17970, 17975 and n.18 (1997). See also *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, First Report and Order, 13 FCC Rcd 15920, 15981 (1998) ("The Commission adopted the anti-collusion rule to both prevent and to facilitate the detection of collusive conduct, thereby enhancing the competitiveness of the auction process and the post-auction market structure."). Neither Dana nor Withers participated in FM Auction No. 37, in which Jensen was the winning bidder for the La Center permit, thus the anti-collusion rule is not implicated.

¹⁴ *Id.* at 8.

¹⁵ Staff Decision at 2-3 and nn.11-13.

¹⁶ Petition at 8.

Stratemeyer likewise resurrects his argument that Jensen is not financially qualified. While conceding that Commission precedent holds that an auction applicant who timely makes all required payments is financially qualified, Stratemeyer argues that the Commission should not follow this precedent if “other information is available.”¹⁷ Once again, Stratemeyer states in conclusory fashion that there is a “lack of public documents filed at the Illinois Secretary of State to perfect loans and the four (4) Illinois county courthouses County Clerk’s offices in which Jensen lives, works, or was employed during the past ten years [sic].”¹⁸ As discussed in the Staff Decision, Stratemeyer fails to state with any particularity what efforts he made to determine whether records existed in those locations, and similarly fails to cite Illinois law setting forth what documents, if any, are required to be recorded by a lender or borrower and under what circumstances. He further contends that “FCC rules . . . say lack of records is not a defense,”¹⁹ without citing the “rules” to which he refers. Finally, Stratemeyer states that “[a]s a CPA, [he] used the practice of forensic accounting to prove Jensen has not financed her activity into broadcasting as she claimed,” but, again, provides no details as to the “forensic accounting” he performed, the documents he reviewed or attempted to locate, or even his special qualifications to perform such forensic analysis.

In his Petition, Stratemeyer introduces two new facts, neither of which was included in his original January 21, 2005, Petition to Deny, although it is unclear what relevance these facts have to the instant Petition. First, Stratemeyer states that Jensen did not give public notice of the location of her public inspection file, and second, he notes that “Jensen’s tower location is within a few miles of the U.S. Department of Energy’s Gaseous Diffusion Plant,” which, according to Stratemeyer, processes uranium for nuclear power plants.²⁰ To the extent these new facts are offered as further support for Stratemeyer’s contention that Jensen’s application be denied, he has failed to demonstrate that the facts occurred since his last opportunity to present them, or that they were unknown to him and could not have been learned through the exercise of reasonable diligence.²¹ Even if we were to consider these allegations, however, they suffer from the same defects that characterize Stratemeyer’s earlier petition. He does not, for example, provide any factual support for his public notice allegation, relying instead on a bare statement that notice was not published. Further, Stratemeyer fails to explain the relevance of Jensen’s tower’s proximity to the Department of Energy plant in question, nor how that proximity pertains to grant of the Jensen Application. Thus, we do not find that consideration of these new facts is necessary.²²

¹⁷ *Id.* at 5.

¹⁸ *Id.* at 5-6.

¹⁹ *Id.* at 5.

²⁰ *Id.* at 4-5.

²¹ *See* 47 C.F.R. §§ 1.106(b)(2), (c)(1).

²² 47 C.F.R. § 1.106(c)(2).

To summarize, in the Staff Decision we found that Stratemeyer had failed to produce evidence sufficient to raise a substantial and material question of fact regarding Jensen's qualifications as a Commission licensee, or regarding her qualifications to claim a new entrant auction bidding credit. We find that, in the instant Petition, Stratemeyer does nothing to rectify these deficiencies, instead reiterating his suspicions and conclusions but providing no credible evidence. While we accept that Stratemeyer disagrees with the Staff Decision, mere disagreement with staff action, without more, does not suffice to justify reconsideration of such action.²³

For the foregoing reasons, the Motion for Petition for Reconsideration IS DENIED.

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau

cc: Samuel K. Stratemeyer
Christopher D. Imlay, Esq.

²³ See *Aircom Consultants, Inc.*, Order on Reconsideration, 18 FCC Rcd 1806, 1808 and n.25 (WTB 2003) (citing and quoting *S&L Teen Hospital Shuttle*, Order on Reconsideration, 17 FCC Rcd 7899, 7900 (2002)) ("It is settled Commission policy that petitions for reconsideration are not to be used for the mere reargument of points previously advanced and rejected.").