



Federal Communications Commission
Washington, D.C. 20554

February 9, 2006

DA 06-320
In Reply Refer to:
1800B3-RDH

Keith E. Lamonica, Esq.
18 Mountain Road
N. Easton, MA 02356

In re: **KWTR(FM), Big Lake, TX**
Facility ID No. 86625
File No. BPH-20041014AFA

Petition for Denial

Dear Mr. Lamonica:

This letter concerns the captioned construction permit application filed by Woodrow M. Warren ("Warren") to modify station KWTR(FM), Big Lake, Texas. Also on file is a "Petition for Denial" filed by Keith E. Lamonica, Esq., on behalf of his client, Danny Ray Boyer ("Boyer"), on November 22, 2004 ("Petition").¹ For the reasons set forth below, we treat the Petition as a formal objection, deny it, and grant the application.

Background. On October 14, 2004, Warren filed the referenced application to modify the facilities of station KWTR(FM). That application proposed a "One Step Upgrade" seeking to increase tower height and the effective radiated power of the station, relocate the KWTR(FM) antenna system on a new tower, and change the class of station from Class A to Class C1. On November 22, 2004, Petitioner filed a "Petition for Denial" asserting that Warren had misrepresented both the availability of his proposed tower site and the date on which KWTR(FM) returned to the air pursuant to a Special Temporary Authorization ("STA").² In response, Warren filed a "Motion to Strike Petition for Denial" alleging that petitions to deny may not be filed against minor modification applications and that the Petition was otherwise procedurally defective. Warren maintains that he had reasonable assurance of the availability of the proposed tower site. Warren also contends that the station did, in fact, return to the air

¹ Additionally, on January 25, 2005, Warren filed a "Motion to Strike Petition for Denial." Two days later, on January 27, 2005, he filed a "Supplement to Motion to Strike Petition for Denial."

² The staff issued an STA on August 9, 2004, that granted Warren permission to operate KWTR with temporary facilities from a site other than the licensed site. The STA noted that KWTR had been off the air since August 18, 2003, and cautioned Warren that the station must return to the air on or before August 18, 2004, or its license would expire as a matter of law pursuant to Pub. Law No. 104-104, 110 Stat. 46, Section 403(1) (1996) and *Order, Silent Station Authorizations*, FCC 96-218 (released May 17, 1996). See Letter from Charles N. Miller, Engineer, Audio Division, Office of Broadcast License Policy, Media Bureau, to Marissa G. Repp, Esq. at page 2 (August 9, 2004); see also Section 312(g) of the Communications Act. Petitioner contends that Warren certified that the station had returned to the air on August 17, 2004, although, in fact, it did not return to the air until August 19, 2004.

on August 17, 2004, although circumstances beyond the licensee's control curtailed that return to service. Furthermore, Warren alleges that the "Petition for Denial" was filed as the consequence of his failure to sell KWTR(FM) to the Petitioner at an artificially deflated price. He states that prior to filing the Petition, Petitioner had demanded that Warren sell him the station for the price of an FM Class A station or else he would file the Petition.

Discussion. As an initial matter, we cannot consider the Boyer filing as a Petition to Deny. Petitions to Deny may not be filed with regard to applications that do not require local public notice to be filed pursuant to Section 73.3580 of the Commission's rules.³ Such local public notice is not required in the case of applications for minor change in the facilities of an authorized station.⁴ Accordingly, we will consider the pleading as an informal objection pursuant to Section 73.3587 of the Commission's rules.⁵

With respect to the substantive allegations contained in the Petition, we are satisfied that Warren has successfully rebutted the claims. He has presented an affidavit which clearly demonstrates that he possesses a reasonable assurance of site availability from the site owner.⁶ The affidavit states that the Affiant is the land owner, that he discussed with the applicant leasing his land for use as a site, that he was amenable to doing so on commercially reasonable lease terms, and agreed to notify Warren if he were to change his mind. This is all that is necessary to establish a reasonable assurance of site availability.⁷

We are also satisfied that Warren did return the station to the air with authorized facilities on August 17, 2004. Moreover, we find that, due to circumstances beyond his control, the station ceased transmitting and returned to the air on August 19, 2004. Warren states that preparations were made to return the station to the air pursuant to the STA on August 17, 2004, but that while working at the authorized site he was informed that the area was possibly still infested with "killer bees" which had just killed one man and hospitalized two others. The crew, he continues, was unwilling to install the antenna system during the day and, consequently, Warren himself erected a temporary metal pole at the proper height, installed the SWR 2-Bay antenna that evening, and returned the station to the air at 7:07 p.m. However, the broadcasts had to be discontinued at 10:30 p.m. so the site could be cleared for the electrical crew which, due to the bee problem, was not allowed by municipal officials to return to the site until August 19, 2004, when the tower was erected and regular broadcasts resumed.

³ See 47 C.F.R § 63.3584(a) ("[A] party in interest may file with the Commission a Petition to Deny any application...for which local notice pursuant to §73.3580 is required...").

⁴ See 47 C.F. R § 73.3580(a)(1).

⁵ Warren also raises issues concerning the lack of specification of an address for Petitioner Boyer, the lack of an executed certificate of service, *etc.* We need not reach these issues given our disposition, above, of the fundamental issue of whether the pleading can be treated as a Petition to Deny in the first instance irrespective of other possible infirmities in the document.

⁶ See Motion to Strike Petition for Denial, Exhibit B, "Statement of Harvey James Mikulik."

⁷ See, e.g., *National Innovative Programming Network, Inc. of the East Coast*, 2 FCC Rcd 5641, 5643 (1987). (All that is ordinarily necessary for reasonable assurance is some clear indication from the landowner that he is amenable to entering into a future arrangement with the applicant for use of the property as its transmitter site, on terms to be negotiated, and that he would give notice of any change of intention.)

In support of his allegation that the station did not return to the air on August 17, 2004, Petitioner provides an affidavit of Danny Everette Turnbow who claims to have monitored the frequency on which KWTR(FM) operates from Thursday, August 12, 2004, until Wednesday, September 13, 2004. He states that he “kept the receiver on, turned up to a high volume, 24 hours a day, seven days a week, until KWTR-FM began broadcasting on August 19, 2004,” at which time he reduced the volume.⁸ Warren, in his “Motion to Strike,” provides affidavits of three individuals apparently unconnected with the station, each of whom claim to have heard KWTR(FM) the evening of August 17, 2004.⁹ We find that Lamonica has neither proven by a preponderance of the evidence nor raised a substantial and material question of fact that KWTR(FM) did not briefly return to the air on August 17, 2004,¹⁰ using KWTR(FM)’s authorized facilities.¹¹

Finally, we are troubled by Warren’s allegations concerning the attempt by Petitioner and his attorney to obtain station KWTR(FM) for less than its fair market value in return for not filing the Petition. These allegations are supported by the e-mail from “Prof. Keith E. Lamonica,” on behalf of his client, to Warren in which he states that he would be filing a “Petition for Denial” against the subject application but that his client would be willing to discuss purchasing the station prior to the filing of the Petition. The Commission’s abuse of process policies are designed to prevent the filing of non-*bona fide* pleadings or applications for purposes of delay or extracting a profit from settlement.¹² The Commission has authorized its Bureaus to impose sanctions upon participants whose primary purpose is to abuse our processes.¹³ Given our concern for free participation in FCC proceedings, however, we only consider the possibility of such sanctions in egregious cases where the abusive nature of the pleadings is clear.¹⁴

⁸ See Petition for Denial, “Affidavit of Danny Everette Turnbow.”

⁹ See Motion to Strike Petition for Denial, Exhibit E, “Statement of Louise Matthews,” Exhibit F, “Statement of Francisco Ynojosa,” and Exhibit G, “Statement of Helen Ynojosa.” Mrs. Matthews is the owner of the STA site.

¹⁰ In this regard, we note that Petitioner’s Affiant Turnbow, who claims to have monitored the frequency 24 hours a day, 7 days a week, for a month, beginning 5 days prior to the August 17, 2004, does not account for possible lapses due to eating, sleeping or the requirements of personal hygiene.

¹¹ Additionally, notwithstanding that the KWTR(FM) license was set to expire on August 18, 2004 if the station did not resume operation with authorized facilities, the Commission has the flexibility under revisions to Section 312(g) of the Communications Act to extend or reinstate a broadcast station license “to promote equity and fairness.” 47 U.S.C. § 312(g) was amended in December of 2004 to allow the Commission to extend or reinstate a broadcast for this and other reasons. See Pub.L. 108-447, Div. J, Title IX [Title II, § 213(3)]. Because we find that Warren preserved the KWTR(FM) license by operating with authorized facilities, albeit briefly, on August 17, 2004, we need not invoke that provision here.

¹² See, e.g., *Radio Carrollton, et al.*, 69 F.C.C.2d 1139, 1150 (1978) and cases cited therein (concluding that a “strike pleading” – *i.e.*, a pleading filed in bad faith primarily to block, impede, or delay grant of another application – constitutes abuse of process).

¹³ See *Public Notice*, “Commission Taking Tough Measures Against Frivolous Pleadings,” 11 FCC Rcd 3030 (1996). See also 47 C.F.R. § Section 73.3589(a), which provides: “No person shall make or receive any payments in exchange for withdrawing a threat to file or refraining from filing a petition to deny or an informal objection.”

¹⁴ *Nationwide Communications, Inc.*, 13 FCC Rcd 5654, 5655 (1998).

We caution Boyer and his counsel that parties may not use the threat of filing or refraining from filing pleadings to extract “financial concessions, including but not limited to the transfer of assets or the provision of tangible pecuniary benefit.”¹⁵ Using the threat of litigation to obtain a station at a price below fair market or to compel the sale of the station to a potential objector would constitute an abuse of our processes. Attorneys practicing before the Commission who engage in conduct that demonstrates a lack of character or professional integrity may be censured, suspended, or disbarred.¹⁶ Although a close question, we cannot conclude on the record of this proceeding that Boyer made such threats. In particular, we recognize that the Petition raised colorable issues regarding site availability and the possible expiration of the KWTR(FM) license pursuant to Section 312(g) of the Act.

Conclusion/Actions. Accordingly, for the reasons set forth above, the Petition for Denial IS DISMISSED. Similarly, for the reasons set forth above, as an informal objection the filing IS DENIED. Finally, because the subject application is otherwise in full compliance with the Commission’s Rules and the Communications Act, and finding that the public interest, convenience, and necessity would be served thereby, the Application for Construction Permit (File No. BPH-20041014AFA) for station KWTR (FM) Big Lake, Texas, IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Marissa G. Repp, Esq.
Woodrow Michael Warren

¹⁵ See 47 C.F.R. § 73.3589(c)(3).

¹⁶ See 47 C.F.R. § Section 1.24.