



Federal Communications Commission
Washington, D.C. 20554

October 18, 2007

DA 07-4330

In Reply Refer to:

1800B3-TSN

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Coosa Valley News, Inc.
c/o Mr. Thom Holt
300 North 5th Avenue
Rome, GA 30165

Mr. Howard C. Toole
1811 Talon Court
Keller, TX 76248

Re: FM Broadcast Auction No. 70
Howard C. Toole
New(FM), Plainville, Georgia
Facility ID No. 171028
File No. BNPH-20070423AAS
**Petition to Deny Application for
Construction Permit**

Dear Petitioner and Applicant:

We have before us a Petition to Deny ("Petition") filed by Coosa Valley News, Inc. ("CVN"). CVN seeks denial of Howard C. Toole's ("Toole") long-form (Form 301) application for a new FM broadcast station at Plainville, Georgia ("Application").¹ Toole was the winning bidder in FM Broadcast Auction No. 70 ("Auction 70") for the Plainville permit. For the reasons set forth below, we deny the Petition and grant the Application.

Background. On December 19, 2006, Toole filed a short-form (Form 175) application to participate in Auction 70, giving his legal classification as "sole proprietor."² In his short-form application, Toole specified four permits on which he wished to bid, one in Alabama and three in Georgia, including the Plainville permit. Toole states that he is currently the general manager of five

¹ File No. BNPH-20070423AAS. Also before us are applicant Howard C. Toole's ("Toole") May 29, 2007, Opposition to Petition to Deny ("Opposition"), and CVN's June 8, 2007, Reply to Opposition ("Reply").

² File No. BSFH-20061219AFN.

radio stations in Georgia, licensed to three different corporations that are 100 percent owned by Paul C. Stone (“Stone”).³

CVN also filed a short-form application to participate in Auction 70, seeking only to bid on the Plainville permit. Auction 70 closed on March 26, 2007, with Toole being the provisionally winning bidder for the Plainville permit.⁴ Toole timely made his final auction payment, and timely filed the Application.

Discussion. CVN appears primarily to raise a question as to whether Toole was in fact an independent applicant or was, instead, acting for an undisclosed real party in interest, namely Stone. Specifically, CVN speculates whether Stone, as Toole’s employer, is using Toole’s Application to cement “its dominant position within the Rome (Georgia) radio market.”⁵

As with all petitions to deny, we must first determine whether CVN has made specific allegations of fact that, if true, would demonstrate that grant of the application would be *prima facie* inconsistent with the public interest. These specific allegations must be supported by the affidavit of a person with knowledge of the facts alleged, except for those of which we may take official notice.⁶ If the specific allegations make a *prima facie* case, we next examine and weigh the evidence presented, to determine “whether the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for.”⁷ We must also determine whether grant or denial of the application would serve the public interest.⁸

As noted above, CVN suggests that Toole did not act independently in acquiring the Plainville permit but, rather, as an employee of Stone acting to further Stone’s interests. The allegations, however, take the form of numerous hearsay statements (or, in some cases, hearsay-on-hearsay statements). A majority of the statements are attributed not to named individuals, but to unnamed employees of CVN or other entities, and the statements are themselves impermissibly vague.⁹ Merely stating that one has heard

³ Declaration of Howard C. Toole, attached to Opposition, para. 5. According to Toole, his employers are Southern Broadcasting of Athens, Inc., New Broadcast Investment Properties, Inc., and Southern Broadcasting of Pensacola, Inc. (collectively, “Southern Broadcasting”). *Id.*

⁴ *Auction of FM Broadcast Construction Permits Closes, Winning Bidders Announced for Auction No. 70*, Public Notice, 22 FCC Rcd 6323 (MB/WTB 2007).

⁵ Petition at 3.

⁶ 47 U.S.C. § 309(d); 47 C.F.R. § 73.5006(b).

⁷ *Citizens for Jazz on WRVR v. F.C.C.*, 775 F.2d 392, 395 (D.C. Cir. 1985). *See also* 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(a)]. 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).

⁸ *Astroline Communications Co. v. F.C.C.*, 857 F.2d 1556, 1561 (D.C. Cir. 1988). *See also Rocky Mountain Radio Co., LLP*, Memorandum Opinion and Order, 15 FCC Rcd 7166, 7167 (1999).

⁹ Examples of the types of statements CVN makes in support of its Petition are as follows: “[CVN] has been told by a media source that during a conversation between a McDougald family member and a media source, the family member discussed information that increased the concern among the management of [CVN] that improper activities might be taking place.” Petition at 9. “In the early part of January 2006, a Southern Broadcasting employee in

information that makes one suspicious cannot suffice to raise a substantial and material question of fact.¹⁰ Moreover, no reason is given for the lack of detail in CVN's allegations. For example, if CVN heard "information that supported [its] concern that improper activities might be taking place,"¹¹ it should be able to detail that information. Also, there is no readily apparent reason why CVN could not identify its own employee and principal sources by name. CVN nevertheless consistently refers to its management or stockholders without naming the individuals supposedly receiving information.¹²

If in fact there were undisclosed real parties in interest behind Toole's application, or Toole misrepresented his eligibility for the new entrant bidding credit, this could suggest that grant of the Application would not be in the public interest. However, as Toole states in his Opposition, the allegations in the Petition are both fatally vague and are not, as required, supported by the affidavit of a person with actual knowledge.¹³ Although two of CVN's principals, John E. Bailey, III ("Bailey") and Thom Holt ("Holt"), purport to verify their allegations "to the best of [their] knowledge, information, and belief,"¹⁴ nowhere does either Bailey or Holt set forth the source of that knowledge, information, and belief. Instead, as noted above, the Petition consists for the most part of a series of vaguely stated suspicions culminating in a conclusion that Toole and Stone demonstrate a "consciousness of guilt."¹⁵ Allegations consisting merely of ultimate, conclusory facts or more general affidavits are not sufficient.¹⁶

Rome told a [CVN] employee information that supported [CVN's] management's concern that improper activities might be taking place. That report was later supported by a similar report from a media source's conversation with a second Southern Broadcasting employee in Rome." Petition at 10. "Once the final list of qualified [Auction 70] bidders had been released, [CVN] determined that Howard C. Toole was the only bidder that fit the criteria of having a possible link to Mr. Stone. At that point, we could not find any information that provided a specific link between Messrs. Toole and Stone. However, in late February or early March, a media person told us that he had talked to a woman (possibly Mr. Toole's wife) in Texas. The woman said Mr. Toole conducted all of his business on the cell phone, but did not say whether he lived or worked in Texas or Georgia." Petition at 11. "During this time, a [CVN] stockholder spoke with a McDougald family member who told him further information that heightened the concern among [CVN's] management about the potential of improper activities. That same McDougald family member later told a media contact further information that heightened the concern among [CVN's] management about the potential of improper activities." Petition at 12.

¹⁰ See *WFBM, Inc.*, Memorandum Opinion and Order, 47 FCC2d 1267, 1267 (1974) ("Hearsay, rumor, opinion or broad generalization do not satisfy the specificity requirements of Section 309(d) or the Commission's regulations implementing that provision of the Communications Act.")

¹¹ Petition at 10.

¹² We note, moreover, that CVN labels itself varyingly as "Coosa Valley" (Petition at 1) and "Coosa News" (Petition at 5). While this might ordinarily be dismissed as inadvertent error, such an explanation is less plausible when CVN describes itself as two separate entities in communication with each other. See Petition at 5 ("Coosa Valley has been told that Coosa News' management received reports from multiple sources that, if confirmed, caused them concern that improper activities were taking place.")

¹³ See *supra* note 6.

¹⁴ See Declaration of John E. Bailey, III, attached to Petition, para. 2; Declaration of Thom Holt, attached to Petition, para. 2.

¹⁵ Petition at 2, 14.

¹⁶ *Gencom, Inc. v. F.C.C.*, 832 F.2d 171, 180 n.11 (D.C. Cir. 1987).

Likewise, allegations that do not even rise to the level of ultimate facts, but merely raise questions and demand Commission investigation, do not suffice.¹⁷ Further, to the extent that CVN's allegations consist of hearsay statements, they are similarly insufficient to raise a substantial question of fact that would warrant further inquiry. While we may consider hearsay evidence, we need not consider hearsay evidence that does not possess satisfactory indicia of reliability.¹⁸ We find no such indicia here.¹⁹

We find CVN's other arguments equally lack merit. In the Reply, CVN makes much of the fact that Toole "finally admitted" to being general manager of five stations in Athens, Georgia, owned by Stone's companies.²⁰ CVN then asserts that this "is directly contradictory to the Auction Certification in [Toole's] FCC Form 301 in which he claims to be a 'sole proprietor' living in Texas."²¹ We find no contradiction. CVN appears to believe that "sole proprietor" means "unemployed" or, at least, "not employed by another broadcaster." However, an applicant identifying himself as a "sole proprietor" in the "legal classification" section of the short-form application merely represents that he is applying as an individual, rather than as a corporation, partnership, or other form of organization or legal entity. Thus, the fact that Toole works as General Manager for certain Southern Broadcasting stations does not contradict his identification as "sole proprietor," and does not, by itself, raise an inference that he is acting

¹⁷ *Mr. Lawrence E. Steelman, Capstar TX Limited Partnership, Mr. Stanley Daniels*, Letter, 22 FCC Rcd 4866, 4869 (MB 2007) (Petition for Reconsideration "was an amalgam of conclusion, speculation, supposition, trade press articles, and other material that did not raise a substantial and material question of fact," thus no evidentiary hearing was required.) See also *Mr. Benjamin L. Stratemeyer and Ms. Janet Jensen*, Letter, 21 FCC Rcd 11715, 11716 (MB 2006).

¹⁸ See, e.g., *EchoStar Communications Corp. v. F.C.C.*, 292 F.3d 749, 753 (D.C. Cir. 2002). Cf. *WFBM, Inc.*, 47 FCC2d at 1267.

¹⁹ Further undermining CVN's vague allegations is the fact that the staff's independent efforts to verify those few allegations capable of verification were fruitless. CVN states that a John Druckenmiller, of the local Website Hometown Headlines (<http://www.hometownheadlines.com>), "published on hometownheadlines.com that the bidder on Plainville construction permit might be a Southern Broadcasting executive. So far, neither Mr. Toole nor Southern Broadcasting has responded to the report." Petition at 13. No such report appears to have been published that would warrant any response. A search of the Hometown Headlines Website, using the terms "Plainville," "Toole," and "Southern Broadcasting," failed to disclose any report linking the winning Plainville auction bidder to Southern Broadcasting, even though the "Southern Broadcasting" search yielded posts dating back to 2004. CVN also states that "a reporter from the local paper, the Rome News-Tribune interviewed Toole. Toole made ambiguous comments to the reporter." *Id.* Once again, however, a search of the *Rome News-Tribune's* Website (<http://news.mywebpal.com/index.cfm?pnpid=680>) disclosed only two stories between November 1, 2006, and July 18, 2007, discussing the Plainville permit. Only one of these stories (published May 8, 2007) mentioned Toole, who is quoted only as making general statements about his plans for the new station, and as saying that he presently does not own any other media. "Plans for new FM radio station in Plainville moving forward," *Rome News-Tribune*, May 8, 2007 (found at http://news.mywebpal.com/news_tool_v2.cfm?pnpid=680&show=archivedetails&ArchiveID=1267817&om=1 (accessed July 18, 2007)). Toole is quoted as saying, "I want to do something that will attract the most listeners and the most advertisers But right now, it is a little premature for me to say anything, since it is still in the permitting stage." The story further states that "Toole, who listed himself as the station's sole proprietor in his FCC application, said he presently does not own any other media." The alleged "ambiguity" of these statements is not apparent.

²⁰ Reply at 1.

²¹ *Id.*

for his employer. Likewise, Toole's position as a key employee is not attributable,²² nor does it preclude his participation in Auction No. 70.²³ We also reject CVN's claim that Toole's placing bids in rounds in which he was already the provisionally winning bidder for the Plainville permit, but not for another permit, constitutes "suspicious bidding activity."²⁴ Such conduct is specifically permitted in broadcast auctions,²⁵ and we draw no inference from such bidding behavior.

Conclusion. As discussed above, CVN's Petition consists of no more than vaguely stated suspicions regarding Toole and his Application, and the allegations therein do not rise to the level necessary for us to find a substantial and material question of fact regarding Toole's qualifications to be a Commission licensee. Accordingly, IT IS ORDERED that the Petition to Deny filed by Coosa Valley News, Inc. IS DENIED. IT IS FURTHER ORDERED that pursuant to Section 309(d) of the Communications Act of 1934, as amended, the Application of Howard C. Toole for an FM broadcast station construction permit at Plainville, Georgia (File No. BNPH-20070423AAS) IS GRANTED.

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau

cc: Lewis J. Paper, Esq. and Andrew S. Kersting, Esq., counsel for Howard C. Toole

²² See generally 47 C.F.R. § 73.3555 and Note 2, as to what interests in a licensee are considered attributable.

²³ The "key employee relationships" component of the cross-interest policy was eliminated in 1999. This aspect of the cross-interest policy had prohibited an individual who served as a key employee, such as a general manager, of one station from holding an attributable ownership interest in another station in the same market. See also *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, Reexamination of the Commission's Cross-Interest Policy*, Report and Order, 14 FCC Rcd 12559, 12609-10 (1999) ("We nonetheless believe, as commenters have pointed out, that internal conflict of interest policies, common law fiduciary duty, and contract remedies provide adequate substitutes for our administration of the [cross-interest] policy with respect to key employees. (citation omitted) In addition, many key employees are also officers and directors and are thus already covered by the attribution rules. In any event, we believe that the very small risk of harm to competition by a key employee in an instance not covered by any of these other regulations and remedies is greatly outweighed by the benefits of minimizing our case-by-case approach to transactions and applying bright line tests, such as the EDP test and our other attribution rules.").

²⁴ Petition at 11.

²⁵ *Auction of FM Broadcast Construction Permits Scheduled for March 7, 2007; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 70*, Public Notice, 21 FCC Rcd 12957, 12993 (MB/WTB 2006).