



Federal Communications Commission
Washington, D.C. 20554

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DA 08-2501

In Reply Refer to:

1800B3-TSN

Released: November 13, 2008

Mr. Stephan Myers
92 Hickory
Brookeland, TX 75931

Mr. James M. Lout
765 Hemphill Street
Jasper, TX 75951

In re: **James M. Lout**
New (FM), Pineland, Texas
Facility ID No. 170971
File No. BNPH-20070502ABN

**Application for FM Broadcast
Station Construction Permit**

Dear Objector and Applicant:

We have before us a letter (the "Objection") filed June 19, 2007, from Mr. Stephan Myers ("Myers"). Myers states that he and 11 other named citizens of the Jasper, Texas, area "petition that a denial of license occur" for the application of James M. Lout ("Lout") for a new FM broadcast station at Pineland, Texas (the "Application").¹ For the reasons set forth below, we deny the Objection and grant the Application.

Background. Lout was the provisionally winning bidder for the Pineland, Texas, construction permit in FM Broadcast Auction No. 70 ("Auction 70"), which concluded on March 26, 2007.² Lout timely filed his post-auction Form 301 long-form Application on May 2, 2007. Public notice of acceptance of the Application for filing was given on May 16, 2007.³ On June 19, 2007, Myers filed the Objection, which was dated May 30, 2007, and which did not indicate that it had been served upon Lout or his counsel. Lout, having obtained a copy of the Objection from Commission staff, filed an Opposition to Petition to Deny and Motion to Strike on July 16, 2007 ("Opposition"). On August 3, 2007, Myers

¹ File No. BNPH-20070502ABN.

² *Auction of FM Broadcast Construction Permits Closes, Winning Bidders Announced for Auction No. 70*, Public Notice, 22 FCC Rcd 6323 (MB/WTB 2007).

³ *Broadcast Applications*, Public Notice, Report No. 26487 (May 16, 2007).

submitted a number of additional documents, including a “Response to Opposition to Petition to Deny” (collectively “Reply”).

Discussion. Procedural Issues. Lout asserts that Myers failed to serve Lout with a copy of the Objection, that the Objection was untimely filed, and that it lacked a signature. Additionally, Lout notes Myers’s failure to provide an affidavit or a declaration under penalty of perjury in support of the allegations in the Objection, and the fact that none of the individuals named in the Objection appear to reside in Pineland or are alleged to be listeners of Lout’s other station.⁴ Lout concludes that Myers lacks standing to file a petition to deny.⁵

Lout is correct that the Objection was untimely. Under the Commission’s Rules, a petition to deny a post-auction long-form application must be filed within ten days following public notice that the application has been accepted.⁶ In this case, public notice that the Application was accepted was given on May 16, 2007, thus a petition to deny must have been filed by May 26, 2007. The Objection was dated May 30, 2007, four days too late, and was not received at the Commission until June 19, 2007. Moreover, Lout is correct that only individuals residing in a station’s proposed service area have standing as listeners to challenge an application.⁷ As it is impossible to determine the petitioners’ residences from the showing in the Objection,⁸ Myers fails to meet his pleading burden with regard to their standing to interpose a petition to deny the Application.

In the Reply, Myers admits he did not serve the Objection on Lout, but complains that he had requested the Objection remain confidential and that its contents not be divulged to Lout, for fear of retaliation by Lout against the objecting parties.⁹ We disregard the confidentiality complaint for a number of reasons. First, the Objection clearly states that it seeks denial of the Application.¹⁰ Section 309(d) of the Communications Act of 1934, as amended (the “Act”) requires that a petition to deny an application be served on the applicant.¹¹ The Act does not otherwise provide for the filing of “confidential” petitions

⁴ Lout has been the licensee of Station KJAS(FM), Jasper, Texas, since the original construction permit was granted on July 30, 1992. Several of the allegations in the Objection refer to his conduct in operating that station.

⁵ Opposition at 2-5.

⁶ 47 C.F.R. § 73.5006(b).

⁷ See, e.g., *Petition for Rulemaking to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, Memorandum Opinion and Order, 82 FCC2d 89, 98-99 (1980) (an individual may qualify as a party in interest if he alleges he is a listener or viewer of the station in question or resides within the station’s service area). See also *National Broadcasting Co., Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 10779, 10780 (1996) (denying standing to individual who viewed WNBC-TV on frequent travels to New York City; the Commission accords standing to those who reside in the service area, not to transients); *CHET-5 Broadcasting, L.P.*, Memorandum Opinion and Order, 14 FCC Rcd 13041, 13042 (1997) (standing accorded to both residents of a station’s service area and non-residents who are regular viewers or listeners, but not to transients).

⁸ Objection at first-second unnumbered pages.

⁹ Reply, Document # 2 at first-second unnumbered pages, Document # 3 at first unnumbered page.

¹⁰ *Id.* at first unnumbered page.

¹¹ 47 U.S.C. § 309(d)(1) (“The petitioner shall serve a copy of such petition on the applicant.”)

to deny. Moreover, Myers did not file a request for confidentiality under Section 0.459 of the Commission's Rules.¹² Finally, while Myers attaches to his Reply a purported copy of the Objection that bears the legend, "Confidential; Not for public inspection" at the top of all pages, the original Objection filed with the Commission bore no such legend on any page. Thus, Myers made no valid confidentiality request when he filed the Objection.

Lout is also correct in observing that the Objection lacks an affidavit or declaration signed by a person or persons with personal knowledge of the facts alleged, as required by the Act.¹³ Instead, Myers lists the names of "witnesses" to the facts alleged, none of whom is Myers himself (who, in any event, did not sign the Objection). Accordingly, we find that Myers has not established standing to file a petition to deny, nor has he provided a sufficient affidavit or declaration in support of the Objection. Because the Objection was untimely and did not comply with the Act or the Commission's Rules, we therefore consider it as an informal objection under Section 73.3587 of the Rules.¹⁴

Substantive Matters. As with all petitions or objections seeking to deny an application for a new station, here we must first determine whether Myers 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.¹⁵ 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."¹⁶ We must also determine whether grant or denial of the application would serve the public interest.¹⁷

Myers tenders six basic allegations against Lout. Of the six allegations, three concern off-air behavior by Mr. Lout: an allegation that he opposed an African-American purchasing a competing radio station in the Jasper, Texas, area, and used a denigrating epithet to refer to the potential station buyer;¹⁸ an allegation that he sent a volunteer poll worker a thick package of anti-Semitic literature;¹⁹ and an

¹² 47 C.F.R. § 0.459.

¹³ 47 U.S.C. § 309(d)(1) ("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.") See also 47 C.F.R. § 1.16 (allowing unsworn declaration under penalty of perjury in lieu of a sworn affidavit in certain circumstances).

¹⁴ 47 C.F.R. § 73.3587. Because we may consider Myers's pleading as an informal objection, we will deny Lout's Motion to Strike the Objection.

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

¹⁶ *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).

¹⁷ *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).

¹⁸ Objection at second-third unnumbered pages.

¹⁹ Objection at third unnumbered page.

allegation that Lout punched a patron at a local country club after the patron asked his girlfriend to dance.²⁰ While none of the acts alleged, if true, would reflect favorably on Mr. Lout, in order to challenge Lout's character qualifications as a Commission licensee or permittee, one would need to allege more, such as a felony conviction or adjudicated criminal misconduct relating to fraud or broadcast-related activities.²¹

The remaining allegations concern alleged on-air behavior by Lout at station KJAS(FM). Specifically, Myers alleges that: "at one time or another" everyone he interviewed stated that they heard Lout "on the air speaking with slurred speech and suspected he was under the influence of alcohol"; one (unnamed) witness stated that he went to the KJAS(FM) studio at the time of Lout's emergency broadcast during Hurricane Rita, and that Lout "reeked" of whiskey;²² Lout and his associates use Lout's Thursday evening talk program on KJAS(FM) to "embarrass, harass, criticize or intimidate local townspeople, telling negative, often completely fabricated or grossly misleading stories about them and accusing them falsely";²³ and Lout "slants his local news reporting" to favor the current mayor of Jasper, Texas, and invites the mayor to appear on air up until the time period for providing equal time to opposing candidates, thereby giving the mayor an "unfair political advantage."²⁴ Myers notes that Lout's Thursday night talk show on KJAS(FM) has since been discontinued, although he states his suspicion that the discontinuance coincides with Lout's Pineland application and any public comment associated with that.²⁵

Again, however, even assuming that there were evidentiary support for Myers's allegations, if true they would not raise a substantial and material question of fact regarding Lout's qualifications. The personal attack and political editorial rules were repealed by the Commission seven years ago,²⁶ thus Lout's alleged on-air attacks or criticisms of individuals do not violate any current Commission Rule or policy.²⁷ Further, Myers admits that Lout's interviews with the mayor of Jasper ceased during election cycles when the equal time rules are in effect,²⁸ thus he alleges no violation of those rules. Finally, with regard to the allegations concerning Lout's alleged on-air intoxication, Myers cites no specific rule violations. His bare statement that because the counties surrounding Jasper are "dry," and thus on-air intoxication "violates community standards for decent behavior," is insufficient to raise a substantial and material issue of fact regarding Lout's qualifications.²⁹

²⁰ *Id.*

²¹ *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).

²² Objection at third unnumbered page.

²³ *Id.* at fourth unnumbered page.

²⁴ *Id.*

²⁵ *Id.* at fifth unnumbered page.

²⁶ *Repeal or Modification of the Personal Attack and Political Editorial Rules*, Order, 15 FCC Rcd 20697 (2000).

²⁷ Myers produced no evidence that Lout's on-air statements had been adjudicated as defamatory.

²⁸ *See generally* 47 U.S.C. § 315, 47 C.F.R. §§ 73.4185, 73.4190.

²⁹ Objection at third unnumbered page.

It bears repeating that Myers has not supported his allegations with proper evidence. In the Reply, Myers offers to obtain affidavits from “at least a few of the petitioners,” while stating that many would be “afraid” to participate further.³⁰ Myers then states: “I request and strongly urge you to send an enforcement official to the area to personally interview the petitioners and listed witnesses and obtain sworn statements regarding these allegations.”³¹ Given the lack of evidence presented in the Objection and Reply, such action is unwarranted. Allegations that merely raise questions and demand further Commission investigation do not suffice to raise a substantial and material question of fact as to an applicant’s qualifications.³² Thus, we find that Myers fails to raise a substantial and material question of fact regarding Lout’s qualifications as a Commission licensee warranting further inquiry or action.

Conclusion. Based on the pleadings and evidence presented, we find no evidence sufficient to raise a substantial and material issue of fact regarding Lout’s qualifications. Accordingly, the Objection IS DENIED. Lout’s Motion to Strike IS DENIED. We have examined the Application, and are satisfied that Lout is fully qualified to be a Commission licensee, and that grant of the Application is in the public interest. Therefore, the Application IS GRANTED.³³

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau

cc: Christopher D. Imlay, Esq., Counsel for James M. Lout

³⁰ Reply, Document # 2 at second unnumbered page.

³¹ *Id.*

³² See *Pinelands, Inc. and BHC Communications, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 6058, 6058 n.2 (1992) (denying request for investigation based solely on speculation). See also *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); *Mr. Benjamin L. Stratemeyer and Ms. Janet Jensen*, Letter, 21 FCC Rcd 11715, 11716 (MB 2006).

³³ File No. BNPB-20070502ABN.