



Federal Communications Commission
Washington, D.C. 20554

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DA 08-2629

In Reply Refer to:

1800B3-TEC

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

Mr. Howard C. Toole
150 Westpark Drive, #320
Athens, GA 30606

Re: **FM Broadcast Auction No. 70**
Howard C. Toole
New(FM), Plainville, Georgia
Facility ID No. 171028
File No. BNPH-20070423AAS

Petition for Reconsideration

Dear Mr. Holt:

We have before us a Petition for Reconsideration (the "Petition") filed by Coosa Valley News, Inc. ("CVN") on March 13, 2008, requesting that the Commission reconsider its October 18, 2007, decision granting the above-referenced application (the "Application")¹ of Howard C. Toole ("Toole") for a construction permit for a new FM station at Plainville, Georgia (the "Plainville Permit").² For the reasons discussed below, we dismiss the Petition.

Background. On December 19, 2006, Toole filed a short-form ("Form 175") application to participate in FM Broadcast Auction No. 70 ("Auction 70").³ Toole specified four permits on which he wished to bid, one in Alabama and three in Georgia, including the Plainville Permit.⁴ CVN also filed a Form 175, seeking only to bid on the Plainville Permit.⁵ Toole placed the highest bid for the Plainville

¹ File No. BNPH-20070423AAS.

² Coosa Valley News, Inc. and Mr. Howard C. Toole, Letter, 22 FCC Rcd 18600 (MB 2007) ("Staff Decision").

³ File No. BSFH-20061219AFN.

⁴ Staff Decision at 1.

⁵ *Auction of FM Broadcast Construction Permits Closes, Winning Bidders Announced for Auction No. 70*, Public Notice, 22 FCC Rcd 6323 (MB/WTB 2007).

permit, subsequently making all required auction payments to the Commission and filing the Application on April 23, 2007.⁶

CVN filed a petition to deny the Application on May 10, 2007, questioning whether Toole bid for the Plainville permit as a “sole proprietor,” as certified on the Application, or acted on behalf of an undisclosed real party in interest, namely Paul C. Stone (“Stone”).⁷ Toole served as the general manager of five radio stations in Georgia, licensed to three different corporations that are 100 percent owned by Stone (collectively, “Southern Broadcasting”).⁸ According to CVN, if a new commercial competitor were to acquire the Plainville permit, it would threaten Southern Broadcasting’s “dominance” over the market in Rome, Georgia.⁹ For that reason, CVN argued that Toole and Stone demonstrated a “consciousness of guilt” by not disclosing Toole’s position as a general manager for Southern Broadcasting, which Toole assumed just days before filing a Form 175 for Auction 70.¹⁰ CVN also contended that Toole resided in Georgia when he stated on the Application that his residence was in Texas.¹¹

In the Staff Decision, the staff denied CVN’s petition to deny and granted the Application.¹² The staff found that CVN failed to raise a substantial and material question of fact because CVN’s allegations regarding Stone’s influence on Toole’s bidding consisted of impermissibly vague statements and hearsay.¹³ The staff also found that the fact that Toole served as a general manager of stations owned by Stone did not, by itself, raise the inference that Toole had bid on Stone’s behalf.¹⁴ Furthermore, the staff determined that Toole’s identification of himself as a “sole proprietor” merely signified that he was applying as an individual. The Staff Decision rejected CVN’s contention that Toole’s “sole proprietor” applicant status was in some way inconsistent with his Southern Broadcasting employment¹⁵ Lastly, the staff concluded that Toole would not have been precluded outright from bidding in Auction 70 if he had disclosed the general manager position.¹⁶

⁶ *Id.*

⁷ Staff Decision at 2.

⁸ *Id.* at 1. According to Toole, his employers are Southern Broadcasting of Athens, Inc., New Broadcast Investment Properties, Inc., and Southern Broadcasting of Pensacola, Inc. *Id.* at 1 n.3.

⁹ *See* Petition to Deny at 2.

¹⁰ *See id.*; *see also* Declaration of Howard C. Toole, attached to Opposition to the Petition for Reconsideration (“Opposition”), ¶ 3. Toole stated, however, that he “never had any conversations . . . with Paul Stone . . . about the substance or timing of any bids [he] would make or did make with respect to the Plainville” permit. *Id.*

¹¹ *See* Petition to Deny at 11.

¹² Staff Decision at 1.

¹³ *Id.* at 2-5.

¹⁴ *Id.* at 4.

¹⁵ *Id.*

¹⁶ *Id.* at 4-5.

CVN filed the Petition on November 19, 2007, claiming that the staff had no basis for denying its petition to deny. CVN again alleges that Toole engaged in “improper behavior” by not disclosing his relationship with Stone, and by informing the Commission that his residence was in Texas instead of Georgia when he filed the Application.¹⁷ The Petition includes several declarations from Anthony P. Potts (“Potts”), an employee of Nexcom of Georgia who works for CVN.¹⁸ Potts recounts several exchanges with Southern Broadcasting employee Jerry Duke (“Duke”), occurring between January and March 2007. According to Potts, Duke told him that Stone had said he “would prevent [CVN] from acquiring the Plainville station.”¹⁹ Potts also states that Duke told him that if CVN “were able to acquire the [Plainville permit] that Stone [had said that he] would cause the bid to be so high that [CVN] would not be able to afford to operate the station.”²⁰ CVN asserts that Stone’s intentions raise significant questions about whether Stone influenced Toole’s bidding decisions because of their relationship through the management of Southern Broadcasting.²¹

Toole filed an Opposition to the Petition on December 4, 2007, arguing that: (1) the Petition merely repeats the allegations made in the petition to deny; (2) the staff already dismissed CVN’s allegations because they failed to show wrongdoing, were impermissibly vague and, therefore, should not be reconsidered; (3) Potts’s conversations with Duke occurred before May 2007, and should have already been addressed in the petition to deny; (4) Toole had no obligation to disclose his general manager position, and holding the position would not have changed his status as a “sole proprietor”; and finally, (5) Toole did not move to Georgia until August 2007, and consequently, he had no reason to amend the Application regarding that fact until September 2007.²² The Opposition includes a declaration from Duke stating that although he had talked to Potts on the telephone, he never discussed anything about Stone’s intentions with respect to the Plainville permit.²³ Duke also states that he only had one “chance meeting” with Stone between June 2006, and December 2007, saying “little more than . . . hello.”²⁴

CVN replied to the Opposition on December 21, 2007, arguing that pursuant to Section 1.106(c) of the Rules the Commission must still review the allegations made in the Petition because it is in the public interest to ensure that an applicant makes accurate representations to the Commission.²⁵ CVN attaches another declaration from Potts to the Reply. According to CVN, in this declaration Potts acknowledges that Duke never had a telephone conversation with Potts regarding Stone’s intentions. Rather, according

¹⁷ Petition at 2.

¹⁸ First Declaration of Anthony P. Potts, attached to the Petition, ¶ 4.

¹⁹ Second Declaration of Anthony P. Potts, attached to the Petition, ¶ 5.

²⁰ Third Declaration of Anthony P. Potts, attached to the Petition, ¶ 5.

²¹ Opposition at 2-3.

²² *Id.* at 2-4.

²³ Declaration of Jerry Duke, attached to Opposition, ¶ 4.

²⁴ *Id.*

²⁵ Reply to Opposition (“Reply”) at 1; *see also* 47 C.F.R. § 1.106(c)(2).

to the declaration, those Potts-Duke conversations occurred in person.²⁶ CVN claims that Potts and Duke submitted contradictory declarations to the Commission.²⁷ Therefore, in light of all of the allegations, CVN contends that the public interest requires reconsideration of the staff's decision to grant the Application.²⁸

Discussion. Procedural Issues. Section 1.106(c) of the Rules provides that we will only accept a petition for reconsideration relying on facts not previously presented to the Commission in one of three circumstances: (1) the petition relies on facts relating to events which have occurred, or circumstances which have changed since the last opportunity to present such matters; (2) the petition relies on facts unknown to petitioner until after his last opportunity to present such matters, which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity; or (3) the designated authority determines that consideration of the facts relied on is required in the public interest.²⁹ A petition for reconsideration that simply reiterates arguments previously considered and rejected will be denied.³⁰

On reconsideration, CVN relies on the same meritless arguments raised in its petition to deny. It attempts to supplement these arguments with several additional Potts declarations. However, the Commission's Rules are clear that a petition for reconsideration relying on new facts may only be entertained if the facts involve changed circumstances previously unknown to the petitioner, which could not have been ascertained by the exercise of ordinary diligence, or if consideration is required in the public interest.³¹ The Potts declarations refer to conversations and events occurring between January and March 2007, well before CVN filed the petition to deny in May 2007. Additionally, Potts works for CVN, and thus, CVN could have obtained and submitted Potts's declarations in a timely manner. As the Commission has held before, "[w]e cannot allow a party to 'sit back and hope that a decision will be in its favor and, when it isn't, to parry with an offer of more evidence.'"³² Against this backdrop, we believe that by exercising due diligence, CVN should have been able to present these "new" facts when it filed the petition to deny.³³

CVN maintains that the public interest still requires reconsideration of the matter, because Potts and Duke provided contradictory statements regarding conversations about Stone's intentions with respect

²⁶ Declaration of Anthony P. Potts, attached to the Reply, ¶ 6.

²⁷ Reply at 3.

²⁸ *Id.* at 4.

²⁹ *Albion Community Development Corporation*, Order on Further Reconsideration, 18 FCC Rcd 7714, 7716 (WTB 2003) ("*Albion Community Development*"); *see also* 47 C.F.R. § 1.106(c).

³⁰ *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert denied*, 387 U.S. 967 (1966).

³¹ *See* 47 C.F.R. § 1.106(c).

³² *Albion Community Development*, 18 FCC Rcd at 7716; *see also Canyon Area Residents*, Memorandum Opinion and Order, 14 FCC Rcd 8152, 8154 (1999) (quoting *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941)); *S&L Teen Hospital Shuttle*, Order on Reconsideration, 17 FCC Rcd 7899, 7900 (2002).

³³ *See Joseph C. Chautin, III, Esq.*, Letter, 22 FCC Rcd 5364 (MB 2007).

to the Plainville Permit.³⁴ We disagree. As discussed below, these additional “facts” consist largely of second-hand allegations, which need not be credited.³⁵ Therefore, the Petition will be dismissed because CVN does not meet the requirements of Section 1.106(c) of the Rules.³⁶ Were we to consider the Petition on the merits, however, we would still deny it.

Substantive Issues. As noted in the Staff Decision, the staff must first determine whether the petitioner makes specific allegations that, if true, would demonstrate that grant of the application would be *prima facie* inconsistent with the public interest. These 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.³⁷ Allegations that consist of “ultimate, conclusory facts . . . are not sufficient.”³⁸ Similarly, allegations that are not based on personal knowledge, but rather on second-hand information, are insufficient.³⁹ If the 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.”⁴⁰ We must also determine whether grant or denial of the application would serve the public interest.⁴¹

In the Petition, CVN attempts to amplify the arguments presented in the petition to deny by submitting three declarations from Potts, as well as another one filed with the Reply. Even when supplemented by the Potts declarations, however, CVN’s arguments remain speculative and impermissibly vague. First, Potts’s declarations are not based on personal knowledge, but rather second-hand accounts of conversations which supposedly occurred between Duke and Stone. Second and more importantly, CVN utterly fails to explain or provide supporting documentation detailing the specific ways in which Stone allegedly influenced the bidding for the Plainville Permit or prevented CVN from prevailing in the auction for the Plainville Permit.

We recognize that there are conflicting allegations in the record, particularly on the question of whether Duke and Potts ever discussed Stone’s intentions. However, we note that “the Commission has

³⁴ Reply at 3.

³⁵ See *Rocky Mountain Radio Co.*, Memorandum Order and Opinion, 15 FCC Rcd 7166, 7167-68 (1999) (“*Rocky Mountain Radio*”).

³⁶ See, e.g., *Winstar Broadcasting Corp.*, Memorandum Opinion and Order, 20 FCC Rcd 2043, 2050 (2005).

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

³⁸ *Rocky Mountain Radio*, 15 FCC Rcd at 7167 (quoting *Gencom, Inc. v. FCC*, 832 F.2d 171, n.11 (D.C. Cir. 1987)).

³⁹ *Id.* (citing *KPL, Inc.*, Letter, 5 FCC Rcd 2823, 2824 (1990)).

⁴⁰ *Citizens for Jazz on WRVR v. FCC*, 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).

⁴¹ *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988); see also *Rocky Mountain Radio*, 15 FCC Rcd at 7167.

broad discretion as to how much weight to accord disputed facts based on the existing record.”⁴² CVN has offered uncorroborated claims and hearsay to argue that Stone influenced Toole’s bidding on the Plainville Permit. Although hearsay that is relevant and material is admissible in administrative proceedings, the weight to be accorded it depends on its truthfulness, reasonableness, and credibility.⁴³ A prime indicium of probity is whether the declarants are disinterested witnesses.⁴⁴ Because Potts works for CVN, he fails to qualify as a disinterested witness.⁴⁵ CVN, again, fails to provide any independent first-hand corroboration of Pott’s claims. Accordingly, we decline to credit these allegations based on Potts’s second-hand information.⁴⁶ Deciding otherwise would result in “numerous proceedings in which the staff would need to consider in depth, and applicants would need to defend against, completely unsubstantiated attacks on the applicant’s qualifications.”⁴⁷

With regard to whether Toole should have amended the Application to reflect his change of address from Texas to Georgia, we direct our attention to Toole’s declaration in the Opposition. According to Toole, he maintained a residence in Texas until August 2007, when he moved to Georgia.⁴⁸ Although Toole had started working in Georgia before that date, he continued to visit his family in Texas and kept a Texas driver’s license.⁴⁹ In light of these facts, we find that CVN’s claims regarding Toole’s change of address are without merit. Toole had no need to amend the Application on this matter until September 2007.⁵⁰ Finally, we note that CVN’s fly-specking argument, even if true, would not in any way put in issue whether grant of the Plainville Permit to Toole was contrary to the public interest.

After reviewing the totality of the evidence presented by CVN in the Petition, we find that CVN has wholly failed, again, to make a *prima facie* case warranting reconsideration of our decision to deny CVN’s petition to deny. Therefore, we conclude that the grant of the Plainville Permit to Toole was proper.

⁴² *Brookfield Development, Inc.*, Order, 18 FCC Rcd 10558, 10561 (WTB 2003) (quoting *Quantron Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 4749, 4754 (2000)).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 10562.

⁴⁶ See *Rocky Mountain*, 15 FCC Rcd at 7167 (citing *Beaumont Branch of NAACP v. FCC*, 854 F.2d 501, 507 (D.C. Cir. 1988); *Texas RSA 1 Limited Partnership*, Memorandum Opinion and Order, 7 FCC Rcd 6584, 6885 (1992)).

⁴⁷ *Rocky Mountain Radio*, 15 FCC Rcd at 7168.

⁴⁸ Declaration of Howard C. Toole, attached to the Opposition, ¶ 4.

⁴⁹ *Id.* at ¶ 3.

⁵⁰ See 47 C.F.R. § 1.65(a) (“Whenever [an application’s] information . . . is no longer substantially accurate and complete . . . the applicant shall . . . within 30 days, unless good cause is shown, amend . . . his application so as to furnish such additional or corrected information.”).

Conclusion. For the aforementioned reasons, IT IS ORDERED, that the Petition for Reconsideration filed by Coosa Valley News, Inc. is DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

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