

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
EMR Consulting, Inc.)
Motion to Set Aside the Grant of Extended) File No. 0002221713
Construction Period for 800 MHz Public Safety)
Station WPYE521, City of Terre Haute, Indiana)
)
)
)

MEMORANDUM OPINION AND ORDER

Adopted: August 16, 2012

Released: August 16, 2012

By the Deputy Chief, Policy Division, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. EMR Consulting, Inc. and its principals (collectively EMR) seek reconsideration of a Public Safety and Homeland Security Bureau Order1 denying EMR’s Motion to Set Aside the Grant of Extended Construction Period for 800 MHz Public Safety Station WPYE521, licensed to the City of Terre Haute, Indiana (Terre Haute).2 The Order denied EMR’s motion because of EMR’s failure to make a prima facie case of misrepresentation and lack of candor against Terre Haute. For the reasons set out below, we deny EMR’s Petition for Reconsideration.

II. BACKGROUND

2. Terre Haute is licensee of public safety station WPYE521. EMR represents itself as “a concerned citizen who is entitled to the proper operation of that citizen’s local government without the employment of misrepresentation or subterfuge.”3 The gravamen of EMR’s Petition is that the Bureau should have found misrepresentation and lack of candor on Terre Haute’s part because its application, File No. 0002221713, for extension of time to construct, was executed by a person who was not a “duly elected or appointed official as may be competent to do so under the law of the applicable jurisdiction” in violation of Section 73.3513 of the Commission’s rules.4 EMR contends that the materials submitted with a

1 EMR Consulting, Inc. Motion to Set Aside the Grant of Extended Construction Period for 800 MHz Public Safety Station WPYE521, City of Terre Haute, Indiana, Memorandum Opinion and Order, DA 07-1068 (rel. Mar. 7, 2007). EMR filed the Motion in question on October 17, 2005. Id..

2 Petition for Reconsideration filed by EMR Consulting, Inc., April 5, 2007 (Petition).

3 Id. at 14.

4 Id. at 9 citing 47 C.F.R. § 73.3513.

supplement to its initial Motion show that the inappropriate execution of applications occurred five times, a fact that, by EMR's account, should have led the Bureau to investigate to determine whether Terre Haute lacked candor or engaged in misrepresentation.⁵

3. EMR submitted voluminous attachments to the supplement to its Motion and complains that, of those documents, the Bureau took official notice only of those that constituted its own records from the Commission's Universal Licensing System (ULS).⁶ EMR also faults the Bureau for holding that "Movant's efforts were defective for reasons related to the provision of an affidavit in support of the Motion."⁷ According to EMR, no affidavit was required, because the attachments to the Supplement were subject to official notice by the Commission and, that the documents themselves, made out a *prima facie* case of misrepresentation and lack of candor, without need for an affidavit of a person with first hand knowledge of the facts alleged in the Motion.⁸

III. DISCUSSION

4. EMR's reliance on Section 73.3513 of the Commission's rules for the proposition that Part 90 applications must be executed by a "duly elected or appointed official as may be competent to do so under the law of the applicable jurisdiction," is seriously misplaced. Section 73.3513, entitled "Signing of applications,"⁹ falls in Subpart H of Part 73 of the Commission's rules, "Rules Applicable to all Broadcast Stations."¹⁰ Terre Haute's station is not a "broadcast station;" it is a Private Land Mobile Radio Service facility governed by Part 90 of the Commission's rules, not Part 73. Terre Haute's application was filed on FCC Form 601, the instructions for which require only that "[t]he signor must be a person authorized to sign the application."¹¹ The instant application was signed by William Lower with the title "President of Board." The application was accompanied by a letter, on Terre Haute city letterhead, signed by Mr. Lower as "President Board of Works and Safety" of the city of Terre Haute. EMR has proffered no evidence raising even the slightest inference that Mr. Lower was not a "person authorized to sign the application," much less that Terre Haute lacked candor in not disclosing that Mr. Lower was not a "duly elected or appointed official as may be competent to do so under the law of the applicable jurisdiction."¹² We find, therefore, that Section 73.3513 is inapplicable to the instant application and, accordingly, that EMR's allegation of lack of candor on Terre Haute's part lacks merit.

5. EMR also included in its filing what it characterizes as "five applications improperly executed by Gary C. Doty on behalf of the City, presumably with the City's knowledge."¹³ EMR claims that Mr. Doty's execution of the five applications means that "the City engaged in or facilitated a misrepresentation

⁵ Petition at 9.

⁶ *Id.* at 3-5.

⁷ *Id.* at 1.

⁸ *Id.* at 3.

⁹ See 47 C.F.R. § 73.3513 .

¹⁰ See 47 C.F.R. § 73.1001 *et. seq.*

¹¹ FCC 601 – Instructions June 2011 - Page 17.

¹² Indeed, even if Section 73.3513 of the Commission's rules were applicable here - which it demonstrably is not – Mr. Lower as an appointed official of the city of Terre Haute would have met the Section 73.3513 requirement.

¹³ Petition at 8.

as to the authority possessed by Gary C. Doty.”¹⁴ EMR again relies on Section 73.3513 of the Commission’s rules – a Section applicable only to broadcast stations – to support its claim of misrepresentation.¹⁵ It contends that the Bureau should have looked behind every application filed by Terre Haute “in view of the City’s pattern of allowing Gary C. Doty and other non-officials to execute applications.”¹⁶ As noted *supra*, the instructions to Form 601 require only that the signatory thereof be authorized to sign on the licensee’s behalf. EMR itself concedes that Mr. Doty was authorized by Terre Haute to sign the applications. Thus, EMR states that the applications were signed “presumably with the City’s knowledge”¹⁷ and refers to “the City’s pattern of allowing Gary C. Doty . . . to execute applications.”¹⁸ We conclude, therefore, as EMR admits, that Terre Haute authorized Mr. Doty to sign the applications on Terre Haute’s behalf.¹⁹ No more than that was required for Terre Haute to conform to the Form 601 instructions.

6. EMR contends that the Bureau erred by holding that “Movant’s efforts were defective for reasons related to the provision of an affidavit in support of the Motion.”²⁰ An affidavit was unnecessary, EMR avers, because “Movant’s Motion is based on the existence of . . . official documents and contents of the Commission’s records.”²¹ In the *Order*, the Bureau stated: “the Commission may take official notice of certain documents if they support the movant’s allegations. Otherwise, the movant must support its allegations with an affidavit or affidavits from a person with personal knowledge of facts sufficient to establish the alleged misconduct.”²² The Bureau did take official notice of Commission documents proffered by EMR, and found that nothing therein established a *prima facie* case of misrepresentation or lack of candor on Terre Haute’s part.²³ Looking beyond the documents to the “verification” of Ms. Sandra Black, the Bureau found nothing factual therein to support the allegations of misrepresentation, lack of candor, “conspiracy” or other charges made by EMR.²⁴ Accordingly, because neither the Commission documents proffered by EMR nor the “verification” of Ms. Black made out a *prima facie* case, the Bureau denied “the Motion and Supplement because of the lack of evidentiary support for the allegations made therein.”²⁵ Thus, the Bureau did not deny the Motion because it lacked an affidavit, as EMR claims; it

¹⁴ *Id.* at 9. EMR also alleges that applications were executed by “[c]onsultant JoAnn Hodges” and EMR requested that “the Bureau’s investigation include Ms. Hodge’s participation.” *Id.* at n. 11. EMR offers no evidence that Ms. Hodge was not authorized to execute applications on Terre Haute’s behalf.

¹⁵ Petition at 9.

¹⁶ *Id.*

¹⁷ *Id.* at 8.

¹⁸ *Id.* at 9.

¹⁹ EMR also questions whether “a letter filing made by RF Licensing Service dated June 15, 2004” on behalf of Terre Haute was “authorized or verified by any authorized representative of the City.” Petition at 6. EMR presents no evidence that the letter was not authorized by Terre Haute.

²⁰ Petition at 1.

²¹ *Id.* at 4.

²² *Order* at 3 ¶ 5.

²³ See ¶¶ 5-6, *supra*; *Order* at 3 ¶ 6.

²⁴ *Order* at 3 ¶ 6.

²⁵ *Id.* ¶ 7.

denied the Motion because neither the documents proffered nor the contents of Ms. Black's verification²⁶ established an evidentiary foundation for EMR's allegations of misconduct by Terre Haute.

7. Contrary to EMR's claim that the Bureau took official notice only of ULS records,²⁷ the Bureau also took official notice of documents proffered by EMR establishing that Mr. Timothy M. Doty had been convicted of two felonies and misrepresented that fact to the Commission in connection with applications that he filed in his own, or his company's, name. Relying on those documents, the Bureau referred the matter to the Commission's Enforcement Bureau. On August 28, 2006, the Commission issued a *Show Cause Order* directing Mr. Timothy M. Doty to show cause why his licenses should not be revoked.²⁸

8. EMR characterizes as "bizarre" the fact that the Bureau found EMR's proffered documents sufficient to result in the show cause order being issued to Timothy M. Doty, but insufficient to result in a finding that Terre Haute was guilty of misrepresentation, lack of candor and conspiracy.²⁹ The documents, however, showed definitively that Mr. Timothy M. Doty was a convicted felon whereas they showed nothing with respect to misconduct by Terre Haute.

9. EMR's entire case rests on the mistaken assumption that a rule governing signatures on applications for broadcast facilities – A.M., F.M, and TV stations – also applies to applications for private land mobile facilities. In light of the mistaken assumption that Section 73.3513 of the Commission's rules so applies, the voluminous record that EMR has submitted fails to establish any rule violation by Terre Haute.

IV. DECISION

10. We have indulged EMR's motion, its supplement and its petition for reconsideration despite the fact, as the *Order* states, that EMR's "standing is at best problematic."³⁰ We have done so to "put to rest the serious allegations that EMR has raised against the City."³¹ Herein, we have shown that those allegations have no basis in fact and are premised on a misreading of the Commission's rules. Therefore, we are denying the Petition.

V. ORDERING CLAUSE

11. Accordingly, pursuant to the authority of Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, IT IS

²⁶ EMR included an affidavit from Ms. Black with its Petition. We decline to consider it. It is not based on newly discovered evidence, 47 C.F.R. § 1.106(b)(2)(i)-(ii), and, in any event, parties may not "parry with more evidence" in a petition for reconsideration after their initial attempt to adduce evidence was deemed inadequate. *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (1941).

²⁷ EMR contends that the Bureau took "official notice of the ULS records furnished with the Supplement' and nothing more." Petition at 2.

²⁸ *Order* at 2 ¶ 3. *Commercial Radio Service, Inc., Order to Show Cause*, 21 FCC Rcd 9983 (2006).

²⁹ Petition at 13.

³⁰ *Order* at 1 citing *AT&T Wireless PCS, Inc., Order*, 15 FCC Rcd 4587, 4588 ¶3 (WTB CWD 2000), citing *Sierra Club vs. Morton*, 405 U.S. 727, 733 (1972).

³¹ *Order* at 1 n.1.

ORDERED that the Petition for Reconsideration filed by EMR Consulting, Inc. on April 5, 2007 IS DENIED.

12. This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392.

FEDERAL COMMUNICATIONS COMMISSION

Michael J. Wilhelm
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