



Federal Communications Commission
Washington, D.C. 20554

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DA 06-205
In Reply Refer to:
1800B3-JWR

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In re: Station WYPF(FM), Frederick, MD
Facility ID No. 32360
File No. BALED-20040108AMF
Petition for Reconsideration

Dear Counsel:

We have before us the Petition for Reconsideration (the "Petition") filed on December 15, 2004 by the Committee to Save WJTM-FM by and through its member John F. Dallavalle ("Dallavalle").¹ Dallavalle seeks reconsideration of the November 24, 2004 decision (the "Staff Decision")² denying, *inter alia*, Dallavalle's informal objection (the "Objection") and granting the application (the "Application") to assign the license of noncommercial educational ("NCE") Station WYPF(FM), Frederick, Maryland, from Joy Public Broadcasting Corporation ("Joy") to Your Public Radio Corp. ("YPR").³ We also have before us a Motion for Leave to Supplement Petition for Reconsideration (the "Motion") filed by Dallavalle on February 14, 2005. For the reasons set forth below, we dismiss the Petition and the Motion.

BACKGROUND

Dallavalle was one of numerous parties that contested the Joy-YPR transaction.⁴ The staff determined that Dallavalle did not have standing as a petitioner because its pleading was filed after the

¹ The former call sign of the subject station is WJTM(FM).

² See *Letter to John Crigler, Esquire* (MB Nov. 24, 2004).

³ On December 29, 2004, YPR filed an Opposition to the Petition, and on January 6, 2005, Dallavalle filed a Reply.

⁴ The staff treated all such parties' submissions as informal objections under 47 C.F.R. § 73.3587.

deadline for petitions to deny.⁵ Dallavalle claimed that it should be treated as a petitioner because the station allegedly failed to give local notice of the proposed sale in January 2004, contrary to Joy's certification, and did not provide such local notice until May 2004. The staff rejected Dallavalle's argument, explaining that the 30-day petition to deny period is not triggered by a station's local public announcements but, rather, by the Commission's public notice. Dallavalle did not allege deficiencies in the Commission's public notice.

On reconsideration, Dallavalle challenges the staff's finding that Dallavalle lacked standing and asserts that it has party status in this proceeding. According to Dallavalle, a requirement that listeners monitor the FCC's public notices constitutes an enormous and unfair burden. Citing *Fenwick Island Broadcast Corporation et al.* ("*Fenwick*"),⁶ Dallavalle argues that the Commission intends a 30-day petition to deny period following the station's local public notice. Dallavalle reiterates its position that there was no local notice of the proposed sale in January 2004, as prescribed by Section 73.3580 of our rules,⁷ but now adds in the alternative that, if there was local notice, it was inadequate. Dallavalle also reiterates its argument that the Application was not signed by an authorized corporate official and complains that the staff ignored Dallavalle's comments on the local marketing agreement. Finally, in its Motion, Dallavalle claims that Tom Bush ("Bush") abused the Commission's process by sending an email that allegedly "threatens" civil action "to try to intimidate Mr. Dallavalle from pursuing his statutory reconsideration/review rights."

DISCUSSION

Section 405(a) of the Communications Act of 1934, as amended (the "Act"), provides that a petition for reconsideration may be filed by (1) a party to the proceeding or (2) "any other person aggrieved or whose interests are adversely affected by" the underlying decision.⁸ This statutory language is reflected in Section 1.106(b)(1) of the Commission's rules, which states, in pertinent part:

. . . If the petition is filed by a person who is not a party to the proceeding, it shall state with particularity the manner in which the person's interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding.⁹

We first address whether the staff erred, as Dallavalle claims, in treating Dallavalle's pleading as an informal objection rather than as a petition to deny to determine whether Dallavalle has party status.¹⁰ In this regard, Dallavalle's persistent focus on Section 73.3580 concerning local public notice is

⁵ The Commission announced acceptance of the Application on January 13, 2004, thereby establishing a February 12, 2004, petition to deny deadline. Dallavalle did not file its "Petition to Dismiss, Deny or Designate for Hearing" until February 25, 2004.

⁶ 4 FCC Rcd 8803 (Rev. Bd. 1989).

⁷ 47 C.F.R. § 73.3580.

⁸ 47 U.S.C. § 405(a).

⁹ 47 C.F.R. § 1.106(b)(1)..

¹⁰ See, e.g., *Letter to Robert Lewis Thompson, Esquire*, 10 FCC Rcd 11555, 11556 (MMB 1995) ("*Thompson*") (citing *Montgomery County Broadcasting Corp.*, 65 F.C.C.2d 876, 877 n.2 (1977)); *University of North Carolina*, 4 FCC Rcd 2780, 2780 (1989) ("*UNC*") (to qualify as a party, a petitioner for reconsideration must have filed a valid petition to deny).

misplaced, as is Dallavalle's new-found reliance on *Fenwick*. The *Fenwick* case involved an applicant's failure to publish local notice of an amendment that substituted new substantial owners (holding 90% of the voting stock). We have no such scenario here.¹¹ Moreover, as already explained in the Staff Decision, it is the Commission's public notice of acceptance of the Application, not local public notice of the proposed sale, that triggers the 30-day petition to deny period. This is grounded in Section 309(d) of the Act: a petition to deny must be filed within the period specified by the Commission "following the issuance of public notice by the Commission of the acceptance for filing" of the application or of any substantial amendment thereof"¹² Section 311 of the Act requires local public notice but makes no mention of the petition to deny period.¹³ Dallavalle's attempts to link the petition to deny deadline with local public notice are without merit. No provision of the Act supports such a link.

We also note that many of the other informal objections were filed by individual listeners on or before the February 12th deadline for petitions to deny.¹⁴ Dallavalle has not provided persuasive evidence on reconsideration that it was unable to submit its comments by that deadline. Thus, we find that Dallavalle has not demonstrated good reason for not participating earlier in the proceeding. Accordingly, we affirm the staff's treatment of Dallavalle's pleading as an informal objection, rendering Dallavalle a non-party in this proceeding.

Having so found, we consider whether Dallavalle has established standing to file the petition for reconsideration under the aggrieved party test, which requires that Dallavalle satisfy both the "adversely affected" and the "good cause" prongs.¹⁵ Dallavalle does not even attempt to show that it is adversely affected by the staff's grant of the Application, and thus fails to satisfy this prong of the test. For the reasons discussed above, Dallavalle has also failed to satisfy the "good cause" prong as to the untimely filing. Therefore, we find that Dallavalle has not complied with the procedural requirements of Section 405 of the Act and Section 1.106 of the Commission's rules. Accordingly, we dismiss its Petition as procedurally defective. Furthermore, because there is no valid petition for reconsideration to be supplemented in this case, we also dismiss Dallavalle's Motion. Consequently, we need not address Dallavalle's other arguments. We exercise our discretion, however, to consider whether Bush, on behalf of Joy, abused the Commission's process.

The Motion includes a copy of the e-mail Bush sent to Dallavalle on January 28, 2005, which states in pertinent part:

. . . we are going to be preparing a letter to you and your legal team that we are planning to take action based upon your use of the FCC legal process to ask for a

¹¹ The Staff Decision fully addressed the adequacy of Joy's January 2004 on-air announcements of the sale of the subject station. Specifically, the staff found that local public notice of the pending Application was broadcast in substantial compliance with Section 73.3580 and that members of the public -- including listeners like Dallavalle -- had adequate notice of the proposed sale. Dallavalle's statement that "the FCC's staff all agree that notice of the sale was not provided to the public prior to May 2004" (Petition at 4) is patently false.

¹² 47 U.S.C. § 309(d)(1) (emphasis added).

¹³ See 47 U.S.C. § 311(a)(1).

¹⁴ Such submissions did not qualify as formal petitions to deny for reasons other than untimeliness. See 47 U.S.C. § 309(d).

¹⁵ 47 C.F.R. § 1.106(b)(1). See also *Thompson*, 10 FCC Rcd at 11556; *Gulfcoast Broadcasting, Inc.*, 8 FCC Rcd 483, 483 (1993); *UNC*, 4 FCC Rcd at 2780.

decline of the sale to benefit you personally in attempting to gain access to the station. This is a serious infraction and we are preparing documents.

An abuse of process ordinarily involves “intent to gain some benefit by manipulating the Commission’s procedures.”¹⁶ The Commission has stated that “caution should be exercised by licensees so as not to hinder public participation” in Commission proceedings.¹⁷ At the same time, the Commission has recognized that “licensees . . . have the right to pursue any legal remedies they may have at their disposal.”¹⁸ In the Commission’s decision in *Fort Collins*, for example, the Commission found that the licensee was not committing an abuse of process, but was simply “acting like any other potential litigant [who] believed in good faith that it could advise [petitioner] that it might file suit.”¹⁹

On the record before us, we cannot find that Bush, on behalf of Joy, set out to manipulate the Commission’s procedures or otherwise engaged in conduct that rises to the level of abuse of process. The email cannot reasonably be characterized as a threat designed to prevent Dallavalle from challenging the Staff Decision; Dallavalle had already done so. By the time the email was sent, Dallavalle had filed its Petition for Reconsideration as well as its Reply to the new licensee’s (YPR’s) Opposition. Nor does Bush’s email appear to be intended to intimidate Dallavalle into withdrawing its appeal. Bush’s statement about “preparing a letter . . . that we are planning to take action” appears, rather, as a straightforward notification that the company had already made a decision to pursue legal remedies based on Dallavalle’s past actions in the initial proceeding. The email conveys Joy’s beliefs that (1) Dallavalle had improper motives for contesting the sale, and (2) Dallavalle’s actions (“a serious infraction”) are a sound basis for pursuing judicial relief in local courts.

The facts before us differ significantly from those in *Patrick Henry*,²⁰ on which Dallavalle relies. There the Commission affirmed its “strong concern regarding the potentially chilling effect of lawsuits filed against a petitioner to deny by . . . licensees” and designated the subject renewal application for hearing.²¹ However, there was evidence that the licensee had threatened suit *unless* the petitioner would withdraw its petition, and then actually brought suit. In addition, the Commission faced conflicting facts regarding the motive for filing suit as well as an allegation of a threat of physical injury to the petitioner and his family.²² The Bush email does not raise similar issues. Indeed, as discussed above, we do not find that the language used in the email constitutes a threat or intimidation of any kind. In the absence of evidence of a calculated attempt to threaten Dallavalle or coerce it into withdrawing its appeal, we find no substantial and material question of fact that the email constitutes an abuse of process.

¹⁶ *High Plains Wireless, L.P.*, 15 FCC Rcd 4620, 4623 (WTB 2000).

¹⁷ *Fort Collins Broadcasting Co., Inc.*, 38 F.C.C.2d 707, 711-12 (1972) (“*Fort Collins*”).

¹⁸ *Id.* at 711.

¹⁹ *Id.* at 711-12. *See also Adlai E. Stevenson IV*, 5 FCC Rcd 1588, 1590 (1990) (noting there was no allegation that the subject civil action was “patently frivolous or wholly vexatious,” and finding that the filing of a collateral civil lawsuit “is not, *per se*, grounds for questioning an applicant’s basic character qualifications . . .”).

²⁰ 69 F.C.C.2d 1305 (1978).

²¹ *Id.* at 1313.

²² *Id.* at 1312-14.

Accordingly, IT IS ORDERED, That the Petition for Reconsideration and the Motion for Leave to Supplement Petition for Reconsideration filed by the Committee to Save WJTM-FM by and through its member John F. Dallavalle ARE DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau