

ORIGINAL

RECEIVED
2014 AUG 25 A 5:44

BEFORE THE
Federal Communications Commission
WASHINGTON, D. C. 20554

In re Application of)
)
SAN DIEGO CATHOLIC RADIO, INC.) File No. BNPL-20131113ADT
San Diego, California) Facility ID # 193134
)
For Construction Permit for)
New Low Power FM Station)

ACCEPTED/FILED

AUG 20 2014

Federal Communications Commission
Office of the Secretary

TO: Honorable Marlene H. Dortch
Secretary of the Commission

ATTN: Audio Division, Media Bureau

**OPPOSITION TO
"ART PULSE" PETITION TO DENY**

San Diego Catholic Radio, Inc. (SDCR), by its attorney, and pursuant to 47 C.F.R. §73.7004(c), hereby respectfully submits its Opposition to the "Petition to Deny" filed by Art Pulse (AP) on August 6, 2014 against SDCR's application for a construction permit for a new Low Power FM Station on Channel 229, 93.7 MHz, at San Diego, California. In support whereof, the following is shown:

Preliminary Statement

1. The tenth day subsequent to August 6, 2014 was Saturday, August 16, 2014. AP served its "Petition to Deny" upon SDCR by mail, and therefore SDCR is permitted by 47 C.F.R.

1.4(h) an additional three business days. Therefore, the due date for this pleading is Wednesday, August 20, 2014. It is therefore timely filed.

AP's Petition Has Several Procedural Defects

2. 47 U.S.C. §309(d) contains the following requirement for petitions to deny:

[A]llegations 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.

3. The sole premise of AP's petition is that SDCR does not have reasonable assurance of the availability of its transmitter site. To attempt to prove this, AP relies on an exchange of unsworn e-mails and a hearsay declaration (in lieu of an affidavit) of consulting engineer Albert Davis of Freehold, New York. Hearsay affidavits/declarations do not satisfy the "personal knowledge" requirement of Section 309(d) and must be rejected. **Gary Golden**, 19 FCC Rcd 21117 (WTB, 2004), citing **Manahawkin Communications Corp.**, 17 FCC Rcd 342, 356, ¶23 (2001).

4. What appears to have happened here was AP attempting to tamper with SDCR's transmitter site reasonable assurance, which it obtained prior to the filing of its application, and which it has now reconfirmed.

5. There are other procedural issues with AP's petition, starting with the fact that AP does not exist as a legal entity in the state of California. Official notice is requested of this fact, evidenced by a printout from the California Secretary of State's business entity website, kepler.sos.ca.gov (Exhibit A). Since it does not exist, it cannot have standing to contest the SDCR application because, at best, it is a sham corporation. See e.g. *In re Phoenix Diversified Inv. Corp.*, 239 B.R. 231, 240 (Bkrtcy. S. D. Fla. 2010).

6. Furthermore, the signing of the "Petition to Deny" does not comport with the requirements of 47 C.F.R. §1.52. Todd Urick is not an attorney pursuant to 47 C.F.R. §1.22-1.24. Neither is April Game. Section 1.52 of the FCC's Rules contains the following signature requirements:

The original of all petitions, motions, pleadings, briefs, and other documents filed by any party represented by counsel shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign and verify the document and state his address. * * * If the original of a document is not signed or is signed with intent to defeat the purpose of this section, or an electronic reproduction does not contain a facsimile signature, it may be stricken as sham and false, and the matter may proceed as though the document had not been filed. [emphasis supplied]

7. Urick is not an attorney and his signature must be disregarded. April Game, the purported "Executive Director" of

AP, does not verify her signature. The FCC has defined "verify" thusly:

Section 1.52 of the Rules specifically requires a *pro se* petitioner, like Lewis, to "submit a declaration made before a duly authorized officer, *e.g.* a notary public, stating that the contents of the petition are true." *San Francisco Unified School District*, Hearing Designation Order and Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 13326, 13328 n.13 (2004); See also *Harrea Broadcasters, Inc., Memorandum Opinion and Order*, 52 F.C.C.2d 988, 1001 (1975) ("Verification is a declaration, made before any officer authorized by law to administer oaths (*e.g.*, a notary public), that the contents of the petition are true.").

Annabelle Savage, Chapter 7 Trustee, 25 FCC Rcd 3665, n. 27 (MB, 2010).

8. Therefore, the AP "Petition to Deny" must be stricken, disregarded or otherwise dismissed or denied as procedurally defective.

SDCR Does Have Transmitter Site Reasonable Assurance

9. There is attached hereto as Exhibit B the "Declaration" under penalty of perjury executed by Stephen Beuerle, SDCR's President. This demonstrates that SDCR had reasonable assurance of the availability of space on its proposed transmitter site as of November 8, 2013, five days **before** the SDCR Form 318 application was executed and filed. Mr. Beuerle recounts that, with respect to AP's attempt to interfere with its reasonable assurance relationship with Clear

Channel, Gary Hess, the Clear Channel Vertical Real Estate employee responsible for reasonable assurance decisions, sent him a message on August 9, 2014 reconfirming reasonable assurance:

[I]ndeed you have previously secured an assurance from Clear Channel on its availability for your LPFM.

A recent inquiry apparently from a competing application again asked that question which I replied it was not available. Please understand that we have been deluged with these requests so memory sometimes conflicts with the facts

10. Therefore, AP's attempt to tamper with SDCR's application notwithstanding, SDCR does have reasonable assurance of the availability of its proposed transmitter site. AP's "Petition to Deny" must be dismissed or denied forthwith.

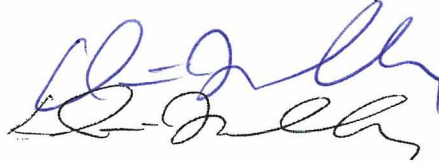
Conclusion

11. AP is a sham application which has publicly stated that it has run out of money, that it will close its art gallery, and that its Executive Director will leave town (see Exhibit C). Its "Petition to Deny" against SDCR is both procedurally and substantively defective. SDCR does have reasonable assurance of the availability of its proposed transmitter site.

WHEREFORE, San Diego Catholic Radio, Inc. urges that the "Petition to Deny" filed by Art Pulse **BE DISMISSED OR DENIED**.

Respectfully submitted,

SAN DIEGO CATHOLIC RADIO, INC.



By _____
Dennis J. Kelly
Its Attorney

LAW OFFICE OF DENNIS J. KELLY
Post Office Box 41177
Washington, DC 20018
Telephone: (202) 293-2300
dkellyfcclaw1@comcast.net

PREPARED: August 18, 2014

TO BE FILED: August 20, 2014

EXHIBIT A

Business Entities (BE)

- Online Services
- **E-File Statements of Information for Corporations**
 - **Business Search**
 - **Processing Times**
 - **Disclosure Search**

- Main Page**
- Service Options**
- Name Availability**
- Forms, Samples & Fees**
- Statements of Information**
(annual/biennial reports)
- Filing Tips**
- Information Requests**
(certificates, copies & status reports)
- Service of Process**
- FAQs**
- Contact Information**
- Resources
- **Business Resources**
 - **Tax Information**
 - **Starting A Business**
- Customer Alerts
- **Business Identity Theft**
 - **Misleading Business Solicitations**

Business Search - Results

Data is updated to the California Business Search on Wednesday and Saturday mornings. Results reflect work processed through Friday, August 15, 2014. Please refer to [Processing Times](#) for the received dates of filings currently being processed. The data provided is not a complete or certified record of an entity.

- *Select an entity name below to view additional information.* Results are listed alphabetically in ascending order by entity name.
- For information on checking or reserving a name, refer to [Name Availability](#).
- For information on ordering certificates, copies of documents and/or status reports or to request a more extensive search, refer to [Information Requests](#).
- For help with searching an entity name, refer to [Search Tips](#).
- For descriptions of the various fields and status types, refer to [Field Descriptions and Status Definitions](#).

Results of search for " ART PULSE " returned no entity records.

Record not found.

[Modify Search](#) [New Search](#)

EXHIBIT B

DECLARATION

Stephen C. Beuerle, pursuant to Section 1.16 of the Commission's Rules, hereby declares as follows:

1. I am President of San Diego Catholic Radio, Inc., an applicant for a construction permit for a new Low Power FM Station in San Diego, California.

2. The preceding "Opposition to Art Pulse Petition to Deny" was prepared under my direction and has been reviewed by me.

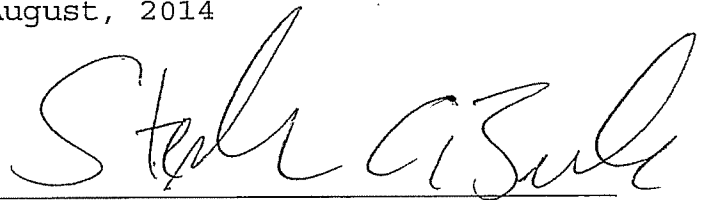
3. The statements made in said "Opposition to Art Pulse Petition to Deny" are true and correct to the best of my knowledge.

4. I initiated contact with Clear Channel Vertical Real Estate on October 31, 2013 relative to the availability of a tower in San Diego, California (ASR #1052001) for use for our application's proposed transmitter site. On November 8, 2013, five days before the filing of our application, I received reasonable assurance of the availability of said tower from Gary Hess of Clear Channel Vertical Real Estate.

5. Subsequent to receiving Art Pulse's "Petition to Deny", I recontacted Gary Hess of Clear Channel Vertical Real Estate, and he reconfirmed on August 9, 2014 that I had in fact obtained reasonable assurance. His e-mail to me is attached.

6. The foregoing statements in this Declaration are true and correct and are made under penalty of perjury.

DATED this 18th day of August, 2014



Stephen C. Beuerle

From: Hess, Gary - (Vertical Real Estate) [<mailto:GaryHess2@clearchannel.com>]
Sent: Saturday, August 09, 2014 8:23 AM
To: Beuerle, Stephen C.; Rigg, John
Subject: RE: San Diego LPFM at your Tower Located at Latitude 32 43 48.0, Longitude 117 05 02.0

Mr. Beuerle

It appears that I have created confusion over the availability of this tower site. Although, we list this site as off limits in our towers database indeed you have previously secured an assurance from Clear Channel on its availability for your LPFM.

A recent inquiry apparently from a competing application again asked that question which I replied it was not available. Please understand that we have been deluged with these requests so memory sometimes conflicts with the facts

I will be glad to discuss and provide what is needed to rectify this situation. If needed please send me a time to call on Monday.

Again my apologies for the miscommunications.

Gary Hess

Director of Vertical Real Estate
2666 Shell Wood Drive
Melbourne, FL 32934
772-215-1634
Email--ghess@clearchannel.com
Visit our site --towers.clearchannel.com



EXHIBIT C

Art Pulse will shut down

Nine-year-old San Diego non-profit arts service organization out of money

By [James Chute \(/staff/james-chute/\)](#) 3:44 p.m. June 24, 2014



April Game

The good news for Art Pulse: the organization recently won a regional Emmy for an ArtPulse TV episode.

The bad news for Art Pulse: there's no more money.

"We're calling it quits," said Art Pulse's co-founder, April Game, on Monday. "We'll have a board meeting later this week and we're going to close."

For most of its nine-year existence, Art Pulse co-founder Henry Moon has been funding the organization, which for the past year has been based at Bread & Salt in Logan Heights. The nonprofit organization operates a gallery, a website and offers education programs for artists. According to Game, it has an annual budget between \$700,000 and \$900,000.

But Moon had to drastically cut back his support earlier this year, and in an email blast in April, Art Pulse, calling itself "your local arts agency," asked people to "fund what you believe in. Make a gift to Art Pulse today."

Apparently, not enough people believed, and Game said the financial situation has reached a point where she has no choice but to shut down.

"I'm disappointed, but it's what we have to do," Game said.

Game and Art Pulse have been virtually inseparable.

She arrived in San Diego in 2005 from Los Angeles, where she ran an art gallery. She formed the San Diego Fine Arts Society in 2007, moved it to NTC in 2009, renamed it Art Pulse in 2011 and raised a few eyebrows the same year by becoming one of the major sponsors of the Americans for the Arts annual convention in San Diego in 2011.

But Game has always thought big.

She hosted a series of community forums that brought arts administrators from all over California to San Diego County to support the idea of a county arts council, which Game hoped, would be Art Pulse.

Given the realities of county politics, and the presence of a strong city arts commission, that idea seemed like a non-starter. But in 2012, Game and Art Pulse made a \$7 million bid to buy Pacific View Elementary in Encinitas and transform it into a community arts center. It looked like there was a deal, but ultimately it fell through.

She started a TV show, ArtPulse TV, which San Diego's NBC 7 aired through last December, and an online listing service, Snorkl, which was still live as of Tuesday.

Earlier this year, Game relaunched Culture Buzz, an online arts journal that included several former Union-Tribune and CityBeat writers.

"Art Pulse is committed to promoting and expanding arts journalism and supporting artists of a different genre — writers — in earning a real wage doing what they do best," stated a news release from Art Pulse.

But some of those writers, apparently, have not been paid.

"I feel terrible about that," said Game, who added she will be working for the next two months to try to find money to pay the employees. She hopes to have everything wrapped up by the end of August.

Game said she has several options for her future, including working as a consultant on an arts project in Europe. She indicated she's unlikely to stay in San Diego after closing Art Pulse.

"We did the best we could," she said.

© Copyright 2014 The San Diego Union-Tribune, LLC. An MLIM LLC Company. All rights reserved.

CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing "Opposition, etc." were served by first-class United States mail, postage prepaid, on this 20th day of August, 2014 upon the following parties¹:

April Game
Art Pulse
1955 Julian Street
San Diego, CA 92101

Melanie Fletcher
Hi Neighbor Inc
3632 Dwight Street
San Diego, CA 92104



Dennis J. Kelly

¹San Isidro Community Radio is no longer a party to LPFM MX Group 41 as its application was dismissed on January 8, 2014; see **Broadcast Actions, Report No. 48154**, released January 13, 2014.