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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC MAIL SECTION

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In re Applications) MM Docket No. 93-241
)
DARRELL BRYAN) File No. BPH-920109MA
)
SBH PROPERTIES, INC.) File No. BPH-920123MD
)
For Construction Permit for a)
New FM Station on Channel 276A)
in Tusculum, Tennessee)

DISPATCHED BY

MEMORANDUM OPINION AND ORDER

Issued: February 2, 1994 ; Released: February 4, 1994

1. Under consideration are the following:

Petition to Enlarge Issues and Threshold Showing of Unusually Poor Broadcast Record, filed September 30, 1993, by SBH Properties, Inc. ("SBH");

Opposition to Petition to Enlarge Issues and Threshold Showing of Unusually Poor Broadcast Record, filed November 12, 1993, by Darrell Bryan ("Bryan");

Reply to Opposition to Petition to Enlarge Issues and Threshold Showing of Unusually Poor Broadcast Record, filed December 10, 1993, by SBH;

Supplement to Petition to Enlarge Issues and Threshold Showing of Unusually Poor Broadcast Record, filed December 10, 1993, by SBH;

Request for Leave to File Late Opposition to Supplement to Petition to Enlarge, filed December 28, 1993, by Bryan;¹

Opposition to Supplement to Petition to Enlarge Issues, filed December 28, 1993, by Bryan;

Comments on Petition to Enlarge Issues, filed January 5, 1994, by the Mass Media Bureau ("Bureau");

¹ IT IS ORDERED that the Request for Leave to File Late Opposition to Supplement to Petition to Enlarge, filed December 28, 1993 IS GRANTED and the Supplement IS ACCEPTED.

Reply to Opposition to Supplement to Petition to Enlarge Issues, filed January 10, 1994, by SBH; and

Reply to Mass Media Bureau's Comments on Petition to Enlarge Issues, filed January 18, 1994.

2. SBH seeks to enlarge the issues against Bryan as follows:

- (1) To determine whether Bryan has violated the Commission's Rules in his operation of WSMG(AM) by permitting the station's carrier to remain on, unmodulated, unmonitored, and unattended, following sign-off.
- (2) To determine whether Bryan has violated the Commission's Rules in his operation of WSMG(AM) by permitting the station to operate at power levels in excess of its authorized power.
- (3) To determine whether Bryan has violated the Commission's Rules in his operation of WSMG(AM) by failing to properly prepare and maintain in the station's local public inspection file the required quarterly issues/programs lists.
- (4) To determine whether either Kathy Knight or Frank Harkins is an undisclosed principal or a real-party-in-interest with respect to Bryan's application.
- (5) To determine whether Bryan has misrepresented the true nature of the ownership and control of his application and the intended ownership and control of the proposed station.
- (6) To determine whether Bryan violated the Commission's Rules in his operation of WSMG(AM) by failing to make available for public inspection, during regular business hours, the station's local public inspection file.
- (7) To determine whether Bryan should be charged with having a poor past broadcast record based on its threshold showing.

3. SBH states that Darrell Bryan is an individual applicant and that he has been the sole proprietor of Burley Broadcasters, Inc., licensee of Radio Station WSMG(AM), Greenville, Tennessee.

4. Issues 1 and 2. According to SBH, WSMG(AM) left its unmodulated and unattended carrier on all night following sign-off on a number of days between May 8, 1993 and June 30, 1993. On June 29-30, 1993, SBH's witness made periodic WSMG field strength measurements and recorded 330 mv during regular programming and after sign-off.

5. In its comments the Bureau notes that it does appear that WSMG(AM) did violate the Commission's Rules by permitting its carrier current to remain on following sign-off. This violation, however, appears to be of minor significance. The licensee assumed that because the carrier current was on for maintenance purposes it was in compliance with the rules.² There is no allegation that the broadcast of the carrier signal caused any disruption to other services or was the subject of any interference complaints.³

6. SBH's allegation that WSMG(AM) was operated with excess power also does not warrant an issue. SBH's claim is based on meter readings contained in SBH's operating log. Bryan has adequately explained that those readings were incorrect. Moreover, Bryan has submitted a statement by an engineering consultant which establishes that at no time was the station operating at excess power. The Bureau's engineering staff has reviewed this statement and has no reason to dispute it. Moreover, the Bureau has determined that absent extenuating circumstances, the allegations, even if true, would not result in a recommendation of designation for hearing. Consequently, the conduct here would not be considered disqualifying.

7. Issue No. 3 -- Public File. SBH seeks an issue to determine whether Darrell Bryan had violated Sections 73.3526(a)(9) and 73.3526(e) of the Commission's Rules in his operation of WSMG by failing to prepare and place the required quarterly issues/programs lists in the station's public file. The requested issue is premised upon an inspection of the station's public file on July 8, 1993, which revealed that as of that date, no quarterly list had been prepared and included in the public file for the periods of October, 1986 through December, 1990, July through December, 1991 and July through December, 1992.

8. In response Bryan has submitted declaration of Kathy Knight in which she points out (page 2) that she had been working with the quarterly lists in an effort to organize the public file, and that she had the "missing" lists in her office when Mr. Murray visited WSMG. She also states that the secretary

² The licensee should have requested special temporary authorization to operate at variance from the terms of its authorization pursuant to Section 73.1635 of the Commission's Rules.

³ The fact that the station could not monitor for emergency broadcast signals while its carrier current was on, is not relevant. During the time the station's carrier current was on, the station was off the air.

on duty when Mr. Murray came to the station offered to contact Ms. Knight when informed that documents were missing, but Mr. Murray declined the offer.

9. Also attached to the Opposition is a declaration by Darrell Bryan in which he states the missing quarterly lists were at the station but were in Ms. Knight's office. He also points out that the list for the second quarter of 1993 was not even due to be placed in the file until July 10, 1993. In response to the SBH allegations about the lack of public affairs programming, Mr. Bryan points out that WSMG helps groups such as civic clubs, church organizations, schools, athletic booster clubs, and Ruritan clubs raise money for their activities. Examples of the activities include providing coats, shoes, and eyeglasses for the needy, Toys for Tots, and books for the library. Additionally, Bryan has submitted over forty letters from almost as many different organizations and individuals, including the Superintendent of Schools, and a member of the Tennessee House of Representatives, lauding WSMG for its support and broadcast of areas of concern to its broadcast community. These letters praise WSMG's broadcast devotion to diverse issues ranging from coverage of local events and fundraisers to its advancement of agriculture and education, two areas of utmost concern to this community. The issue is not warranted.

10. Issues No. 4 and 5 -- Real-Party-In-Interest; Misrepresentation. J. Kent Bewley avers that he was approached by Kathy Knight, an employee of WSMG, as well as her father, Frank Harkins, on behalf of Bryan in an effort to dissuade Mr. Bewley from continuing to participate as a nonvoting shareholder of SBH. Mr. Bewley reports that Mr. Harkins also stated that "he was going to have to help them (WSMG)." Subsequent to his conversation with Mr. Harkins, Mr. Bewley was also approached by Bryan, himself, in an effort to dissuade Mr. Bewley from continuing to participate as a nonvoting shareholder of SBH. Following that conversation, he was again approached by Kathy Knight on several occasions regarding the same subject.

11. In response, Darrell Bryan states that neither Ms. Knight nor her father, have any interest in his application, and, that there have never been any understandings concerning their future ownership or involvement.

12. In a declaration, Frank Harkins states that he went to see Mr. Bewley because his daughter was excited about the prospect of the new FM station because it would provide service to all of Greene County. He denies ever stating to Mr. Bewley that he was providing funds to the Bryan application as an investor, and does not recall using any words in his conversation with Mr. Bewley that could be construed in that way. He states categorically that there has never been any understanding with Darrell Bryan about a role for him, as principal or investor, and he points out that as a 73 year old retired person, he is not in a position to invest in any business.

13. In a declaration, Kathy Knight states that she regularly goes to Bewley's business as a WSMG sales person, and that she was hoping that if he found out that Darrell Bryan had also filed an application that he might reconsider continuing with the application. Ms. Knight points out that she regularly uses words such as "us" when talking to prospective advertisers and is confident that no one interprets such words as a indication that she is a

part owner of WSMG. She states that she has never had an interest in the Bryan application and has never had any discussions with Mr. Bryan or anyone else about becoming an investor.

14. The issues are not warranted. SBH has failed to make a prima facie showing that Kathy Knight or Frank Harkins have an ownership interest or that they will be in a position to exert any control over the operation of the proposed Bryan station. Furthermore, SBH has failed to meet the requirements of Section 1.229 of the Rules which requires that motions to enlarge issues contain sufficient concrete facts, free of surmise, to warrant further inquiry. The SBH allegations based on the impressions formed by Mr. Bewley from his conversations with Kathy Knight and Frank Harkins constitute gross speculation.

15. Issue No. 6 -- Availability of Public File. SBH voting stockholder William Seaver states that he went to WSMG on December 3, 1993 and asked to speak to either Mr. Bryan or Kathy Knight. He states that when he was informed that they were not at the station and then asked to inspect the public file, he was told by WSMG employee Connie Thompson that "she had been expressly advised by Darrell Bryan not to permit anyone to review the public file unless he was present at the station." Mr. Seaver states that it was not possible for him to return to the station at a later time, because he had a prior business commitment in Florida the following day, that he made a few other stops and then began the trip back to Florida.

16. In response Mr. Bryan points out that when the SBH representative, Mr. Murray, had visited the station in July, Ms. Thompson had given him access to the station's operating logs which are not supposed to be accessible to the public. He states that because of that incident, he told Ms. Thompson that he wanted to be informed immediately if anyone wanted to inspect the file so that I could come out of my office and personally handle the request." Mr. Bryan states that he never told Ms. Thompson to deny access to the file if he was not at the station.

17. Mr. Bryan states that when he returned to the station on December 3 and was informed that Mr. Seaver had been denied access to the file, he reprimanded Ms. Thompson and attempted to locate Mr. Seaver. He states that Kathy Knight telephoned Mr. Seaver's mother, was told by her that Mr. Seaver was still in town, but, Mr. Seaver never returned the call. Mr. Bryan points out that Ms. Thompson offered to provide Mr. Seaver with the file containing the letters but that he refused, and that if the file with the letters had been provided, Mr. Seaver would have had access to the entire file.

18. Ms. Connie Thompson avers that when Mr. Seaver appeared at the station at approximately 9:15 a.m. on December 3, she denied him access to the public file because "she had gotten the mistaken impression" that Mr. Bryan did not want anyone looking at the file unless he was present. She states that she told Mr. Seaver that Mr. Bryan and Ms. Knight would return to the station around 10:00 a.m. and offered to make the letters in the public file available in the meantime. Finally, she states that when he returned to the Station, Mr. Bryan "told me that I should have made the file available to Mr. Seaver."

19. It is clear from the Thompson declaration that the denial of the request to see the file was based on her mistaken impression and not on any direct order of Mr. Bryan. There is no evidence that there is a pattern of refusing to provide access to the public file. An isolated incident where a station public file is not accessible is not sufficient to warrant the addition of a public file issue.

20. SBH's Threshold Showing. SBH has failed to sustain its burden of making a threshold showing adequate to warrant including the issue of unusually poor broadcast record. Under the 1965 Policy Statement, an applicant seeking to introduce evidence on the past broadcast record of an applicant or its principals at other stations that they have owned or managed, must first demonstrate as a threshold matter, that the broadcast record has been unusually good or unusually poor and thus could be predictive of future performance. SBH bases its threshold showing solely on its allegations relating to real-party-in-interest and alleged violations of Commission rules, i.e., unmodulated, and unattended transmitter operation; operation in excess of authorized power, failure to place quarterly issues/program lists in the public inspection file, and lack of issue responsive programming.

21. As for the real-party-in-interest issue, it has been shown that the SBH allegations are not based on sufficient concrete facts and that the request for that issue is devoid of merit. As for the allegation with regard to operation with excess power, it has been shown that no such operation occurred because SBH bases its request solely on the remote meter readings. The meter was not giving accurate readings because of radiation to the spliced remote meter line, but, the station engineer, knowing that the remote meter readings were high, took readings at the transmitter which demonstrate that the transmitter was not operating at excess power at any time. As for the allegations of public file violations, it has been shown that the SBH allegations are unsubstantiated. It has been shown that SBH is in error when it speculates that no lists were prepared because they were not available to its representative on the single visit to the station. The "missing" quarterly lists were at the station in another office. Even if the file had not been complete, that standing alone, would be insufficient to support a finding of unusually poor broadcast record. See, Arkansas Educational Television Commission, 6 FCC Rcd 478 (1991).

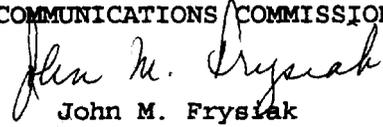
22. With regard to the unmodulated, unattended, operation of the transmitter after sign-off, Mr. Bryan has explained that he used unmodulated operation in the Experimental Period as a form of preventive maintenance. This activity was carried out only in the interest of insuring the station's ability to broadcast for the benefit of the community. Furthermore, curative steps were taken.

23. SBH assertions that WSMG does not offer significant treatment of issues of concern to the community are based solely on its interpretation of the programming described on the quarterly lists that it copies at the station. Bryan has demonstrated that the station has presented considerable issue responsive programming.

24. In light of the foregoing, the requested issues are not warranted.

Accordingly, IT IS ORDERED that the Petition to Enlarge Issues and Threshold Showing of Unusually Poor Broadcast Record, filed September 30, 1993, and Supplement, filed December 10, 1993 by SBH ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION



John M. Frysak
Administrative Law Judge