

DOCKET FILE COPY ORIGINAL

ORIGINAL

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

In the Matter of)
)
WILLIAM L ZAWILA)
)
et al)
)
TO The Commission

EB Docket No. 03-152

Facility ID No. 72672

et al

RECEIVED

DEC 15 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

APPEAL OF RICHARD B. SMITH

VINCENT J. CURTIS
SUSAN A. MARSHALL
HARRY L. COLE

Fletcher, Heald & Hildreth, P.L.C.
1300 N. 17th Street
11th Floor
Arlington, Virginia 22209
(703) 812-0400

Counsel for Richard B. Smith

December 15, 2003

0412

1 Pursuant to Section 1.301(a) of the Commission's Rules, Richard B. Smith appeals the decision of Administrative Law Judge Arthur I. Steinberg ("ALJ") denying Mr. Smith's right to participate as a party in the above-captioned hearing. The ALJ's decision is set forth in a Memorandum Opinion and Order ("MO&O") released December 8, 2003.

2 On July 16, 2003, the Commission designated this proceeding for hearing. As the *HDO* makes clear, the initial impetus for this proceeding was Mr. Smith, who objected repeatedly to applications filed by William Zawila in connection with a construction permit to build Station KNKS(FM), Coalinga, California. *See, e.g., HDO*, FCC 03-158, at ¶¶3, 9-10. As Mr. Smith repeatedly explained in his objections, KNKS(FM), whose permit currently specifies Class B facilities, precludes Mr. Smith from improving his own Station KMAK(FM), Orange Cove, California.¹

3 While the KNKS(FM) permit specifies a 300-foot (91-meter) tower, and while Mr. Zawila claimed (in a license application to cover that permit) that he had constructed such a tower, that tower seemingly disappeared before FCC investigators arrived on the scene at Mr. Smith's suggestion. *See HDO* at ¶¶7-13. The field agent who inspected the site "found no evidence of concrete footings, guy anchors, or other evidence of a 91-meter tower," *HDO* at ¶13, in dramatic distinction to Mr. Zawila's glib and unsupported claims that he really had built the tower. This proceeding was initiated to address the substantial and material questions which this and similar circumstances raised relative to Mr. Zawila's honesty and candor.

4 While Mr. Smith's precipitous role was acknowledged in the *HDO*, the Commission did not expressly include or exclude him from participating as a party herein. Accordingly,

¹ *See, e.g.* Mr. Smith's Informal Objection, filed November 12, 1999, at 1-2, Mr. Smith's Complaint, filed December 5, 2000 at 1-2.

Mr. Smith filed a timely Petition for Leave to Intervene pursuant to Section 1.223 of the Rules. It is the ALJ's denial of that Petition which Mr. Smith here appeals.

5 According to the ALJ, Mr. Smith did not demonstrate "that he would be aggrieved, that his interests would be adversely affected, or that he would suffer a potential direct and substantial injury *as a result of the outcome of this proceeding*" *MO&O* at ¶7 (emphasis in original)

According to the ALJ,

[i]n the worst case scenario from Smith's perspective (*i.e.*, a resolution of the KNGS issues in Zawila's favor), Smith would be left in the exact same position he was in before this case was designated for hearing, namely, he would still be precluded from improving his facility due to the KNGS permit. Therefore, the outcome of this proceeding will not adversely impact or injure Smith's interests any more than he has already been "injured."

Id. The ALJ's "analysis", however, is flawed because it assumes that Mr. Zawila *will* prevail. But if Mr. Zawila does *not* prevail, Mr. Smith stands to benefit considerably. As the Commission has recently observed, a permittee may not file a "grossly defective and incomplete [license] application as a mere placeholder and shift to the staff the full burden of ensuring the technical integrity and safety of [supposedly] constructed facilities." *Aerco Broadcasting Corporation*, FCC 03-281, released November 19, 2003. In that case, the Commission concluded that a license applicant had constructed facilities fundamentally different from those authorized in its permit. The Commission dismissed the bogus license application and cancelled the underlying permit.

6 Here, as the *HDO* makes clear, Mr. Zawila is in the same predicament as the permittee in *Aerco*. Having failed (apparently) to construct according to the terms of his permit, Mr. Zawila filed a license application, presumably attempting to keep his permit alive just a little longer.² If

² As indicated in the *HDO*, the KNGS permit was originally granted in 1987, but was extended four times and reinstated twice before Mr. Zawila filed his license application in 1999 in order to avoid cancellation of the permit pursuant to Section 73.3598(e).

the evidence establishes that the claims in his license application were indeed bogus, then that application will be dismissed and his permit cancelled or revoked.³

7. Those results would plainly benefit Mr. Smith, as they would remove the impediment to the improvement of his facilities which the KNGS Class B permit presents.⁴ By focusing exclusively on the possibility that Mr. Zawila may prevail here, the ALJ ignored the fact that Mr. Smith would benefit considerably if Mr. Zawila does *not* prevail here. Thus, contrary to the ALJ's view, Mr. Smith's interests may be seriously and adversely affected through this proceeding. He is therefore entitled to party status here to assure him the opportunity to avoid these consequences.⁵

8. Indeed, denial of such status not only deprives Mr. Smith of the ability to participate in the full range of hearing processes, but it also precludes him from appealing rulings of the ALJ which Mr. Smith believes to be incorrect and harmful. Similarly, he is precluded from seeking review of the *HDO*'s rejection of his argument that the KNGS(FM) authorization must be deemed to have expired by operation of Section 312(g) of the Act. *See HDO* at 6-7.

³ That result could be reached in one of at least two ways. First, the Commission could determine that Mr. Zawila failed to complete construction of KNGS within the term of his construction permit, in which event the permit must be deemed to have expired. Second, the Commission could determine that Mr. Zawila engaged in disqualifying misrepresentation to the Commission, in which case his permit would be revoked. Either way, the KNGS permit would be eliminated.

⁴ There can be no doubt about the preclusive effect of the outstanding KNGS Class B permit. KMAK operates on Channel 262, which is first adjacent to Channel 261, the channel specified in the KNGS permit, and the two stations are so geographically proximate that KMAK is presently precluded even from increasing its power to full Class A status.

⁵ In pleadings before the ALJ, the Bureau claimed that, because the caption of this proceeding does not include any applications relating directly to Station KNGS(FM), Mr. Smith is precluded from asserting a right to intervene pursuant to Section 1 223(a). But that rule does not refer to "captioned" applications. Rather, it refers to "cases involving applications for . . . station licenses." The *HDO*'s first sentence states unequivocally that the Commission "has before it for consideration the . . . application[] for license for station[] KNGS(FM)." And the discussion in the *HDO* makes clear that an essential allegation concerning the misconduct which is a focus of this proceeding is contained in the KNGS license application. Clearly, the instant case "involves" the KNGS license application, and therefore Section 1 223(a) is applicable here.

9 The ALJ also belittled Mr. Smith's assertion that he would assist in the determination of the issues here. *See MO&O* at ¶8. But Mr. Smith clearly has direct, personal knowledge, borne of his own personal observation, concerning Mr. Zawila's failure to construct Station KNKS(FM). Moreover, Mr. Smith has demonstrated a greater inclination to raise questions about Mr. Zawila and the legitimacy of his permit than has the Bureau here. From the limited discovery which the Bureau has undertaken thus far, the Bureau appears inclined to focus its attention on matters relating to Station KKFO(AM) rather than KNKS or any of the other FM stations here. *Compare* Bureau Request for Admissions re KNKS (six pages in length) with Bureau Request for Admissions re KKFO (263 pages in length).⁶

10 The disparate treatment by the Bureau may arise from the Bureau's apparent perception that KKFO, a licensed facility, is differently situated from the FM stations at issue here. *See, e.g., Tr.* at 13 (Bureau counsel refers to the KKFO(AM) license as possibly already having been forfeited under 47 U.S.C. §312(g)). While the Bureau may set its own priorities in these matters, the fact is that the KNKS(FM) construction permit is equally subject to attack arising from Mr. Zawila's failure to construct the station according to the terms of its permit. It is well-settled that a construction permit has a finite limit, and that a failure to construct within the established time limit results in cancellation of the permit. *Aerco, supra*. Here, the *IIDO* makes abundantly clear that Mr. Zawila did *not* construct the facilities authorized for Station KNKS(FM) within the allotted time. And if that's the case, the permit must be cancelled. *Id.*

⁶ The ALJ suggests that Mr. Smith may provide information as a witness, presumably to be called by the Bureau. *MO&O* at ¶8. But since the commencement of this hearing the Bureau has made no effort to contact Mr. Smith, to solicit information or suggestions from him, or otherwise to acknowledge his involvement and interest herein. The Bureau's conduct thus far does not indicate that the Bureau contemplates any significant role for Mr. Smith in the hearing, the ALJ's unfounded suggestion to the contrary notwithstanding.

11. Mr. Smith's primary interest was and remains the cancellation of the KNGS permit, and he is prepared to participate in the hearing to that end. He can be counted on to contribute meaningfully on this point and to pursue the truth of this matter aggressively. The ALJ's casual dismissal⁷ of Mr. Smith's likely contributions to this hearing cannot be sustained.

12. Perhaps most importantly, rejection of Mr. Smith's request for party status sends an extremely dangerous message to the public. The Commission's ability to regulate in the public interest depends in large measure on the voluntary participation of the public. Here, Mr. Smith has provided and wishes to continue to provide the Commission with precisely that kind of active, public interest-based assistance. The Commission's *HDO* reflects that assistance. And yet, the ALJ would now slam the door in Mr. Smith's face. What better way to discourage public involvement in the licensing process? The ALJ's exclusion of Mr. Smith should be reversed, and Mr. Smith should be accorded status as a party to this proceeding.

Respectfully submitted,


 Vincent J. Curtis
 Susan A. Marshall
 Harry F. Cole

Fletcher, Heald & Hildreth, P.L.C.
 1300 N. 17th Street – 11th Floor
 Arlington, Virginia 22209
 (703) 812-0483

December 15, 2003

⁷ For example, the ALJ asserted that Mr. Smith is seeking to assert his own private interests, rather than the public interest. *MO&O* at ¶8. While it is true that Mr. Smith hopes to benefit from the outcome of this proceeding, that does not foreclose his entitlement to party status here. The interest he is asserting encompasses not merely his own private, pecuniary interest, but also the interest of the increased efficiency of spectrum use which would be achieved if Mr. Zawila's unbuilt station were to be removed from the Commission's records, thus enabling other diligent broadcasters, including Mr. Smith, to improve their service to their respective audiences. *Arizona Mobile Telephone Co.*, 80 FCC2d 87 (Rev. Bd. 1980), cited by the ALJ, is not to the contrary. In that case, the Review Board determined that creditors seeking to intervene to protect their private investment were not, under the facts of that case, entitled to intervention. That is a far cry from the instant situation.

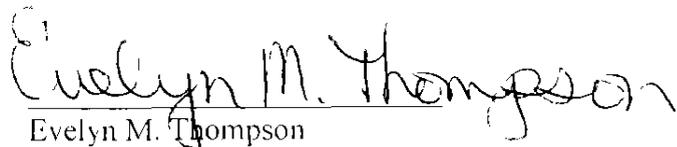
CERTIFICATE OF SERVICE

I, Evelyn M. Thompson, a secretary in the law firm of Fletcher, Heald & Hildreth, P L C .
do hereby certify that a copy of the foregoing "Appeal" was sent this 15th day of December,
2003, by first-class United States Mail, postage prepaid to:

Howard J. Braun, Esquire
Shelley Sadowsky, Esquire (by first class mail and email)
Katten Muchin Zavis Rosenman
1025 Thomas Jefferson Street, N W
Suite 700 East Lobby
Washington, D C 20007-5201
Counsel for William L. Zawila *et al*

Maureen F. Del Duca, Chief
James W. Shook, Esquire (by hand and email)
David M. Janas, Esquire
Investigations and Hearings Division, Enforcement Bureau
Federal Communications Commission
445 12th Street, S W , Room 3-B443
Washington, DC 20554

The Honorable Arthur I. Stemberg (by hand and fax)
Administrative Law Judge
Federal Communications Commission
445 12th Street, S.W. B Room 1-C861
Washington, D C 20554


Evelyn M. Thompson