



Federal Communications Commission
Washington, D.C. 20554
May 24, 2017

In Reply Refer To:
1800B3-JM

Branigan Sherman
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In re: KJPG(AM), Frazier Park, CA, et al.
Facility ID No. 2268
File No. BAL-20170123GCC

through

BALFT-20170123GDO

Application for Assignment of License
Informal Objection

Gentlemen:

We have before us the above referenced applications (Applications) seeking approval for the proposed assignment of the licenses for Station KJPG(AM), Frazier Park, California and 38 other noncommercial educational (NCE) stations (collectively, the Stations), from IHR Educational Broadcasting (IHR), to Immaculate Heart Media, Inc. (Immaculate Heart). Also before us is an "Affidavit of Branigan Sherman in Support of a Petition to Deny Application for Merger/License Transfer" which, for reasons stated below, we will treat as an Informal Objection to the Applications (Objection), filed February 24, 2017, by Branigan Sherman (Sherman), and related pleadings.¹ For the reasons set forth below, we deny the Objection, and grant the Applications.

Background. Sherman is the son of IHR founder, Douglas M. Sherman, and until October 23, 2015, served as a member of IHR's governing board.² On August 31, 2015, Sherman filed a civil lawsuit against IHR and his fellow directors in the California Superior Court for Placer County (Superior Court). The suit was apparently found to be legally defective,³ and on March 11, 2016, Sherman filed a second

¹ IHR filed an Opposition to the Objection (Opposition) on March 9, 2017, to which Sherman filed a Reply (Reply) on March 17, 2017.

² There is dispute between the parties as to the propriety of Sherman's removal from the IHR board of directors and whether he is currently a director. See n. 16, *infra*.

³ Opposition at 6.

amended complaint which he includes as a supporting document to the Objection.⁴ The Superior Court judge determined Sherman's complaint to raise three justiciable causes of actions, including: (1) an attempt to remove IHR's remaining directors pursuant to Cal. Corp. Code §9223(a); (2) injunctive relief to restrain the wrongful actions of Defendants [IHR/directors], including wrongful actions of IHR caused by the Director Defendants; and (3) unspecified declaratory relief.⁵ The Superior Court decided all claims in favor of IHR and entered judgment against Sherman on March 3, 2017.⁶

In his Objection, Sherman argues that the accompanying documents from the Superior Court proceeding establish: (1) "the other Directors of IHR failed to fulfill their fiduciary duties" with respect to a hostile work environment claim which Sherman brought to the board's attention in early August 2015;⁷ and (2) evidence of "self-dealing between IHR Director defendants and officers."⁸ Sherman also argues that the public interest disfavors allowing the proposed transaction, because it would allow the two most dominant Catholic radio broadcasters to create a monopoly in the United States Catholic radio market, and urges us to deny the Applications.⁹

In its Opposition, IHR argues the Objection is procedurally defective and lacks the "specific allegation of fact" required of petitions to deny under Section 309 of the Communications Act of 1934, as amended (the Act).¹⁰ In addition, the Opposition challenges Sherman's standing to file the Objection,¹¹ states the Commission lacks jurisdiction "to evaluate the propriety of internal corporate affairs" such as the interpretation of bylaws,¹² characterizes the Objection as an attempt to relitigate before the

⁴ See *Second Amended Complaint for Removal of Directors*, Case No. SCV0036721 (Sup. Ct. Placer County, California, filed Mar. 11, 2016) (Corporate Governance Complaint). Also included in the Objection was the full discovery conducted in the Superior Court proceeding.

⁵ *Sherman v. Sherman et al.*, Tentative Decision, Case No. SCV – 36721 (Sup. Ct. Placer County, California, Mar. 3, 2017), included as Exhibit B to IHR's Opposition, at 2, ¶¶ 7-15 (Tentative Decision).

⁶ See *Sherman v. Sherman et al.*, Judgment, Case No. SCV – 36721 (Sup. Ct. Placer County, California; Feb. 3, 2017), included as Exhibit A to IHR's Opposition. At defendants' request, the court subsequently entered a "Statement of Decision" in that proceeding. Tentative Decision at 18, ¶¶ 8-13.

⁷ In the Corporate Governance Complaint, Sherman alleges he "is informed and believes" the General Manager of IHR, an outside-hired consultant, created a work environment that "has drastically deteriorated to the point that a hostile and oppressive work environment has developed at the (IHR) Main Office which is unacceptable in any context" and that, although formal staff complaints about the General Manager ceased, this fact "and the loss of valuable staff personnel choosing to leave IHR were the direct and proximate result of intimidation of IHR staff by the GM/Consultant and their fear of retaliation against them by the GM/Consultant." See Corporate Governance Complaint at ¶¶ 29, 30. As noted above, the Superior Court ruled against Sherman, finding the allegations were merely personnel matters and were insufficient under California State Law to prove fraud among IHR's remaining directors. See also "Employment Complaint against Immaculate Heart Radio," Case No. SCV-0038063 (Sup. Ct. Placer County, California, Filed June 30, 2016), attached to the Objection. That Complaint references, but does not include, a complaint allegedly filed by Sherman on or about February 12, 2016, with the Equal Employment Opportunity Commission and a complaint Sherman allegedly filed with the California Labor and Workforce Development Agency on June 30, 2016. The record here contains no further mention of these filings.

⁸ Objection at 2.

⁹ *Id.* at 3.

¹⁰ See 47 U.S.C. §309(d); Opposition at 3.

¹¹ Opposition at 4-5.

¹² *Id.* at 6.

Commission matters previously adjudicated in the Superior Court,¹³ and argues that collateral estoppel has attached to the allegations in the Objection.¹⁴ The Opposition concludes by characterizing the allegations that the proposed merger is against the public interest as “speculative and conclusory in nature” and failing to “rise to the level of a substantial and material issue” as required in order to challenge a broadcast application.¹⁵

In his Reply, Sherman asserts standing as a Director of IHR.¹⁶ He also argues that all issues raised in the Objection are relevant to the Commission’s determination “as to whether granting the Application[s] would serve the public interest.”¹⁷ Sherman also accuses IHR of making misleading statements to the Commission as to the true market implications of the proposed transaction, including the total number of stations Immaculate Heart will own and the markets affected.¹⁸

Discussion. Procedural Issue: Under Section 309(d) of the Act,¹⁹ a party has standing to file a petition to deny if grant of an application would result in, or be reasonably likely to result in, some injury of a direct, tangible or substantial nature.²⁰ The Commission also accords party-in-interest status to a petitioner who demonstrates either that he resides in the service area of the station that is the subject of the petition or that he listens to or views the station regularly, and that such listening or viewing is not the result of transient contacts with the station.²¹ To do so, the petitioner must provide an affidavit or declaration that establishes such standing.²² Sherman’s affidavit neither demonstrates residence within the Station’s service area nor listenership. Additionally, even assuming *arguendo* that he prevails in his directorship claim, Sherman does not provide evidence of exactly how he would be injured by grant of the Application. Accordingly, we find Sherman lacks standing to file a petition to deny in this proceeding. Nevertheless, we will consider the petition as an informal objection under Section 73.3587 of the Rules.²³

¹³ *Id.* at 7-11.

¹⁴ *Id.* at 11-14.

¹⁵ *Id.* at 14 (citing *Mandeville Broad. Corp.*, Memorandum Opinion and Order, 2 FCC Rcd 2523, 2523, para. 4 (1987)).

¹⁶ Sherman notes the Opposition’s claim that the Commission does not resolve internal corporate questions, but argues that under the operative IHR bylaws, a unanimous written vote of all directors was required to remove him which was allegedly not the case. As such, Sherman claims to still be an IHR director and claims to have standing in that capacity. Reply at 3.

¹⁷ *Id.*

¹⁸ Sherman argues that by omitting translators from its calculation the Opposition falsely states the merger will result in the common ownership of only 43 AM and FM stations located in 15 states, when in actuality, the IHR website states “the merged corporation will broadcast inspirational Catholic radio programs over 108 AM and FM radio stations and translators in 36 states.” Additionally, Sherman argues that the Opposition fails to disclose to the Commission that the merged network covers a total population of 133 million people to operate in 22 top 50 media markets. *Id.* at 4-5.

¹⁹ 47 U.S.C. § 309(d).

²⁰ See, e.g., *Telesis Corp.*, Memorandum Opinion and Order, 68 FCC 2d 696, 698-99, para. 8 (1978).

²¹ See *Tabback Broad. Co.*, Memorandum Opinion and Order, 15 FCC Rcd 11899, 11900 n. 3 (2000), and *Chet-5 Broad., L.P.*, Memorandum Opinion and Order, 14 FCC Rcd 13041, 13042, para. 4 (1999).

²² See *Petition for Rulemaking to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, 82 FCC 2d 89 (1980); see also *Infinity Broad. Corp. of California*, Memorandum Opinion and Order, 10 FCC Rcd 9504, 9504, paras. 8-10 (1995); *Tabback Broad. Co., supra*, and *Niles Broad. Co.*, Memorandum Opinion and Order, 7 FCC Rcd 5959, 5959, para. 3 (1992).

²³ 47 CFR § 73.3587.

Substantive Issues. Section 310(d) of the Act²⁴ requires the Commission to make a determination whether the proposed transfer or assignment of a broadcast license would be in the public interest. Under Section 309(d), informal objections, like petitions to deny, must provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity.²⁵ Sherman's Objection has not met this burden.

The Commission has consistently rejected attempts to use its licensing procedures to resolve private contractual disputes.²⁶ It retains exclusive authority to license broadcast stations²⁷ and, in the absence of a stay or injunction issued by a court,²⁸ the Commission has routinely acted favorably on license assignment applications pending resolution of private disputes,²⁹ such as that currently before us. Our grant of an assignment application merely finds that the parties are qualified under, and the proposed transaction does not violate, the Act and the Commission's rules and policies.³⁰ It is permissive only and does not prejudice any relief that the parties may ultimately be entitled to under civil suit.³¹

Accordingly, to the extent that Sherman requests that the Commission review IHR's bylaws and make a determination regarding the propriety of the IHR board's action with respect to Sherman's removal and allegations of self-dealing and other corporate misdeeds, we decline to do so. Interpretation of the IHR bylaws is more appropriately a matter for IHR shareholders and courts of competent jurisdiction.³² Further, in this case, it appears that the appropriate court has considered and rejected Sherman's allegations.

Similarly, with respect to Sherman's allegations that IHR's general manager created a hostile and repressive work environment, it appears that the Superior Court considered and rejected that allegation from the Corporate Governance Complaint in its decision in Case No. SCV – 36731. We will not revisit that determination. Additionally, even assuming *arguendo* that a "hostile work environment" presents a

²⁴ 47 U.S.C. § 310(d).

²⁵ 47 U.S.C. § 309(d); *See, e.g., WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff'd sub nom. Garden State Broad. L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *reh'g denied* (Sept. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864, para. 6 (1986) (informal objection must contain adequate and specific factual allegations sufficient to warrant the relief requested).

²⁶ *See Arcibo Radio Corp.*, Memorandum Opinion and Order, 101 FCC 2d 545, 548, para. 8 (1985); *John F. Runner, Receiver*, Memorandum Opinion and Order, 36 RR 2d 773, 778 (1976) (local court of competent jurisdiction, not the FCC, is the proper forum to resolve private disputes).

²⁷ *See, e.g. Arcibo Radio*, 101 FCC 2d at 549, para. 10 (honoring court order requiring licensee to execute assignment application in favor of another party).

²⁸ Sherman attaches a copy of a "Federal Complaint to Enjoin Merger" apparently filed with the Eastern District of California on January 17, 2017, Case 2:17-cv-00102-KJM-DB. We have no record of any ruling on that filing.

²⁹ *See, e.g., A.L.Z. Broad., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 23200, 23201, paras. 3-4 (2000) (finding contractual dispute concerning payment obligations to be within the province of a court of competent jurisdiction, not the Commission) (citations omitted).

³⁰ *Cumulus Licensing LLC*, Letter, 21 FCC Rcd 2998, 3007 (2006).

³¹ *Id.*

³² *See Sumiton Broad. Co.*, Memorandum Opinion and Order, 15 FCC 2d 410, 412, para. 5 (1968).

justiciable claim under the Act and the Commission's Rules (Rules), Sherman has not provided a sufficient factual basis to support his allegation.³³

Regarding Sherman's allegation that granting the Application would create a monopoly in the Catholic radio market, we note that Section 73.3555(f) of the Rules specifically exempts NCE stations from the Commission's multiple ownership rules.³⁴ Nowhere in the Rules, local radio ownership³⁵ or otherwise, does the Commission impose ownership restrictions on NCE licensees based on religious affiliation or other content niches in a given market, and we decline to impose one here.

Finally, we reject Sherman's allegation that IHR made "misleading statements" to the Commission regarding the true market implications of the proposed transaction. FM translator stations, like NCE stations, are specifically exempted from the multiple ownership rules.³⁶ Thus, IHR's translator stations are irrelevant for purposes of any multiple ownership or "concentration" purposes. Moreover, the representation in IHR's Opposition that it will hold "43 primary AM and FM broadcast stations located in . . . 15 states"³⁷ is not in any way misleading for purposes of determining the Application's compliance with the Act and the Rules, and it is not necessarily inconsistent with the statement on the IHR website that the merged corporation "will broadcast inspirational Catholic radio programs over 108 AM and FM radio stations *and translators* in 36 states"³⁸

Conclusion/Actions. For these reasons, we find that Sherman has failed to raise a substantial and material question of fact calling for further inquiry regarding the Applications. We also find that IHR is qualified to assign the Stations and Immaculate Heart is qualified to hold the Stations' licenses and that grant of the Applications are consistent with the public interest, convenience, and necessity.

Accordingly, IT IS ORDERED that the "Affidavit of Branigan Sherman in Support of a Petition to Deny Application for Merger/License Transfer," filed February 24, 2017, treated herein as an Informal Objection, IS DENIED.

³³ See, e.g., *Eagle Radio, Inc.*, Memorandum Opinion and Order, 9 FCC Rcd 1294, 1295 n.6 (1994) (Commission rejects argument that racist speech at radio station could create a hostile work environment leading to employment discrimination because petitioner had failed to provide a sufficient factual basis for its legal conclusions).

³⁴ 47 CFR §73.3555(f); see *WGBH Educ. Foundation*, Memorandum Order and Opinion, 60 FCC 3d 506, 507, para. 3 (1926) (rejecting concentration of control allegations, in part, because NCE stations are exempt from the multiple ownership rules); see also *KTRU(FM), Houston, Texas*, Letter, 26 FCC Rcd 5966, 5969-70 (MB 2011).

³⁵ See 47 CFR § 73.3555(a).

³⁶ *Id.*; see also 47 CFR § 74.1232(b). For this reason, the FCC Form 314 does not require analysis of an assignee's secondary service FM translator holdings when demonstrating compliance with the local radio ownership rules. See, e.g., FCC Form 314, General Instruction E and Worksheet # 3.

³⁷ Opposition at 14.

³⁸ See *2016 Annual Report*, IMMACULATE HEART RADIO, <https://ihradio.com/about-2/2016-annual-report/> (last visited April 6, 2017) (emphasis added).

IT IS FURTHER ORDERED, that the Applications for Assignment of License for Stations KJPG(AM), Frazier Park, California, et al. (File No. BAL-20170123GCC through BALFT-20170123GDO) ARE GRANTED.

Sincerely,

A handwritten signature in blue ink, appearing to read "Peter H. Doyle".

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Dan J. Alpert, Esq.