



Federal Communications Commission
Washington, D.C. 20554
February 20, 2013

In Reply Refer to:
1800B3-TSN

Anthony T. Lepore, Esq.
P.O. Box 823662
South Florida, FL 33082-3662

Lee J. Peltzman, Esq.
Shainis & Peltzman, Chartered
1850 M Street, N.W.
Suite 240
Washington, DC 20036

In re: **Tony E. Cuellar**
New (FM), Eldorado, Texas
Facility ID No. 190414
File No. BNPH-20120529ALB

Dear Counsel:

We have before us the above-referenced application ("Application") filed by Tony E. Cuellar ("Cuellar") for a new FM broadcast station at Eldorado, Texas.¹ We also have before us a Petition to Deny the Application ("Petition") filed June 28, 2012, by Danny Ray Boyer ("Boyer"), a resident of Eldorado and a principal of the licensee of two radio stations in that community, Stations KLDE(FM) and KPEP(FM).² For the reasons set forth below, we deny the Petition and grant the Application.

Background. Cuellar was the winning bidder for the Eldorado allotment in FM Auction 93 ("Auction 93"). Cuellar timely filed the Application on May 29, 2012. In the Application as originally filed, Cuellar answered "No" to Item 6 in Section II of FCC Form 301, which requires the applicant to certify that

no adverse finding has been made, nor has an adverse final action been taken by any court or administrative body in a civil or criminal proceeding brought under the provisions of any law related to any of the following: any felony; mass media-related antitrust or unfair competition; fraudulent statements to another government unit; or discrimination.

In Exhibit 9 to the Application as originally filed, Cuellar stated that "[t]he application will be amended shortly to provide a complete response to this inquiry [Item 6]." On June 10, 2012, Cuellar amended the Application to check "Yes" in response to Item 6 in Section II, explaining that "[a]fter reviewing the instructions to FCC Form 301 as well as relevant Bureau case law, the applicant affirmatively certifies to this question."

¹ File No. BNPH-20120529ALB.

² Cuellar filed an Opposition to Petition to Deny ("Opposition") on July 20, 2012. Boyer filed a Reply to Opposition to Petition to Deny ("Reply") on July 30, 2012. On August 10, 2012, Cuellar filed a Petition for Leave to File Supplemental Response, along with a Supplemental Response ("Response"), addressing certain issues raised in the Reply. Because Boyer raised certain new issues in the Reply, and in the interest of having a complete record before us, we grant Cuellar's Petition for Leave to File Supplemental Response.

On June 28, 2012, Boyer filed the Petition,³ alleging that grant of the Application would not serve the public interest, convenience, and necessity. Specifically, Boyer presents evidence that on May 13, 1998, in the District Court of Tom Green County, Texas, Cuellar was convicted, pursuant to a plea bargain, of the felony of Engaging in Organized Criminal Activity.⁴ Boyer alleges that Cuellar lacked candor with the Commission when he certified that he was not the subject of any adverse findings or adverse final actions regarding his character qualifications, and that Cuellar's "evasive answer" to Item 6 evidenced a willful material omission relating to his felony conviction and, thus, an intent to deceive the Commission.⁵ In opposition, Cuellar references the Instructions to Section II, Item 6 of Form 301, which state that in responding to this item, "the applicant should consider any relevant adverse finding that occurred within the past ten years."⁶ Cuellar explains that, after initially responding "no" to this item, he reviewed the Instructions to Form 301 and relevant Media Bureau case law, and determined that the correct response was "yes," as his felony conviction, incarceration, and subsequent parole all occurred more than ten years prior to his filing the Application.⁷ He also contends that to consider older felony convictions would render meaningless the principle of rehabilitation of convicted criminals once they have served their sentences.⁸

Boyer counters, in his Reply, that Cuellar neglected to take into account certain Commission policy statements relating to the reporting of past convictions.⁹ He points in particular to the *1990 Policy Statement*, which expanded the range of reportable non-FCC-related criminal misconduct to include any felony conviction. Boyer further cites the *1990 Policy Statement's* admonition that the Commission would continue to examine "the willfulness of the misconduct, the frequency of the misconduct, the currentness of the misconduct, the seriousness of the misconduct, the nature of the participation (if any) of managers or owners, efforts made to remedy the wrong, overall record of compliance with FCC rules and policies, and rehabilitation."¹⁰ Boyer suggests that there might be a substantial relationship between Cuellar's felony conviction and his proclivity to be truthful or comply with the Commission's rules and policies, and that it might constitute the type of "egregious misconduct" that would constitute *prima facie* evidence that Cuellar lacks the traits of reliability or truthfulness necessary to be a Commission licensee.¹¹ He also cites an Enforcement Bureau case in support of his contention that applicants should know they are required to report

³ The Petition was timely filed, as notice was given on June 20, 2012, that the Application was accepted for filing. *See Broadcast Applications*, Public Notice, Report No. 27763 (MB June 20, 2012). 47 C.F.R. § 73.5006(b).

⁴ Petition at 3 and Exhibit A.

⁵ Petition at 3-4.

⁶ *See* Instructions to FCC Form 301, Section II(D).

⁷ Opposition at 2-3.

⁸ *Id.* at 3-4.

⁹ Reply at 2-3. *See Policy Regarding Character Qualifications In Broadcast Licensing Amendment of Rules of Broadcast Practice and Procedure Relating to Written Responses to Commission Inquiries and the Making of Misrepresentations to the Commission by Permittees and Licensees*, Report, Order, and Policy Statement, 102 F.C.C.2d 1179 (1985), *recon. denied*, 1 FCC Rcd 421 (1986) ("1985 Policy Statement"). *See also Policy Regarding Character Qualifications in Broadcast Licensing*, Policy Statement and Order, 5 FCC Rcd 3252 (1990) ("1990 Policy Statement"), *modified*, 6 FCC Rcd 3448 (1991), *further modified*, 7 FCC Rcd 6564 (1992).

¹⁰ *Id.*, citing *1990 Policy Statement*, 5 FCC Rcd at 3252.

¹¹ Reply at 3.

a felony conviction older than ten years prior to application.¹² In the Response, Cuellar distinguishes *Titus* as well as the policy statements, and offers character evidence of his rehabilitation.¹³

Discussion. A petition to deny an application must, pursuant to Section 309(d) of the Communications Act of 1934, as amended (the “Act”),¹⁴ 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.¹⁵ We find that Boyer has not established such a substantial and material question of fact.

We reject Boyer’s contention that Cuellar intended to deceive the Commission regarding his criminal record. In his initial Application, Cuellar checked “no” to Item 6 of Section II of FCC Form 301, indicating that he was unable to certify as to his qualifications with regard to adverse actions. Common sense dictates that an applicant seeking to deceive the Commission as to a past criminal conviction would simply have checked “yes” to that item; Cuellar’s response and exhibit were more indicative of an applicant choosing to err on the side of caution. Moreover, Cuellar’s subsequent revision of his response was not incorrect. The Instructions to Form 301 do, in fact, advise applicants that when responding to Section II, Item 6, they “should consider any relevant adverse finding that occurred within the past ten years.”¹⁶ Further, the review of Commission precedent that Boyer insists is necessary does not change this time limitation. In the *1985 Policy Statement*, the Commission stated that, as a general standard, a ten-year limitation on reportable convictions should apply.¹⁷ Although the *1990 Policy Statement* did expand the scope of non-FCC-related felony convictions that must be reported, it did not extend the ten-year general standard, as Boyer suggests. Based on the explicit instructions to Form 301 as well as the guidance offered by the Policy Statements, then, we cannot conclude that Cuellar intended to deceive the Commission as to his more-than-ten-year-old felony conviction, imprisonment, and subsequent parole.¹⁸

Boyer further argues that, because the ten-year period is only a general standard, and because the Commission may consider older convictions based on the particular facts of a given case, Cuellar should have nonetheless known to report his 14-year-old conviction. Boyer bases this contention on the *Titus* case, in which the Commission’s Enforcement Bureau designated for a revocation hearing the license of an

¹² *David L. Titus*, Order to Show Cause, 22 FCC Rcd 1638 (EB 2007) (“*Titus*”) (order to show cause why amateur radio licensee’s license should not be revoked, due to 14-year-old felony conviction; see discussion in the text below).

¹³ Response at 3-5 and Attachments.

¹⁴ 47 U.S.C. § 309(d).

¹⁵ *Id.* § 309(a). As a resident of and broadcaster in Eldorado, Boyer has demonstrated that he is a party in interest.

¹⁶ See *supra* note 6.

¹⁷ *1985 Policy Statement*, 102 F.C.C.2d at 1229 (“As to the time period relevant to character inquiries, we find that, as a general matter . . . even as to consideration of past conduct indicating ‘a flagrant disregard of the Commission’s regulations and policies,’ a ten year limitation should apply. The ‘inherent inequity and practical difficulty’ (citation omitted) involved in requiring applicants to respond to allegations of greater age suggests that such limit be imposed.”).

¹⁸ See also *Iglesia Jesucristo Es Mi Refugio, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 16310, 16318 (MB 2010), cited by Cuellar (Opposition at 3), in which an applicant’s director, among other things, was alleged to have falsely responded “Yes” to the “adverse actions” item in FCC Form 340. The Media Bureau, Audio Division, found that because the director’s misdemeanor conviction and probation for drug possession occurred more than ten years prior to filing the application, it need not have been reported. While Boyer is correct that the conviction was also not reportable because it was a misdemeanor, the Bureau specifically cited the age of the conviction and probation as its reasons for finding that they need not be reported. 25 FCC Rcd at 16318 and n.67.

amateur radio operator, based upon a 14-year-old conviction for communicating with a minor for immoral purposes.¹⁹ While recognizing that Titus's conviction was older than the general ten-year standard, the Enforcement Bureau explained that requiring Titus to show cause why his license should not be revoked was appropriate because "the nature of his criminal misconduct and the fact the amateur radio service is particularly attractive to children call[ed] into serious question whether he should be permitted to retain his amateur radio authorization."²⁰

While there appears to have been a specific and plausible concern that Titus could have used his amateur radio license to facilitate criminal acts similar to that for which he had been convicted and sentenced,²¹ we do not find a comparable nexus between the FM construction permit for which Cuellar has applied and his past felony conviction. From the record presented, it appears that Cuellar engaged in the possession and sale of cocaine. However, Boyer does not state how Cuellar's status as a Commission permittee or licensee would facilitate further such activities, suggesting only that Cuellar's conviction might constitute *prima facie* evidence that he lacks the traits of reliability and truthfulness necessary to be a licensee.²² Boyer has not established the kind of connection between Cuellar's past conduct and his possession of a Commission authorization that the Enforcement Bureau found in *Titus*, and we thus reject Boyer's suggestion that the *Titus* case compels us to consider a felony conviction more than ten years old.

Moreover, in his Reply Boyer cites in detail the factors to be considered in determining whether a convicted felon has been rehabilitated to the point where he may qualify for a Commission authorization.²³ This in turn prompted Cuellar to file the Response, in which he presents evidence responsive to Boyer's cited factors. This includes the statement of a former member of the San Angelo, Texas, City Council,²⁴ as well as a vice president of Cuellar's bank,²⁵ both attesting to Cuellar's character and work ethic in the trucking company he now owns with his wife. There is also a statement from the Chief of Police of San Angelo, stating that there are no reports on file of any criminal activity by Cuellar since his release from incarceration.²⁶ Finally, Cuellar attaches his own declaration in which he describes his current trucking business, the recipient of several contracts including federal stimulus projects, and his efforts to put his past acts behind him.²⁷ We are therefore satisfied that Cuellar's felony conviction, more than a decade in the past, does not present an impediment to grant of the Application.

¹⁹ *Titus*, 22 FCC Rcd at 1638.

²⁰ *Id.* at 1639.

²¹ As is pointed out by Cuellar, however, at the hearing the Administrative Law Judge permitted Titus to retain his amateur radio license. *David Titus*, Initial Decision, 25 FCC Rcd 2390 (2010).

²² Reply at 3.

²³ *Id.* Specifically, Boyer cites the standard set forth in *RKO General, Inc.*, Memorandum Opinion and Order, 5 FCC Rcd 642, 644 (1990) ("At minimum, the submission should demonstrate that: (1) the applicant has not been involved in any significant wrongdoing since the alleged broadcast-related misconduct occurred; (2) the applicant enjoys a reputation for good character in the community; and (3) the applicant intends to undertake meaningful measures to prevent the future occurrence of FCC-related misconduct."). See also *1990 Policy Statement*, 5 FCC Rcd at 3252 n.4.

²⁴ Letter from Daniel Cardenas, attached to Response.

²⁵ Letter from Joe D. Terrazas, Vice President, First Financial Bank San Angelo, attached to Response.

²⁶ Letter from Tim R. Vasquez, Chief of Police, San Angelo Police Department, attached to Response. We note that Boyer has not presented any evidence of further criminal misconduct by Cuellar since his 1998 felony conviction.

²⁷ Declaration of Tony Cuellar, attached to Response, second and third unnumbered paragraphs.

Conclusion. Based on the Application and the record before us, we conclude that Cuellar did not attempt or intend to deceive the Commission as to his past felony conviction, and that Cuellar is fully qualified to be a Commission licensee. We further find that Boyer has not presented evidence sufficient to raise a substantial and material issue of fact regarding Cuellar's qualifications. Finally, we find that grant of Cuellar's Application is in the public interest, convenience, and necessity. Accordingly, Boyer's Petition to Deny IS DENIED. The Application of Tony Cuellar for a construction permit for a new FM broadcast station at Eldorado, Texas, File No. BNPH-20120529ALB, IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau