Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-43

In re Applications of

OJEDA BROADCASTING, INC. (hereafter "Ojeda") — File No. BPH-910705ML

ROSEMARY HOUSTON (Previously Returned) (hereafter "Houston") — File No. BPH-910705MH

For Construction Permit for a New FM Station on Channel 243A in Hobbs, New Mexico

HEARING DESIGNATION ORDER

Adopted: February 23, 1993; Released: March 9, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned applications for a new FM station.

2. On August 7, 1991, the Commission returned Houston's application as not sufficient for tender. On September 10, 1991, Houston filed a petition for reconsideration of the return of her application. Additionally: (i) On August 13, 1991, Houston filed a petition to dismiss Ojeda's application; (ii) On August 26, 1991, Houston filed a second petition to dismiss Ojeda's application; and, (iii) on September 10, 1991, Houston filed a third petition to dismiss Ojeda's application.[1]

3. *Houston.* In the petition to reconsider the return of her application, Houston alleges that: (i) she requested the forms on June 14, 1991 and did not receive them until late July; (ii) in the meantime, through her contact with the Commission, she was informed by an Information Specialist that since the engineering portion of the application had been completed, she should file that portion, and file the remaining parts as soon as the complete FCC Form 301 was received; and (iii) she then filed those sections and, upon receipt of the forms from the FCC, filed the complete application as soon as possible. Houston further alleges that the Commission returned her incomplete application on August 7, 1991, not realizing that the missing sections had been filed.

4. Houston attempts to shift the responsibility to file a substantially complete application to the Commission for its alleged delay in sending FCC Form 301 to her. The fact that Houston requested FCC Form 301 on June 14, 1991, with the window closing on July 5, 1991 suggests that had Houston requested the form in a more timely manner, she would have had ample time to prepare and file the complete form. Under the Commission's "hard look" FM processing policy, Houston's incomplete application was properly returned as not acceptable for tender. *FM Application Processing,* 50 Fed. Reg. 19936, 19945. (1985) *recon. denied, Memorandum Opinion and Order,* 50 Fed. Reg. 53157 (1985). Houston filed the application with the entire legal qualifications portion omitted, and her attempt to resubmit the complete application after close of the filing window was an impermissible attempt to cure a tenderability defect. *See also* 47 C.F.R. § 73.3522 (a)(6) and 73.3564(a).[2]

5. The "hard look" FM processing policy has been strictly applied by the Commission. In *Lauderdale-Mckeehan Christian Broadcasting Corp.,* 4 FCC Rcd 8095 (1989), the Commission held that "a petition for reconsideration of a finding of untenderability ... must demonstrate that findings of fact and/or conclusions of law concerning the tenderability of the application as originally filed were erroneous," citing *FM Applications Processing, supra,* and 47 C.F.R. § 1.106(d)(2) (emphasis omitted). Houston's incomplete application was properly returned by the staff. Additionally, we do not believe that the advice of an unnamed "information specialist" should stop the Commission from applying the "hard look" processing rules in effect at the time Houston's application was filed. The Commission has stated previously, and we emphasize again, that interested parties have the obligation to ascertain facts from official Commission records and files and may not rely on inquiries to the staff. *See, e.g., Texas Media Group, Inc.,* 5 FCC Rcd 2851, *aff'd sub nom. Malkan FM Associates v. FCC,* 935 F. 2d 1313 (D.C. Cir. 1991); *220 Television, Inc.,* 81 FCC 2d 575 (1980), *Camelot, Inc.,* 61 FCC 2d 15 (1976). To accept Houston's argument would "enable an applicant to unjustifiably shift a responsibility that is properly its own to the Commission staff." *M&C Broadcasting, Inc.,* FCC 85-217, Mimeo no. 35777 (released April 29, 1985) p.4.

6. *Ojeda.* In her first petition to dismiss Ojeda's application, Houston alleges that Ojeda failed to comply with the public notice requirements contained in 47 C.F.R. § 73.3580. She states that she conducted an intensive search for the public notice in the local daily newspaper and has confirmed that no such public notice was requested or published on behalf of Ojeda. Additionally, since Ojeda certified compliance within the application submitted to the Commission (Section VII, Question #1, Page 24, FCC Form 301), and since the required public notice serves to inform the citizens of the community of the applicant's intent and location of the local public file, Houston be-

[1] An opposition to the petition to reconsider was filed by Ojeda on October 2, 1991; an opposition to the August 13 petition to dismiss was filed by Ojeda on August 27, 1991; a consolidated opposition to the second and third petitions to dismiss was filed by Ojeda on September 25, 1991; and comments in opposition to Ojeda's response were filed on October 30, 1991.

[2] The Commission recently modified the "hard look" processing rules, and made these revised rules effective as of August 7, 1992. *Report and Order, Commercial FM Broadcast Applications,* 7 FCC Rcd 5074(1992). The Commission determined that applications filed prior to that date would continue to be processed under the rules in effect on the date of the application's receipt.

lieves that Ojeda omitted this obligation intentionally in order to allow the time for comment and response to the Commission to expire.

7. In Houston's second petition to dismiss Ojeda's application, she alleges that Ojeda falsely represented that D. Kirk Edens, Executive Vice President of the United New Mexico Bank, has committed to lend $60,000.00 to construct and operate the new FM station. Houston states that the United New Mexico Bank has neither loaned nor committed to lend any money for this purpose, and submitted an affidavit of Attorney Glen L. Houston to support this allegation. Houston further alleges that Ojeda's representations that $100,000.00 would be necessary to construct and operate the facility for three months, that $40,000.00 of this would come from its own funds, and that the remainder would come from the United New Mexico Bank, constitute material misrepresentations.

8. In her third petition to dismiss Ojeda's application, Houston alleges that in Section V-B, of FCC Form 301 of Ojeda's application, the 60 dbu contour lies within the 70 dbu contour as shown on the USGA 1:250,000 map annexed as "Figure 5A" to the engineering section of the application, and the population figures could therefore be incorrect.

9. We find Houston's petition to dismiss Ojeda's application due to noncompliance with the public notice requirement to be without merit. Ojeda's publication of the local notice after the 30-day time period specified in Section 73.3580 is not a disqualifying defect. The Commission has consistently permitted an applicant who has not complied with the rule to publish its local notice late. *See, e.g., United Broadcasting Co. of Eastern Maryland, Inc,,* 51 RR 2d 1393 (1982). Local notice of the filing of Ojeda's application was published in the *Hobbs Daily News-Sun* on August 16, 1991, as well as on August 20, 21, 22, 1991, some 17 days after the 30-day period established by Section 73.3580. *See* Opposition to Petition to Dismiss, at 3. Houston has demonstrated no harm resulting form Ojeda's failure to publish its local notice in a timely manner and comments or objections by Hobbs residents notified by the late local notice would have been duly considered. None was submitted.

10. In response to Houston's second petition to dismiss, Ojeda argues that she was financially qualified based upon discussions with the United New Mexico Bank and a letter that she had acquired from the bank prior to filing the application. Additionally, Ojeda contends all that is required is "reasonable assurance" of financing, and that there exists written documentation supporting the claim of "reasonable assurance" at the time the application was filed, which need not be submitted with the application. *See* Ojeda's September 25, 1991 opposition, at 3. By letter dated August 24, 1992, the staff requested that Ojeda submit the referenced bank letter, along with any other pertinent material confirming her arrangement with the bank, in the form of an amendment to Ojeda's application. On September 10, 1992, Ojeda filed an amendment in which she submitted a letter dated July 1, 1991 from United New Mexico Bank. This letter simply states that: (i) Mr. and Mrs. Ojeda have visited the bank about a loan and Mr. Ojeda estimated that he will need a total of $100,000.00; (ii) he will have a strong cash equity contribution into this project; and (iii) this "speaks very favorably for them and will be considered a strong plus" as the bank looks further into their loan application. Ojeda also submitted a letter dated September 16, 1991 from the United New Mexico Bank in which the bank provided "reasonable assurance" of its willingness to consider a loan to the Ojedas in the amount of $80,000.00. However, this September 16 letter was received from the bank after the Ojeda application was filed on July 5, 1991.

11. An applicant is required to have "reasonable assurance" of financing before it certifies its financial qualifications. It may not make the certification and then arrange financing. *Pepper Schultz,* 103 FCC 2d 1052 (Rev. Bd. 1986). This does not require that the applicant have written documentation when it certifies its financial qualifications, so long as the applicant actually has reasonable assurance of adequate funds at the time of certification, it may prepare supporting documentation after certification. *Northampton Media Associates, Inc.,* 4 FCC Rcd 5517 (1989), *recon. denied* 5 FCC Rcd 3075 (1990). Here, Ojeda indicates that it relies on the July 1 letter to demonstrate its pre-certification "reasonable assurance" of financing. However, that document, in connection with the September 16 letter for the United New Mexico Bank, demonstrates that Ojeda may not have had *any* assurance of funding from the Bank at the time of the certification. Rather, she had applied and the bank was "looking further" into her loan application. We will therefore designate Ojeda's application for hearing and appropriate issues will be specified.

12. Finally, Houston's third petition to dismiss is without merit. On September 19, 1991, Ojeda filed an amendment which indicated that the 70 dbu and 60 dbu contours on the USGA 1:25 0,000 map had been inadvertently mislabeled (switched). This amendment was filed during the amendment-of-right period. *See* 47 C.F.R. § 73.3522(a)(6).

13. Except as is indicated by the issues specified below, the applicant is qualified to construct ad operate as proposed. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the application of Ojeda Broadcasting, Inc. IS DESIGNATED FOR HEARING IN A PROCEEDING to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues.

1. To determine whether or not Ojeda was financially qualified at the time she filed her application.

2. To determine, in light of the evidence adduced pursuant to issue 1 above, whether Ojeda misrepresented facts or lacked candor with the Commission in certifying its financial qualifications.

3. To determine, in light of the evidence adduced pursuant to issues 1 and 2 above, whether Ojeda possesses the basic qualifications to be a licensee of the facilities sought herein.

14. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Rosemary Houston IS DENIED; the petition to dismiss Ojeda's application filed by Rosemary Houston IS DENIED; the third petition to dismiss Ojeda's application filed by Rosemary Houston IS DENIED; and, the second petition to dismiss Ojeda's application filed by Rosemary Houston IS GRANTED to the extent indicated above, and IS DENIED in all other respects.

15. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the

Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail itself of the opportunity to be heard, the applicant shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicant shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau