

PETITION TO DENY PROCESS

**Prepared by
Romilda Crocama, Joshua Greenberg and Kimathi Foster, Benjamin N. Cardozo
School of Law, Yeshiva University**

After an LPFM application has been approved by the FCC, the application is still subject to a Petition to Deny by another party with an interest in the FM channels sought by the LPFM applicants. The process begins after the FCC issues a public notice, available on the FCC web page (www.fcc.gov), accepting applications. The FCC's first such Notice regarding LPFM applications is expected in October 2000.

The Petition to Deny process includes three elements: (1) the initial Petition to Deny, brought by the party objecting to the LPFM application (the "Petitioner"); (2) an Opposition to the Petition to Deny, which is an opportunity for the LPFM applicant to respond to the claims set forth in the Petition to Deny; and (3) a Reply to the LPFM applicant's Opposition to the Petition to Deny, a final step available to the Petitioners.

APPLICABLE STATUTE

UNITED STATES CODE SERVICE—TITLE 47. TELEGRAPHS, TELEPHONES,
AND RADIOTELEGRAPHS—CHAPTER 5. WIRE OR RADIO
COMMUNICATION—SPECIAL PROVISIONS RELATING TO RADIO--
GENERAL PROVISIONS (2000)

§ 309. Application for license

(a) Considerations in granting application

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application. . . .

(d) Petition to deny application; time; contents; reply; findings.

(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) [the public interest, convenience or necessity](or subsection (k) in the case of renewal of any broadcast station license). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are substantial or material questions of fact and that grant of the application would be consistent with subsection (a) [the public interest, convenience and necessity], it shall make the grant, deny the petition and issue a concise statement of the reasons for denying the petition which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that a grant would be consistent (a).[the public interest, convenience and necessity], it shall proceed as provided in subsection (e) [designate the application for hearing].

STANDING

Any “party in interest” may file with the Commission a petition to deny an application for a LPFM license. 47 U.S.C. § 309 (d) (1) (2000); 47 F.R. 73.3584 (a) (2000). To have standing as a party in interest, a petitioner must establish that a grant of the application complained of would result in, or be reasonably likely to result in, some injury of a direct, tangible or substantial nature to the petitioner. Branton v. FCC, 993 F.2d 906 (1993). Further, there must be probable injury of a substantial character, not an injury that is only nominal or speculative. In the Matter of application of Irene M. Neely 49 F.C.C.2d 311 (1974). For example, in one case the FCC found a prior competitor did not have standing because the would-be competitor was “not currently an economic competitor” and its injuries were too speculative. Pinelands, Inc., 71 Rad. Reg. 2d (P & F) 175, 181 (1992).

In practice, standing at the FCC includes only three kinds of parties: competitors suffering signal interference; direct economic competitors; and audience members. Individuals have standing only as representatives of the public interest, and must be listeners to, or persons living within, the broadcast area of the licensee. Office of Communication of the United Church of Christ v. FCC, 359 F. 2d 994, (1966); Maier v. FCC, 735 F. 2d 220 (1984). Corporations also may assert standing as audience members. In WGSM Radio, Inc., for example, several local corporations that were not competing licensees challenged an assignment of a license. The principals of the corporations had standing as listeners, and their standing was imputed to their corporations. 2 F.C.C.R. 4565 (1987). In addition, where the Commission has designated an application for

hearing, parties in interest who are not parties to the proceeding may acquire the status of a party by filing a petition for intervention, after showing the basis for their interest in the proceeding. 74 Am. Jur. 2d Telecommunications 168.

CONTENT OF PETITION TO DENY

A Petition to Deny must state specific facts to demonstrate: a) that the Petitioner is a party in interest; and b) that approval of the application is inconsistent with the public interest, convenience, and necessity.

These statements of fact must be "supported by affidavit of a person or persons with personal knowledge thereof," except for "those [statements] of which official notice may be taken." 47 CFR § 1.939(d)

day after the Public Notice is announced and includes weekends and holidays, except for the final day of the 30 day period. 47 C.F.R. §§ 1.4(b) and (j). In cases where the thirtieth day falls on a Saturday or Sunday or a National Holiday, the Petitioner has until the following business day to file the Petition.

EXAMPLE 1: If a Public Notice is announced on Wednesday, September 1, then the Petition to Deny must be filed by Friday, October 1.

EXAMPLE 2: If a Public Notice is announced on Friday, September 1, then the Petition to Deny must be filed by Monday, October 2 (rather than Sunday, October 1).

EXAMPLE 3: If however, in the second example Monday, October 2 is a National Holiday, then the Petitioner would not have to file until Tuesday, October 3.

Opposition to Petition (to Deny)

The LPFM applicant may file an Opposition to the Petition to Deny "within 10 days after the original pleading is filed;" that is, 10 days after the Petitioner files the Petition to Deny. 47 C.F.R. § 1.45(b). Again, like the calculation used for the 30 day time period indicated for the Petition to Deny, the 10 days allowed for the Opposition includes weekends and holidays.

EXAMPLE 4: If the Petition to Deny is filed on Friday, October 1, then the window to file the Opposition would begin to run on Saturday, October 2 and would end on Monday, October 11.

EXAMPLE 5: If however, Monday October 11 was a National Holiday, then the filing window would not end until Tuesday, October 12.

The filing window for the Opposition is initiated only once the Petition to Deny is actually filed. Therefore:

EXAMPLE 6: If the Public Notice is released on Wednesday, September 1, giving the Petitioner until Friday, October 1 to file, and the Petitioner filed early, on Monday, September 6, then the applicant has only until Tuesday, September 16 to file the Opposition. The applicant does not have 10 days from the close of the filing window (Friday, October 1), but 10 days from the date that the Petition to Deny was actually filed (Monday, September 6).

Reply to Opposition

The Petitioner's Reply to the applicant's Opposition to the Petition to Deny must be filed "within 5 days after the time for filing Oppositions has expired." 47 C.F.R. § 1.45(c). However, unlike the filing period for the Petition to Deny and the Opposition, this 5 day period does not include weekends or holidays. 47 C.F.R. § 1.45(g).

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Opposition until Friday, October 22 (5 days from October 15, the last day for filing the Opposition).

Because of this provision, it is in an applicant's interest not to file an Opposition immediately, but to wait until the end of the period allowed for filing the Opposition. This extra time will not only benefit the applicant's drafting of the Opposition, but will also frustrate the Petitioner's drafting of a Reply to the Opposition by providing less time to complete and file the Reply.

Service By Mail

If the document to which an applicant or Petitioner is responding in his Opposition or Reply was served upon the applicant or Petitioner by mail, then the applicant or Petitioner may be given an additional 3 days to file his Opposition or Reply (not including weekends or holidays). However, this does not include “service by facsimile or by electronic means.” 47 C.F.R. § 1.45(h).

Extensions for Filing Dates

An applicant or Petitioner may request that the Commission allow a continuance or extension of the time permitted for filing, and need not wait for the filing of Oppositions or replies before making such a request. The Commission may then approve or reject the request at its own discretion, and without notice or argument from the other party. 47 C.F.R. § 1.45(e).

SERVICE

A copy of the Petition to Deny, the Opposition, or the Reply must be served on all interested parties (including the applicant or Petitioner) by delivering a copy to the party, the party's attorney or agent, or by mailing a copy to the party's last known address. Service of documents in electronic form will be considered acceptable only if the party to be served agrees to accept service in a form other than paper. 47 C.F.R. §§ 1.939(c), 1.47(d).

Service can be made at the party's residence or office, and can be left with the person in charge of such office or, if there is no such person, left in a conspicuous place in the office. If delivery is made to the party's residence, it must be left with "some person of suitable age and discretion." Service may also be made by leaving a copy of the document with the carrier's designated agent in the District of Columbia; if carrier has failed to designate such an agent, then service may be made by posting such notice in the Office of the Secretary of the Commission. 47 C.F.R. §§ 1.47(e) and (h).

Finally, once service is made, proof of service must be filed and must include the time and manner of the service. Such proof of service "may be by written acknowledgement of service, by certificate of the person effecting the service, or by other proof satisfactory to the Commission." However, the validity of the service will not be affected by a failure to file a proof of service; such proof may be offered or altered at any time, "unless to do so would result in material prejudice to a party." 47 C.F.R. § 1.47(g).

FCC ACTION

The FCC will conduct a hearing on the application only if the Petition to Deny raises a substantial and material question of fact, or if the Commission, for any reason,

decides that a grant of the license may be inconsistent with the public interest, convenience and necessity. 47 U.S.C. § 309(d)(2)(2000). If the Commission designates the application for hearing, the parties must appear at the hearing and the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except with respect to any issue presented by a petition to deny or a petition to enlarge the issues. 47 U.S.C. § 309(e)(2000). An Administrative Law Judge will preside. The Administrative Law Judge's determination can be appealed to the full Commission.

The filing of a Petition to Deny does not automatically jeopardize an LPFM application because the FCC may dismiss or deny the Petition to Deny and grant the application in question without a hearing. In this case, the Commission will provide a concise statement that disposes of the substantive issues raised in the Petition, and give the reason(s) for the dismissal or denial of the Petition. 47 C.F.R. §1.939(h). If the issues raised in a Petition to Deny have become moot or the Petition does not comply with the requirements set out in 47 C.F.R. § 1.939 then the FCC may dismiss the Petition. The reasons for any dismissal will be indicated in a dismissal letter or order. All responsive pleadings related to the Petition to Deny also are dismissed along with the Petition. 47 C.F.R. § 1.939 (g).