



Federal Communications Commission  
Washington, D.C. 20554

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**DA 05-1945**  
***In Reply Refer to:***  
**1800B3-CNZ**

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Re: Liberty Productions, a Limited Partnership  
WOXL-FM, Biltmore Forest, NC  
Facility ID No. 37242  
File No. BAPH-20040116ACT  
Application for Consent to Assignment

Dear Counsel:

We have before us the above-captioned application (“Assignment Application”) of Saga Communications of North Carolina, LLC (“Saga”), to acquire the permit of station WOXL-FM, Biltmore Forest, North Carolina, from Liberty Productions, a Limited Partnership (“Liberty”).<sup>1</sup> We also have before us the Petition to Deny (“Sutton Petition to Deny”) filed by Sutton Radiocasting Corporation (“Sutton”) on February 20, 2004, and the Petition to Deny and Revoke Permit (“Willsyr

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<sup>1</sup> On February 20, 2002, after Liberty had filed the Assignment Application to assign the WOXL-FM construction permit, Liberty filed an application for a license to cover the construction permit (File No. BLH-20020220AAL). This license application was granted December 8, 2004. We are therefore treating the Assignment Application as one that proposes assignment of the license.

Petition”) filed by Willsyr Communications, Limited Partnership (“Willsyr”) on February 23, 2004.<sup>2</sup> Willsyr also filed an Objection on March 22, 2004 (“Willsyr Objection”), which reiterates the arguments in its Petition.<sup>3</sup> After reviewing the record,<sup>4</sup> we find that grant of the Assignment Application is consistent with the public interest.

**Background.** Liberty was the high bidder in Closed Broadcast Auction No. 25 for the FM construction permit at Biltmore Forest (“Biltmore Forest Auction”).<sup>5</sup> Willsyr was a mutually exclusive applicant and qualified bidder in the auction for the Biltmore Forest permit.<sup>6</sup> On May 25, 2001, in its post-auction decision (“*Liberty Order*”),<sup>7</sup> the Commission determined that Liberty was fully qualified, accepted its November 10, 1999, amendment<sup>8</sup> and, subject to full payment of Liberty’s final bid and timely compliance with all payment procedures, granted Liberty’s application, as amended. The Commission also dismissed the competing applications.<sup>9</sup> Subsequently, in a “ready to grant” public

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<sup>2</sup> Willsyr filed a Petition for Reconsideration and to Reopen the Record on December 30, 2004, in response to a December 3, 2004, staff decision (*Letter to Timothy K. Brady*, Ref. No. 1800B3-CNZ (MB Dec. 3, 2004)) regarding applications for a construction permit (File No. BPH-19870831MI) and license (File No. BLH-20020220AAL) (“Petition for Reconsideration”). That proceeding remains pending. Although Willsyr did not file its Petition for Reconsideration in the instant proceeding, Willsyr requests therein that it be “considered in conjunction with” the Willsyr Petition in the instant proceeding. We decline to do so.

<sup>3</sup> Additional pleadings have been filed in the instant proceeding. Liberty filed a Response to Objection on April 2, 2004. Saga filed an Opposition to Objection on April 6, 2004. Willsyr filed a Consolidated Reply to Oppositions to Objection on April 16, 2004. Willsyr filed a Supplement to Objection on July 6, 2004. Liberty filed an Opposition to Supplement to Objection on July 19, 2004. Saga filed an Opposition to Supplement to Objection on July 21, 2004. Willsyr filed a Consolidated Reply to Oppositions to Supplement on August 2, 2004. Willsyr filed a Further Supplement to Objection on August 30, 2004. Liberty and Saga filed a Joint Opposition to Further Supplement to Objection on September 21, 2004. Willsyr filed a Reply to Joint Opposition on October 1, 2004. Willsyr also filed a Statement for the Record on October 20, 2004. Liberty filed a Reply to Statement for the Record on October 29, 2004. Willsyr filed a Reply to Response of Liberty on November 5, 2004.

<sup>4</sup> On July 9, 2004, the Audio Division staff (“Division”) sent Liberty a letter of inquiry (“*LOI*”) seeking information and documents germane to the WOXL-FM Assignment Application. Liberty’s July 19, 2004, submission of the documents specifically requested by the Division included a “Request for Confidential Treatment of Documents Under Sections 0.457 and 0.459 of the Rules.” As discussed *infra*, the Division denied Liberty’s request for confidentiality. Once the documents were made public, Willsyr supplemented its Petition on December 3, 2004 (“Willsyr Supplement”).

<sup>5</sup> See “Closed Broadcast Auction No. 25 Closes, 91 Winning Bidders in the Auction of 118 Broadcast Construction Permits,” *Public Notice*, 14 FCC Rcd 17186 (Oct. 12, 1999).

<sup>6</sup> See File No. BPH-19870831MJ. The other mutually exclusive applicants that qualified as bidders to compete in the Biltmore Forest Auction were Biltmore Forest Broadcasting FM, Inc., File No. BPH-19870831MK (“BF Broadcasting”); Skyland Broadcasting Co., File No. BPH-19870831ML; and Orion Communications Limited, File No. BPH-19870901MI (“Orion”).

<sup>7</sup> *Liberty Productions, L.P.*, 16 FCC Rcd 12061 (2001).

<sup>8</sup> Liberty’s amendment consisted, in part, of minor changes to its technical proposal, including a new transmitter site and an upgrade from a Class A to a Class C3 facility.

<sup>9</sup> *Liberty Order*, 16 FCC Rcd at 12095.

notice released on June 14, 2001, the Mass Media Bureau (“Bureau”) announced that the balance of Liberty’s winning bid payment was due by June 19, 2001, and that upon timely payment, the authorization would be issued.<sup>10</sup> On July 9, 2001, having received such payment timely on June 19, 2001, the Commission issued a permit to Liberty to construct a new FM station on Channel 243C3 at Biltmore Forest, North Carolina. On August 7, 2001, the Commission released a Public Notice of the grant of Liberty’s construction permit.<sup>11</sup> As noted above, the station is now built and licensed; it is on the air using the call letters WOXL-FM.

Sutton is the licensee of WNCC-FM, Franklin, North Carolina.<sup>12</sup> In its Petition to Deny, Sutton requests that the Commission withhold action on the Assignment Application pending resolution of a June 13, 2001, Petition for Reconsideration and/or Clarification filed by Sutton and a September 5, 2001, Petition for Reconsideration filed by Sorenson Southeast Radio, LLC (“Sorenson”).

Willsyr raises various arguments in its pleadings.<sup>13</sup> First, Willsyr claims that certain recent statements made by Liberty regarding its ownership structure are inconsistent with representations made while it was prosecuting its construction permit application. Second, Willsyr argues that Ashville Radio Partners, LLC (“Ashville”) is the real party in interest and has *de facto* control of WOXL-FM. Finally, Willsyr contends that Liberty failed to include with the Assignment Application agreements and documents material to the sale of WOXL-FM. Liberty and Saga each filed an Opposition responding to Willsyr’s allegations and asserting that Willsyr does not have standing to petition against the Assignment Application.<sup>14</sup> David T. Murray, a limited partner of Liberty, separately filed an Opposition to Willsyr’s Petition.<sup>15</sup> In addition, Ashville filed an Opposition responding to Willsyr’s allegations against it.<sup>16</sup>

### **Sutton Petition to Deny**

In its Petition to Deny, as noted above, Sutton requests that the Commission withhold action on the Assignment Application pending a final resolution of a June 13, 2001, Petition for Reconsideration

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<sup>10</sup> “FCC Announces It Is Prepared to Grant FM Broadcast Construction Permit for Biltmore Forest, North Carolina After Final Payment Is Made,” *Public Notice*, 16 FCC Rcd 11884 (June 5, 2001) (corrected by a Correction Public Notice released June 14, 2005, to specify that the deadline for submission of Liberty’s lump sum final payment would be June 19, 2001).

<sup>11</sup> See “Broadcast Actions,” *Public Notice*, Report No. 45043 (Aug. 7, 2001).

<sup>12</sup> Sutton argues that the WOXL-FM authorization for Channel 243C3 is in conflict with a minor modification application for Station WNCC-FM filed by Sorenson Southeast Radio, LLC, the former station licensee. See File No. BPH-20010301ABB.

<sup>13</sup> We consider all arguments raised in the Willsyr Petition, Willsyr Objection, and Willsyr Supplement.

<sup>14</sup> See Opposition to Petition to Deny Assignment and to Revoke Permit filed by Liberty on March 18, 2004 (“Liberty Opposition”); Opposition to Petition to Deny Assignment and Revoke Permit filed by Saga on March 19, 2004 (“Saga Opposition”).

<sup>15</sup> See Opposition to Petition to Deny and to Revoke Permit filed by David T. Murray (“Murray”) on March 18, 2004 (“Murray Opposition”).

<sup>16</sup> Opposition to Petition to Deny filed by Ashville on March 8, 2004 (“Ashville Opposition”).

and/or Clarification filed by Sutton and a September 5, 2001, Petition for Reconsideration filed by Sorenson. Both pleadings address the Commission's grant of Liberty's application to construct a new FM station on Channel 243C3 at Biltmore Forest, North Carolina.<sup>17</sup> By a staff letter decision dated December 3, 2004, the Sutton June 13, 2001, Petition for Reconsideration and/or Clarification was dismissed and the Sorenson September 5, 2001, Petition for Reconsideration was denied.<sup>18</sup> Accordingly, the Sutton Petition to Deny the Assignment Application is now moot.

### **Willsyr Petition to Deny Assignment and Revoke Permit**

**Standing.** Liberty and Saga argue that Willsyr has not met the statutory standard for standing set forth in Section 309(d) of the Communications Act of 1934, as amended (the "Act").<sup>19</sup> Section 309(d)(1) of the Act restricts to "parties in interest" the universe of entities that may file a petition to deny a proposed assignment.<sup>20</sup> Under this provision of the Act, a party in interest must essentially meet the same requirements as those required for standing to appeal a Commission decision to a federal court.<sup>21</sup> Thus, an entity claiming standing must allege and prove three elements: (1) personal injury; (2) the injury is "fairly traceable" to the challenged action; and (3) there is a substantial likelihood that the relief requested will redress the injury claimed.<sup>22</sup>

Nearly four years after grant of the Biltmore Forest FM construction permit to Liberty, Willsyr asserts standing to petition against the Assignment Application based on its status as a competitor for the permit and particularly as a "disappointed bidder" in Closed Broadcast Auction No. 25 for that permit.<sup>23</sup>

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<sup>17</sup> See FCC File No. BPH-19870831MI. Sutton also filed an Informal Objection on May 10, 2002, objecting to the grant of the WOXL-FM license application. See File No. BLH-20020220AAL.

<sup>18</sup> In addition, in that same decision, the WNCC-FM modification application, File No. BPH-20010301ABB, was dismissed and the Sutton Informal Objection was denied. On January 7, 2005, Sutton filed an Application for Review of the staff decision, and it remains pending.

<sup>19</sup> 47 U.S.C. § 309(d)(1). See Liberty Opposition at 1-3; Saga Opposition at 3-6.

<sup>20</sup> 47 U.S.C. § 309(d)(1). See also 47 C.F.R. § 73.3584(a); *MCI Communications Corp.*, 12 FCC Rcd 7790, 7794 (1997).

<sup>21</sup> See 47 U.S.C. § 402(b). See also *MCI Communications Corp.*, 12 FCC Rcd at 7794; *Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, 82 F.C.C.2d 89, 95-96 (1980); *Office of Communications of the United Church of Christ v. FCC*, 359 F.2d 994 (1966).

<sup>22</sup> See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *MCI Communications Corp.*, 12 FCC Rcd at 7794; *Conn-2 RSA Partnership*, 9 FCC Rcd 3295, 3297 (1994). In an assignment of license proceeding, petitioner must allege and prove: (1) it has suffered or will suffer injury-in-fact; (2) there is a causal link between the proposed assignment and the injury-in-fact; and (3) redressability, meaning that not granting the assignment would remedy the injury-in-fact.

<sup>23</sup> Willsyr Petition at 5-7. In addition, Willsyr asserts that the Commission's decision in the *1998 Biennial Regulatory Review* confers standing. Willsyr Consolidated Reply to Oppositions filed March 30, 2004 at 4 ("Willsyr Reply") (citing *1998 Biennial Regulatory Review - Streamlining of Mass Media Applications, Rules, and Processes*, 13 FCC Rcd 23056, 23075, 23078, 23084-85 (1998)). We reject that assertion. That decision does not discuss standing requirements. Instead, the portions of the item cited by Willsyr address public access to applications.

There is no legal basis for this assertion. Willsyr attempts to bootstrap its standing by relying on court cases concerning unsuccessful bidders in Commission auctions.<sup>24</sup> None of the cases cited by Willsyr involves an unsuccessful bidder subsequently challenging a sales application.<sup>25</sup> As such, they are inapposite. Notably, while Willsyr filed motions to enlarge the issues against Liberty in the Biltmore Forest construction permit proceeding, it did not seek timely reconsideration of the *Liberty Order* in which the Commission granted the permit to Liberty.<sup>26</sup> Willsyr appealed the *Liberty Order* directly to the United States Court of Appeals for the District of Columbia, but the court dismissed the appeal on procedural grounds.<sup>27</sup> Willsyr did not challenge that dismissal. The proceeding concerning the Biltmore Forest construction permit award was concluded with a final order by the court on March 7, 2003.<sup>28</sup>

Willsyr also states that its challenge to the Assignment Application is “based upon its request to *revoke* the permit under review.”<sup>29</sup> Section 312 of the Act provides the Commission with the discretion to institute revocation proceedings on its own motion, but does not specifically create rights in third parties, such as Willsyr, to file petitions to revoke licenses or permits.<sup>30</sup> The Commission has traditionally treated petitions to revoke as informal requests for Commission action pursuant to Section 1.41 of the

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<sup>24</sup> Willsyr Petition at 7 (citing *High Plains Wireless, LP v. FCC*, 276 F.3d 599 (2002) (“*High Plains*”) (finding that appellant had standing to appeal the award of the block licenses for which it had bid); *US Airwaves, Inc. v. FCC*, 232 F.3d 227 (2000) (finding that appellant had standing to challenge rules subsequently adopted by the Commission, but only where the rules represented post-auction revisions to the financing options available to the high bidders in the auction in which the appellant had participated); *DirectTV, Inc. v. FCC*, 110 F.3d 816 (1997) (finding that appellant had standing to challenge an auction rule that had placed the appellant at a substantial competitive disadvantage vis-à-vis other bidders)).

<sup>25</sup> For example, in *High Plains*, the appellant complained that it was injured because the Commission awarded the block license for certain broadband personal communications services (PCS) to Mercury, which had violated the anti-collusion rule, instead of holding a new auction. The court found that appellant, as an unsuccessful bidder, had standing to appeal the award of the block licenses for which it had bid. The court found that the appellant lacked standing to challenge the award to the successful bidder of other licenses for which it did not compete. *See High Plains*, 276 F.3d at 605.

<sup>26</sup> *See Liberty Order*, 16 FCC Rcd 12061 (2001). Requests for stay of the *Liberty Order* were filed by unsuccessful bidders BF Broadcasting and Orion, but were denied by the Commission in *Order*, FCC 01-276 (rel. Oct. 26, 2001).

<sup>27</sup> Willsyr’s pleadings were dismissed as prematurely filed. *See Orion Communications Limited v. FCC*, 2002 WL 335537 (D.C. Cir. Jan. 7, 2002) (finding that Willsyr lacked standing to bring a motion to dismiss because it was not a party to the case).

<sup>28</sup> *See Biltmore Forest Broadcasting FM, Inc. v. FCC*, 321 F.3d 155 (D.C. Cir. 2003), *cert denied*, 540 U.S. 981 (2003) (affirming the *Liberty Order*, finding that the substantive arguments raised in timely appeals of the *Liberty Order* by BF Broadcasting and Orion lacked merit). *See also Radio Para La Raza*, 40 F.C.C.2d 1102 (1973) (citing *Greater Boston Television Corp. v. FCC*, 463 F.2d 268 (1971) (noting that the courts have a strong policy in favor of administrative finality, and have held that proceedings that have become final will not be reopened unless there has been fraud on the agency’s or the court’s processes)).

<sup>29</sup> Willsyr Reply at 8.

<sup>30</sup> 47 U.S.C § 312. *See also Manning Telecasting, Inc.*, 1986 WL 292657 (Feb. 14, 1986); *Conn-2 RSA Partnership*, 9 FCC Rcd at 3298, n.7 (citing *City of Kerrville v. Dugosh Flying Service, Inc.*, 99 F.C.C.2d 124, 126 (1984); *Puerto Rican Media Action and Educational Council, Inc. v. Educational Broadcasting Corp.*, 51 F.C.C.2d 1178 (1975)).

Commission's rules.<sup>31</sup> Filing a petition to revoke does not enhance Willsyr's argument that it has standing in the instant proceeding. Moreover, we find that Willsyr's request for revocation contains no allegations which raise public interest concerns meriting further consideration.

With respect to the three-pronged standing requirement, traditionally, in a sales context, injury has been asserted in three ways: (1) petitioner is a competitor in the market suffering signal interference; (2) petitioner is a competitor in the market suffering economic harm; or (3) petitioner is a resident of the station's service area.<sup>32</sup> Willsyr does not claim to be a competitor or a resident in the WOXL-FM market. Further, it does not allege injury based on any competitive harm it would incur by grant of the Assignment Application. Willsyr claims it would be "injured" by grant of the Assignment Application because such action would "impair its right to seek vindication as to the alleged illegalities in the Biltmore Forest Auction in which it was a bidder, to seek the revocation of the permit, and to seek a new auction for the permit."<sup>33</sup> Willsyr states that it is ready to participate in a new auction should the Commission deny the Assignment Application *and* revoke Liberty's permit.<sup>34</sup>

Willsyr neither demonstrates injury-in-fact nor explains how any alleged injury is linked to the Assignment Application. Nor does Willsyr show that any alleged injury would be redressed by a decision not to grant the Assignment Application. A revocation proceeding under Section 312 would not be precluded by a grant of the Assignment Application. As noted above, the authority to revoke licenses and permits given to the Commission pursuant to Section 312 is discretionary and can be initiated on the Commission's own motion at any time. Even if the Commission were to initiate a revocation proceeding, Willsyr does not demonstrate how such action is likely to redress its claimed injury. As Willsyr is aware, auctioning of the then-pending mutually exclusive Biltmore Forest construction permit applications, which were filed prior to July 1, 1997, was governed by Section 309(l) of the Act.<sup>35</sup> In all previous Auction No. 25 cases involving winning bidder default or disqualification of applicants subject to Section 309(l), the Commission has offered the construction permit to the next highest bidder, concluding that this best comports with statutory requirements.<sup>36</sup> Given that Willsyr was the fourth highest bidder for the Biltmore Forest construction permit, disqualification of Liberty – entailing revocation of Liberty's authorization – is not substantially likely to provide the remedy Willsyr seeks.

For the foregoing reasons, we conclude that Willsyr does not have standing to file a petition to deny the Assignment Application. Nonetheless, we will treat Willsyr's Petition as an informal objection and consider its arguments in making our determination.<sup>37</sup>

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<sup>31</sup> 47 C.F.R. § 1.41. *See Conn-2 RSA Partnership*, 9 FCC Rcd at 3298, n.7.

<sup>32</sup> *See Office of Communications of the United Church of Christ v. FCC*, 359 F.2d 994 (1966); *FCC v. Sanders Brothers Radio Station*, 309 US 470 (1940).

<sup>33</sup> Willsyr Reply at 9.

<sup>34</sup> *Id.* at 6-7. *See High Plains*, 276 F.3d at 605.

<sup>35</sup> 47 U.S.C § 309(l).

<sup>36</sup> *See, e.g., Delta Radio, Inc.*, 18 FCC Rcd 16889 (2003), *aff'd*, 387 F.3d 897 (D.C. Cir. 2004). *See also Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, 13 FCC Rcd 15920, 15952-53 (1998).

<sup>37</sup> 47 C.F.R. § 73.3587.

**Ownership Structure.** Willsyr claims that recent statements made by Liberty in a state court proceeding regarding its ownership structure are inconsistent with representations it made while prosecuting its construction permit application.<sup>38</sup> Willsyr bases its allegations on public records obtained in an ongoing civil suit between Liberty’s limited partner, Murray, and its general partner, Valerie Klemmer Watts (“Watts”).<sup>39</sup> Willsyr claims that Watts represented to the North Carolina state court that Murray “ceased being a 65 percent equity owner of Liberty beginning in 1990”<sup>40</sup> and did not report this change to the Commission. Willsyr argues that where such inconsistent representations are made, substantial and material questions as to misrepresentation and lack of candor are raised. As Liberty points out, this issue was previously addressed and the arguments were rejected by the Commission.<sup>41</sup> On December 13, 1999, in the Biltmore Forest construction permit proceeding, Willsyr had filed a Second Motion to Enlarge. Therein, Willsyr sought consideration of whether Liberty had misrepresented its ownership structure, questioning, *inter alia*, Murray’s equity contributions.<sup>42</sup> The Commission found Willsyr’s motion without merit.<sup>43</sup>

We find that the claimed new facts proffered by Willsyr and contained in Watts’ Answer and Interrogatory Response to the North Carolina state court<sup>44</sup> provide no additional information beyond that which was available to the Commission during the Biltmore Forest construction permit proceeding. The issues regarding Liberty’s ownership were resolved by the Commission and are no longer subject to reconsideration.<sup>45</sup> Moreover, to the extent that other issues may be raised in the litigation, the Commission refrains from making decisions based on mere allegations of misconduct, where those allegations are in the process of being adjudicated by another agency or court.<sup>46</sup> The ongoing civil dispute between Liberty’s principals is best addressed by the state court and not within the scope of this proceeding.<sup>47</sup>

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<sup>38</sup> Willsyr Petition at 7-12.

<sup>39</sup> See *Murray v. Watts*, Case Number CVS 03-978, Superior Court, Buncombe County, North Carolina (selected portions of record provided with Willsyr Petition at Exhibits 2-3).

<sup>40</sup> Willsyr Petition at 8.

<sup>41</sup> Liberty Opposition at 4-10 (citing *Liberty Order*, 16 FCC Rcd at 12075-77, 81-84).

<sup>42</sup> See *Liberty Order*, 16 FCC Rcd at 12075-76.

<sup>43</sup> *Id.* at 12075.

<sup>44</sup> See Willsyr Petition at Exhibits 1-3.

<sup>45</sup> We further note that in his Opposition, Murray expressly states that he is a limited partner with a 65 percent equity interest in Liberty. Murray Opposition at 2.

<sup>46</sup> See *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252, 3252-53 (1990), *recon. granted in part*, 6 FCC Rcd 3448 (1991) (citing *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C.2d 1179, 1204-05 (1986)).

<sup>47</sup> The Commission defers to courts of competent jurisdiction regarding private contractual disputes and the interpretation and enforcement of contracts for the sale of a broadcast station. See, e.g., *Kidd Communications*, 19 FCC Rcd 13584, 13589 (2004).

***Real Party In Interest.*** Willsyr contends that the sales documents provide “newly discovered evidence” that Liberty was not the real party behind its auction bid for the WOXL-FM permit and thus the Biltmore Forest Auction was “irreparably tainted.”<sup>48</sup> In addition, Willsyr claims that Liberty continues to have no control over the station.<sup>49</sup> As support for its argument, Willsyr first alleges that Ashville paid the amount bid at auction and that it will receive most of the profits from the sale of the station to Saga.<sup>50</sup> Second, Willsyr argues that, as the time broker of WOXL-FM, Ashville sub-brokered its time brokerage agreement to Saga without Liberty’s involvement.<sup>51</sup>

Willsyr’s contention that documents submitted in the instant sales proceeding demonstrate that Liberty was not the real party in interest behind the auction bid for the Biltmore Forest construction permit is without merit.<sup>52</sup> Arguments that Liberty was not the real party in interest behind its auction application were previously raised.<sup>53</sup> At that time, losing bidders for the Biltmore Forest construction permit argued that Liberty was fronting for Cumulus Broadcasting, Inc. The Commission considered and rejected these allegations.<sup>54</sup> Now Willsyr asserts that the sales documentation demonstrates that Ashville was the real party in interest behind Liberty’s bid because Ashville allegedly paid “the auction bid price of some two million dollars.”<sup>55</sup> Willsyr has provided no credible evidence to support such a claim. The provisions serving as the primary basis for Willsyr’s argument are extracted from the Amended and Restated Term Loan Agreement (“ARTLA”), executed by Liberty and Ashville on August 21, 2001,<sup>56</sup> well after Closed Broadcast Auction No. 25 had concluded and the WOXL-FM permit had been issued.<sup>57</sup> Liberty argues that, therefore, Ashville could not have participated in the auction nor been “behind” Liberty’s auction bid.<sup>58</sup> Liberty also states that it is fully liable under obligations created by the loan

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<sup>48</sup> Willsyr Reply at 8; Willsyr Supplement at 6.

<sup>49</sup> Willsyr Reply at 8.

<sup>50</sup> *Id.* at 34.

<sup>51</sup> Willsyr Petition at 15.

<sup>52</sup> Willsyr Supplement at 5-6.

<sup>53</sup> *Liberty Order*, 16 FCC Rcd at 12074-75.

<sup>54</sup> *Id.*

<sup>55</sup> Willsyr Supplement at 5.

<sup>56</sup> Willsyr contends that the ARTLA was entered into on June 19, 2001. Willsyr Supplement at 6. Liberty explains that Willsyr’s error in this regard is understandable because of a typographical error in the Renewed and Extended Promissory Note at Section (a). Liberty Opposition to Supplement at 2. The copy of the ARTLA submitted to the Commission is dated August 21, 2001.

<sup>57</sup> *See supra* notes 5 and 10.

<sup>58</sup> Liberty Opposition to Supplement at 4-6. As noted above, the *Liberty Order* was released on May 25, 2001, and the WOXL-FM permit was issued on July 9, 2001.



documents, including the ARTLA.<sup>59</sup> We find that Willsyr has not supported its claim that a party other than Liberty was behind its Biltmore Forest auction bid.

We also find that Willsyr has not substantiated its claim that documents concerning the distribution of the profits from the sale of WOXL-FM demonstrate that Ashville has *de facto* control of the station.<sup>60</sup> Willsyr cites, for example, the Option Agreement, dated August 21, 2001, between Liberty and Ashville, giving Ashville the right to purchase WOXL-FM on certain terms (“Option Agreement”). Commission records indicate that the Option Agreement was filed with the Commission on September 19, 2001.<sup>61</sup> Thus, Willsyr’s depiction of this agreement as “new” evidence is wrong. Pursuant to the Option Agreement, Ashville exercised its option to purchase the station, then entered into an Asset Purchase Agreement with Liberty on January 13, 2004 (“APA”). On this same day, Ashville entered into an Assignment and Assumption Agreement with Saga, conveying all of its rights, title, and interest in the APA to Saga. Willsyr offers no evidence that the APA restricted Ashville’s ability to do so. Liberty notes that Ashville, having exercised a valid option to purchase, was afterward entitled to not only assign its right to purchase the station, but to dictate the terms of any assumption agreement.<sup>62</sup> Ashville’s assignment of its right to purchase, and any profit received thereto, is unrelated to the issue of station control. In addition, Ashville asserts that the actual consideration due Liberty at closing is indicative that Liberty remains in control of the station.<sup>63</sup> Moreover, Willsyr makes no showing, nor do we find evidence, that anyone other than Liberty ultimately controls the station’s finances, personnel, or programming.<sup>64</sup>

Willsyr also cites the sub-time brokerage agreement between Ashville and Saga to assert that Ashville is in control of WOXL-FM, not Liberty.<sup>65</sup> Liberty entered into a time brokerage agreement with Ashville on February 21, 2002 (“Liberty TBA”). Ashville then negotiated a Sub-Time Brokerage Agreement with Saga, dated November 1, 2002 (“sub-TBA”), whereby Saga would operate WOXL-FM in conjunction with WISE(AM).<sup>66</sup> Willsyr claims the financial benefits under the sub-TBA inure to Ashville, not Liberty.<sup>67</sup> Furthermore, according to Willsyr, the sub-TBA was not filed with the

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<sup>59</sup> Liberty Opposition to Supplement at 2. Ashville also adds that Willsyr’s contention that Liberty “fronted” for Ashville in the auction cannot possibly be correct given that Ashville did not exist until after the auction concluded. Ashville Opposition at 3.

<sup>60</sup> Willsyr Petition at 17; Willsyr Reply at 34.

<sup>61</sup> Willsyr Petition at 14.

<sup>62</sup> Liberty Opposition at 12.

<sup>63</sup> Ashville Opposition at 4.

<sup>64</sup> See, e.g., *WGPR, Inc.*, 10 FCC Rcd 8140, 8145 (1995).

<sup>65</sup> Willsyr Petition at 15.

<sup>66</sup> Ashville also separately entered into a TBA with Saga whereby Saga would provide programming to WISE(AM). The application to assign the license for station WISE(AM) from Ashville to Saga was granted on November 1, 2004 (File No. BALH-20040116ADC). The parties consummated the transaction on January 10, 2005.

<sup>67</sup> Willsyr Petition at 15.

Commission until the submission of the instant Assignment Application, which demonstrates Liberty's lack of candor.<sup>68</sup>

The Commission has expressly found that "TBA arrangements, properly conditioned, do not by themselves establish that a transfer of control has taken place."<sup>69</sup> Willsyr presents no evidence that the terms of the sub-TBA are not properly conditioned. In addition, Willsyr presents no evidence that Liberty's actions demonstrate a relinquishment of control. To the contrary, the record demonstrates that Liberty's consent was required as a condition to the sub-TBA and that Liberty's written consent accompanied the filing of the sub-TBA.<sup>70</sup> Furthermore, contrary to Willsyr's claim, a copy of the sub-TBA was filed by Liberty with the Commission on November 26, 2002, and the terms are consistent with Commission rules and policies.<sup>71</sup> The evidence presented by Willsyr does not establish that Liberty has abdicated control of WOXL-FM, and we find no other basis on which to so find.

***Failure to Submit Relevant Documents.*** In its Petition, Willsyr alleges that Liberty failed to submit documents relevant to the Commission's review of the sales application and failed to disclose the total consideration it will receive from the sale of WOXL-FM. On July 9, 2004, the Division sent Liberty an *LOI* seeking information and documents germane to the assignment of license of WOXL-FM.<sup>72</sup> Liberty submitted a response to the *LOI* on July 19, 2004.<sup>73</sup> Liberty's response included a "Request for Confidential Treatment of Documents Under Sections 0.457 and 0.459 of the Rules" concerning the documents specifically requested by the Division. The Division found that Liberty's request for confidential treatment of the subject materials failed to comply with the standards set forth in Section 0.459 of our rules.<sup>74</sup> Accordingly, pursuant to Section 0.459(c), on November 9, 2004, we denied Liberty's July 19, 2004, Request for Confidential Treatment of Documents.<sup>75</sup> Pursuant to the Commission's 1998 decision, *Confidential Treatment of Documents*, once the Liberty documents became publicly available, interested parties had 30 days to file a petition to deny or supplement a petition currently on file.<sup>76</sup> Willsyr supplemented its Petition on December 3, 2004.<sup>77</sup> Contrary to Willsyr's

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<sup>68</sup> *Id.* at 16.

<sup>69</sup> *Secret Communications II, LLC*, 18 FCC Rcd 9139, 9145 (2003) (citing *Solar Broadcasting Company, Inc.*, 17 FCC Rcd 5467, 5486 (2002) (licensee's participation in LMA does not *per se* constitute a premature transfer of control).

<sup>70</sup> Ashville Opposition at 3-4. The Declaration of John Melko states that Liberty's consent was required as a condition of the sub-TBA. See *id.* at Exhibit B.

<sup>71</sup> See Sub-Time Brokerage Agreement for WOXL-FM, Biltmore Forest, North Carolina between Ashville and Saga, dated November 1, 2002, submitted on November 25, 2002 by Liberty pursuant to 47 C.F.R. § 73.3613.

<sup>72</sup> See *supra* note 4.

<sup>73</sup> Letter from Timothy K. Brady, Esq., filed on July 19, 2004 ("Response").

<sup>74</sup> 47 C.F.R. § 0.459.

<sup>75</sup> See Letter to Timothy K. Brady, Esq., et al., Ref. No. 1800B3-CNZ (Nov. 9, 2004).

<sup>76</sup> See *Confidential Treatment of Documents*, 13 FCC Rcd 24816 (1998).

<sup>77</sup> Liberty filed an Opposition to Supplement to Petition to Deny on December 20, 2004. Willsyr filed a reply on December 30, 2004. In its Supplement, Willsyr again asserts that the documents submitted in response to the *LOI*

allegations, we find that the documents Liberty submitted in response to the *LOI* are consistent with the Commission's rules and policies. The record moreover is sufficient now to allow us to perform our public interest review and determine that grant of the Assignment Application is consistent with the public interest.

**Conclusion.** Based on the evidence before us, we find no substantial and material questions of fact that warrant further inquiry. In addition, we have reviewed the Assignment Application and find that Saga is qualified to be the licensee of WOXL-FM and that grant of this transaction is consistent with the public interest, convenience and necessity. Accordingly, IT IS ORDERED, that the Petition to Deny Assignment and Revoke Permit filed by Willsyr Communications, Limited Partnership IS DISMISSED, and when treated as an Informal Objection to the Assignment Application and as an informal request to revoke the permit, IS DENIED. IT IS FURTHER ORDERED, that the Objection filed by Willsyr Communications, Limited Partnership IS DENIED. IT IS FURTHER ORDERED, that the Petition to Deny filed by Sutton Radiocasting Corporation is DISMISSED. IT IS FURTHER ORDERED, that the Assignment Application<sup>78</sup> for station WOXL-FM, Biltmore Forest, North Carolina, from Liberty Productions, a Limited Partnership, to Saga Communications of North Carolina, LLC IS GRANTED.

Sincerely,

Peter H. Doyle, Chief  
Audio Division  
Media Bureau

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demonstrate that Liberty has never assumed financial risk for WOXL-FM. As discussed above, we have concluded otherwise. Willsyr raises no issue with respect to the consideration Liberty will receive from the sale.

<sup>78</sup> See *supra* note 1.