



Federal Communications Commission
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In Reply Refer to:
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In re: **WGIT(AM), Canovanas, PR**
Facility ID No. 87150
File No. BR – 20031001BFK
Application for Renewal of License

Informal Objection

Dear Counsel:

This letter concerns the captioned application filed by International Broadcasting Corp. (“International”) to renew the license of station WGIT(AM), Canovanas, Puerto Rico. Also on file is Joseph Bahr’s (“Bahr”) February 6, 2004, “Objection to Application for License Renewal” (“Objection”) directed to the subject renewal application.¹ For the reasons set forth below, we deny the Objection and grant the renewal application.²

Section 73.1150(c). WGIT(AM) is an AM expanded band station. Its paired lower band station was WCHQ(AM), Camuy, Puerto Rico. On March 19, 2003 International, filed an assignment application to acquire WGIT(AM) – but not WCHQ(AM) - from Aureo A. Matos and Olga Rosario.³ As assignee, International certified in Section III, Item 3 of the application that its agreements for the

¹ International filed an Opposition on February 25, 2004, to which Bahr responded on March 4, 2004.

² We have been informed of the passing of Joseph Bahr. However, in accordance with longstanding practice, when a petition raises serious allegations, we consider these matters to insure that the public interest will be served by grant of those applications. *See e.g., Quincy D. Jones*, 11 FCC Rcd 2481, 2484 (1995); *Stockholders of CBS Inc.*, 11 FCC Rcd 3733, 3741 (1995); and *BBC License Subsidiary L.P. (WLUK-TV)*, 10 FCC Rcd 7926 (1995) (all citing *Booth American Company*, 58 FCC 2d 553, 554 (1976)).

³ Application No. BAL – 20030319ADX.

purchase of the station complied fully with the Commission's rules and policies.⁴ The staff granted the application on May 29, 2003, and the sale was consummated on July 1, 2003. Bahr contends that the assignee's certification was false because the sales agreement contemplated the assignment of only the WGIT(AM) license. This transaction violated Section 73.1150(c)⁵ which requires the licenses for the two stations to be assigned to International together. Bahr posits that International was motivated by a desire to take control of WGIT(AM) as quickly as possible, without having to wait for Commission action on WCHQ(AM)'s renewal application. Due to this alleged misrepresentation, Bahr contends that International's WGIT(AM) renewal application should be designated for hearing.

International responds that, when the necessity to also assign WCHQ(AM) became apparent, the licensees of the station and International, on June 18, 2003, executed a "lease" of the station to International and that the lease agreement specifically stated that a purchase agreement would be executed to assign WCHQ to International. This purchase agreement, it continues, was executed on September 15, 2003, long prior to Bahr's raising this issue, and specified that this assignment was part of the agreement to assign WGIT(AM) to International. The assignment application for WCHQ(AM) was filed with the Commission on November 18, 2003.⁶ Thus, International contends, there was no intent to avoid Section 73.1150(c) of the Commission's Rules or to mislead the Commission and that appropriate steps were taken to comply with the rule.⁷

On March 17, 2004, the assignors of WCHQ(AM) filed a "Motion to Dismiss Applications Without Prejudice" asking the Commission to dismiss both the pending renewal⁸ and assignment applications for WCHQ(AM). They stated that they were required to surrender the lower band station license by July 2006 and that in these circumstances they did not wish to incur the costs of defending against Bahr's claims.⁹ Pursuant to this request, the applications were dismissed and the authorization for WCHQ(AM) was cancelled by the Commission on April 5, 2004.

⁴ Additionally, we note that Section II, Item 4, of FCC Form 303-S ("Application for Renewal of Broadcast Station License") requests that the licensee certify, with respect to the station for which it is seeking license renewal, that "there have been no violations...of the Communications Act of 1934, as amended, or the rules or regulations of the Commission during the preceding license term." International indicated "Yes" as to that certification.

⁵ See also *Review of the Technical Assignment Criteria for the AM Broadcast Service*, Report and Order, 6 FCC Rcd 6273 (1991), *recon. granted in part and denied in part*, 8 FCC Rcd 3250 (1993), *recon. granted in part and denied in part*, 10 FCC Rcd 12143 (1995), *recon. denied*, 11 FCC Rcd 12444 (1996), *recon. granted in part and denied in part*, 12 FCC Rcd 3361 (1997).

⁶ BAL-20031118AAN.

⁷ In a "Statement Under Penalty of Perjury" attached to Bahr's Objection, Aureo A. Matos, one of the assignors of WGIT(AM)'s license, indicates that he erroneously believed that the license for WCHQ(AM) would have expired in January 2003 and suggests that this was the reason it was not originally made part of the WGIT(AM) assignment.

⁸ BR-20030930AJP.

⁹ Bahr filed comments in response to the Motion to Dismiss Applications contending that the misrepresentation issue was not terminated by the surrender of the license for WCHQ(AM). He asks the Commission to refer the matter to its Enforcement Bureau for the preparation of an Order to Show Cause why Matos' and Rosario's licenses for stations WWNA and WXZX-FM should not be revoked.

Although filed against the WGIT(AM) license renewal application, Bahr's chief contention is based on an alleged misrepresentation in an assignment application. That proceeding was final months before Bahr first objected to that transaction in his renewal challenge. It is well settled that we do not reopen proceedings that are final unless there has been fraud on our processes or the challenged result is unconscionable.¹⁰ To the extent that Bahr would have us reopen that assignment by challenging the station's license renewal, we decline to do so. He has not demonstrated a fraud on our processes; nor can we say the grant of the assignment application was unconscionable. Accordingly, we reject Bahr's untimely collateral challenge to the long-final grant of the WGIT(AM) assignment application.

At issue in this proceeding is whether International's alleged misrepresentation in connection with the WGIT(AM) assignment application should now impact its renewal application. The trait of truthfulness is one of the key elements of character necessary to operate a broadcast station in the public interest.¹¹ Acts of willful misrepresentation and lack of candor raise immediate concerns as to whether a licensee will be truthful in future dealings with the Commission.¹² Misrepresentation involves false statements of fact made with an intent to deceive whereas lack of candor involves concealment, evasion, and other failures to be fully forthcoming.¹³ Intent to deceive is a factual question which may be inferred from a motive or logical desire to deceive.¹⁴

In the instant case, it is clear that International's acquisition of WGIT(AM) without its existing band "paired" station, WMHQ(AM), violated Section 73.1150(c). Nevertheless, Bahr has presented no evidence that International intended to deceive the Commission by certifying that the WGIT(AM) sales contract "compl[ie]d fully with the Commission's rules and policies," and Bahr has posited no plausible motive to support such an intent. Bahr argues that International was motivated by a desire to take control of WGIT(AM) as quickly as possible, without having to await Commission action on WCHQ(AM)'s renewal application.¹⁵ We cannot credit this speculative assertion. The renewal applications for WGIT(AM) and WCHQ(AM) were filed only a day apart. There is no reason to believe that the latter's renewal application would take significantly more time to process than the former. Moreover, we credit Aureo A. Matos' explanation that, at the time the WGIT(AM) assignment application was filed, he believed that the term for joint ownership of WGIT(AM) and WCHQ(AM) had expired or was about to expire. Matos further explained that when he discovered his error, the parties entered in to a lease

¹⁰ See *Birach Broadcasting Corp.*, 16 FCC Rcd 5015, 5018 (2001), citing *Radio Para La Raza*, 40 FCC 2d 1102, 1104 (1973); *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238 (1944); *Greater Boston Television Corporation v. FCC*, 463 F. 2d 268 (D.C. Cir. 1971); and *KIRO, Inc. v. FCC*, 438 F.2d 141 (D.C. Cir. 1970); see also *KRPL, Inc.*, 5 FCC Rcd 2823, 2824 (1990).

¹¹ *Letter to John Garziglia, Esq., et al.*, 2005 WL 1630120 (F.C.C.), citing *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1178, 1209-1210 (1986).

¹² *Id.*

¹³ See *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983), *recon. dismissed*, FCC 831-43 (released April 20, 1983).

¹⁴ See *Black Television Workshop of Los Angeles, Inc.*, 8 FCC Rcd 4192, 4198 n. 41 (1993), citing *California Public Broadcasting Forum v. FCC*, 752 F.2d 670, 679 (D.C. Cir. 1985).

¹⁵ Joseph Bahr's "Objection to Application for License Renewal," Exhibit C, "Statement Under Penalty of Perjury."

agreement for WCHQ(AM) and filed an assignment application.¹⁶ Lacking a plausible motive for deliberate deception, especially when the Commission was in a position to independently confirm compliance with Section 73.1150(c) requirements, we cannot find that International deliberately intended to deceive the Commission.

Section 1.65. Bahr next claims that International violated Section 1.65 of the Commission's rules by failing to amend the WGIT(AM) assignment application to provide the information that it had obtained an attributable interest in WCHQ(AM). Assuming International obtained an attributable interest in WCHQ(AM),¹⁷ it still would not have had to report that interest pursuant to Section 1.65. That section requires the updating of applications whenever there has been a "substantial change as to any other matter which may be of decisional significance in a Commission proceeding involve the pending application." International's obtaining of an attributable interest in WCHQ(AM) was not a "substantial change. . . of decisional significance." The Commission's broadcast multiple ownership rule clearly states that the Commission's local radio ownership rule does not apply to interests in expanded band AM radio stations during the five-year "transition period."¹⁸ Therefore, the failure to report the lease agreement for WCHQ(AM) did not constitute an actionable violation of Section 1.65 of the Commission's rules.

¹⁶ Matos' claim of confusion *vis-à-vis* the WCHQ(AM) authorization expiration date is plausible. In the *Report and Order in Review of the Technical Assignment Criteria for the AM Broadcast Service*, 6 FCC Rcd 6273 (1991), the Commission permitted AM licensees awarded Expanded Band frequencies to operate both the existing band AM station and the expanded band AM station for a defined "transition period" of five years. Although the five-year transition period for dual operation begins as of the date the Expanded Band facility is licensed, *see Letter to Jennifer D. Wagner, Esq.*, 16 FCC Rcd 21398 (MMB 2001), Note 9 to Section 73.3555 exempts Expanded Band AM stations from the ownership limit of Section 73.3555(a)(1), but Note 10 limits this rule exemption to a five-year period beginning on "the date of issuance of a construction permit for an AM radio station in the 1605-1705 kHz band." *See Entercom Kansas City License, LLC*, 17 FCC Rcd 24917 (2002). The WGIT(AM) permit was issued on January 28, 1998, so it is plausible that Matos would believe that the transition period for the dual operation ended on January 28, 2003, prior to filing the assignment application for WGIT. (Matos' error was compounded by his apparent belief that the WCHQ(AM) license would expire automatically upon his having chosen its Expanded Band mate, WGIT(AM); in fact, Matos would have to surrender the license upon the expiration of the transition period.) Matos states that, when he discovered that the transition period ran from the date on which the Expanded Band station was licensed, and thus the transition period involving WCHQ(AM) would not end until July 27, 2006, he sought to assign WCHQ(AM) to International to comply with Section 73.1150(c). As indicated earlier, Matos ultimately surrendered the WCHQ(AM) permit and requested dismissal of the WCHQ(AM) renewal and assignment applications.

¹⁷ Our attribution rule for radio stations involved in time brokerage agreement clearly provides that for the brokered station to be attributable to the owner of the brokering station, that station must supply more than 15 percent of the brokered station's programming and be in the same market. Pursuant to the lease agreement, WGIT(AM) provided WCHQ(AM) with more than 15 percent of its programming. Also, because Puerto Rico is considered a single radio market, WGIT(AM) and WCHQ(AM) are in the same market irrespective of the fact that their 5 mV/m signal contours only overlap over water. Therefore, International obtained an attributable interest in WCHQ(AM).

¹⁸ *See* Section 73.3555, Note 9, of the Commission's rules. ("Paragraph (a)(1) of this section will not apply to an application for an AM station license in the 1605-1705 kHz band where grant of such application will result in the overlap of the 5 mV/m groundwave contours of the proposed station and that of another AM station in the 535-1605 kHz band that is commonly owned, operated or controlled. Paragraphs (d)(1)(i) and (d)(1)(ii) of this section will not apply to an application for an AM station license in the 1605-1705 kHz band by an entity that owns, operates, controls or has a cognizable interest in AM radio stations in the 535-1605 kHz band.") This exemption terminates five years after the grant of a license application for the expanded band facility. *See* Note 16, *supra*.

Unauthorized Transfer of Control. Finally, Bahr argues that International participated in an unauthorized transfer of control of WCHQ(AM) as a result of its lease of the station from the former licensees. We have reviewed the Lease Agreement and we find that its terms, while less specific than those generally used for these agreements, broadly comport with the terms of similar agreements previously approved of by the Commission.¹⁹ Moreover, Bahr has not shown any conduct by Matos, Rosario or International that, notwithstanding the terms of the Lease Agreement, would constitute evidence of an unauthorized transfer of control of WCHQ(AM). Therefore, we conclude that Bahr has failed to make a *prima facie* case regarding this allegation.

Additionally, this is not an issue we may consider in connection with International's application to renew the WGIT(AM) license. Section 309(k) of the Communications Act provides that we are to grant the renewal application if, upon consideration of the application and pleadings, we find that (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations of the Communications Act or the Commission's Rules; and (3) there have been no other violations which, taken together, constitute a pattern of abuse.²⁰ Section 309(k) of the Act limits the Commission broadcast station renewal review to matters relating to "that station" for which license renewal is sought. This limitation is reflected in the broadcast license renewal form and instructions.²¹ Because in the instant matter, Bahr is alleging that misconduct took place with regard to a station other than the station whose renewal application is before us, we may not consider those allegations in this application proceeding.

Conclusion/Actions. Accordingly, for the reasons set forth above, the Bahr objection IS DENIED. Finally, because the subject application is otherwise in full compliance with the Commission's Rules and Communications Act, and finding that the public interest, convenience, and necessity would be served thereby, the application for renewal (BR – 20031001BFK) for station WGIT(AM), Canovanas, Puerto Rico, IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

¹⁹ See, e.g., *Roy R. Russo, Esq.*, 5 FCC Rcd 7586 (1990); *Gisela Huberman, Esq.*, 6 FCC Rcd 5397 (1991); and *Brian M. Madden, Esq.*, 6 FCC Rcd 1871 (1991).

²⁰ 47 U.S.C. §309(k)(1). The renewal standard was amended to read as described by Section 204(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). See *Order, Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures)*, 11 FCC Rcd 6363 (1996).

²¹ See FCC Form 303-S, Section II, Item 4 and concomitant instructions.