



Federal Communications Commission
Washington, D.C. 20554

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DA 06-645
In Reply Refer to:
1800B3-ALV

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Re: WNCV(FM), Niceville, FL
Facility ID No. 10055
File No. BALH-20050502ACB

WYZB(FM), Mary Esther, FL
Facility ID No. 27469
File No. BALH-20050502ACC

WPGG(FM), Evergreen, AL
Facility ID No. 73395
File No. BALH-20050503AAW

WTKE(FM), Holt, FL
Facility ID No. 56374
File No. BALH-20050504AAO

Applications for Assignment of Licenses

Dear Counsel:

We have before us the above-captioned applications (the "Assignment Applications") proposing to: (1) assign the licenses of stations WNCV(FM), Niceville, Florida, and WYZB(FM), Mary Esther, Florida, from Cumulus Licensing LLC ("Cumulus") to Star Broadcasting, Inc. ("Star"); and (2) assign the licenses of WPGG(FM), Evergreen, Alabama, and WTKE(FM), Holt, Florida, from Star to Cumulus. We also have before us a Petition to Deny ("Petition"), filed June 6, 2005, by Qantum of Ft. Walton Beach License Company, LLC ("Qantum" or "Petitioner"¹), and a one-page letter opposing the transaction, filed

¹ Qantum is the licensee of three stations in the Ft. Walton Beach vicinity: WFFY(FM), Destin, Florida; WMXZ(FM), Valparaiso, Florida; and WWAV(FM), Santa Rosa Beach, Florida.

November 21, 2005, by Media Access Project (“MAP”).² For the reasons stated below, we deny the Petition and Objection, and grant the Assignment Applications, subject to modifications of the agreements between Cumulus and Star.

Background

On February 14, 2003, the Commission granted an application to assign the license for WTKE(FM) from Capstar TX Limited Partnership (“Capstar”) to Star,³ and subsequently, on May 27, 2004, granted an application to assign the license for WTKE(FM) from Star to Quantum Communications Corporation (“Quantum Corp.”).⁴ Pursuant to the Capstar-Star agreement, consummation of the initial assignment of WTKE(FM) from Capstar to Star was contingent upon Commission approval of an application to assign the license of WQYZ(FM), Ocean Springs, Mississippi, from Golden Gulf Coast Broadcasting, Inc. to Capstar. As of April 14, 2005, the WQYZ(FM) assignment application remained pending before the Commission,⁵ and Star notified Quantum Corp. on that date that it was terminating the parties’ WTKE(FM) Asset Purchase Agreement.⁶ Subsequently, on April 18, 2005, Star entered into an Asset Exchange Agreement with Cumulus, whereby Cumulus would loan \$850,000 to Star to enable Star to complete the purchase of WTKE(FM) from Capstar,⁷ and Star would then sell WTKE(FM) to Cumulus in exchange for Cumulus’s station WYZB(FM) plus \$1,500,000. The parties filed the subject applications seeking Commission consent to (1) assign the license for WYZB(FM) from Cumulus to Star, and (2) assign the license for WTKE(FM) from Star to Cumulus, on May 2, 2005, and May 4, 2005, respectively.

On April 13, 2004, the Commission granted an application to assign the license for WPGG(FM) from Gulf Coast Broadcasting Co., Inc. (“Gulf Coast”) to Star.⁸ Due to financial difficulties, Star was unable to consummate the assignment until a year later, when Cumulus loaned \$1,500,000 to Star. The transaction closed shortly thereafter, on April 18, 2005. On the same date, Cumulus and Star also executed a separate Asset Exchange Agreement (collectively, with the WTKE(FM)-WYZB(FM) Asset Exchange Agreement, the “Agreements”) whereby Star would assign WPGG(FM) to Cumulus in exchange for Cumulus’s station WNCV(FM) plus \$1,500,000. The parties filed the subject applications seeking Commission consent to (1) assign the license for WNCV(FM) from Cumulus to Star, and (2) assign the license for WPGG(FM) from Star to Cumulus, on May 2, 2005, and May 3, 2005, respectively.

² Cumulus and Star each filed an Opposition to the Petition on June 21, 2005, to which Quantum filed a Reply on July 1, 2005. On August 17, 2005, Quantum submitted a Supplement to its Reply, and on August 19, 2005, Cumulus filed a Supplement to its Opposition. We consider herein all such pleadings in order to resolve this proceeding on the basis of a complete record. Petitions to deny the applications to assign WNCV(FM) and WYZB(FM) to Star were due by June 6, 2005, and petitions to deny the applications to assign WTKE(FM) and WPGG(FM) to Cumulus were due by June 13, 2005. The MAP letter, filed November 21, 2005, fails to meet the requirements of a petition to deny. We will, however, treat the letter as an informal objection (“Objection”), pursuant to 47 C.F.R. § 73.3587.

³ See BALH-20021224ACX.

⁴ See BALH-20030922AFA. Quantum Corp. is the parent company of Petitioner.

⁵ See BALH-20031125ALX (granted May 26, 2005).

⁶ Section 17.1(g) of the Star-Quantum Asset Purchase Agreement (“Agreement”) states, in relevant part, that the Agreement may be terminated “by written notice of either party to the other if the closing shall not have been consummated on or before the date eighteen months after the date of this Agreement, and the party seeking to terminate the Agreement is not then in breach of this Agreement.” The 18-month deadline was March 5, 2005. See BALH-20030922AFA at Exh. 4.

⁷ The assignment of WTKE(FM) from Capstar to Star was consummated July 5, 2005.

⁸ See BALH-20031105AAA.

Quantum objects to the grant of the Assignment Applications on four grounds. First, invoking the Commission’s equity-debt-plus (“EDP”) attribution rule,⁹ Quantum alleges that Cumulus currently holds a prohibited attributable interest in one too many same-service (FM) stations in Arbitron’s Ft. Walton Beach Metro Survey Area (the “Ft. Walton Beach Metro”) and is thus “unfit to assign its present licenses or to be the assignee of the Star licenses.”¹⁰ Second, Quantum asserts that grant of the Assignment Applications would result in Cumulus having an undue concentration of market power in the Ft. Walton Beach Metro. Third, Quantum contends that Cumulus has guaranteed its market dominance through contractual rights for itself and restrictions for Star that will “ensur[e] that Star and others cannot effectively compete with Cumulus” in the Metro.¹¹ Finally, Quantum states that Cumulus used loans to Star to induce Star to breach its agreement with Quantum for the sale of WTKE(FM). MAP objects to grant of the Assignment Applications, averring that the transactions are “egregiously anti-competitive” and contrary to the public interest.

Discussion

Prohibited Attributable Interest. Quantum’s allegation that Cumulus is already in violation of the Commission’s local radio ownership rule is premised on: (1) Cumulus’s \$1.5 million loan to Star for the purchase of WPGG(FM), which, according to Quantum, causes Cumulus to “hold more than 33% of the total debt plus equity in Star and thus hold an attributable interest in the station”;¹² and (2) the Commission’s reallocation of WPGG(FM) from Evergreen, Alabama, to Shalimar, Florida,¹³ a community located within the Ft. Walton Beach Metro, where Cumulus is currently the licensee of four FM stations and one AM station.¹⁴ Cumulus counters that: (1) its \$1.5 million loan to Star “represents less than 33 percent of the value of WPGG”¹⁵ and is thus a non-attributable interest; and (2) WPGG(FM) is still licensed to and operating in Evergreen, Alabama, and accordingly, should not be considered part of the Ft. Walton Beach Metro.

For purposes of determining compliance with the numerical limits of the local radio ownership rule, the Commission decided in its *Ownership Order*¹⁶ to “count as being in an Arbitron Metro above-

⁹ The Commission’s EDP attribution rule, 47 C.F.R. § 73.3555, Note 2(i), provides, in relevant part, that a party’s interest in a broadcast licensee is attributable if its equity and debt interests in the licensee “exceed 33 percent of the total asset value . . .” and the party “also holds an interest in a broadcast licensee . . . operating in the same market . . .”

¹⁰ Quantum Petition at 2.

¹¹ *Id.* at ii.

¹² *Id.* at 9; *see also supra* note 9.

¹³ *See Evergreen, Alabama and Shalimar, Florida*, Report and Order, 20 FCC Rcd 6300 (March 25, 2005) (“*Shalimar Order*”).

¹⁴ According to BIA data made publicly available on January 3, 2006, there are 17 stations “home” to the Ft. Walton Beach Metro. Pursuant to Section 73.3555(a)(1)(iii) of the Commission’s Rules, in a radio market with between 15 and 29 full-power commercial and noncommercial radio stations, one owner may hold up to six commercial stations, no more than four of which are in the same service. *See* 47 C.F.R. § 73.3555(a)(1)(iii).

¹⁵ Cumulus Opposition at 14.

¹⁶ *See 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules*, 18 FCC Rcd 13620 (2003) (“*Ownership Order*”), *aff’d in part and remanded in part, Prometheus Radio Project, et al. v. F.C.C.*, 373 F.3d 372 (2004), *cert. denied*, 125 S. Ct. 2902, 2903, 2904 (2005). *See also Prometheus Radio Project, et al. v. F.C.C.*, No. 03-3388 (3d Cir. Sept. 3, 2004) (lifting stay with respect to new local radio ownership rule).

the-line stations (i.e., stations that are listed as ‘home’ to that Metro) as determined by BIA.”¹⁷ The Commission will also count “any other licensed full power commercial or noncommercial radio station whose community of license is located within the Metro’s geographic boundary.”¹⁸ BIA does not currently list WPGG(FM) as home to the Ft. Walton Beach Metro or any other Arbitron Metro market. On March 25, 2005, the Commission approved the request to change WPGG(FM)’s community of license from Evergreen, Alabama, to Shalimar, Florida.¹⁹ Subsequently, on May 13, 2005, Star filed a minor modification application for a construction permit to implement the community of license change. Star’s minor modification application, however, remains pending before the Commission;²⁰ WPGG(FM) is still operating in Evergreen, Alabama. In fact, Qantum concedes that its Ft. Walton Beach stations *do not* currently compete with WPGG(FM), but rather “*will compete* with WPGG(FM) once that station’s abandonment of Evergreen and its relocation to Ft. Walton Beach is complete.”²¹

Because WPGG(FM) is neither currently listed by BIA as home to the Ft. Walton Beach Metro, nor yet operating in a community located within the Metro’s geographic boundary, we do not count WPGG(FM) as part of this Metro. Accordingly, we need not resolve the issue of whether Cumulus’s loan to Star caused Cumulus to obtain an attributable interest in WPGG(FM) under the EDP rule, because even if such an interest were attributable, as Qantum alleges, Cumulus would remain in compliance with the Commission’s local radio ownership rule.²² We thus reject Qantum’s first argument.

Undue Market Concentration. Under the local radio ownership rule now in effect,²³ the Ft. Walton Beach Metro is the relevant geographic market for evaluating compliance with the numerical limits set forth in Section 73.3555(a) of the Commission’s rules with respect to stations WTKE(FM), WNCV(FM), and WYZB(FM).²⁴ When it adopted its bright-line, geography-based radio rule for rated

¹⁷ *Ownership Order*, 18 FCC Rcd at 13727.

¹⁸ *Id.*

¹⁹ See *Shalimar Order*, *supra* note 13. Qantum’s May 10, 2005, Petition for Reconsideration of the *Shalimar Order* was recently denied. See *Evergreen, Alabama and Shalimar, Florida*, Memorandum Opinion and Order, DA 06-382 (February 24, 2006).

²⁰ See BPH-20050513ACW (accepted for filing June 3, 2005). On July 6, 2005, Qantum filed an informal objection to the WPGG(FM) minor modification application.

²¹ Qantum Petition at 1, n.2 (emphasis added).

²² See *infra* note 24 and accompanying text.

²³ See *Ownership Order*, 18 FCC Rcd at 13724-37.

²⁴ 47 C.F.R. § 73.3555(a). Because, as noted above, WPGG(FM) is not currently in an Arbitron-rated market, we apply the interim contour-overlap methodology to determine whether Cumulus’s proposed acquisition of WPGG(FM) complies with our local radio ownership rule, and find that it so complies. Under the contour-overlap methodology, the relevant radio market is defined by the area encompassed by the mutually overlapping principal community contours of the stations proposed to be commonly owned. See *Ownership Order*, 18 FCC Rcd at 13729-13730. Staff analysis confirms that there is no contour overlap between WPGG(FM) and any licensed station attributable to Cumulus. See BALH-20050503AAW at Exh. 15. The principal community contour of WPGG(FM) does overlap the principal community contour proposed in the pending application to relocate Cumulus station WLWI-FM, Montgomery, Alabama. However, even assuming the Commission grants the WLWI-FM modification application, Cumulus’s common control of WPGG(FM) and the modified WLWI-FM would still comply with the local radio ownership rule under the interim contour-overlap methodology. See 47 C.F.R. § 73.3555(a)(1)(iv) (providing that in a local radio market with 14 or fewer stations, a single owner may own up to five commercial stations, no more than three of which are in the same service, except that the party may not own more than 50% of the stations in such market).

markets, the Commission concluded that “[b]y applying the numerical limits of the local radio ownership rule to a more rational market definition, we believe that, *in virtually all cases*, the rule will protect against excessive concentration levels in local radio markets that might otherwise threaten the public interest.”²⁵

Quantum asserts that this is an extraordinary case in which the current rules will not protect against excessive concentration levels. Specifically, Quantum alleges that Cumulus currently controls 70 percent of the radio advertising revenue in the Ft. Walton Beach Metro. According to Quantum, upon consummation of the subject transactions, in which Cumulus is trading two lower power stations for two higher power stations,²⁶ Cumulus will “nearly double the number of people, and nearly triple the geographic area” served by its stations and thus “further solidify [its] monopoly position” in the Ft. Walton Beach Metro.²⁷ Cumulus counters that the Assignment Applications fully comply with the Commission’s local radio ownership rule and that Quantum’s allegations are premised on nothing more than supposition and speculation.²⁸

We are bound to give a “hard look” to petitions that allege that a particular transaction is not in the public interest, notwithstanding compliance with the new rule.²⁹ The petitioner, however, faces a high hurdle and must present specific allegations of fact sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest, and a substantial and material question is presented to be determined by the Commission.³⁰ We find that Quantum’s challenge ultimately fails under this standard and that departure from the rule is unwarranted in this case. Quantum relies, in large part, on advertising revenue shares in asserting its competition concerns. The Commission, however, has concluded that ad revenue share is of “decreasing relevance . . . as a barometer of competition”³¹ and explicitly rejected arguments that it incorporate a market share analysis into the local ownership rule.³² Moreover, even were we to attempt to conduct such an analysis here, Quantum has failed to proffer sufficient economic data to substantiate its claim of competitive harm. For example, Quantum does not explain how it derives its 70 percent revenue share figure for Cumulus, and otherwise provides no data to

²⁵ *Ownership Order*, 18 FCC Rcd at 13813 (emphasis added).

²⁶ Cumulus is selling WYZB(FM), a Class C3 station, and WNCV(FM), a Class A station, to Star. Star, in turn, is selling WTKE(FM), a Class C1 station, and WPGG(FM), a Class C2 station, to Cumulus.

²⁷ Quantum Petition at ii, iii. MAP asserts that the Assignment Applications represent “one of the most egregiously anticompetitive transactions which [it] has ever encountered.” MAP, however, does not provide any support whatsoever for this bold and bald statement. It merely refers the Commission to Quantum’s Petition. We therefore find MAP’s Objection to have no merit.

²⁸ Cumulus states that there is no evidence that its acquisition of WTKE(FM) and WPGG(FM), which is not yet even operating in the Ft. Walton Beach Metro, will increase its advertising revenue share in that Metro. Moreover, Cumulus contends, market shares are an ever-fluctuating, unreliable barometer of competition. *See* Cumulus Opposition at i.

²⁹ *See Ownership Order*, 18 FCC Rcd at 13647 (explaining that although “[w]e are confident that the modified rules will reduce the chances of precluding transactions that are in the public interest or, alternatively, permitting transactions that are not in the public interest . . . we are obligated to give a hard look both to waiver requests . . . as well as petitions to deny.”).

³⁰ *Id.* at 13647, n.131 (citing 47 U.S.C. § 309(d) and case precedent (case citations omitted)).

³¹ *Id.* at 13642.

³² *Id.* at 13736-37.

support this figure.³³ Further, Quantum’s market concentration allegations are based on an assumption that WPGG(FM), a station for which no revenue estimates are reported by BIA, is part of the Ft. Walton Beach Metro. As discussed above, we do not count WPGG(FM) as part of this Metro.

Quantum further premises its competition concerns on the disparity between the technical facilities of the subject stations. Specifically, Quantum asserts that as a result of the station swaps, Cumulus will own four of the most powerful stations in the Ft. Walton Beach Metro, thus “leaving Cumulus’s competitors to scrounge for market share with lesser facilities”³⁴ and making it “next to impossible for viable competition to develop in the market.”³⁵ We find Quantum’s speculative prediction of an anti-competitive environment unpersuasive. Upon consummation of the Assignment Applications, Cumulus will own two Class C1 stations and one Class C2 station in the Ft. Walton Beach Metro. To reiterate, we do not count WPGG(FM), a Class C2 station, as part of the Metro. Even assuming *arguendo* that WPGG(FM) will ultimately operate in this Metro, we are still unpersuaded by Cumulus’s allegations. Other stations with comparable or superior facilities will continue to compete against Cumulus.³⁶ Moreover, the Ft. Walton Beach Metro consists of only Okaloosa County, a geographically small county along the coast of Florida.³⁷ As the Commission recognized in the *Ownership Order*, “technically weaker stations may, of course, be strong competitors in their markets, depending on a variety of factors such as format choice, population coverage, and quality of programming.”³⁸ Accordingly, even smaller stations can potentially cover a significant area of this small Metro, thus serving a substantial portion of the population, and effectively compete with the higher powered stations in the Metro.

Furthermore, we emphasize that our ultimate obligation is to consider the potential benefits and harms of the transactions on the listening public. As the Commission observed in the *Ownership Order*, “[p]reserving competition for listeners is of paramount concern” in our public interest analysis.³⁹ The Commission stated that the numerical limits approach is designed to promote competition by assuring that a sufficient number of rivals are actively engaged in competition for listening audiences.⁴⁰ Grant of the Assignment Applications will not alter the number of competitors in the Ft. Walton Beach Metro. According to BIA data, six station owners currently compete in the Metro, and six owners will remain in the Metro post-transaction.

In light of the above, we are unpersuaded that application of the new radio ownership rule is inadequate to protect against competitive harm in this case. We therefore analyze these transactions by

³³ The most recent publicly available advertising revenue estimates from BIA show that Cumulus’s market share will decline from 64.1% pre-transaction to 43.2% post-transaction. BIA’s 43.2% estimate does not speculate on possible changes in WTKE(FM)’s revenue due to the station’s recent facility upgrade, nor does it include any revenue for WPGG(FM), which is not yet operating in the Metro.

³⁴ Quantum Petition at ii.

³⁵ *Id.* at 13.

³⁶ For example, Carter Broadcasting, Inc. owns a Class C1 station in the Metro while Quantum is the licensee of two Class C2 facilities.

³⁷ The total area of Okaloosa County is 2,802 square kilometers, and 13.5 percent of the area is water. The county has a population of 181,460 people, according to 2004 U.S. Census Bureau estimates. See www.co.okaloosa.fl.us; www.census.gov.

³⁸ *Ownership Order*, 18 FCC Rcd at 13732.

³⁹ *Id.* at 13716. See also *id.* at 13641.

⁴⁰ See *id.* at 13716.

applying the numerical limits of Section 73.3555(a), using the Ft. Walton Beach Metro as the relevant geographic market for stations WTKE(FM), WYZB(FM), and WNCV(FM), and using the interim contour-overlap methodology for station WPGG(FM). BIA reports 17 commercial and noncommercial educational radio stations as home to the Ft. Walton Beach Metro. Cumulus currently owns five stations in the Metro: WKSM(FM), WZNS(FM), WYZB(FM), WNCV(FM), and WFTW(AM). Through its acquisition of WTKE(FM), and concurrent assignment of WYZB(FM) and WNCV(FM) to Star, Cumulus would own one AM and three FM stations in the Metro, which complies with the local radio ownership rule.⁴¹ As already indicated above,⁴² Cumulus's acquisition of WPGG(FM) also would comply with the rule. Further, if and when WPGG(FM) implements its approved relocation to Shalimar, Florida and becomes a part of the Ft. Walton Beach Metro, such that Cumulus would own one AM and four FM stations in the Metro, Cumulus would remain in compliance with the local radio ownership rule.

“Anti-Competitive” Contractual Provisions. Quantum rests its third argument on contract provisions that: (1) grant Cumulus an exclusive option to acquire another station from Star -- WBAU(AM), Ft. Walton Beach, Florida; (2) grant Cumulus a 10-year right of first refusal with respect to the two Cumulus stations now being sold to Star; (3) prohibit Star and any successor-in-interest from instituting an adult contemporary or country program format on WNCV(FM) or WYZB(FM) for a period of five years; (4) allow Cumulus to obtain voting control over Star in the event of Star's default on the loan repayment; and (5) allegedly prohibit Star from acquiring any other stations until its loans from Cumulus are re-paid.⁴³ While we find no evidence on the record to sustain Quantum's assertion that these provisions will “act as real, practical barriers to competition,”⁴⁴ we find, as explained below, that three of the provisions are nevertheless contrary to Commission rules and policies and must be modified prior to closing.

Option and Right of First Refusal. Quantum argues Cumulus can, and likely will, exercise its option and right of first refusal to prevent any effective competitor from acquiring WBAU(AM), WNCV(FM), and WYZB(FM) in the event Star opts to sell any of these stations. Cumulus, in turn, asserts that these provisions are entirely consistent with Commission policy and that Quantum's anti-competitive concerns are premised on nothing more than speculation. We agree in part: we find nothing untoward in the provision that grants Cumulus an option to acquire WBAU(AM). We have frequently approved similar provisions, and Quantum's speculative anti-competitive allegations have not convinced us to reverse course here.⁴⁵ If Cumulus exercises the option, the parties will be required to obtain approval from the Commission. Quantum can raise anti-competitive concerns at that time. We find,

⁴¹ See 47 C.F.R. § 73.3555(a)(1)(iii) (in a radio market with between 15 and 29 full-power, commercial and noncommercial radio stations, one owner may hold up to six commercial stations, no more than four of which are in the same service). Upon consummation of the Assignment Applications, Star would own one AM and two FM stations in the Metro, which also complies with the local radio ownership rule.

⁴² See *supra* note 24.

⁴³ This allegation, as Cumulus explains, is based on Quantum's misreading of the language in the Agreements. The Agreements do not prevent Star from acquiring additional stations. In fact, subsequent to the execution of the Agreements, Star acquired additional stations. See, e.g., BAL-20050425ACK (consummated July 22, 2005). We therefore find this allegation does not merit further consideration.

⁴⁴ Quantum Reply at ii.

⁴⁵ The option does not compel the conclusion that Cumulus will control Star or have the ability to exert improper influence. Our rules make it clear that a mere option to acquire does not convey control. See 47 C.F.R. §73.3555, Note 2(e); see also *Manahawkin Communications*, 17 FCC Red 342 (2001) (standing alone, an unexercised option does not represent a relinquishment of control).

however, that Cumulus's right of first refusal to re-acquire WNCV(FM) or WYZB(FM) violates Section 73.1150 of the Commission's rules, which provides that the assignor of a broadcast station license "may retain . . . no right to reassignment of the license in the future."⁴⁶ Accordingly, we require the parties to delete the right of first refusal clause before closing.

Format Restriction. Section 12.17 of the Agreements prohibits Star and any successor-in-interest from instituting an adult contemporary or country program format, or any similar or derivative format, on WNCV(FM) or WYZB(FM) for a period of five years. Quantum asserts that this format restriction deprives Star of a fundamental licensee right, permits Cumulus to exercise unauthorized control over the stations, and ensures that Cumulus will not be subject to format competition. Cumulus argues that the format restriction clause is consistent with Commission policy, and moreover, will not preclude any of the other stations in the market from maintaining or introducing formats competitive with Cumulus stations. Neither Quantum nor Cumulus cites to Commission precedent to support its arguments.

Although the Commission does not scrutinize or regulate programming formats and does not consider programming format when making its licensing decisions,⁴⁷ it looks to whether the new licensee will retain control and mandate the basic policies with respect to the station's programming.⁴⁸ The ultimate responsibility for selecting programming material and establishing programming policies lies with the licensee, and we have held this responsibility cannot be "unduly fettered by contractual arrangements restricting the licensee in his free exercise of his independent judgments."⁴⁹

We find that the Agreements' clause restricting Star from instituting certain formats on WNCV(FM) and WYZB(FM) improperly infringes on Star's programming responsibilities. As the new licensee of the stations, Star must retain the flexibility to address the needs and interests of its local communities, to react to changing audience tastes and preferences, to respond to other competitors in the market, and to select its programming accordingly.⁵⁰ While Star ultimately may decide, at its discretion, not to implement an adult contemporary or country format on the stations, a contract barring the use of such formats, even for a limited period, is impermissible. Accordingly, we require the parties to delete

⁴⁶ 47 C.F.R. § 73.1150. See also *Radio KDAN, Inc.*, 11 F.C.C.2d 934 (1968), *recon. denied*, 13 R.R.2d 100 (1968), *aff'd sub nom.*, *W.H. Hansen v. FCC*, 413 F.2d 374 (D.C. Cir. 1969).

⁴⁷ See, e.g., *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 595 (1981) ("Commission has provided a rational explanation for its conclusion that reliance on the market is the best method of promoting diversity in entertainment formats.").

⁴⁸ See, e.g., *Stereo Broadcasters, Inc.*, 55 F.C.C.2d 87 (1981), *recon. denied*, 50 R.R.2d 1346 (1982); *WHDH, Inc.*, 17 F.C.C.2d 856 (1969), *aff'd sub nom.*, *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). See also FCC Form 314, Worksheet #2, Question 3 (explaining that a sales contract must provide the assignee with ultimate control over station programming, without reservation, in order to comply fully with the Commission's rules and policies). Although a licensee may delegate certain functions on a day-to-day basis, ultimate responsibility for essential station operations, such as personnel, programming, and finances, is non-delegable. See, e.g., *WGPR, Inc.*, 10 FCC Rcd 8140, 8145 (1995); *Southwest Texas Public Broadcasting Council*, 85 F.C.C.2d 713, 715 (1981).

⁴⁹ *Report on Editorializing*, 13 F.C.C.2d 1246, 1248 (1949). See also *Cosmopolitan Broadcasting Corp.*, 59 F.C.C.2d 558, 561 (1976), *recon. denied*, 61 F.C.C.2d 257 (1976) (non-renewal of license for abdicating control over programming to time broker).

⁵⁰ See, e.g., *National Ass'n for Better Broadcasting*, 55 F.C.C.2d 800 (1975) ("this duty [for programming decisions] cannot be delegated and a licensee cannot, even unilaterally, foreclose its discretion and continuous responsibility to determine the public interest and operate in accordance with that determination.").

the format restriction clause before closing.⁵¹

Stock Pledge Agreement. Qantum further asserts that the parties' Stock Pledge Agreement gives Cumulus the right to influence strongly, if not control, the future of Star and its stations. Specifically, the Stock Pledge Agreement provides that Cumulus may, in the event Star defaults on its Cumulus loans, vote all or any part of Star's voting stock, or assign or transfer all or any part of that voting stock into its own name.⁵² A controlling percentage of a licensee's stock may be pledged as security for a loan if: (1) the licensee/borrower retains voting rights in the stock, and thus control of the station, even in the event of default; and (2) in the event of default, the pledged stock is sold, subject to Commission approval, in a manner, such as a public auction, that does not restrict the sale to the lender.⁵³ Such arrangements provide financial security for lenders without jeopardizing the independence of the licensee.⁵⁴ Because the parties' Stock Pledge Agreement does not adhere to these restrictions, we find it is inconsistent with Commission rules and policies. We require the parties to revise the Stock Pledge Agreement accordingly before closing.

Star/Qantum Contractual Dispute. Finally, Qantum contends that Star breached its agreement with Qantum for the sale of WTKE(FM), while Star denies the alleged contract breach. We will not reach the merits of this contractual dispute. The Commission has long held that it is not the proper forum for the resolution of private contractual disputes and that any redress should be sought in a local court of competent jurisdiction.⁵⁵ The alleged breach is already the subject of a specific performance suit initially filed in a Florida District Court. On August 9, 2005, the United States District Court for the Southern District of Florida issued a preliminary injunction enjoining Star from, *inter alia*, consummating the transaction contemplated in any agreement with Cumulus or conveying the WTKE(FM) assets to any third party.⁵⁶ While the Court's preliminary injunction currently precludes Star and Cumulus from

⁵¹ See, e.g., *CFM Communications, LLC*, 20 FCC Rcd 9738 (MB May 24, 2005) (requiring parties to modify contract provision that obligated new station owner to fill 85% of its broadcast time with paid or bartered programming), *grant rescinded on other grounds*, 20 FCC Rcd 10824 (MB June 20, 2005); *Twin States Broadcasting, Inc.*, 42 F.C.C.2d 1091 (1973) (disapproving initial agreement that required assignee to change to a progressive rock format under certain market conditions).

⁵² See Sections 1 and 7 of Stock Pledge Agreement, attached at Exh. 4 to BALH-20050502ACB.

⁵³ See *Minority Ownership in Broadcasting*, 99 F.C.C.2d 1249, 1254 (1985) ("*Minority Ownership*"); see also FCC Form 314, Worksheet #2, Question 5 (explaining that in order to certify that a stock pledge agreement complies fully with the Commission's rules and policies, the agreement must "expressly state that voting rights will remain with the assignee, even in the event of default . . . [and] indicate that, in the event of default, there will be either a public or private arm's length sale of the pledged interests . . ."). The lender may secure an interest in the proceeds of the sale of the stock or station license. See, e.g., *Beach Television Partners*, 38 F.3d 535 (11th Cir. 1994); *Cheskey*, 9 FCC Rcd 986 (1994).

⁵⁴ *Minority Ownership*, 99 F.C.C.2d at 1254.

⁵⁵ See, e.g., *Listeners' Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987) (endorsing "the Commission's longstanding policy of refusing to adjudicate private contract law questions"); *John F. Runner, Receiver (KBIF)*, 36 R.R.2d 773, 778 (1976) (local court of competent jurisdiction, not the FCC, is the proper forum to resolve private disputes).

⁵⁶ See *Qantum Communications Corporation v. Star Broadcasting, Inc. and Ronald E. Hale, Sr.*, Case No. 05-21772-CIV-Martinez-Bandstra. The District Court has not resolved the substantive merits of the litigation. On November 10, 2005, Star filed a voluntary petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court, Northern District of Florida, Pensacola Division, Case No. 05-35012-WSS. Accordingly, the Qantum-Star case has been removed from the District Court in Miami and is now pending before the Bankruptcy Court in Pensacola. See *Letter from David E. Bailey, Jr., Counsel for Star, to Andrew Jay Schwartzman, President/CEO of MAP* (December 1, 2005) (sent in response to MAP Objection and served on Donna C. Gregg,

(continued...)

closing the WTKE(FM) transaction, it does not forestall our consideration of the Assignment Applications nor enjoin us from acting on the applications.⁵⁷ We emphasize, however, that our decision to grant the Assignment Applications merely finds that the parties are qualified under, and the proposed transactions do not violate, the Communications Act of 1934, as amended, and the Commission's rules and policies. As such, it is permissive only and does not prejudice the outcome of the court proceeding and any relief to which the parties are entitled under the civil suit.

Conclusion

Based on the evidence presented in the record, we find that neither Qantum nor MAP has raised a substantial and material question of fact warranting further inquiry. We further find that both Star and Cumulus are qualified as assignees and that grant of the Assignment Applications is consistent with the public interest, convenience, and necessity. Accordingly, IT IS ORDERED, That the applications to (1) assign the licenses of stations WNCV(FM), Niceville, Florida (File No. BALH-20050502ACB) and WYZB(FM), Mary Esther, Florida (File No. BALH-20050502ACC) from Cumulus Licensing LLC to Star Broadcasting, Inc. and (2) assign the licenses of stations WPGG(FM), Evergreen, Alabama (BALH-20050503AAW) and WTKE(FM), Holt, Florida (File No. BALH-20050504AAO), from Star Broadcasting, Inc. to Cumulus Licensing LLC, ARE GRANTED, subject to the modifications of the agreements between Cumulus and Star as described above. These modifications must be made prior to consummation of the assignments of licenses and are to be reflected in all final agreements between the parties. Copies of the agreements as modified shall be served on Peter H. Doyle, Chief, Audio Division, Media Bureau, within 30 days of the date of this letter. IT IS FURTHER ORDERED, That the June 6, 2005, Petition to Deny filed by Qantum of Ft. Walton Beach License Company, LLC IS DENIED. Finally, IT IS ORDERED That the letter filed November 21, 2005, by Media Access Project, when treated as an Informal Objection, IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Andrew Jay Schwartzman, Esq.
David E. Bailey, Jr.

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Chief, Media Bureau). On November 21, 2005, Star filed applications for the involuntary assignment of its station licenses for WBAU(AM), WTKE(FM), WIJK(FM), and WPGG(FM) to Star Broadcasting, Inc., Debtor-in-Possession. See BAL/BALH-20051121AOC-AOF. The Commission granted the applications on January 11, 2006, but the assignments have not yet been consummated.

⁵⁷ The Commission has routinely acted favorably on applications pending resolution of private contractual disputes. See, e.g., *Decatur Telecasting, Inc.*, 7 FCC Rcd 8622 (1992).