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In re:

WNGA(FM), South Pittsburg, TN
Facility ID No. 40469
File No. BALH-20060918AHP

W278AC, Walden, TN
Facility ID No. 56727
File No. BALFT-20060918AHQ

W257AZ, Lookout Mountain, TN
Facility ID No. 56726
File No. BALFT-20060918AHR

WUUS(AM), Rossville, GA
Facility ID No. 72374
File No. BAL-20060918AHS

WGMM(AM), Roanoke, VA
Facility ID No. 37746
File No. BAL-2006090618AHT

WVGM(AM), Lynchburg, VA
Facility ID No. 70330
File No. BALH-20060918AHU
Applications for Assignment of Licenses

Dear Counsel:

We have before us the above-captioned applications (the "Applications") of Capstar TX Limited Partnership ("Capstar") and 3 Daughters Media, Inc. ("3 Daughters") for consent to the proposed assignment from Capstar to 3 Daughters of the licenses of Stations WNGA(FM), South Pittsburg, Tennessee, W278AC, Walden, Tennessee, W257AZ, Lookout Mountain, Tennessee, WUUS(AM), Rossville, Georgia, WGMN(AM), Roanoke, Virginia, and WVGM(AM), Lynchburg, Virginia (the "Stations"). We also have before us a Petition to Deny the Applications filed by Centennial Licensing, LLC ("Centennial") on October 23, 2006 (the "Petition").¹ For the reasons stated below, we deny the Petition and grant the Applications.

Background. On February 28, 2005, 3 Daughters' sole shareholder, officer, and director, Gary E. Burns ("Burns"), assigned Station WLNI(FM), Lynchburg, Virginia, to Centennial Broadcasting, LLC ("Centennial Broadcasting"), Petitioner Centennial's parent entity.² Station WLNI(FM) is included in the Roanoke-Lynchburg Arbitron Metro (the "Metro Area"). As part of that transaction, Burns entered into a Non-Solicitation and Consulting Agreement (the "Agreement") with Centennial Broadcasting.³ According to Centennial, the Agreement prohibits Burns, directly or through a business entity, from operating a radio station in the Metro Area for a period of five years if the station utilized a "format substantially similar" to that of WLNI(FM) as of the date that Centennial acquired WLNI(FM) from Burns.⁴

On November 1, 2005, 3 Daughters acquired Station WBLT(AM), Bedford, Virginia, which is also in the Metro Area.⁵ After acquiring that station, 3 Daughters changed the format of WBLT(AM) to one which Centennial believed was similar to that of WLNI(FM), and, accordingly, in violation of the Agreement. Shortly thereafter, Centennial Broadcasting instituted an action before the United States District Court for the Western District of Virginia ("District Court"), seeking temporary and permanent injunctions against Burns and 3 Daughters to prohibit further alleged violation of their Agreement.⁶ The District Court found in favor of Centennial Broadcasting, first issuing a temporary injunction on March 20, 2006, and, on June 8, 2006, issuing a permanent injunction against Burns and 3 Daughters, for a

¹ On November 6, 2006, 3 Daughters filed an Opposition to Petition to Deny (the "Opposition"). On November 14, 2006, Centennial filed a Reply to Opposition to Petition to Deny.

² File No. BALH-20041110ACM. Subsequently, the WLNI(FM) license was assigned to Centennial. See File No. BALH-20060309AAD (Form 316), granted on January 7, 2005.

³ A copy of the Agreement was submitted in conjunction with the WLNI(FM) assignment application. Petition at 3, note 4.

⁴ Centennial states that Station WLNI(FM) uses a "Talk" format. *Id.* at 4.

⁵ File No. BAL-20050721ABJ.

⁶ Petition at 4, citing *Centennial Broadcasting, LLC v. Gary E. Burns*, CA No. 6:06-CV00006 (W.D. Va. Sep. 29, 2006) (the "Permanent Injunction").

period of five years, from owning, operating or otherwise being connected with any commercial AM or FM station in the Metro Area “if that business station uses . . . [the programming formats of] All Talk, News/Talk, Full Service Talk or Specialized Talk with a focus on current events and/or politics.”⁷ An appeal of this decision is currently pending before the U.S. Court of Appeals for the Fourth Circuit.⁸

In the Petition, citing the District Court decision described above and the Affidavit of Burns submitted in that proceeding, Centennial alleges that 3 Daughters is unqualified to be a Commission licensee. Centennial maintains that, as licensee of Station WBLT(AM), 3 Daughters has “admitted to willfully withholding programming concerning issues facing the community of Bedford (its community of license).”⁹ In support of this contention, Centennial quotes from the Burns Affidavit, submitted by 3 Daughters in an effort to dissolve the preliminary injunction on the theory that it prevented 3 Daughters from meeting its obligations as a licensee, as follows:

as a result of the Court’s injunction, WBLT(AM) is unable to air talk programming that concerns issues facing the community of Bedford. Such issue-responsive programming is required by the FCC’s rules. The FCC takes this rule very seriously and routinely issues fines for violations of the rule’s reporting requirements.¹⁰

According to Centennial, Burns and 3 Daughters “cynically and deliberately misinterpreted the court’s injunction as a ploy to dissolve the injunction. The Commission’s rules were willfully sacrificed in pursuit of this strategy. . . Burns displayed a willingness to forgo his obligation to the community of Bedford as a Commission licensee while he pursued his strategy of personal aggrandizement.”¹¹ Moreover, Centennial asserts that 3 Daughters violated the Commission’s public file rule¹² by failing to place in WBLT(AM)’s public file the station’s issues/programs list for the first quarter of 2006 and by refusing to allow two Centennial employees to copy material from the public file.¹³

Discussion. Under Section 309(d)(1) of the Communications Act of 1934, as amended (the “Act”),¹⁴ any party in interest may file a petition to deny an application. In order to assess the merits of a petition to deny, a two-step analysis is required. First, the petition must make specific allegations of fact

⁷ *Id.*, Exhibit 5, Permanent Injunction at 22-23.

⁸ Opposition at 6, note 1.

⁹ Petition at 2.

¹⁰ *Id.* at 4; and Exhibit 1 (May 2, 2006, Affidavit of Gary E. Burns). The propriety of the District Court’s injunction enforcing the Agreement voluntarily signed by 3 Daughters and Centennial Broadcasting is not at issue in this proceeding. What Centennial has alleged is that 3 Daughters has failed to meet its duty as the licensee of Station WBLT(AM) to respond to local needs and issues with the station’s programming. Accordingly, we reject, as beyond the scope of this proceeding, the request in 3 Daughters’ Opposition that we declare that its Agreement violates Section 310(d) of the Communications Act of 1934, as amended. Opposition at 20-23.

¹¹ *Id.* at 5.

¹² 45 C.F.R. § 73.3526.

¹³ According to Centennial, when two Centennial employees visited WBLT(AM) on May 10, 2006, “(t)hey found that the quarterly lists were current only through the end of 2005, and did not include information for the first quarter of 2006 . . . [and they] were not permitted to duplicate material in the station’s public file.” Petition at 5. (footnote omitted), and Exhibit 3 (undated and unsworn statement signed by Bob Abbott and Ryan Carlson).

¹⁴ 47 U.S.C. § 309(d)(1).

sufficient to demonstrate that the petitioner is a party in interest and that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity.¹⁵ This threshold determination is made by evaluating the petition and the supporting affidavits. If the petition meets this threshold requirement, the Commission must then examine all of the material before it to determine whether there is a substantial and material question of fact calling for further inquiry and requiring resolution in a hearing.¹⁶ If no such question is raised, the Commission will deny the petition and grant the application if it concludes that such grant otherwise serves the public interest, convenience, and necessity.

Procedural Issue. As an initial matter, we conclude that Centennial has standing to file the Petition. It has long been established that a competitor of an applicant has party-in-interest status.¹⁷ Here, Centennial's Stations WZZI(FM), Vinton, Virginia, WLEQ(FM), Bedford, Virginia, and WZZU(FM) and WLNI(FM), Lynchburg, Virginia, are located in the same Metro Area as two of the Capstar stations that are the subject of the transaction proposed in the Applications.¹⁸ Contrary to 3 Daughters' assertions, where standing is derived from status as a competitor in the market, a petitioner "does not need to demonstrate that it will suffer a direct injury from grant" of an application.¹⁹ Nor, as a competitor, "must it demonstrate, or even allege . . . that it will be subjected to increased or materially different competition as a result of the proposed assignment."²⁰ Accordingly, we find that Centennial has the requisite standing to file its Petition.

Substantive Issues. Centennial's arguments are founded solely on its observations regarding 3 Daughters' operation of Station WBLT(AM), Bedford, Virginia, a station not involved in the transaction proposed in the Applications. Under the Commission's *Character Policy Statement*,²¹ there is no presumption that misconduct at one station is necessarily predictive of the licensee's operation of other stations. Thus, Centennial faces a high threshold barrier in showing the relevance of 3 Daughters' operation of WBLT(AM) to this proceeding. We find that Centennial has not established any nexus between the operation of Station WBLT(AM) and the proposed transaction.²² Therefore, Centennial's allegations concerning Station WBLT(AM) do not warrant further inquiry.²³

¹⁵ See *id.*; *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

¹⁶ 47 U.S.C. § 309(d)(2).

¹⁷ See *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 476-477 (1940).

¹⁸ Specifically, Capstar Stations WGMM(AM), Roanoke, Virginia and WVGM(AM), Lynchburg, Virginia are located in the Metro Area.

¹⁹ See *Waterman Broadcasting Corporation of Florida*, Letter, 17 FCC Rcd 15742, 15744 n.2 (MB 2002) (citing *American Mobilphone, Inc. and Ram Technologies, Inc.*, Order, 10 FCC Rcd 12297, 12298 (WTB 1995). ("American Mobilphone").

²⁰ *American Mobilphone*, 10 FCC Rcd at 12298.

²¹ *Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order, and Policy Statement, 102 FCC 2d 1179, 1223-1225 (1986), recon. granted in part and denied in part, Memorandum Opinion and Order, 1 FCC Rcd 421 (1986) (subsequent history omitted).

²² See e.g. *WJZD, Inc.*, Letter, 20 FCC Rcd 9941, 9943 (MB 2005) (operation of licensee's other stations not relevant to review of assignment application).

²³ We note that Centennial's arguments concerning 3 Daughter's performance as licensee of Station WBLT(AM) may be addressed at the time of its renewal application filing. The Commission has long held that the appropriate time to review a licensee's conduct is generally when the subject license has filed an application for renewal. See

Moreover, even if Centennial’s objections regarding Station WBLT(AM) were relevant to our review of the Applications, we find that they are meritless. We do not read the Burns Affidavit as an acknowledgement that 3 Sisters abdicated its public service obligations as licensee of Station WBLT(AM). In the Affidavit, Burns states that, as a result of the court’s preliminary injunction, the station was constrained as to the types of programming that it aired.²⁴ However, according to 3 Daughters, “even after the preliminary injunction was entered, WBLT(AM) did provide issue-responsive programming, including a local newscast produced by 3 Daughters, that aired every hour from 6 AM to 6 PM every Monday through Friday.”²⁵ Licensees have broad discretion to determine, in good faith, the issues they believe to be of concern to their communities and the manner in which to address those issues.²⁶ The Commission may intervene only in circumstances in which a licensee has abused this discretion. Centennial has failed to provide evidence which demonstrates that 3 Daughters abused this broad discretion in its programming of Station WBLT(AM).²⁷

As to Centennial’s contentions concerning Station WBLT(AM)’s public inspection file, 3 Daughters responds that the alleged “violations, without more . . . even if true, generally do not raise questions about a licensee’s character or warrant denial of an application.”²⁸ We agree. Public file violations only implicate the Commission’s Character Qualifications Policy when extensive and egregious or when indicative of substantial carelessness.²⁹ With regard to the single issues/programs report that was allegedly missing from WBLT(AM)’s public inspection file, we do not find that such an alleged violation, if true, rises to the level of a “serious” violation which would be relevant to our considerations of the Applications.³⁰ For example, Commission staff has granted applications for license renewal in which the licensee had a significantly greater number of public file violations than that presented here.³¹ Nor are we persuaded by Centennial’s claim of its inability to obtain copies of the

RKO General, Inc., Decision, 1 FCC Rcd 1081, 1086 (1986).

²⁴ The Preliminary Injunction enjoins Burns and 3 Daughters from “further use of nationally syndicated or local talk shows” on WBLT(AM) during the pendency of the action or until the court’s further order. Opposition, Ex. B at 5-6.

²⁵ Opposition at 7. (footnote omitted).

²⁶ *Time-Life Broadcast, Inc.*, Memorandum Opinion and Order, 33 FCC 2d 1081, 1092 (1972). See also *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413, 1431 (D.C. Cir 1983), and *Broadcast Localism*, Notice of Inquiry, 19 FCC Rcd 12425, 12429 (2004).

²⁷ *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986). In its Reply, Centennial does not challenge the accuracy of 3 Daughters’ characterization of its programming, instead maintaining that, if true, the language in the Burns Affidavit “appears to have been intended to mislead the court” and urges that the Commission “take into account Burns’ apparently deceptive behavior before the court.” Reply at 5. Although this is a matter for the court to resolve, we fail to see how 3 Sisters’ advocacy in attempting to dissolve the temporary injunction calls to question its qualifications as a Commission licensee, much less to obtain the Stations as proposed in the Applications.

²⁸ Opposition at 10.

²⁹ See *R&L Broadcasters*, Memorandum Opinion & Order, 7 FCC Rcd 5551 (1992) (absent intentional misconduct an isolated public file issue does not warrant a hearing designation).

³⁰ 3 Daughters advises that it had been timely prepared the list, but did not place it into the public file due to an “inadvertent oversight,” which was since corrected. Opposition at 10.

³¹ See e.g. *Canandaigua Broadcasting, Inc.*, Memorandum Opinion and Order, 21 FCC Rcd 10646(MB 2006) (\$4,000 forfeiture issued for five missing issues/programs lists, renewal granted); and *Geneva Broadcasting, Inc.*,

WBLT(AM) public inspection file materials. Section 73.3526(c) requires that “[r]equests for copies shall be fulfilled within a reasonable period of time, which generally should not exceed 7 days.”³² Centennial has provided with its Petition an e-mail that it received from Burns,³³ dated May 17, 2006, seven days after the Centennial employees’ visit, confirming his offer to make copies of the file materials that they requested.³⁴ Given the timing of this e-mail, even when we consider all of the evidence in the most favorable light to Centennial, we do not find that 3 Daughters improperly refused to allow photocopies of the Station’s public file. 3 Daughters’ disposition of the Centennial request was in compliance with its obligations under the Rule.

Strike Pleading Allegation. Finally, we decline, as 3 Daughters urges, to deem Centennial’s filing against it a “strike petition.” To successfully raise such an issue, the requesting party must make a threshold showing that the primary and substantial purpose behind the filer’s action is delay.³⁵ The factors the Commission takes into account to determine if a submission constitute a strike petition are: statements by the filer’s principals or officers admitting the obstructive purpose; the filer’s withholding information relevant to disposition of the requested issues; the absence of any reasonable basis for the adverse allegations in the petition; economic motivation indicating a delaying purpose; and other conduct of the filer.³⁶ Here, although 3 Daughters claims that Centennial’s allegations lacked a reasonable basis and were made primarily to delay the Application, it fails to produce any evidence of this allegation of delay. While these assertions are factors to be taken into account when determining if a strike petition exists, these allegations alone are insufficient to meet the threshold showing needed. Although we conclude that Centennial has failed to raise a substantial and material question of fact why the Applications should not be granted, we find that its Petition is not so frivolous as to constitute a ‘strike’ pleading.³⁷

Conclusions/Actions. Accordingly, IT IS ORDERED, that the Petition to Deny filed by Centennial Licensing, LLC, IS DENIED.

IT IS FURTHER ORDERED, that the Applications (File Nos. BALH-20060918AHP; BALFT-20060918AHQ; BALFT-20060918AHQ; BALFT-20060918AHR; BAL-20060918AHS; BAL-

Memorandum Opinion and Order, 21 FCC Rcd 10642 (MB 2006) (\$10,000 forfeiture issued for eleven missing issues/programs lists, renewal granted).

³² 47 C.F.R § 73.3526(c).

³³ Petition, Exhibit 4.

³⁴ In his e-mail, Burns notes that there is no photocopy machine at WBLT(AM) and the station does not allow original documents to leave the building. According to the e-mail, the Centennial employees were told that they would be provided photocopies of any requested materials within 24 hours of their request. *Id.* Centennial does not contend that it further pursued the matter after receiving the e-mail.

³⁵ See *Radio Carrollton*, Memorandum Opinion and Order, 69 FCC 2d 1139, 1150 (1978).

³⁶ *Id.* at 1151.

³⁷ See *American Mobilphone*, 10 FCC Rcd at 12299; See also *Hispanic Information and Telecommunications Network, Inc.* Order on Reconsideration, 19 FCC Rcd 2829 (2004) (for allegations of a strike pleading to be considered, there must be a demonstrable showing of abuse of the Commission’s processes); *Utica Telephone Company*, Memorandum Opinion and Order, 5 FCC Rcd (1990) (an economic motivation to delay the proceeding, on its own, would not establish a *prima facie* case of having filed the pleadings with the sole purpose of delaying the proceeding).

2006090618AHT; and BAL-20060918AHU) for consent to assign the licenses of Stations WNGA(FM), South Pittsburg, Tennessee; W278AC, Walden, Tennessee; W257AZ, Lookout Mountain, Tennessee; WUUS(AM), Rossville, Georgia; WGMN(AM), Roanoke, Virginia; and WVGM(AM), Lynchburg, Virginia, from Capstar TX Limited Partnership to 3 Daughters Media, Inc. ARE GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau