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In Reply Refer to:

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Kathleen Victory, Esq.
Fletcher, Heald & Hildreth, PLC
1300 North 17th St., 11th floor
Arlington, VA 22209

Lauren Colby, Esq.
10 East 4th St.
Frederick, MD 21701

Howard Liberman, Esq.
Drinker Biddle & Reath, LLC
1500 K St., Suite 1100
Washington, DC 20005

In re: KSNQ(FM), Twin Falls, ID
Facility ID No. 87843
Intermart Broadcasting Twin Falls, Inc.
File No. BTCH-20070522ABS
File No. BALH-20080423ADZ

**Applications for Transfer of Control and
Assignment of License**

Petitions to Deny

Dear Counsel:

We have before us: (1) the captioned application (the "Transfer Application") seeking consent to transfer control of Intermart Broadcasting Twin Falls, Inc. ("Intermart"), the licensee of Station KSNQ(FM), Twin Falls, Idaho (the "Station"), from James E. Martin, Jr. to Patricia S. Woods, and (2) the captioned application (the "Assignment Application") seeking approval for the proposed assignment of license for the Station from Intermart to GAP Broadcasting Twin Falls License, LLC. Also before us are petitions to deny the Transfer Application and Assignment Application, filed by Astounding Productions, Inc. ("Astounding") on June 25, 2007, and May 29, 2008, respectively.¹ Because the petitions to deny raise related issues, we will consider them together. For the reasons stated below, we dismiss Astounding's pleadings as petitions to deny, consider and deny them as informal objections, and grant the Transfer Application and Assignment Application, subject to the conditions outlined below.

¹ InterMart filed an Opposition to the Petition to Deny the Transfer Application on July 5, 2007, and Astounding filed a Reply on July 16, 2007. InterMart filed an Opposition to the Petition to Deny the Assignment Application on June 3, 2008, and a Motion for Leave to Supplement Opposition to Petition to Deny the Assignment Application on June 26, 2008.

Background. Both InterMart and Astounding participated in Closed Broadcast Auction No. 25. InterMart entered the high bid of \$838,000 for the Twin Falls FM construction permit, and timely made its down payment. Astounding filed an informal objection, alleging that various agreements between InterMart and Citicasters Co. (“Citicasters”) raised a substantial and material question of fact as to whether Citicasters was the real party in interest behind InterMart’s application. The staff found no evidence that Citicasters controlled InterMart’s auction bidding and denied Astounding’s objection.² Astounding’s Application for Review followed, which was denied on May 22, 2008.³ Astounding filed an appeal of this Commission decision with the United States Court of Appeals, District of Columbia Circuit on June 23, 2008.⁴ Given the pendency of this court proceeding, Astounding argues that the Assignment Application is premature and should be denied.

Discussion. Section 310(d) of the Communications Act of 1934, as amended (the “Act”),⁵ requires the Commission to make a determination whether the proposed transfer or assignment of a broadcast license would be in the public interest. Pursuant to Section 309(d)(1) of the Act,⁶ 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 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.⁷ 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.⁸ 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. InterMart argues that Astounding lacks standing to file its Petition to Deny the Transfer Application.⁹ We agree. Astounding is only a dismissed applicant, not a competitor of the Station. Standing to file a petition to deny either the Transfer Application or the Assignment Application, as an aggrieved competitor, assumes an actual state of competition, not merely a history as a former applicant whose application was dismissed nine years ago.¹⁰ Therefore, Astounding has failed to

² See *Letter to Harry C. Martin, Esq., Marissa G. Repp, Esq., and Lauren A. Colby, Esq.*, Ref. No. 1800B3-TSN (MB Apr. 4, 2003). Following full and timely payment of the winning bid, the staff granted the InterMart Twin Falls construction permit application on May 9, 2003. A license to cover the construction permit was granted on January 6, 2006 (File No. BLH-20041119ADY).

³ *InterMart Broadcasting Pocatello, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 8822 (2008) (“*Intermart Order*”).

⁴ *Idaho Wireless Corp. v. FCC*, Docket No. 08-1227 (D.C. Cir. Jun. 23, 2008).

⁵ 47 U.S.C. § 310(d).

⁶ 47 U.S.C. § 309(d)(1).

⁷ See *id.*; *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

⁸ 47 U.S.C. § 309(d)(2).

⁹ While InterMart has only raised this argument with respect to Astounding’s petition to deny the Transfer Application, we find that it is also relevant with respect to the Assignment Application.

¹⁰ See *Family Television Corp.*, Memorandum Opinion and Order, 59 RR 2d 1344, 1346 (1986); *WIBF Broadcasting Co.*, Memorandum Opinion and Order, 17 FCC 2d 876 (1969)

establish that it is a party in interest as contemplated by the Act. Nevertheless, we shall treat its pleadings as informal objections pursuant to Section 73.3587 of the Rules.¹¹

Substantive Issues. Astounding claims that the Commission cannot grant the Assignment Application “without final action granting the underlying construction permit to Inter-Mart.”¹² We disagree. When a private contractual dispute concerning a Commission license is the subject of a pending court proceeding, in the absence of a stay or an injunction (neither of which are present here), it is the Commission's “long-standing policy” to condition the grant of an assignment or transfer of such license on the outcome of the pending proceeding.¹³ Commission grant of such 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.¹⁴ As such, it is permissive only and does not prejudice any relief that the parties may ultimately be entitled to under civil suit.¹⁵ Accordingly, we deny Astounding's petitions to deny, but shall place an appropriate condition on the assignment and transfer of control grants as outlined below.

Conclusion/Actions. Based on the above, we find that the Astounding has failed to raise a substantial and material question of fact warranting further inquiry. We further find that the parties to the transactions are otherwise qualified and that grants of the Transfer Application and Assignment Application are consistent with the public interest, convenience and necessity. Accordingly, IT IS ORDERED that the petitions to deny filed by Astounding Productions, Inc., which we treat as informal objections, ARE DENIED.

IT IS FURTHER ORDERED that the application for transfer of control of Broadcasting Twin Falls, Inc., the licensee of Station KSNQ(FM), Twin Falls, Idaho, from James E. Martin, Jr. to Patricia S. Woods (File No. BTCH-20070522ABS) IS GRANTED, WITH THE CONDITION that our action is without prejudice to whatever further action, if any, may be appropriate upon a final ruling in *Idaho Wireless Corp. v. FCC*, Docket No. 08-1227 (D.C. Cir. Jun. 23, 2008).

IT IS FURTHER ORDERED and that the application for approval to assign the license for Station KSNQ(FM), Twin Falls, Idaho (File No. BALH-20080423ADZ) from Broadcasting Twin Falls, Inc. to GAP Broadcasting Twin Falls License, LLC, IS GRANTED, WITH THE CONDITION that our

¹¹ 47 C.F.R. § 73.3587.

¹² See May 29, 2008, Petition to Deny at 2. See also June 25, 2007, Petition to Deny at 2 (stating that the Commission cannot grant the Transfer Application without Commission action on the Application for Review). This argument is rendered moot by the release of the *Inter-Mart Order* on May 22, 2008, and requires no further discussion.

¹³ *American Mobile Radio Corp.*, Order and Authorization, 13 FCC Rcd 8829, n.119 (IB 1997) (citing *Chief Washakie TV*, Memorandum Opinion and Order, 46 RR 2d 1594, 1598 n.7 (1980)). See also *Northwest Broadcasting, Inc.*, Memorandum Opinion and Order, 1997 WL 60920 at ¶ 10 (1997) (grant of assignment application conditioned upon outcome of pending litigation). *Accord Kidd Communications*, Letter, 20 FCC Rcd 13723, 13724 (MB 2005) (finding that the text in a decision letter addressing ongoing litigation adequately provided sufficient notice to parties, stating that an express condition would provide no added benefit).

¹⁴ *Kidd Communications*, 20 FCC Rcd at 13724-725.

¹⁵ *Northwest Broadcasting, Inc.*, 1997 WL 60920 at ¶ 14; *Kidd Communications*, 20 FCC Rcd at 13725.

action is without prejudice to whatever further action, if any, may be appropriate upon a final ruling in *Idaho Wireless Corp. v. FCC*, Docket No. 08-1227 (D.C. Cir. Jun. 23, 2008).

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau