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In re: **The Helpline**

10 Applications for NEW NCE(FM)
Stations in Ohio, Oklahoma, Missouri,
Arizona, Colorado, Virginia, and
Indiana.

Facility ID Nos. 175084, 175097,
175100, 175107, 175129, 175132,
175136, 175139, 175143, and 177401
File Nos. BNPED-20071022BSU;
BNPED-20071019BCP; BNPED-
20071019BCO; BNPED-
20071019BCN; BNPED-
20071019BCM; BNPED-
20071019BCK; BNPED-20071019BCJ;
BNPED-20071019BCH; BNPED-
20071019BCG; and BNPED-
20071019BCF

Spirit Communications, Inc.

10 Applications for NEW NCE(FM)
Stations in Utah, Arkansas, Colorado,
Kentucky, Washington, Minnesota,
Illinois, Pennsylvania, Indiana, and
North Carolina.

Facility ID Nos. 174142, 174499,
174515, 174554, 174561, 174571,
174574, 175541, 175545, and 177413.
File Nos. BNPED-20071022BVX;
BNPED-20071019BDA; BNPED-
20071019BCZ; BNPED-20071019BCY;
BNPED-20071019BCX; BNPED-
20071019BCW; BNPED

20071019BCV; BNPED-
20071019BCU; BNPED-
20071019BCT; and BNPED-
20071019BCS

Dear Messrs. Fitch and Shumate:

We have before us twenty applications, ten of which were filed by The Helpline (“Helpline”) and ten of which were filed by Spirit Communications, Inc. (“Spirit”) in the October 2007 noncommercial educational FM (“NCE”) filing window. An anonymous petitioner (“Petitioner”) alleged, in connection with two Helpline applications that were accepted for filing as “singletons” that Spirit maintains *de facto* control over Helpline and is the real party in interest in the Helpline applications. Petitioner argues the Commission should dismiss all twenty applications because it considers Helpline to be a “sham organization” created by Spirit to “deliberately circumvent” a cap of ten window-filed applications in which any party may have an attributable interest.¹ Helpline filed an Opposition on April 8, 2008, arguing that the current lack of common directors between Spirit and Helpline is sufficient to defeat Petitioner’s arguments.² We requested additional information from Helpline and Spirit on April 24, 2008, and received their responses on June 16, 2008. For the reasons discussed below, we conclude that Helpline’s applications should be attributed to Spirit and, therefore, that Spirit exceeded the cap. Accordingly, we will dismiss the ten applications with the latest file numbers.

Background. We derive the following facts from documents attached to the Petition, public information available from the Ohio Secretary of State, web sites operated by Spirit, and information provided by Helpline and Spirit in response to our inquiries.

Spirit and Helpline were established as separate corporations in 1994 and 1996 respectively. The corporations were founded by the same three individuals (John P. Shumate, Sr., Kathy Shumate, and Karen Seidenschmidt). Spirit was founded in response to an event in the Shumate family that highlighted the need for positive radio programming aimed toward youth. Spirit’s primary purpose is to operate broadcast stations which encourage Christian values. Helpline was formed to respond to telephone calls to Spirit’s first radio station from young listeners needing help with their problems. Helpline’s primary purpose is to operate a telephone call-in service for troubled teenagers. For most of the organizations’ histories one of the original incorporators, John P. Shumate, Sr., has served as statutory agent for both organizations.

Spirit is the licensee of WUFM(FM), Columbus, Ohio, and numerous FM translator stations which operate as a network using the name RadioU. Other stations not owned or operated by Spirit are also part of the RadioU network, which offers its programming for free to its network affiliates. Spirit also provides video music programming on television stations through an outlet known as TVU. Spirit has 16 employees and with an annual budget of at least \$500,000. It owns the real property from which it operates, 116 County Line Rd W, Westerville, Ohio. Spirit’s board of directors is unpaid. It states that it sells no underwriting announcements and relies on bi-annual fundraisers for support.

¹ Petition at 1-2.

² See Helpline Opposition at 1-2. Helpline also noted that there is no presumption that employers control their employees’ outside business interests or that spouses control each other. *Id.* at 2-3 (citing *Clarification of Commission Policies Regarding Spousal Attribution*, Policy Statement, 7 FCC Rcd 1920 (1992)).

Prior to the October NCE FM window, Helpline had never applied for a broadcast station. Helpline has no paid employees and its board of directors is unpaid. It operates with volunteers from a one-room office co-located with Spirit's offices, and provided to it without cost by Spirit. Among those answering Helpline's phones, as needed, have been two Spirit employees (a receptionist and a network manager) and a director of Spirit, Tammy Matias. Spirit director Kathy Shumate also has volunteered at Helpline. For all times from August 2007 through the date of its response, Helpline states that its capitalization and asset value (equity plus debt) was less than \$1,000.³

Spirit and Helpline work closely with each other, with Spirit providing radio programming aimed toward high school and college-age students and Helpline providing telephone prayer and referral services for the same audience. Helpline's callers are primarily those who learn about its services by listening to Spirit programming, either on Spirit-owned stations and on non-Spirit stations that are part of the RadioU or TVU networks. Spirit's TVU website also informs visitors about how to contact Helpline and provides a link to Helpline's website.

From approximately October 1 through 13, 2007, Spirit held a fundraising drive using the name Unleash the Music.⁴ The dual purpose of the drive was to fund Spirit's current broadcast operations and to assist with future expansion. With respect to expansion, Spirit told potential donors that it would file applications in the NCE window to potentially reach over 30 million new listeners, and expected to incur engineering costs of \$20,000 to prepare those applications. Spirit states that it arrived at the \$20,000 estimate by rounding up a few thousand dollars from an all-inclusive quote of its consulting engineer to perform services for Spirit in connection with the October window. Spirit says that its 30 million audience goal for the October window was an overestimate based on a mistaken belief that spectrum would be available in several major metropolitan areas. Spirit designated \$21,386 of the fundraising receipts toward expansion.

On October 10, 2007, the Commission adopted a ten-application filing limit, as it had proposed two months earlier.⁵ On October 13, 2007, Helpline held a meeting of its three-member board of directors. At the meeting, the three individuals who founded Spirit and Helpline and served on the boards of both organizations for the previous 10+ years, resigned from Helpline after having "elected" among themselves successor directors of Helpline. Spirit states that the resignations were prompted by Kathy Shumate's illness following a kidney transplant in the summer of 2007, making it difficult for John and Kathy Shumate to serve two organizations. Helpline similarly asserts that the change was due to Kathy Shumate's failing health. Spirit provides no explanation for the timing of Karen Seidenschmidt's resignation. Minutes of the meeting do not identify a reason for the board change, but reflect that Kathy Shumate took a leadership role in four of the ten items on the October meeting's agenda. The new

³ Helpline has defined capitalization as cash on hand. Helpline's by-laws suggest that Helpline might also benefit from a trust fund. See Helpline Response, Exh. 3 at paras. 10 and 13. Helpline has provided no information concerning a possible connection between this fund and Spirit. Our attribution decision assumes *arguendo* that there is no such connection.

⁴ Spirit maintains that it did not solicit funds past October 13, 2007. See Spirit Response at 1, 5. Spirit acknowledges that its unleashthemusic.com website continued to reference fundraising for the October window until sometime in the first calendar quarter of 2008, but explains that Spirit felt it unnecessary to update the website when "it was no longer being actively used in presenting the on-air drive." *Id.* at 1.

⁵ See *FCC Adopts Limit For NCE FM New Station Applications*, Public Notice, 22 FCC Rcd 18699 (2007) ("Cap Order").

Helpline board consists of two Spirit employees and their spouses. Michael Buckingham, General Manager for Spirit, is President of Helpline. Obadiah Haybin, on-air talent and program producer for Spirit, is Helpline's Vice President. None of the new board members had been involved with Helpline prior to that time. Helpline states that members of the new Helpline board were chosen for their ministry experience.

The NCE filing window opened on October 12, 2007, and closed on October 22, 2007. Because of the cap, Spirit abandoned its plans to apply for new stations in certain communities.⁶ On October 19, 2007, Spirit filed nine applications which listed as parties to the applications the organization's three founders and two additional individuals: Bob and Tammy Matias. On that same day, Helpline filed nine applications which listed its new board members as parties to the applications. Each entity also filed one additional application on October 22, 2007. No member of their current boards overlap. Helpline's and Spirit's applications were prepared by the same engineering consultant. Helpline's new President, Michael Buckingham, is identified as the contact person for Spirit's applications – Michael@tvulive.com. Two of Helpline's applications are in markets where Spirit also applied during the window. Two other Helpline applications are in markets where Spirit has an FM translator station or a pending application for a new FM translator.

The consulting engineer used by Spirit and Helpline issued two separate bills, and each was addressed solely to Spirit for services rendered in connection with the October window. The first bill, dated October 22, 2007, identifies the following services: "10/22/2007 FM NonCom (20 Channel) Search/Feasibility Study based on top 100 markets... Quantity 10;" "10/22/2007 NonCom Construction Permit Application, including application creation, application filing Quantity 10;" and "10/22/2007 Administrative Charges . . . Quantity 1," for a total, after discount, of \$7,910.50. The second bill, dated October 27, 2007, is for "10/22/2007 Spirit NCE Apps -- Engineering services rendered . . . Quantity 1"⁷ for a total, after discount, of \$6,045. The two engineering bills each would have been for identical amounts equal to the cost of ten studies and applications, but for the inclusion of an additional charge for administrative services on the first bill. Spirit states that it paid both bills in January 2008. In response to requests for similar information from Helpline, Helpline states that "Helpline has no financial records of costs incurred related to the applications."⁸ Helpline also has not submitted a copy of any bills it received for consulting engineering services.

Spirit and Helpline nevertheless assert that Spirit did not directly or indirectly provide Helpline with financial, legal, technical, or other assistance, suggestions, consultations and/or services concerning any matter associated with Helpline's applications. Spirit explains that it negotiated an all-inclusive engineering fee designed to cover the entire process including as many frequency searches as could be completed, as well as preparation of engineering information for each application filed.⁹ It further asserts

⁶ Spirit Response at 9.

⁷ Spirit Response, Exh. 8.

⁸ Helpline Response at 3.

⁹ Spirit Response at 9. There are some discrepancies between the amount that Spirit states it negotiated for the unlimited services of its engineer and the amount billed/paid. Spirit states that its engineer firm offers a discount to NCE organizations. The amounts billed/paid are several thousand dollars more than the negotiated rate at full-price, and several thousand dollars less than negotiated after discount. See Spirit Response at 9, Exh. 8. One possible explanation is that Spirit, upon learning that the cap would allow it to file fewer applications than originally intended, renegotiated its all-inclusive arrangement to pay only for engineering services actually used.

that Buckingham, on his own time and on behalf of Helpline, contacted the same engineer Spirit had used.¹⁰ Helpline states that Buckingham knew of tentative frequency searches that the engineer had already performed for Spirit and other clients. It asserts that Buckingham reviewed the tentative searches that had not been chosen by Spirit or any another organization and had the consulting engineer finalize channel studies and complete applications for communities selected by Helpline.¹¹ The record reflects that Spirit's board voted to fund equipment purchases for future radio stations through a \$1,000,000 line of credit with Spirit's building and equipment as collateral.¹² Nothing in the record reflects that Helpline's board convened any meeting, through mid-June 2008, to discuss potential financing of its proposed radio stations.

Non-compete agreements signed between Spirit and Buckingham in May 2007, and between Spirit and Haybin in February 2003 provide that Buckingham and Haybin may not "compete with Spirit Communications within a thirty (30) mile radius of any broadcast of Spirit Communications or its affiliates, or with any programs of networks with a similar format to that of RadioU or TVU (as determined solely by Spirit Communications) while [they are] providing services for Spirit Communications, and for a period of six months after [their] termination from Spirit Communications."¹³ Spirit states that there are no written or oral agreements concerning the roles of the Buckinghams and Haybins at Helpline should they cease to be employed by Spirit. Spirit also states that there have been no discussions or agreements concerning Spirit's potential acquisition of any permit or license awarded to Helpline. There are no agreements concerning any programming to be provided by Spirit to Helpline. However, Spirit states that it routinely provides its RadioU Network programming without cost to any radio station wishing to become a network affiliate, and would be willing to provide programming to Helpline if Helpline so desires. Helpline states that it has not determined that any of its stations will become RadioU Network affiliates although it acknowledges that this could occur. Helpline notes that it is also planning the creation of its own programming and network. There are no agreements concerning whether Michael Buckingham would continue his current position with Spirit in the event that one or more of Helpline's applications are granted, but Spirit states that it expects Buckingham would retain his role as General Manager for Spirit.

Spirit and Helpline learned of the Petition in late February/early March 2008. At about this time, they took several actions that address allegations made in the Petition. For example, Spirit updated its web site to reflect that it was no longer raising funds for window-filed applications. On March 7, 2008, Helpline filed a notice with the Ohio Secretary of State, changing its statutory agent from Spirit officer John P. Shumate, Sr. to Helpline officer Obadiah Haybin.

Discussion. Unsigned, anonymous allegations do not comport with the requirements for petitions to deny and are insufficient to be treated as informal objections.¹⁴ The Commission may, however, consider information supplied in such filings as part of the Commission's own inquiry into the

¹⁰ Spirit Response at 4.

¹¹ Helpline Response at 4.

¹² Spirit Response, Exh. 3.

¹³ See Spirit Response, Exh. 15.

¹⁴ See 47 C.F.R. § 73.3587; *Lowery Communications*, Hearing Designation Order, 5 FCC Rcd 4222 (MB 1990).

acceptability and grantability of an application.¹⁵ At issue is whether the relationship between Spirit and Helpline requires the attribution of Helpline's applications to Spirit. This inquiry is necessary to ensure that these October NCE FM window filings comply with the ten-application cap. Pursuant to that cap, no party may have an attributable interest in more than ten applications filed in the October window. For purposes of the NCE point system, an "attributable interest" is defined as "an interest of an applicant, its parent, subsidiaries, their officers, and members of their governing boards that would be cognizable under the standards in the notes to Section 73.3555."¹⁶ The rule also identifies as attributable "an interest of an entity providing more than 33 percent of an applicant's equity and/or debt that also either (1) supplies more than 15% of the station's weekly programming, or (2) has an attributable interest pursuant to § 73.3555 in media in the same market."¹⁷ A mere employment relationship is not cognizable under the NCE attribution standards.¹⁸ Broadcast attribution standards identify interests that, while not necessarily controlling, confer a degree of influence sufficient to have a realistic potential to affect a station's programming or core operations.¹⁹ An entity or party with *de facto* or *de jure* control over an applicant would necessarily have an attributable interest.²⁰

As discussed previously, Helpline and Spirit have had separate boards and officers since October 13, 2007, just prior to their application filing dates. This change appears primarily an attempt by Spirit to sever its *de jure* control of and attributable interest in Helpline so that each could file 10 applications, with Kathy Shumate's health playing, at most, a secondary role.²¹ As will be discussed further below, however, Spirit's *de facto* control of Helpline continued.

¹⁵ *E.g.*, *Randolph Victor Bell*, Hearing Designation Order, 3 FCC Rcd 5365 (MB 1988).

¹⁶ *See* 47 C.F.R. § 73.7000. Attributable interests can be direct or indirect. *See* 47 C.F.R. § 73.3555, n.1. Note 2 sets forth various cognizable interests including those of certain owners, partners, stockholders, officers, directors, and time brokers. *Id.* at n.2.

¹⁷ *See* 47 C.F.R. § 73.7000. The Commission modified a similar equity/debt plus provision with respect to commercial applicants in 2008. *See Promoting Diversity of Ownership*, Report and Order and Third Further Notice of Proposed Rule Making, 23 FCC Rcd 5922 (2008).

¹⁸ *See State of Oregon*, Letter, 22 FCC Rcd 17663, 17665 (MB 2007).

¹⁹ *See Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, Report and Order, 14 FCC Rcd 12599, 12559 (1999) (subsequent history omitted).

²⁰ *See Piedmont Television of Springfield*, Letter, 22 FCC Rcd 13910, 13913 (MB 2007); *See generally Intermart Broadcasting Pocatello*, Memorandum Opinion and Order, 28 FCC Rcd 8822 (2008) (Commission does not treat option agreements as attributable much less indicative of *de facto* control).

²¹ Our conclusion is based on the timing of the resignations shortly after adoption of the ten-application cap; the fact that the October meeting required a waiver of the otherwise required five-day written notice to board members whereas Shumate's surgery occurred the previous summer; Kathy Shumate's active role at the meeting; the scope of the resignations to include Karen Seidenschmidt; and the replacement of a board of 10+ years with new officers who had never played any role in Helpline. Without the prompt resignation of Helpline's entire board, including Karen Seidenschmidt, Helpline's applications would have remained attributable to Spirit.

The Commission analyzes *de facto* control issues on a case-by-case basis.²² In determining whether an entity has *de facto* control of an applicant or a licensee, we have traditionally looked beyond legal title and financial interests to determine who holds operational control of the station.²³ For broadcasters in particular, we examine the policies governing station programming, personnel, and finances. A broadcast entity's surrender of control over any one of these indicia to another is sufficient to find that the other entity has *de facto* control.²⁴ The ability of one entity to appoint directors of another, while possibly a mere investor protection, has also been a factor considered in examining control.²⁵

As of the application filing dates, Spirit exercised *de facto* control over Helpline, exerting substantial influence on personnel, finances, and programming. With respect to personnel, Helpline has no employees of its own, relying upon Spirit employees to "volunteer" as needed to perform basic functions such as answering the telephone. Helpline's current board of directors was installed at a meeting at which only the three founding Spirit directors (in their positions as founding directors of Helpline) could vote. The newly elected board consisted of Spirit employees and their spouses. With respect to finances, Helpline has assets under \$1,000, and relies upon Spirit for in-kind resources such as office space. Helpline did not have the funds to purchase the engineering services needed to participate in the filing window (an expense of at least \$6,000, assuming a discounted rate). If we accept *arguendo* that Spirit had an all-inclusive arrangement for engineering services for the October window that cost Spirit no more than the amount associated with its own ten applications, this does not explain how Helpline, which had no agreement with the engineering firm, would be able to use the engineer's work product without charge. In this regard, Helpline's inability to produce contemporaneous documentation of invoices for engineering services and its use of engineering studies paid for by Spirit are highly probative of Helpline's lack of independence from Spirit. With respect to programming, there is no agreement between Helpline and Spirit. Accepting *arguendo*, that Helpline has not yet decided how much, if any, of Spirit's programming it may use, the following facts nevertheless indicate that Spirit's involvement in Helpline's programming is both anticipated by Spirit and inevitable: (1) Helpline's operation of (or production of programming for) a non-Spirit-affiliated station would be inconsistent with Buckingham and Haybin's non-compete agreements, while it is expected that Buckingham will remain a Spirit employee; (2) Spirit's programs are free, while Helpline currently has little, if any, funds to spend on programming; and (3) the airing of Spirit programming furthers Helpline's own non-profit mission because Helpline receives most of its referrals through Spirit-produced programming. Had there been no *de facto* control by Spirit over Helpline, these same financial and programming matters might have

²² See *Shareholders of Hispanic Broadcasting Corporation*, Memorandum Opinion and Order, 18 FCC Rcd 18834, 18843 (2003); *Chase Broadcasting, Inc.*, Decision, 5 FCC Rcd 1642, 1643 (1990).

²³ See *WHDH, Inc.*, Memorandum Opinion and Order, 17 F.C.C. 2d 856, 863 (1969), *aff'd sub nom.*, *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970).

²⁴ See, e.g., *Hicks Broadcasting of Indiana, LLC*, Hearing Designation Order, 13 FCC Rcd 10662, 10677 (1998) ("Control over any one of the areas of personnel, programming and finances would be sufficient for a finding of *de facto* control.").

²⁵ See *Stratos Global Corp.*, Memorandum Opinion and Order, 22 FCC Rcd 21328 (2001).

resulted in attribution under the NCE equity/debt plus (“EDP”) standard,²⁶ which examines financial involvement coupled with provision of substantial programming or a same-market ownership interest.²⁷

Helpline’s interests are properly attributable to Spirit for purposes of the cap. When we adopted the cap, we stated that, if we determined that an applicant exceeded the cap, we would process only the ten applications filed first (based on file number) and dismiss the rest.²⁸ In this way, all entities have the same opportunity to apply for spectrum that is in strong demand. For the reasons discussed above, we will keep the first ten applications filed by the parties and dismiss the second ten.²⁹

Accordingly, IT IS ORDERED That the anonymous “Petition” IS DISMISSED.

IT IS FURTHER ORDERED That the ten applications with the lowest file numbers shall be retained. Specifically, these applications consist of nine filed by Helpline: BNPED-20071019BCF; BNPED-20071019BCG; BNPED-20071019BCH; BNPED-20071019BCJ; BNPED-20071019BCK; BNPED-20071019BCM; BNPED-20071019BCN; BNPED-20071019BCO; BNPED-20071019BCP; and one filed by Spirit: BNPED-20071019BCS.

IT IS FURTHER ORDERED That Helpline’s retained application BNPED-20071019BCJ, to construct a new NCE station at Hebron, Indiana IS GRANTED as a singleton.

IT IS FURTHER ORDERED That Spirit and Helpline must as promptly as possible amend their retained applications pursuant to Section 1.65 of the Commission’s rules to revise any of comparative claims that may have decreased as a result of this determination.³⁰

²⁶ See 47 C.F.R. § 73.7000. See also *Comparative Standards for NCE Applicants*, Report and Order, 15 FCC Rcd 7386, 7419 (2000).

²⁷ Spirit’s assistance to Helpline is valued at several times Helpline’s total assets and capitalization. Use of significant Spirit programming appears inevitable and is not limited by agreement. See *Piedmont Television of Springfield*, 22 FCC Rcd at 13913 (agreement explicitly limiting programming to 15 percent considered as evidence that broker would not control licensee).

²⁸ See *Cap Order*, 22 FCC Rcd at 18699.

²⁹ We reject Petitioner’s suggestion that we dismiss all 20 applicants based on the premise that Helpline is a “sham” organization created by Spirit solely to circumvent the ten-application cap. The record reflects that Helpline was created many years before the cap was adopted and has been engaged in long-time, non-profit activities. While Spirit and Helpline erred in believing that their alteration of Helpline’s governing board made the cap inapplicable to them, such an error is in no way comparable to examples of applicants entirely disqualified, such as sisters who served as fronts for their brother to claim a preference once available to female-owned businesses,²⁹ and deceased relatives whose names were used by licensees that had reached a limit on the number of wireless authorizations that could be issued in their own names. See *Ronald Brasher*, Decision, 19 FCC Rcd 18462, 18477-80 (2004).

³⁰ For example, Helpline may not claim for purposes of tie-breakers that it has no attributable interests in Spirit’s stations, and both entities must count the Hebron, Indiana authorization granted herein.

IT IS FURTHER ORDERED That the ten applications with the highest file numbers are HEREBY DISMISSED as in excess of the cap. Specifically, these applications consist of one filed by Helpline: BNPED-20071022BSU; and nine filed by Spirit: BNPED-20071019BCT; BNPED-20071019BCU; BNPED-20071019BCV; BNPED-20071019BCW; BNPED-20071019BCX; BNPED-20071019BCY; BNPED-20071019BCZ; BNPED-20071019BDA; BNPED-20071022BVX.

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau