



Federal Communications Commission
Washington, D.C. 20554

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In Reply Refer to:

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In re: WPAL-FM, Ridgeville, SC
Facility ID No. 25374
File No. BALH-20090306ACK
Application for Assignment of License

Gentleman:

We have before us an application (the "Application") for Commission consent to the assignment of the license of Station WPAL-FM, Ridgeville, South Carolina, (the "Station") from Caswell Capital Partners, LLC ("Caswell") to WAY-FM Media Group, Inc. ("WAY-FM").¹ We also have before us an April 10, 2009, Petition to Deny the Application² (the "Petition") filed by former licensee Gresham Communications, Inc. ("Gresham"). For the reasons stated below, we deny the Petition and grant the Application.

Background. Previously, Gresham petitioned for reconsideration of the staff's grant of an involuntary assignment of the Station from it to Charles W. Cherry, Receiver for Gresham Communications, Inc. ("Receiver")³ and petitioned to deny the voluntary assignment of the Station from the Receiver to Caswell.⁴ The involuntary and voluntary assignments (collectively "Previous

¹ File No. BALH-20090306ACK.

² Caswell and WAY-FM filed a Joint Opposition to the Petition on April 27, 2009 ("Joint Opposition"), to which Gresham filed a Reply on May 18, 2009 ("Reply"). Additionally, Caswell and WAY-FM submitted a Motion for Leave to File Supplement ("Motion") and a Supplement to the Petition on September 3, 2009 ("Supplement").

³ File No. BALH-20070327AEK.

⁴ File No. BALH-20070406ADD.

Assignments”) arose out of Caswell’s private litigation, commenced in 2006, to collect on a judgment against Gresham.⁵ On March 3, 2009, the Media Bureau (the “Bureau”) granted in part and denied in part Gresham’s petitions, affirmed the grant of involuntary assignment, and granted the voluntary assignment to Caswell.⁶ Subsequently, Caswell consummated the assignment of the Station and filed the current Application. Gresham’s timely filed Application for Review of the *Decision Letter* remains pending.⁷

In the Petition, Gresham argues that the Application should be denied or a decision deferred until the Commission acts on its Application for Review. Gresham contends that the Previous Assignments violated Commission precedent and that while its appeal remains pending “it would be improper for the Bureau to give its approval for a further assignment . . . [as it will only] complicate the ability for this case to be un-wound.”⁸ Specifically, Gresham asserts that as part of the proceedings involving the Previous Assignments, the Station’s license was improperly attached by the South Carolina Court of Common Pleas (the “Court”), in violation of the Communications Act of 1934, as amended, (the “Act”), and that the only asset transferred was the Station’s bare license. Additionally, citing *Jefferson Radio Co. v. FCC*,⁹ Gresham declares that the Application cannot be granted because there are unresolved issues concerning Caswell’s basic qualifications to be a Commission licensee. In particular, Gresham contends that Caswell is unqualified to be a Commission licensee because it has engaged in misrepresentations concerning ownership of certain physical Station assets that it had previously claimed were “used and usable in the operation of WPAL-FM.”¹⁰

In the Joint Opposition, Caswell and WAY-FM (collectively “Respondents”) submit, as an attachment, Caswell’s Opposition to Application for Review,¹¹ filed in connection with the Previous Assignments.¹² Respondents claim that Gresham’s Petition “contains – virtually verbatim – the identical arguments it unsuccessfully propounded [against the Previous Assignments]”¹³ Gresham counters that the Joint Opposition is procedurally defective and should be rejected.¹⁴ Lastly, Gresham notes that it has submitted the *Decision Letter* to the Court “to allow [it] . . . to become aware that its ruling exceeded permissible limits of the federal law.”¹⁵

⁵ See *Letter to Charles W. Cherry, II, et. al.*, Letter, 24 FCC Rcd 2894 (MB 2009) (“*Decision Letter*”).

⁶ *Id.*

⁷ See Application for Review (filed Apr. 2, 2009).

⁸ Petition at 22.

⁹ 340 F.2d 781 (D.C. Cir. 1964) (“*Jefferson Radio*”).

¹⁰ Petition at 21 (citation omitted).

¹¹ Opposition to Application for Review (Apr. 17, 2009).

¹² The Respondents state that they are doing so “to conserve Bureau resources” because Gresham raises arguments identical to those previously considered and rejected by the Bureau. Joint Opposition at 3.

¹³ Joint Opposition at 2.

¹⁴ Gresham states that the Joint Opposition provided no response to the Petition to Deny, but instead, merely, attempted to “incorporate by reference” the previously filed Opposition to Gresham’s Application for Review. Gresham argues that such procedure is improper citing 47 C.F.R. §1.44. Reply at 2.

¹⁵ *Id.* at 13-14. Although not in response to Gresham’s filing of the *Decision Letter* with the Court, on September 2, 2009, the Court ordered Gresham to pay certain attorneys’ fees claimed by Caswell and the Receiver. See *Ex Parte: Saunders v. Gresham Communications of Waltherboro, Inc.*, No. 92-CP-15-508, slip op. at 7 (SC Ct. of Com. Pleas. Fourteenth Cir. Aug. 28, 2009). . In *dictum*, the Court stated that it “has ruled consistently that it was attaching the proceeds of a sale of the WPAL-FM] license, after and conditioned upon approval of the transfer of the license by the FCC” *Id.* at 2 note 1.

Discussion. Section 310(d) of the Act¹⁶ requires the Commission to determine 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,¹⁷ 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.¹⁸ 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.¹⁹ 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. Using this standard, we will consider Gresham’s arguments.

We have previously rejected Gresham’s arguments regarding the propriety of the Court proceeding in connection with the Previous Assignments.²⁰ Gresham concedes as much by stating that “[t]he matters raised in [its Petition] . . . are similar to certain issues raised in the earlier litigation”²¹ We will not revisit issues “merely for the purpose of again debating matters on which the tribunal has once deliberated and spoken.”²² Those matters are pending before the full Commission, and we reject Gresham’s and the Respondents’ attempts to reargue them before the staff.²³ Therefore, we will not revisit these issues as raised in the parties’ pleadings. Accordingly, in this proceeding only, we will also deny the Respondents’ Motion and dismiss the Supplement, as the material contained in the Supplement clearly pertains only to the Previous Assignments.²⁴

We conclude that Gresham’s arguments regarding Caswell’s qualifications also are without merit. In particular, we note that the primary finding in the *Decision Letter* was that there was no bare license assignment due to the simultaneous conveyance of other Station assets: the public inspection file and advertiser lists.²⁵ These items were “sufficient assets to counter Gresham’s allegation” that the prior sale constituted sale of a bare license.²⁶ Lastly, because the Receiver and Caswell consummated the assignment on March 3, 2009, Commission records indicate that the Station has been and is currently on-the-air. Thus Caswell did, in fact, acquire or arrange for the use of sufficient technical facilities to operate the Station. Accordingly, we need not consider further conflicting claims regarding the equipment that Caswell acquired in the Station sale.²⁷

¹⁶ 47 U.S.C. § 310(d).

¹⁷ 47 U.S.C. § 309(d)(1).

¹⁸ See *id.*; *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

¹⁹ 47 U.S.C. § 309(d)(2).

²⁰ See *Decision Letter* at 2-6.

²¹ Reply at 2.

²² *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff’d sub nom. Lorain Journal Company v. FCC*, 351 F.2d 824 (D.C. Cir 1965), *cert. denied*, 383 U.S. 967 (1966). See also *Letter to Richard R. Zaragoza, Esq. et. al.*, 24 FCC Rcd 5743, 5744 (MB 2009).

²³ See *Letter to Percy Squire, Esq. and Mark J. Prak, Esq.*, DA 09-1796 (MB rel. Aug. 12, 2009)(“*Letter to Percy Squire, Esq.*”) (rejecting review of previously raised arguments in related proceedings).

²⁴ A similar Motion and Supplement were also submitted by Caswell and the Receiver in opposition to Gresham’s pending Application for Review of the previous assignments. Our action today does not affect the status of Caswell’s and the Receiver’s filings in that proceeding.

²⁵ *Decision Letter* at 5.

²⁶ *Id.*

²⁷ See *Richard T. and Della R. Moring*, Memorandum Opinion and Order, 11 FCC Rcd. 2333, 2334 (1996) (quoting

Finally, we turn to Gresham's assertion that the Application should not be granted because the Bureau's grant of the Previous Assignments was "improper" and is under appeal. Gresham opines that it will be difficult for the parties to undo an additional assignment should the *Decision Letter* be reversed. We do not find this argument persuasive. It is well established that a decision to grant an assignment application is merely a finding that the parties are qualified under, and the proposed transaction does not violate, the Act, and the Commission's Rules, and policies. Thus, a grant is permissive, not mandatory.²⁸ When parties consummate after a grant is effective, but before it is "final," they proceed at their own peril, as the Commission or the courts may later require the sale to be undone.²⁹ Additionally, such action by the parties does not prejudice the rights of objecting parties seeking administrative review or judicial appeal of the Commission's action.³⁰ All parties are on notice that, should Gresham's appeal of the grant of the previous applications be granted the Commission will take appropriate action regarding the Station's license. Accordingly, we find no impediment to our acting upon the instant Application prior to finality of the Previous Assignments.³¹

Conclusions/Actions. Based on the evidence presented in the record, we find that Gresham has failed to raise a substantial and material question of fact warranting further inquiry. We further find WAY-FM to be fully qualified to be the licensee of Station WPAL-FM and that grant of the Application will further the public interest, convenience, and necessity.

Accordingly, IT IS ORDERED, that the September 3, 2009, Motion for Leave to File Supplement filed by Caswell Capital Partners, LLC and WAY-FM Media Group, Inc. IS DENIED and the Supplement attached thereto IS DISMISSED.

IT IS FURTHER ORDERED that the April 10, 2009, Petition to Deny filed by Gresham Communications, Inc., IS DENIED. IT IS FURTHER ORDERED, that the Application (File No. BALH-20090306ACK) for consent to assign the license of Station WPAL-FM, Ridgeville, South Carolina, from Caswell Capital Partners, LLC to WAY-FM Media Group, Inc., IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

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Broadcast Enterprises v. FCC, 390 F.2d 483, 485 (D.C. Cir. 1968) (contradictory allegations and affidavits which create some possibly unresolved factual issue . . . do not invariably necessitate an evidentiary hearing) .

²⁸ *Cumulus Licensing, LLC*, Letter, 21 FCC Rcd 2998, 3007 (MB 2006).

²⁹ See *Improvement Leasing Co.*, Memorandum Opinion and Order, 73 FCC 2d 676, 684 (1979), *aff'd sub nom. Washington Association for Television and Children v. FCC*, 665 F.2d 1264 (D.C. Cir. 1981) (parties who consummate a sale transaction before its approval becomes final assume the risk that the sale may later be set aside by the Commission or the courts).

³⁰ See *Letter to Dennis P. Corbett, Esq. and Katrina C. Gleber, Esq.*, 22 FCC Rcd. 4795, 4797-98 (MB 2007).

³¹ See, e.g. *Letter to Percy Squire, Esq.*, *supra* note 24, (granting voluntary assignments from receiver to other parties while Application for Review pending against grant of involuntary assignments to receiver).