



Federal Communications Commission
Washington, D.C. 20554

March 3, 2009

DA 09-540

In Reply Refer to:

1800B3-KV

Released: March 3, 2009

Charles W. Cherry, II
Receiver for Gresham Communications, Inc.
5200 SW 18th Street
Plantation, FL 33317

Caswell Capital Partners, LLC
c/o Erwin G. Krasnow, Esquire
Garvey Schubert Barer
1000 Potomac Street, NW, 5th Floor
Washington, DC 20007

Gresham Communications, Inc.
c/o Dan J. Alpert, Esquire
The Law Office of Dan J. Alpert
2120 N. 21st Road
Arlington, Virginia 22201

In re: WPAL-FM, Ridgeville, SC
Facility ID No. 25374
File Nos. BALH-20070327AEK and BALH-
20070406ADD
Applications 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 Charles W. Cherry, Receiver for Gresham Communications, Inc. ("Receiver"), to Caswell Capital Partners, LLC ("Caswell").¹ Previously, the staff granted an assignment application from Gresham Communications, Inc. ("Gresham") to the Receiver.² We also have before us a Petition to Deny the Application and a petition for reconsideration of the grant of the Involuntary Assignment Application (collectively, the "Petitions"), both filed by Gresham.³ For the reasons stated below, we grant in part and deny in part the Petitions, and grant the Application.

Background. The Assignment Applications arise out of a South Carolina court-ordered sale to satisfy a judgment against the former licensee, Gresham.⁴ Specifically, in August 2006, after purchasing the debt that was the subject of the judgment, Caswell petitioned the South Carolina Court of Common

¹ File No. BALH-20070406ADD.

² File No. BALH-20070327AEK ("Involuntary Assignment Application").

³ Collectively, unless referring to a specific assignment application, we will refer to the Involuntary Assignment Application and the Application as the "Assignment Applications."

⁴ In 2002, Commission staff granted an assignment application from Gresham to Caswell. That transaction, however, was never consummated. File No. BALH-20020620AAD.

Pleas (the “Court”) to collect on the judgment.⁵ At the hearing, William Saunders (“Saunders”), president of Gresham, testified that Gresham’s sole asset was the WPAL-FM Station license.⁶ On September 22, 2006, the Court ordered that the Station’s license be attached and sold at a judicial sale.⁷

On February 15, 2007, the sheriff auctioned the Station’s license to the high bidder, Caswell.⁸ Subsequently, the Court appointed the Receiver to effectuate the assignment of the license to Caswell.⁹ On March 27, 2007, the Receiver then filed the Involuntary Assignment Application. The Commission granted the unopposed application on April 3, 2007.¹⁰ Thereafter, on April 6, 2007, the Receiver filed the Application to assign the Station to Caswell.¹¹ On May 7, 2007, Gresham filed for reconsideration of the grant of the Involuntary Assignment Application,¹² and several days later, on May 11, 2007, Gresham petitioned to deny the pending Application to assign the Station license to Caswell. In response, the Receiver and Caswell jointly filed Oppositions.¹³ Over the next eighteen months each of the parties filed numerous additional pleadings, many of which pertained to matters before the Court.¹⁴

The Petitions raise several arguments in opposition to the assignment of the Station license to the Receiver and to Caswell. First, Gresham contends that the court improperly ordered that the Station’s license be attached in violation of the Communications Act of 1934, as amended, (the “Act”). Next, Gresham asserts, the judicial sale of the Station’s license further violated the Act by ordering the sale of a “bare license.” Lastly, Gresham asserts that the State Court Order cannot be honored because it conflicts with a prior federal court order which enjoins Gresham and Saunders from transferring or disposing of the Station until a judgment for copyright infringement has been satisfied.¹⁵

⁵ Caswell is the assignee of a June 2, 1998, judgment on a promissory note against Gresham obtained by Nancy R. Beach. “Assignment of Judgment Interest,” Attachment 4, Petition for Reconsideration.

⁶ September 22, 2006, Order at 2, Attachment 6, Petition for Reconsideration.

⁷ February 21, 2007 Order at 1, Attachment 8, Petition to Deny. (“State Court Order”).

⁸ November 27, 2007, Order at 2, Letter Filing by Receiver and Caswell (Mar. 20, 2008).

⁹ *Id* at 3.

¹⁰ *Public Notice, Broadcast Actions*, Report No. 46459 (Apr. 6, 2007).

¹¹ *Public Notice, Broadcast Applications*, Report No. 26462 (Apr. 11, 2007).

¹² On May 11, 2007, Gresham filed an erratum to its petition for reconsideration.

¹³ The “Opposition to Petition to Deny” and the “Opposition to Petition for Reconsideration” (collectively “the Oppositions”) were filed on June 1, 2007.

¹⁴ In particular, the parties filed the following pleadings with the Commission: the Receiver and Caswell filed a “Motion for Leave to file Supplement to ‘Opposition to Petition to Deny’” (Jun. 22, 2007) and a “Motion for Leave to file Supplement to ‘Opposition to Petition for Reconsideration’” (Jun. 22, 2007); the Receiver and Caswell filed a “Supplement to ‘Opposition to Petition to Deny’” (Jun. 22, 2007) and a “Supplement to ‘Opposition to Petition for Reconsideration’” (Jun. 22, 2007) (collectively “First Supplement”); Gresham filed several “Motions for Extension of Time to Reply to Oppositions” (Jun. 15, 2007, Jun. 22, 2007, Jul. 6, 2007, Jul. 26, 2007, Aug. 27, 2007, Sep. 10, 2007, and Sep. 18, 2007); Gresham filed a “Reply to Opposition to Petition to Deny” (Sep. 25, 2007) and a “Reply to Opposition to Petition for Reconsideration” (Sep. 25, 2007) (collectively, the “Reply”); the Receiver and Caswell filed a “Second Supplement to Opposition to Petition for Reconsideration” (Dec. 26, 2007) and a “Second Supplement and Request for Expedited Action” (Dec. 26, 2007) (collectively, the “Second Supplement”); the Receiver and Caswell filed a First Letter (Mar. 20, 2008); Gresham filed a “Petition for Dismissal of Assignment Application” (Apr. 7, 2008); the Receiver and Caswell filed an “Opposition to Petition for Dismissal of Assignment Application” (May 2, 2008); the Receiver and Caswell filed a Second Letter (Jun. 5, 2008) and a Third Letter (Jun. 12, 2008); and the Receiver and Caswell filed a “Third Supplement to the Opposition to Petition to Deny and Request for Expedited Action” (Dec. 19, 2008) (“Third Supplement”).

¹⁵ *Chi-Boy Music et al v. Gresham Communications and William Saunders*, Order, CA No. 6:0101955-24, (D. S.C. Sep. 16, 2002), Attachment 9, Petition to Deny (“Federal Court Order”).

Discussion. Section 310(d) of the Act,¹⁶ 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. In addition, with respect to petitions for reconsideration, Section 1.106²⁰ of the Commission's Rules (the "Rules") and established case law provides that, "reconsideration is appropriate only when the petitioner either shows a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters."²¹ We review Gresham's arguments against the Assignment Applications against this standard.

State Court Order. The Commission's long-standing policy is to accommodate the actions of state courts, thereby avoiding conflicts between state and federal authority, unless a public interest determination under the Act would compel a different result.²² Indeed, the U.S. Supreme Court has stated that "the principle of fair accommodation between State and federal authority . . . *should* be observed" if the state's laws "can be effectively respected while at the same time reasonable opportunity is afforded for the protection of that public interest" which underlies licensing decisions.²³ The Commission defers to judicial determinations in many areas, including bankruptcy matters, private disputes, and the interpretation and enforcement of contracts for the sale of a broadcast station. The Commission, in contrast, retains exclusive authority to license broadcast stations.²⁴ Thus, the Commission has exclusive authority over a station's license, but it is also charged with the responsibility of accommodating state law, where appropriate. When, however, a state court's decision is contrary to Commission policy, the Commission is neither bound by the state court order nor need recognize it.²⁵

It is well established that a broadcast license does not confer a property right, but rather is a valuable privilege to utilize the airwaves, subject to certain limitations, including restrictions on the right

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 47 C.F.R. § 1.106(c).

²¹ *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC Rcd 685, 686 (1964); *see also National Association of Broadcasters*, Memorandum Opinion and Order, 18 FCC Rcd 24414, 24415 (2003).

²² *Radio Station WOW v. Johnson*, 326 US 120, (1945) ("*Radio Station WOW*"); *Arecibo Radio Corporation*, Memorandum Opinion and Order, 101 FCC 2d 545 (1985) ("*Arecibo Radio*").

²³ *Radio Station WOW*, 326 US at 132.

²⁴ *See e.g. Arecibo Radio*, 101 FCC 2d at 549 (honoring court order requiring licensee to execute assignment application in favor of another party).

²⁵ *See, e.g., Kirk Merkley*, Memorandum Opinion and Order, 94 FCC 2d 829 (1983) ("*Merkley I*"), *recon. denied*, 56 RR 2d 413 (1984) ("*Merkley II*"), *aff'd sub nom., Merkley v. FCC*, 776 F.2d 365 (1985). (declining to recognize court order based on contract with a prohibited reversionary interest that was tantamount to a vested security interest in a license).

to assign licenses.²⁶ As the Commission has stated, “[t]he extraordinary notion that a station license issued by this Commission is a mortgageable chattel in the ordinary commercial sense is untenable.”²⁷ Rather the Commission has repeatedly observed that a “license, as distinguished from a station’s physical assets, is not subject to a mortgage, security interest, or lien, pledge, *attachment*, seizure, or similar property right”²⁸

Here, the State Court Order is facially inconsistent with the Commission’s policy prohibiting attachment of a Station license. The Court acknowledged that a licensee does not hold any property rights in the license itself. It also recognized that the Commission permits licensee creditors to have an interest in the proceeds from a sale of the license.²⁹ Nevertheless, the Court held: “the FCC license held by Gresham Communications, Inc. is properly subject to attachment. I hereby direct that such FCC license . . . be and hereby is attached.”³⁰ In a further order, on February 21, 2007, the Court opined that the Station’s license “was properly subject to attachment and that such License was thereby attached.”³¹ In a recent order, the Court noted that:

The only asset that was identified and levied upon was the FCC license. It was sold . . . at a judicial sale in order to satisfy the judgment. Although the judgment has now expired, the fact that it was “sold” is not affected. The asset was . . . purchased by bid of Caswell, Inc. at the proper judicial sale. *The issue of Federal Communication [sic] Commission approval is a formality and a collateral matter and should not affect the fact that the property was actually sold.*³²

The Receiver and Caswell assert that the Court *intended* to grant a security interest in the proceeds from the sale of the license.³³ We find that the Court’s plain language states otherwise. Moreover, we reject as unsupported the Receiver’s and Caswell’s argument that the Commission’s prohibition against attachment of a broadcast license is only of concern when an automatic right of reversion is involved. The prohibition on treating a broadcast license as a property right is premised on the rationale “that such hypothecation endangers the independence of the licensee who is and who should be at all times responsible for and accountable to the Commission”³⁴ Finally, the Receiver and Caswell contend that we should honor the State Court Order because Caswell would have received the proceeds from the Station’s sale had it not submitted the winning bid and that the State Court Order expressly provides that the sale is subject to Commission approval. We disagree. To give effect to this portion of the State Court Order would require that we ignore our longstanding policy against the attachment of a broadcast license.

In these circumstances, the Commission’s general deference to state court orders is not warranted. We find that the Court’s attachment of the WPAL-FM license exceeded its authority and to this extent its

²⁶ See 47 U.S.C. § 310(d).

²⁷ *Radio KDAN*, Memorandum Opinion and Order, 11 FCC 2d 934, n.1, *recon denied*, 13 RR 2d 100 (1968), *aff’d on procedural grounds sub nom., W.H.Hansen v. FCC*, 413 F.2d 374 (D.C. Cir. 1969) (“*Radio KDAN*”).

²⁸ *Merkley II*, 56 RR 2d at 416. (emphasis added).

²⁹ See September 22, 2006, Order at 2 -3, Attachment 6, Petition for Reconsideration.

³⁰ *Id.* at 3.

³¹ February 21, 2007, Order at 1, Attachment 8, Petition to Deny.

³² December 3, 2008, Order at 3, Attachment A, Third Supplement. (emphasis added).

³³ See Opposition at 7.

³⁴ *Radio KDAN*, 13 RR 2d at 102.

order is void *ab initio* as violative of the Act and Commission policy.³⁵ However, in cases of bankruptcy or receivership, the Commission does permit trustees or receivers to hold licenses on a temporary basis pending disposition of station assets.³⁶ This policy serves the public interest because, as the Commission has acknowledged, “these assets would be of comparatively little value if the Commission did not permit the operating authorization to accompany them pending ultimate passage of all [assets] to a qualified buyer.”³⁷ In a further order³⁸ appointing the Receiver, the Court stated that, upon receipt of Commission approval, the Receiver is ordered to take possession of, operate, and manage Gresham’s property and station license “to conserve the business and assets of the Station until a sale of the Station’s assets is confirmed and a purchaser is found for the station acceptable to the Receiver and the FCC and the FCC has granted its consent for transfer of the FCC license to such purchaser.”³⁹ This order is a valid exercise of the Court’s authority under state law. Therefore, notwithstanding the invalidity of the State Court Order *vis-à-vis* attachment of the Station’s license, we find no reason to overturn the staff’s action granting the Involuntary Assignment Application.

Bare License. Gresham next argues that grant of the Application would constitute a sale of a prohibited “bare license.” In particular, Gresham notes that the Asset Purchase Agreement submitted with the Application seeks to transfer only the local public inspection file and the Station license. The Commission has historically refused to permit a price to be placed on the transfer of a bare license.⁴⁰ When weighing a bare license allegation, the Commission will review “the entirety of the proposed transaction”⁴¹ and whether the assignee would have the ability to maintain broadcast operations.⁴² The Commission will permit a license assignment, as is the case here, where other rights, commitments, or physical assets exist. First, the Receiver proposes to assign to Caswell the Station’s intangible assets, namely, the license and related authorizations as well as some tangible assets, specifically, the local public inspection file and its advertiser lists.⁴³ This list constitutes evidence of sufficient assets to counter Gresham’s allegation.⁴⁴ Next, the Asset Purchase Agreement references other tangible Station assets that Caswell has acquired through other transactions, including “the WPAL-FM tower, antenna and most of the station’s furniture fixtures and equipment.”⁴⁵ In short, Caswell possesses the technical assets required

³⁵ Having found that the court’s order is void *ab initio* insofar as it attaches the WPAL-FM license, we dismiss as moot Gresham’s arguments that the court improperly enjoined it from appearing before us and raising arguments against grant of the assignment applications.

³⁶ See e.g., *O.D.T. International et. al.*, Memorandum Opinion and Order, 9 FCC Rcd 2575, 2576 (1994) (“*O.D.T. International*”); and *Arecibo Radio*, 101 FCC 2d at 550-551.

³⁷ *O.D.T. International*, 9 FCC Rcd at 2576.

³⁸ Involuntary Assignment Application, Attachment 2, Order Appointing Receiver (March 26, 2007).

³⁹ *Id.* at 2 ¶3. Additionally, “[a]fter a purchaser (or purchasers) is found acceptable to Receiver and the FCC, Receiver is directed to make all necessary application with the FCC in order to effect the proper transfer or assignment of the licenses, together with such further assets as the Receiver should deem appropriate, to such purchaser.” *Id.* at ¶ 4.

⁴⁰ *Donald L. Horton*, Memorandum Opinion and Order, 10 FCC 2d 271, 273 (1967). *Accord, Edward B. Mulrooney*, Order, 13 FCC 2d 946 (1968), *Bonanza Broadcasting Corp.*, Memorandum Opinion and Order, 10 FCC 2d 906 (1967).

⁴¹ *FM Broadcasters of Douglas County*, Memorandum Opinion and Order, 10 FCC Rcd 10429 (1995).

⁴² See *American Music Radio*, Memorandum Opinion and Order, 10 FCC Rcd 8769, 8772-73 (1995). (“*American Music Radio*”).

⁴³ Section 1.1, Asset Purchase Agreement, Application.

⁴⁴ See *KPAL Broadcasting Corp.*, Memorandum Opinion and Order, 28 FCC 2d 46, 48 (1970) (presence of rights and commitments along with license outweighs bare license allegation).

⁴⁵ Asset Purchase Agreement, Application, Section 1.2 and i.

to assure continuation of broadcast service.⁴⁶ For this reason also, this transaction does not implicate the prohibition on transfer of a bare license. Thus, we find that transfer of a bare license is not at issue here.

Prior Federal Court Order. Lastly, Gresham argues that grant of the Application is barred by a prior Federal Court Order which enjoins Gresham from “transferring or disposing of the radio station owned by them until the judgment has been satisfied, or by further order of the court.”⁴⁷ Gresham’s claim is without merit. In *Cumulus Licensing, LLC*,⁴⁸ the Bureau stated that a decision to grant an assignment application “is permissive only and does not prejudice the outcome of . . . [any] court proceeding and any relief to which the parties are entitled under the civil suit.”⁴⁹ Similarly, we emphasize that our decision today to grant the Application is permissive only and should not impede private remedies in any future court proceedings.⁵⁰ To the extent that Gresham believes that consummation of the proposed assignment by the Receiver contravenes a court order, he should seek relief from that court.

Conclusions/Actions. We find no error in the staff’s grant of the Involuntary Assignment Application. Moreover, we have examined the Application and we find Caswell 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, for the reasons set forth above, IT IS ORDERED, that the Petition to Deny and the Petition for Reconsideration filed by Gresham Communications, Inc., ARE GRANTED IN PART to the extent indicated herein and DENIED in all other respects.

IT IS FURTHER ORDERED, that the Application (File No. BALH-20070406ADD) to for consent to assign the license of Station WPAL-FM, Ridgeville, South Carolina from Charles W. Cherry, II, Receiver for Gresham Communications, Inc., to Caswell Capital Partners, LLC; IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

⁴⁶ See *American Music Radio*, 10 FCC Rcd at 8772. See also *Eileen S. Bailey*, Memorandum Opinion and Order, 14 FCC Rcd 16755 (1999) (acquisition of operational assets from a third party is consistent with Commission policy and does not implicate the “bare license” policy), and *Arecibo Radio*, 101 FCC 2d at 550-551 (physical assets and license assigned from different parties to assignee does not constitute assignment of bare license).

⁴⁷ Federal Court Order at 1-2, Attachment 9, Petition to Deny.

⁴⁸ 21 FCC Rcd 2998 (MB 2006).

⁴⁹ *Id.* at 3007.

⁵⁰ Moreover, according to papers filed by Amos Workman, attorney for *Chi-Boy Music et al.*, this judgment was satisfied in full on December 12, 2008. See Satisfaction of Judgment, Attachment C, Third Supplement.