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In re: KLRK(FM), Marlin, TX
Facility ID No. 35581
File No. BALH-20090917ABL

KRQX(AM), Mexia, TX
Facility ID No. 21493
File No. BAL-20090917ABM

KRQX-FM, Mexia, TX
Facility ID No. 21949
File No. BALH-20090917ABN

KRZI(AM), Waco, TX
Facility ID No. 87179
File No. BAL-20090917ABO

Applications for Assignment of License

Dear Counsel:

We have before us the above-captioned applications (the "Applications") of Simmons-Austin, LS, LLC ("Simmons-Austin") for Commission consent to assign the licenses for KLRK(FM), Marlin, Texas; KRQX(AM) and KRQX-FM, Mexia, Texas; and KRZI(AM), Waco, Texas (the "Stations"), to M&M Broadcasters, Ltd. ("M&M").¹ We also have before us an Informal Objection (the "Informal

¹ On October 29, 2009, Commission staff rescinded the October 28, 2009 grant of the Applications. *See Broadcast Applications*, Report No. 27104 (Nov. 3, 2009).

Objection”) against the Applications filed by Daryl O’Neal (“O’Neal”). For the reasons stated below, we deny the Informal Objection and grant the Applications.

Background. On January 30, 2007, the Enforcement Bureau sent Simmons-Austin a letter of inquiry concerning commonly owned Station KSLG(AM), St. Louis, Missouri, authorized to operate at 5000 watts daytime and 1000 watts nighttime, as to whether it had operated with daytime power during nighttime hours between October 1, 2006, and January 31, 2007.² On February 20, 2007, Simmons-Austin filed a response which included a signed Declaration under penalty of perjury of G. Craig Hanson (“Hanson Declaration”), manager of Simmons-Austin and president of Simmons Media Group, LLC, (“Simmons”) the ultimate parent company of Simmons-Austin.³ In the Hanson Declaration, Simmons-Austin admitted that KSLG(AM) had operated in specific instances in a manner inconsistent with its license due to: “(1) inadvertent human error,⁴ and (2) circumstances beyond Simmons’ control.”⁵ Simmons-Austin also denied the existence, of any “corporate directive” not to reduce KSLG(AM)’s power at sunset, as specified in the station’s license.

On June 20, 2007, the Enforcement Bureau released an order adopting a Consent Decree with Simmons-Austin (“Consent Decree”) wherein it admitted to violating Sections 73.1350 and 73.1745;⁶ agreed to make a twenty-five thousand dollar voluntary contribution to the United States Treasury; and agreed to implement a specified internal program, for a minimum of two years from the Consent Decree’s effective date, to ensure compliance with the Commission’s rules and regulations.⁷

On September 17, 2009, Simmons-Austin and M&M filed the Applications. On October 22, 2009, O’Neal, a non-voting member and former president of Simmons-Austin, LLC, the sole controlling

² *Letter to Simmons-Austin, LS, LLC*, Ref. File No. EB-07-KC-005 (dated Jan. 30, 2007) (“2007 Letter of Inquiry”).

³ *Letter to Robert C. McKinney, District Director, Enforcement Bureau, Federal Communications Commission* at 3 (dated February 20, 2007) (“2007 Simmons-Austin Letter”).

⁴ *Id.* at 3. In particular, Simmons-Austin stated that due to malfunctioning automation equipment, “the Station’s chief engineer had to manually dial in both the daytime and/or nighttime transmitters to turn them on and off the chief engineer did not always turn off the daytime transmitter at the required time. Each instance was unintentional” *Id.*

⁵ *Id.* Specifically, Simmons-Austin noted the following unavoidable circumstances:

From November 15 through November 21, troubles with telephone lines caused the telephone line [used to control the station’s transmitters] to ring busy. Simmons contacted the telephone company the morning of November 16, but it took the telephone company several days to repair the lines.

From November 30 to December 9, a series of events prevented the Station’s chief engineer from turning the transmitters on and off at the appropriate times. On November 30, 2006, an ice storm struck St. Louis that damaged thousands of telephone lines including lines to the daytime transmitter. Even after the telephone company repaired the telephone lines damaged by the ice storm, the telephone lines continued to fail. On December 9, a telephone company technician discovered that a mouse had chewed the insulation on a wire within the utility’s control box while making a nest. The un-insulated wire apparently short circuited during a rainstorm or while ice melted, thereby disconnecting the transmitter’s telephone line from the telephone network. The telephone company repaired the telephone lines on that day. Also for a brief period during this time, the Station’s chief engineer discovered that the telephone company improperly canceled the telemetry line account. The Station quickly resolved this problem, but due to damage caused by the ice storm and the mouse, the telephone lines at the daytime transmitter continued to fail.”

Id. at 3-4.

⁶ 47 C.F.R. §§ 73.1350 and 73.1745.

⁷ *Simmons-Austin, LS, LLC Licensee of Station KSLG(AM)*, 22 FCC Rcd 10924 (EB 2007) (“Order”).

entity of Simmons-Austin, filed the Informal Objection. O’Neal, citing *Jefferson Radio Corp. v. FCC*,⁸ requests that the Commission designate the Applications for hearing to determine whether Simmons-Austin possesses the basic qualifications to be a Commission licensee due to its alleged misrepresentation and lack of candor during the investigation of Station KSLG(AM). Specifically, O’Neal alleges that with respect to the Enforcement Bureau’s investigation of KSLG(AM), Simmons-Austin: “(i) provided false information to the FCC with regard to the original violation; (ii) provided false information concerning the controls implemented to prevent such violations in the future; and (iii) engaged in a lack of candor with respect to each of these matters.”⁹

On October 30, 2009, Simmons-Austin¹⁰ filed an “Answer to Informal Objection” (“Answer”), contending that the Informal Objection “asserts no claim against the proposed transaction, the stations at issue, or the proposed assignee.”¹¹ It also points out that O’Neal was “deeply involved in the preparation of the *2007 Simmons-Austin Letter* and, rather than questioning the veracity of any statement therein or objecting to its submission, O’Neal “endorsed the Response without qualification.”¹²

On December 9, 2009, O’Neal filed a “Reply” (“Reply”) asserting that Simmons-Austin conducted a “cover-up [in the 2007 KSLG(AM) investigation that] excluded the FCC Enforcement Bureau from having the ability to view the evidence, assess the credibility of each of the parties for itself, and to ultimately render an appropriate decision.”¹³ In particular, O’Neal alleges that Simmons-Austin lacked candor in the *2007 Simmons-Austin Letter* in claiming that KSLG (AM)’s unauthorized operation “was unintentional”¹⁴ Moreover, O’Neal declares that Simmons-Austin “has compounded its misconduct by . . . lying about the existence of documented results of his investigation; lying about the reasons for his departure from the company”¹⁵ and possibly overstating the extent of its compliance with the engineering matters detailed in the Consent Decree.”¹⁶ Therefore, O’Neal contends, based on the totality of the evidence, a serious and material question of fact exists as to whether Simmons-Austin meets the Commission’s character qualifications to hold a broadcast license.

⁸ *Jefferson Radio Corp. v. FCC*, 340 F.2d 781 (D.C. Cir. 1964) (“*Jefferson Radio*”).

⁹ Informal Objection at 7.

¹⁰ For convenience purposes, we will refer to all filings made by Simmons on behalf of Simmons-Austin as filed by the licensee.

¹¹ Answer at 1. Additionally, on November 16, 2009, Simmons-Austin submitted a letter to the Enforcement Bureau requesting “a letter affirming that Mr. O’Neal’s Informal Objection does not raise any character or other issue [involving the licensee or its principals]” *Letter to Diane Law-Hsu, Esquire, Regional Counsel, South Central Region, Enforcement Bureau, Federal Communications Commission* at 3 (dated Nov. 16, 2009) (“*2009 Simmons-Austin Letter*”).

¹² Answer at 4. Simmons-Austin submits a February 7, 2007, email from O’Neal to Craig Hanson, President of Simmons-Austin’s parent company, indicating, “This is how I believe we should approach the FCC. (a) a declaration that no corporate directive exists within Simmons Media . . . never has . . . never will” Answer, Attachment 2. It also submits a February 19, 2007, e-mail from O’Neal to Hanson – sent one day before the *2007 Simmons-Austin Letter* was filed with the Enforcement Bureau – indicating that O’Neal had “received a copy of the official response to our FCC dilemma in St. Louis” and that it was “worded well,” although he had one primary concern regarding “making public our financial situation in the market.” Answer, Attachment 3.

¹³ Reply at 21 (emphasis omitted).

¹⁴ *Id.* at 2 (quoting *2007 Simmons-Austin Letter* at 7).

¹⁵ O’Neal states that he resigned on February 3, 2007, after a “contentious” telephone conference call in which the President of Simmons Media (Craig Hanson) and the KSLG(AM) program director “loudly disagreed” with O’Neal’s suggestion that Simmons “should be forthcoming with the FCC and tell them the truth, fire anyone responsible (including the corporate VP of programming), and pay the fine.” Reply at 7-8 and Attachment 8, October 21, 2009 Declaration of Daryl O’Neal at 3 (“O’Neal October 2009 Declaration”).

¹⁶ *Id.* at 23 (emphasis omitted).

Discussion. Pursuant to Section 309(e) of the Communications Act of 1934, as amended (the "Act"),¹⁷ informal objections must provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the Applications would be *prima facie* inconsistent with Section 309(a) of the Act.¹⁸ Specifically, Section 309(a) provides that we are to grant an application if, upon consideration of the application and pleadings and other such matters of which we may officially take notice, we find that the public interest, convenience, and necessity will be served by the granting of such application. If, however, the applicant fails to meet that standard, the Commission may deny the application after notice and opportunity for a hearing under Section 309(e) of the Act.

The Commission's *Jefferson Radio* policy precludes consideration of license assignment applications where a character issue has been resolved against the seller or is pending.¹⁹ This is because, as the Commission explained in one case, "there is no authorization to assign" if the seller ultimately is found unqualified.²⁰ The policy's underlying purpose is to prevent licensees from evading responsibility for wrongdoing.²¹ The policy serves as a deterrent because a licensee would likely suffer an "awesome loss" that would result from revocation or non-renewal of license.²² This deterrent effect would be undermined if a licensee could "sell out from under a potential disqualification."²³

Character Allegations: Misrepresentation and Lack of Candor. The Commission and the courts have recognized that "[t]he FCC relies heavily on the honesty and probity of its licensees in a regulatory system that is largely self-policing."²⁴ Misrepresentation is "a false statement of fact made with intent to deceive."²⁵ Lack of candor is "concealment, evasion, or other failure to be fully informative, accompanied by intent to deceive."²⁶ Intent to deceive is established if a licensee knowingly makes a

¹⁷ 47 U.S.C. § 309(e).

¹⁸ 47 U.S.C. § 309(a). See e.g. *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), aff'd sub nom. *Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), rehearing denied (Sept. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (informal objections, like petitions to deny, must contain adequate and specific factual allegations sufficient to warrant the relief requested).

¹⁹ *Jefferson Radio*, 340 F.2d at 783 (when a seller's qualifications are at issue the Commission will not consider an assignment of a broadcast authorization until it has been determined that the authorization has not been forfeited).

²⁰ *Catherine C. Murphy*, Decision, 42 FCC 2d 346, 347 (1973).

²¹ See, e.g., *Harry O'Connor*, Memorandum Opinion and Order and Notice of Apparent Liability, 2 FCC 2d 45, 48 (1965) ("The purpose underlying this policy is obvious: A licensee cannot act inconsistently with the Communications Act or the Commission's rules and policies, and then, when a question is raised concerning such improper activity, transfer or assign the license to another; if he could, the only result of the wrongdoing would be a forced sale.").

²² See *Stereo Broadcasters, Inc. v. FCC*, 652 F.2d 1026, 1030 (D.C. Cir. 1981).

²³ See *Cellular System One of Tulsa, Inc.*, Memorandum Opinion and Order, 102 F.2d 86 (1985) ("To permit a licensee to sell out from under a potential disqualification would significantly impair the Commission's ability to police and deter licensee misconduct.").

²⁴ See *Commercial Radio Service, Inc.*, Order to Show Cause, 21 FCC Rcd 9983, 9986 (2006) citing *Contemporary Media, Inc. v. FCC*, 214 F.3d 187, 193 (D.C. Cir. 2000). ("*Contemporary Media*").

²⁵ *Id.*, citing *Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order and Policy Statement, 102 FCC 2d 1179, 1210-11 (1986) ("*1986 Character Policy Statement*").

²⁶ *Id.*, citing *Fox River Broadcasting, Inc.*, 93 FCC2d 127, 129 (1983). A false certification may also constitute a misrepresentation. *Id.* at 9986 n.15 (citing *San Francisco Unified School District*, Hearing Designation Order and Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 13326, 13334, nn. 40-41 (2004)).

false statement²⁷ and can also be inferred when the surrounding circumstances clearly show the existence of intent to deceive.²⁸ The Commission may disqualify an applicant who deliberately makes misrepresentations or lacks candor in dealing with the agency.²⁹

Initially, we note that the Informal Objection is procedurally defective in two ways. First KSLG(AM) is not one of the stations to be assigned to M&M. The Commission has long held that misconduct at one station is not necessarily imputed to a licensee's other stations.³⁰ Moreover, in substance, O'Neal seeks reconsideration of the Order. As such, it is several years untimely. To the extent that O'Neal alleges that Simmons-Austin engaged in a pattern of misrepresentations which constituted a fraud on the Commission's processes, it should direct those concerns to the Enforcement Bureau.³¹

In any event, based on our review of the record, we find that O'Neal has failed to raise a substantial and material question of fact calling for further inquiry into Simmons-Austin's qualifications. The Enforcement Bureau, in the *2007 Letter of Inquiry*, issued prior to the execution of the Consent Decree, posed specific questions concerning the unauthorized excessive power transmission of Station KSLG(AM) per the supposed corporate directive.³² In its response, Simmons-Austin denied the existence of an official corporate directive, but acknowledged the chief engineer's belief that one existed. Specifically, Simmons-Austin noted that:

KSLG(AM)'s chief engineer sincerely believes that a corporate officer had issued a directive to begin daytime operations at 6:00 am and conclude daytime operations at 7:00 pm. The apparent source of this directive, however, just as sincerely denies issuing, hearing, or discussing any such demand. The supposed corporate directive was never put into writing, and we are unaware of any evidence that would corroborate one of these individual's beliefs and dismiss the others. As such, while we believe that both individuals sincerely believe that they have been fully honest with us, we simply cannot determine whether the alleged directive had been issued in the form the Station's engineer recalls. Regardless, the chief engineer followed what he understood to be a corporate directive by operating the Station's transmitters accordingly, as reflected in the station's logs.³³

²⁷ *Id.*, citing *Leflore Broadcasting, Co., v FCC*, 636 F.2d 454, 462, (D.C. Cir. 1980).

²⁸ *Id.*, citing *American International Development, Inc.*, Memorandum Opinion and Order, 86 FCC2d 808, 816 n.39 (1981), *aff'd sub nom KXIV, Inc. v. FCC*, 704 F.2d 1294 (D.C. Cir. 1983).

²⁹ *Contemporary Media*, 214 F.3d at 196.

³⁰ See *1986 Character Policy Statement*, 102 FCC 2d at 1223-25 (no presumption that misconduct at one station is necessarily predictive of the licensee's operation of other stations). See also, *Citicasters Licenses, L.P.*, Memorandum Opinion and Order and Notice of Apparent Liability, 22 FCC Rcd 19234, 19336 (MB 2007) (allegations of misconduct by licensee at stations other than those at issue not relevant for consideration).

³¹ See, e.g., *Birach Broadcasting*, 16 FCC Rcd 5015, 5018 (2001), citing *Radio Para La Raza*, 40 FCC 2d 1102, 1104 (1973) (Commission may reopen proceedings that have become final when there has been fraud on the agency's processes or the result is manifestly unconscionable).

³² The *2007 Letter of Inquiry* included a request for the following information:

A statement whether Simmons-Austin or station management at Station KSLG provided its employees a directive or instructions to operate its station in a manner inconsistent with its station authorization. If so, please provide a summary or copy of the corporate directive or instructions. If not, please provide an explanation for the "per corporate directive," "per corporate instruction," and other similar language found in the station logs.

Id. at 1-2.

³³ *2007 Simmons-Austin Letter*, Declaration of G. Craig Hanson at 4. Hanson identifies himself as "Manager" of Simmons-Austin and President of Simmons-Austin's ultimate parent, Simmons Media Group, LLC.

In addition, Simmons-Austin stated that “[a]fter interviewing the general managers and chief engineers of each Simmons-Austin station at the time of the FCC inspection, we concluded that no other Licensee station has operated under the supposed corporate directive other than KSLG(AM).”³⁴ The Enforcement Bureau thereupon entered into the Consent Decree with Simmons-Austin.

Compliance with Consent Decree. O’Neal also questions Simmons-Austin’s adherence to the Consent Decree’s internal compliance plan.³⁵ These are also allegations best directed to the Enforcement Bureau. For purposes of our consideration of the above-captioned applications here, these allegations indicate a lack of personal knowledge and/or misinterpret the terms of the Consent Decree. Moreover, O’Neal provides no corroborating evidence for any of his claims.

Conclusions/Actions. Based on the evidence presented in the record, we find that O’Neal has failed to raise a substantial and material question of fact warranting further inquiry. We further find Simmons-Austin to be fully qualified to assign, and M&M fully qualified to be the licensee of the Stations and that grant of the Applications will further the public interest, convenience, and necessity.

Accordingly, IT IS ORDERED, that the Informal Objection filed by Daryl O’Neal IS DENIED. IT IS FURTHER ORDERED, that the Applications (File Nos. BALH-20090917ABL; BAL-20090917ABM; BALH-20090917ABN; and BAL-20090917ABO) for consent to assign the licenses of Stations, KLRK(FM), Marlin, Texas, KRQX(AM), Mexia, Texas, KRQX-FM, Mexia, Texas, KRZI(AM), Waco, Texas, from Simmons-Austin, LS, LLC to M&M Broadcasters, Ltd. ARE GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

³⁴ *Id.* at 5.

³⁵ O’Neal Declaration 4-5, Attachment 2, Informal Objection.