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In re: **WHNR(AM), Cypress Gardens, FL**
Facility ID No. 21766

**Applications for Assignment of
License**

File No. BAL-20120316AAP
Informal Objections

File No. BAL-20110810AAB
Petition for Reconsideration

Dear Mr. Santos and Counsel:

We have before us: (1) the referenced application (“Assignment Application”) seeking Commission consent to the proposed involuntary assignment of license for Station WHNR(AM), Cypress Gardens, Florida (“Station”), from GB Enterprises Communications Corp. (“GB”) to George R. Reed, Receiver (“Reed” or “Receiver”); and (2) Informal Objections to the Assignment Application filed on March 20, 2012, by La Poderosa, LLC, and its owner Carlos Guerrero (“Guerrero,” and collectively, “Poderosa”) (“Poderosa Objection”) and on March 21, 2012, by Florida Spanish Communications Corp. (“FSCC”) (“FSCC

Objection”).¹ We also have before us Poderosa’s February 15, 2012, Petition for Reconsideration (“Petition”)² of the staff’s February 9, 2012, grant of the referenced application³ for assignment of the Station’s license from GB to FSCC.⁴ For the reasons stated below, we grant the Petition; rescind the grant of the 2011 Application and dismiss it without prejudice; we also deny the Poderosa and FSCC Objections, and grant the Assignment Application.

Background. On August 10, 2011, the Parties filed the 2011 Application to assign the Station from GB to FSCC. On September 12, 2011, Poderosa filed a Petition to Deny that application arguing that it had made loans to GB and to GB’s President and 100 per cent stockholder, Martin Santos (“Santos”), which were not timely repaid. Poderosa asserted that GB sought to assign the Station in order to avoid payment of money that GB and Santos were contractually obligated to pay to Poderosa. In the *Staff Decision* granting the 2011 Application, the staff noted that the Commission is not the proper forum for the resolution of private contractual disputes such as those raised by Poderosa here. It also observed that although “Petitioners [claimed to] have initiated arbitration proceedings in Florida seeking to collect on the debt and for other remedies against Santos and [GB],” they had “not provided evidence of an injunction or a stay issued by a local court against the proposed sale.”⁵ The staff stated that, in the absence of such an order from a local court, it routinely acts favorably on license assignment applications. The *Staff Decision* explained that the “action [granting the 2011 Application was] . . . permissive only and [did] . . . not prejudice any relief to which the parties may ultimately be entitled.”⁶

On January 24, 2012, Poderosa, during the pendency of the 2011 Application, obtained a Florida state court order enjoining Santos and GB from “attempting to assign the license or other assets of the Station to any third party, or to transfer control of [GB], pending the completion of the arbitration proceedings.”⁷ Poderosa did not bring the *January Court Order* to the attention of the staff prior to issuance of the *Staff Decision* on February 9, 2012. Subsequently, on February 16, 2012, the court granted GB creditor Edward Olivares’s (“Olivares”) motion to appoint a Receiver to “obtain the FCC’s consent to the involuntary assignment of the FCC license [for the Station].”⁸ On March 16, 2012, GB and

¹ On March 29, 2012, the Receiver filed an Opposition to the Informal Objections, to which Poderosa replied on April 11, 2012. On May 11, 2012, Receiver filed a Supplement to his Opposition, to which Poderosa filed a Response on June 6, 2012.

² On February 27, 2012, FSCC filed an Opposition to Petition for Reconsideration, to which Poderosa replied on March 8, 2012.

³ File No. BAL-20110810AAB (the “2011 Application”).

⁴ See *Letter to Carlos Guerrero, FSCC, and Martin Santos*, Ref. 1800B3 (MB rel. Feb. 9, 2012) (“*Staff Decision*”). The Parties have not consummated this transaction.

⁵ *Staff Decision* at 2.

⁶ *Id.*

⁷ See *Martin Santos and GB Enterprises Communications, Corp. v. Carlos S. Guerrero and La Poderosa, LLC*, Order Granting Motion to Compel and Injunction, Circuit Court of Polk County, Florida, Case Number 53-2011 CA-001681-0000-LK Section Number 7 (Fla. Polk County Ct.) (rel. Feb. 12, 2012) (“*January Court Order*”).

⁸ See *Edward Olivares v. Martin Santos*, Verified Emergency Motion for Proceedings Supplementary, Injunctive Relief, Request for Appointment of Receiver and Motion for Expedited Hearing, Case No. 2009CA-005214 Section Number 7 (Fla. Polk County Ct.). (“Olivares Motion”), filed February 16, 2012; granted by Judge J. Michael McCarthy (“Judge McCarthy”) on that same day (“*February Court Order*”).

Receiver filed the Assignment Application, attaching to it a copy of the *February Court Order* appointing Reed as Receiver for the Station.⁹

In its Petition, Petitioners argue that the staff should rescind its grant of the 2011 Application and return GB and FSCC to the *status quo ante*, as the *January Court Order* enjoining GB from assigning the Station to any third party precludes the staff's February 9, 2012 grant.¹⁰ In its Opposition to the Petition, FSCC argues that there is no basis for the Commission to reconsider its consent due to Poderosa's failure to timely submit the *January Court Order* into the record and that the proper course under Commission precedent is to allow the state court to render an ultimate decision on the merits.¹¹ In Reply, Poderosa argues that nothing in *Northwest* prohibits the staff from rescinding its grant of consent to an assignment where an injunction prohibits an unconsummated assignment, as here.¹²

In its Objection, Poderosa argues that the Commission should not take any action on the Assignment Application until the court resolves what Poderosa believes is a "conflict" between the *January* and *February Court Orders*.¹³ Poderosa claims that the *January Court Order* enjoins GB from assigning the assets of the Station to any third party – including the Receiver – while the *February Court Order* directs assignment of the Station to the Receiver.¹⁴ Poderosa states that Judge McCarthy, who "labors under an extremely heavy caseload," may have not known that the Station for which he appointed a Receiver in the *February Court Order* was the same station which he enjoined from being assigned in the *January Court Order*.¹⁵ Poderosa also argues that assignment of GB's assets to the Receiver would prejudice other creditors of GB, such as its principal, Guerrero.¹⁶

In its Objection, FSCC argues that the Assignment Application arises from the effort of single creditor, Olivares, who has secured the appointment of Reed to take control of the Station and proceed with a sale process for the benefit of Olivares and to the detriment of FSCC and other parties.¹⁷ It states that the Commission should not grant the Assignment Application until and unless all matters related to

⁹ See Assignment Application and *February Court Order* at Attachment 6.

¹⁰ Petition at 2.

¹¹ Opposition to Petition at 2, citing *Northwest Broadcasting, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 3289, 3296 (1997) ("*Northwest*").

¹² Reply to Opposition to Petition at 5. Poderosa also contends for the first time that GB assigned the Station to FSCC so that FSCC's sole principal, Francisco Arredondo, a former employee of GB, could obtain a federal government loan through the Minority Small Business Investment Corporation and assign the Station back to GB "for the same \$1,000 price," thus constituting "loan fraud." *Id.* at 6. We will not consider this allegation. See 47 C.F.R. § 1.45(c) (replies are limited to matters raised in oppositions).

¹³ Poderosa Objection at 2.

¹⁴ Poderosa also claims that the Assignment Application should be refiled as a transfer of control application with the receiver "stepping into the shoes" of Santos and exercising control of GB stock, but not to acquire ownership of the assets of the Station. *Id.* at 7. It claims that the Emergency Motion requested an Order "seizing the corporation stock . . . [and] appointing George R. Reed as Receiver . . ." These items, Poderosa argues, are more consonant with a transfer of control of the corporation than with an assignment of the station's license and assets. *Id.* at 6-7.

¹⁵ *Id.* at 5.

¹⁶ *Id.* at 7.

¹⁷ FSCC Objection at 1-2.

the ownership and control of the Station, as well as rights and obligations of all creditors and parties to contracts with GB, are fully resolved.¹⁸

In its Opposition to the Poderosa and FSCC Objections, Receiver argues that the Assignment Application is merely implementing the court directive and is nothing more than a routine issuance of an order by a state court for a receiver to take temporary possession of a radio station and to manage it for the benefit of creditors and other parties until competing claims can be resolved.¹⁹ Receiver further argues that contrary to Poderosa's claim, the *February Court Order*, in granting the Olivares Motion, required that the GB stock be seized by the Polk County Sheriff's Office and not the Receiver.²⁰ In Reply, Poderosa argues that "no formal Order was issued delineating exactly what the scope of the Receiver's authority would be," and therefore, the Commission should dismiss the Assignment Application or, at a minimum, wait for the issuance of a court order.²¹

Discussion. The Petition. Reconsideration is warranted only if the petitioner sets forth an error of fact or law, or presents new facts or changed circumstances which raise substantial or material questions of fact that otherwise warrant reconsideration of the prior action.²² For the reasons set forth below, we will grant the Petition.

We affirm that Poderosa's allegations regarding the non-repayment of loans it made to GB and Santos are private in nature, and therefore, fall outside the Commission's jurisdiction.²³ Nevertheless, the Commission is obligated to accommodate, as feasible, federal and state bankruptcy court proceedings.²⁴ Although unaware of the release of the *January Court Order* when it granted the 2011 Application, the staff may take official notice of court opinions and decisions once they are released.²⁵ Accordingly, we will grant reconsideration, rescind grant of the 2011 Application, and dismiss it without prejudice pending the final resolution of the pertinent court proceeding. We believe that our action here furthers the Commission's policy of comity with state court actions and will not prejudice any involved party.²⁶

¹⁸ *Id.* at 2. FSCC observes, for example, that it has a contract to acquire GB's assets and received Commission consent to do so by grant of the 2011 Application.

¹⁹ Opposition at 2 and 6.

²⁰ *Id.* at 2-3; *see also* Olivares Motion at 7 and 12.

²¹ Reply at 6.

²² *See* 47 C.F.R. § 1.106.

²³ *See John F. Runner, Receiver (KBIF)*, Memorandum Opinion and Order, 36 RR 2d 773, 778 (1976).

²⁴ *See Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 131-132 (1945); *Arecibo Radio Corp.*, Memorandum Opinion and Order, 101 FCC 2d 545, 548 (1985) ("*Arecibo*").

²⁵ *See Malin Christian Church, Inc.*, Letter, 25 FCC Rcd 915, 916 (MB 2010); *see also Ms. Sandra Soho*, Letter, 24 FCC Rcd 13826, 13827 n.2 (MB 2009) (staff takes official notice of Oregon court judgment recognizing Soho as *de facto* licensee of station KRAT(FM)).

²⁶ *See, e.g., Kirk Merkley*, Memorandum Opinion and Order, 94 FCC 2d 829, 836 (1983), *recon. denied*, FCC 84-305, 56 RR 2d 413 (1984) ("*Merkley IP*"), *aff'd sub nom. Merkley v. FCC*, 776 F.2d 365 (1985).

The Objections. Section 310(d) of the Communications Act of 1934, as amended (the “Act”)²⁷ requires the Commission to determine whether the proposed transfer or assignment of a broadcast license would be in the public interest. Pursuant to Sections 309(d) and (e) of the Act,²⁸ informal objections must provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact calling for further inquiry regarding whether grant of the Assignment Application would be *prima facie* inconsistent with Section 309(a) of the Act.²⁹ This section 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. Under this standard, when reviewed on their merits, the Poderosa and FSCC challenges fail.

To the extent that Poderosa and FSCC are concerned about their contractual and creditor rights, we reiterate that the local courts, not the Commission, are the appropriate forum for seeking relief.³⁰ In this case, we follow the well established procedure of approving an application for involuntary assignment or transfer of control pursuant to a court order appointing a receiver “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 has granted its consent for transfer of the FCC license to such purchaser.”³¹ Poderosa and FSCC Objections do not argue that the Receiver lacks the basic qualifications to become a Commission licensee or that the proposed transaction violates the public interest. We conclude that the appointment of the Receiver here does not conflict with Commission policy and, consistent with our long-standing precedent of accommodation of state court actions compliant with the Commission's rules and policies, we will defer to the court's appointment of the Receiver.³²

Poderosa and FSCC also argue that the Commission should refrain from acting on the Assignment Application until the court resolves alleged conflicts between the *January* and *February Court Orders*. We disagree. Although any alleged inconsistencies in the *January* and *February Court Orders* certainly are a matter for the court, not the Commission, to decide,³³ as we stated previously in the

²⁷ 47 U.S.C. § 310(d).

²⁸ 47 U.S.C. § 309(e).

²⁹ *Id.* § 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).

³⁰ See, e.g., *O.D.T. International*, Memorandum Opinion and Order, 9 FCC Rcd 2575, 2576 (1994); *Arecibo*, 101 FCC 2d at 550-551.

³¹ See e.g., *Caswell Capital Partners, LLC*, Letter, 24 FCC Rcd 2894, 2898 (MB 2009), *aff'd*, *Gresham Communications, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 11895 (2011).

³² See *Merkley II*, 56 RR 2d at 417.

³³ See, e.g., *Paxson Management Corporation and Lowell W. Paxson*, Memorandum Opinion and Order, 22 FCC Rcd 22224, 22235 (2007), citing *Northwest*, 12 FCC Rcd at 3293 (issue of whether a particular court order constitutes a valid exercise of its authority under state law is a question appropriately resolved under state judicial procedures).

Staff Decision, the Commission's grant of an assignment or transfer of control application merely finds that the parties to the Assignment Application are qualified under, and the proposed transaction does not violate, the Act, or the Commission's rules and policies. Therefore, the permissive grant herein does not prejudice any relief to which any party may ultimately be entitled under state law.³⁴ From our perspective, it is sufficient that the court granted the Olivares Motion both "as to Injunctive Relief and Appointment of Receiver."³⁵

Finally, with respect to Poderosa's claim that the staff should refrain from acting on the Assignment Application because it is unclear whether or not the Receiver will hold only the stock of GB, this matter also is best resolved by Poderosa, FSCC, and Receiver seeking clarification of the *February Court Order* from the state court judge who issued it. We will honor and give effect to any such determination but, as explained above, we need not withhold action on the Assignment Application while Poderosa brings its claim to state court.

Conclusion/Actions. In light of the above discussion, we find that Poderosa has presented circumstances that warrant reconsideration of the staff's grant of the 2011 Application. Accordingly, IT IS ORDERED, that the La Poderosa, LLC and Carlos Guerrero February 15, 2012, Petition for Reconsideration IS GRANTED, and that the application for approval to assign the license for Station WHNR(AM), Cypress Gardens, Florida, from GB Enterprises Communications Corp. to Florida Spanish Communications Corp. (File No. BAL-20110810AAB), granted on February 9, 2012, IS RESCINDED and that application IS DISMISSED without prejudice.³⁶

Additionally, Poderosa and FSCC have not raised a substantial and material question of fact warranting further inquiry regarding the Assignment Application. We further find that the Receiver is qualified to hold the license for Station WHNR(AM), Cypress Gardens, Florida, and that grant of the Assignment Application is consistent with the public interest, convenience and necessity. Accordingly, IT IS FURTHER ORDERED, that the Informal Objections filed by La Poderosa, LLC and Carlos Guerrero on March 20, 2012, and by Florida Spanish Communications Corp. on March 21, 2012, ARE DENIED, and the application for approval to assign the license for Station WHNR(AM), Cypress Gardens, Florida (File No. BAL-20120316AAP) from GB Enterprises Communications Corp. to Geroge R. Reed, Receiver, IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

³⁴ See, e.g., *MB Communications, Inc., c/o James L. Oyster, Esq., The Finger Lakes Radio Group, Inc., c/o John F. Garziglia, Esq.*, Letter, 26 FCC Red 11178, 11179 (MB 2011).

³⁵ Olivares Motion at 1.

³⁶ We note that should the Florida state court lift its injunction or otherwise permit this transaction, the Parties may re-file their application.