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In Reply Refer to:

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In re: **WLDA(FM), Slocomb, Alabama**
Facility ID No. 60591
File No. BALH-20111220AFW

WJRL-FM, Fort Rucker, Alabama
Facility ID No. 63945
File No. BALH-20111220AFX

WESP(FM), Dothan, Alabama
Facility ID No. 6891
File No. BALH-20111220AFY

WECB(FM), Headland, Alabama
Facility ID No. 10666
File No. BALH-20111220AFZ

**Applications for Assignment of Licenses
Petition to Deny**

Dear Counsel:

We have before us the above-captioned applications (the "Assignment Applications") seeking approval for the proposed assignment of the licenses for stations WLDA(FM), Slocomb, Alabama; WJRL-FM, Fort Rucker, Alabama; WESP(FM), Dothan, Alabama; and WECB(FM) (formerly WDBT), Headland, Alabama (the "Stations"), from Southeast Alabama Broadcasters, LLC ("SAB") to Alabama Media, LLC ("Alabama Media"). Also before us is a Petition to Deny or Request for FCC Investigation

filed on January 23, 2012, by Leigh Thomas (*nee* Simpson) (“Thomas”) (the “Thomas Petition”), a Joint Opposition to Petition to Deny filed on February 7, 2012, by Alabama Media and SAB (the “Joint Opposition”), and a Reply to Joint Opposition to Petition to Deny or Request for FCC Investigation filed by Leigh Thomas on February 17, 2012. For the reasons set forth below, we deny the Thomas Petition and grant the Assignment Applications.

Background. In 2010, Magic Broadcasting Alabama Licensing, LLC (“Magic”) contacted Clay Holladay, president and majority shareholder of Gulf South Communications, Inc. (“Gulf South”), regarding the possible purchase of Magic’s five radio stations in the Dothan, Alabama, market.¹ At the time, Gulf South already owned the maximum number of stations permissible in that market.² However, Gulf South agreed to sell two of its existing stations in order to buy two of the Magic stations, and to help Magic locate buyers for the remaining stations.³

Gulf South located two buyers: Georgia Edmiston (“Edmiston”), a former business associate of Clay Holladay, and Alisha Cummings (“Cummings”), the daughter of two of Clay Holladay’s employees.⁴ On December 30, 2010, Cummings formed Alabama Media Investments, LLC (“AMI”), and on February 7, 2011, Edmiston formed SAB. On February 16, 2011, the various parties filed applications to simultaneously assign two Magic stations (WKMX(FM) and WTVY-FM)⁵ to Gulf South, two Gulf South stations (WESP(FM) and WECB(FM) (formerly WDBT(FM))⁶ and two Magic stations (WLDA(FM) and WJRL-FM)⁷ to SAB, and the remaining Magic station (WBBK-FM) to AMI.⁸

On March 25, 2011, Thomas filed a petition to deny against all seven assignment applications, arguing that the assignments could result in an “anti-competitive situation.”⁹ The Bureau denied the petition and granted the seven assignment applications by letter dated November 25, 2011.¹⁰ Thomas

¹ *Applications for Consent to Assignment of WKMX(FM), Enterprise, Alabama, WTVY-FM, Dothan, Alabama, WESP(FM) Dothan, Alabama, and WDBT(FM), Headland, Alabama*, Opposition to Petition to Deny or Request for FCC Investigation of Gulf South Communications, filed Apr. 7, 2011, at 2 (“2011 Gulf South Opposition”).

² 47 C.F.R. § 73.3555(a)(1)(iii); *David D. Oxenford, Esq. et al.* Letter, Ref. 1800B3-BSH (Nov. 25, 2011), at 2 (“Nov. 2011 Letter Decision”).

³ 2011 Gulf South Opposition at 2.

⁴ *Id.* at 2-3.

⁵ File No. BALH-20110216AAG; File No. BALH-20110216AAH.

⁶ File No. BALH-20110216AAC; File No. BALH-20110216AAD.

⁷ File No. BALH-20110216AAE; File No. BALH-20110216AAF.

⁸ File No. BALH-20110216AAB.

⁹ *Applications for Consent to Assignment of Broadcast Station License WBBK-FM, Blakely, Georgia, WKMX(FM), Enterprise, Alabama, WTVY-FM, Dothan, Alabama, WESP(FM), Dothan, Alabama, WDBT(FM), Headland, Alabama, WLDA(FM), Slocomb, Alabama, WJRL-FM, Fort Rucker, Alabama*, Petition to Deny or Request for FCC Investigation, filed Mar. 25, 2011, at 2.

¹⁰ Nov. 2011 Letter Decision, *supra* note 2.

filed a petition for reconsideration of that decision on December 30, 2011, which we address in a separate, concurrent decision.¹¹

On November 30, 2011, the sale of the Stations from Magic and Gulf South to SAB was consummated. That same day, SAB entered into a local marketing agreement (“LMA”) and asset purchase agreement (“APA”) with Alabama Media, LLC (“Alabama Media”), a company controlled by Robert Holladay, Clay Holladay’s brother. Pursuant to the APA, on December 20, 2011, the parties filed the Assignment Applications, seeking consent for the sale of the four Stations to Alabama Media. Copies of the LMA and APA were filed with the Assignment Applications.¹²

Thomas argues that grant of the Assignment Applications would create the potential for anti-competitive collusion by the Holladays to dominate the Dothan market.¹³ Specifically, she argues that the original Magic-Gulf South-SAB assignments were merely a means of “parking additional stations that [the Holladays] can’t hold directly.”¹⁴ She also contends that, since there must have been some sort of “understanding” regarding the LMA and APA prior to grant, SAB was required by Section 1.65 of the rules¹⁵ to amend the Magic-Gulf South-SAB assignment applications to disclose any such “understanding” to subsequently sell the Stations.¹⁶ Failure to do so, in Thomas’s view, constitutes lack of candor or misrepresentation in light of Edmiston’s declaration in connection with the Magic-Gulf South-SAB assignment applications that she would “operate the Stations as I may determine in my sole discretion” and “fully compete for every advertising dollar in the Dothan, Alabama, radio market.”¹⁷ Such lack of candor, according to Thomas, calls into question Edmiston’s qualifications to be a Commission licensee and thus her ability to now assign the licenses to Alabama Media.¹⁸ Finally, Thomas argues that the Commission cannot act on the instant Assignment Applications until her challenge to the Magic-Gulf South-SAB assignment applications is resolved.¹⁹

In response, the Joint Opposition contends that Thomas has not provided any facts to substantiate her allegations of anti-competitive behavior on the part of the Holladays.²⁰ It alleges certain facts, such as

¹¹ *David D. Oxenford, Esq. et al*, Letter, DA 12-1714 (MB Oct. 24, 2012).

¹² See File No. BALH-20111220AFW, Exhibit 5.

¹³ Thomas Petition at 5-8.

¹⁴ Thomas Petition at 12-13.

¹⁵ 47 C.F.R. § 1.65.

¹⁶ Thomas Petition at 9-11.

¹⁷ *Id.*; *Applications for Consent to Assignment of Broadcast Station License WBBK-FM, Blakely, Georgia, WKMX(FM), Enterprise, Alabama, WTVY-FM, Dothan, Alabama, WESP(FM), Dothan, Alabama, WDBT(FM), Headland, Alabama, WLDA(FM), Slocomb, Alabama, WJRL-FM, Fort Rucker, Alabama*, Joint Opposition to Petition to Deny or Request for FCC Investigation, filed Apr. 14, 2011 (attachment entitled “Declaration of Georgia Edmiston”).

¹⁸ *Id.* at 9.

¹⁹ *Id.* at 11.

²⁰ Joint Opposition at 6-10.

competing for the same advertisers, to demonstrate competition between Robert and Clay Holladay.²¹ The Joint Opposition also states that the Magic-Gulf South-SAB assignments and the current Assignment Applications should be considered independently.²² Finally, the Joint Opposition argues that the Commission's rule governing disclosure of the LMA and APA is Section 73.3613,²³ which SAB complied with by filing those documents with the Assignment Applications within 30 days after execution.²⁴

Discussion. Section 309(d)(1) of the Communications Act of 1934, as amended, (the "Act") provides a two-step analysis for judging the adequacy of the Thomas Petition.²⁵ We must first determine whether Thomas has made specific allegations of fact that, if true, would demonstrate that grant of the Assignment Applications would be *prima facie* inconsistent with the public interest.²⁶ These specific allegations must be supported by the affidavit of a person with knowledge of the facts alleged, except for those of which we may take official notice.²⁷ If the specific allegations support a *prima facie* case, we next examine and weigh all the evidence presented, to determine whether "a substantial and material question of fact" is presented,²⁸ *i.e.* "whether the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for."²⁹ We must also determine whether grant of the Assignment Applications would serve the public interest.³⁰

We find that Thomas fails to provide the necessary specific allegations of fact required by Section 309(d)(1) of the Act to make a *prima facie* case that grant of the Assignment Applications would be against the public interest. Thomas alleges that the common ownership of stations in the Dothan market by Clay and Robert Holladay would ultimately lead to anti-competitive results—that "the Holladay brothers will not be true competitors in the Dothan market."³¹ Thomas' allegations would be relevant to our evaluation of the Assignment Applications if she presented facts indicating that Clay Holladay is a real party in interest to the transaction or has interests in or involvement with Alabama Media. As discussed below, however, we find that Thomas presents no facts, other than the familial relationship,

²¹ *Id.*

²² Joint Opposition at 5-6.

²³ 47 C.F.R. § 73.3613.

²⁴ Joint Opposition at 3-5.

²⁵ 47 U.S.C. § 309(d)(1).

²⁶ *Id.*; See also *Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985) ("*Citizens for Jazz*").

²⁷ 47 U.S.C. § 309(d)(1).

²⁸ 47 U.S.C. § 309(d)(2).

²⁹ *Citizens for Jazz*, 775 F.2d at 395.

³⁰ 47 U.S.C. § 309(a); See also *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

³¹ Thomas Petition at 5.

showing that Clay Holladay has any attributable interest in the Assignment Applications or would be involved in the operation of the Stations.

Real Party in Interest. Whether familial relationships raise real party in interest issues involves a fact-based evaluation of influence and control.³² The media interests of other family members are not attributed to the applicant when the applicant's disclosures confirm that the broadcast interests involved will be independently owned and operated and are not subject to common influence or control.³³ In deciding attribution issues in the context of close family relationships, we are guided by the seven factors enunciated in the Commission's *Spousal Attribution Policy Statement*.³⁴ The Commission has repeatedly found that a petitioner attempting to raise a real party in interest issue has a heavy burden, because even independent family relationships may have financial or business ties which would be indicia of common ownership or real party in interest status in non-family situations.³⁵

Examining these factors, we find that Thomas' allegations do not raise a *prima facie* case that Clay Holladay is a real party in interest or otherwise has an attributable interest in Alabama Media. She does not present any specific facts that would call into question Robert Holladay's certification in the Assignment Applications that the assignments would not "present an issue under the Commission's policies relating to media interests of immediate family members."³⁶ The Joint Opposition avers that Robert Holladay is an "experienced and independent broadcaster" who, in his capacity as time broker for the Stations, "is competing aggressively with his brother's stations in the Dothan market."³⁷ It states that, since the acquisition of the Stations by SAB, and commencement of the LMA, the number of employees at the Stations has increased from five to 20 and the Stations as a group have increased their weekly live locally-originated programming from five hours to 200 hours. In addition to enhancing the programming, SAB and Alabama Media have changed WECB(FM) to a country format that is in direct competition with Gulf South's stations WDJR(FM) and WTVY-FM.³⁸ Finally, the Joint Opposition states that, as further evidence of its competitive efforts, Alabama Media has pursued a large advertiser that advertised on Gulf South's country stations and "brought them over" to station WECB(FM).³⁹

³² See *Clarification of Commission Policies Regarding Spousal Attribution*, Policy Statement, 7 FCC Rcd 1920, 1922 (1992) ("*Spousal Attribution Policy Statement*").

³³ *Spousal Attribution Policy Statement*, 7 FCC Rcd at 1922-23.

³⁴ The factors are: (1) representations about the independence of family members' media interests; (2) commingling of media business interests; (3) family members' participation in the financial affairs, programming and personnel decisions of each other's media interests; (4) prior broadcasting experience of the individual seeking to establish independent interests; (5) financial independence; (6) sharing of personnel, equipment, contractors or programming information; and (7) involvement by family members in the acquisition or application process. *Id.*

³⁵ *Kern Broadcasting Corporation*, Memorandum Opinion and Order, 10 FCC Rcd 6584, 6585-6586 (1995).

³⁶ See, e.g., File No. BALH-20111220AFW, Question 6.c.1.

³⁷ Joint Opposition at 7.

³⁸ Joint Opposition at 9.

³⁹ *Id.*

Thomas does not allege that Robert and Clay Holladay have commingled ownership or other interests in media businesses, nor does she show evidence of the types of parallel business structures or operations, such as similar articles of incorporation, bylaws, financial structure, policies, programming, and consulting experts, which the Commission has found to raise real party in interest issues in the past.⁴⁰ There are no relevant facts before us to suggest that Clay Holladay will be involved in the financial affairs, programming, or personnel decisions of Alabama Media or the Stations. Thomas has not presented any evidence that Alabama Media is financially dependent or reliant on Clay Holladay for the financing or the acquisition of the Stations. With the exception of one contract engineer, Alabama Media and Gulf South state that they do not share employees, facilities, or services.⁴¹ While we recognize that Clay Holladay was involved in the original purchase of the Stations by SAB, Thomas does not present any evidence that Clay Holladay was involved in the proposed sale to Alabama Media.

Therefore, based on the record before us, we find that Thomas has failed to make a *prima facie* case, or to present a substantial and material question of fact, that Robert Holladay is not acting independently in the proposed acquisition of the Stations. Because there is no familial attribution, and Robert Holladay has no other broadcast interests in the Dothan market, the acquisition of the Stations by Alabama Media does not violate our multiple ownership rules. Should it come to our attention, however, that Gulf South and Alabama Media principals are exercising common influence or control over the operations of these Dothan radio market stations, we are prepared to apply the full weight of available sanctions.⁴²

Local Marketing Agreement. The Commission has consistently held that a licensee's participation in an LMA, also known as a time brokerage agreement (“TBA”), does not, *per se*, constitute an unauthorized transfer of control or a violation of the Act or any Commission rules or policies.⁴³ As with any allegation of unauthorized transfer of control, we look to whether a licensee continues to have ultimate control over the station, including its programming, personnel, and finances.⁴⁴ Licensees are permitted under Section 310(d) of the Act to delegate day-to-day operations relating to those three areas, as long as they continue to set the policies guiding those operations.⁴⁵

The Thomas Petition does not establish a *prima facie* case that SAB has “abdicated the responsibility to make decisions regarding the operation of these stations to Robert Holladay,”⁴⁶ *i.e.*,

⁴⁰ See *North Idaho Broadcasting Company*, Memorandum Opinion and Order, 8 FCC Rcd 1637, 1638 (1993) (holding that the sale of station from father to son was not a violation of cross-ownership rule where the business or financial ties between father and son were insufficient to indicate a “family business operation”).

⁴¹ Joint Opposition at 9-10.

⁴² See *Spousal Attribution Policy Statement*, 7 FCC Rcd at 1923.

⁴³ See, e.g., *Solar Broadcasting Company, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 5467, 5486 (2002) (“Solar Broadcasting”); *WGPR, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 8140, 8141 (1995), *vacated in part on other grounds sub nom. Serafyn v. FCC*, 149 F.3d 1213 (D.C. Cir. 1998); *Roy R. Russo, Esq.*, 5 FCC Rcd 7586 (MMB 1990).

⁴⁴ See, e.g., *Solar Broadcasting*, 17 FCC Rcd at 5486.

⁴⁵ *Id.*

⁴⁶ Thomas Petition at 9-10.

engaged in an unauthorized *de facto* transfer of control of the Stations. Thomas does not provide any specific facts to suggest such control by Robert Holladay other than the existence of the LMA itself. Therefore, we look to the LMA to determine whether its terms impermissibly delegate control from SAB to Alabama Media.

We find that the LMA comports with Commission policy. The LMA states that SAB “will have full authority, power and control over the operation of the Stations and over [its] [e]mployees, as required by FCC rules, regulations and policies; and will bear the responsibility for the Stations’ compliance with all applicable provisions of the rules, regulations and policies of the FCC and all other applicable laws.”⁴⁷ Specifically, the LMA expressly retains SAB’s control over the Stations’ programming, personnel, and finances. For example, SAB retains the right to reject or refuse programs that are contrary to the public interest, violate the rights of third parties, or do not comply with FCC rules.⁴⁸ Under the LMA, SAB can substitute programs that it reasonably and in good faith believes to be of greater local or national importance or better address the problems, needs and interests of the residents of the Stations’ communities of license.⁴⁹ SAB is also responsible for preparing issues/programs lists, meeting public service programming requirements, and maintaining the political and public inspection files and the Stations’ logs.⁵⁰ SAB retains at the Stations at least two full-time employees who act at its direction and are under its control, including a general manager who reports solely to SAB.⁵¹ Finally, SAB is responsible for the “ordinary and necessary costs of operating the Stations,” subject to certain exceptions and reimbursable expenses.⁵²

Because we find that SAB retains the required degree of control over the Stations, neither the execution of the LMA and APA, nor any “understanding” that existed prior to their execution, required modification of Edmiston’s earlier declaration that she would operate the Stations independently and competitively. On the facts presented, we find that Edmiston operated the Stations in accordance with her declaration and her obligations as a licensee. Furthermore, Edmiston’s earlier declaration addressed the issue of whether Clay Holladay exerted impermissible control over SAB or the Stations in the context of the Magic-Gulf South-SAB transaction. It was thus not inconsistent with SAB later entering into an LMA or seeking to sell the Stations to a third party. Finally, the Commission’s rule governing disclosure

⁴⁷ *Local Marketing Agreement* at 4.

⁴⁸ *Local Marketing Agreement* at 4; *See also Local Marketing Agreement* at 7 (“Licensee hereby certifies that it maintains ultimate control over the Stations’ facilities, including specifically control over the Stations’ finances, personnel and programming . . .”).

⁴⁹ *Id.* at 4. SAB also reserves the right to preempt any program in the event of a local, state, or national emergency and to delete any commercial announcements that do not comply with the requirements of the FCC’s sponsorship identification policy. *Id.*

⁵⁰ *Id.* at 6.

⁵¹ *Id.* No SAB employee is permitted under the LMA to have an employment, consulting, or other relationship with Alabama Media. *Id.*

⁵² *Id.* at 5. Thomas does not suggest that SAB does not operate as a standalone entity, *i.e.* maintain its own bank accounts, pay the salaries of its own employees, or take responsibility for its obligations to programmers, utility companies, and other operational matters. *See WGPR, Inc.*, 10 FCC Rcd at 8145.

of the APA and LMA is Section 73.3613, not Section 1.65. We find that the agreements were properly filed pursuant to Section 73.3613 with the Commission within 30 days of their execution.

Conclusion/Actions. We find that Thomas fails to provide the necessary specific allegations of fact to make a *prima facie* case that grant of the Assignment Applications would be inconsistent with the public interest. We further find that Thomas has not raised a substantial and material question of fact warranting further inquiry. SAB is qualified to hold the WLDA(FM), WJRL-FM, WESP(FM), and WECB(FM) station licenses, and grant of the Assignment Applications is consistent with the public interest, convenience, and necessity. Accordingly, IT IS ORDERED, that the Petition to Deny or Request for FCC Investigation filed by Leigh Thomas IS DENIED.

IT IS FURTHER ORDERED, that the applications to assign the licenses of stations WLDA(FM), Slocomb, Alabama (FCC File No. BALH-20111220AFW); WJRL-FM, Fort Rucker, Alabama (FCC File No. BALH-20111220AFX); WESP(FM), Dothan, Alabama (FCC File No. BALH-20111220AFY); and WECB(FM), Headland, Alabama (FCC File No. BALH-20111220AFZ), from Southeast Alabama Broadcasters, LLC to Alabama Media, LLC ARE GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau