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In re: **KTDK(FM), Sanger, TX**
Facility ID No. 26146
File No. BAL-20130701ADA

**Application for Consent to
Assignment of License**

Dear Counsel:

We have before us the above-captioned application (“Assignment Application”) seeking approval for a proposed assignment of license for Station KTDK(FM), Sanger, TX (the “Station”) from Susquehanna Radio Corp., a subsidiary of Cumulus Media, Inc. (“Cumulus”), to Whitley Media LLC (“Whitley”). For the reasons stated below, we dismiss the Assignment Application as inadvertently accepted for filing, pursuant to Section 73.3566(a) of the Commission’s Rules (the “Rules”).¹

Background. The Station is located in the Dallas – Ft. Worth, TX radio market, the fifth-largest radio market in the country.² In that market, a party may own or hold attributable interests in up to eight radio stations, no more than five of which may be in the same service (AM or FM).³ Cumulus, through

¹ 47 C.F.R. § 73.3566(a).

² See Arbitron Radio Market Rankings: Spring 2013.

³ 47 C.F.R. § 73.3555(a)(1) (specifying the ownership/attribution limit for markets with 45 or more full-power, commercial and non-commercial radio stations).

subsidiaries, currently owns five FM stations (including the Station) and three AM stations in the market.⁴ Cumulus describes itself as “America’s second largest operator of radio stations.”⁵

Whitley is wholly owned by William Whitley. Mr. Whitley holds no attributable media interest in the Dallas – Ft. Worth, TX radio market. Mr. Whitley has more than thirty years of experience as a media broker and has completed more than \$300,000,000 in broadcasting transactions in that capacity.⁶ He works in the Dallas office of Media Services Group, a nationally recognized media brokerage firm.⁷

The Assignment Application includes an Amended Asset Purchase Agreement (“APA”) submitted by the parties. The APA, executed on July 10, 2013, contains customary terms and conditions for a station sale. However, the consideration section of the APA reads as follows:

1.4. Consideration. In consideration for the sale of the Station Assets, Buyer shall pay Seller (a) One Hundred Dollars (\$100) in cash at Closing by wire transfer of immediately available funds and (b) all proceeds which Buyer receives from the subsequent sale of the Station Assets, less (i) Fifty Thousand Dollars (\$50,000), (ii) all reasonable expenses incurred by Buyer from the operation of the Station and the ownership and holding of the Station Assets after Closing, if and to the extent that such expenses exceed any income derived from the operation of the Station after Closing, and (iii) all reasonable expenses incurred by Buyer in the marketing and subsequent sale of the Station (collectively, the “Purchase Price”); provided, that Buyer shall use commercially reasonable efforts to sell the Station Assets for the maximum amount of consideration available in the market. Except for the monies specified in subsection (b) [sic]⁸ hereof, the remaining portion of the Purchase Price shall be paid to Seller on the date on which the subsequent sale of the Station Assets is consummated.⁹

⁴ These are: WBAP(AM), Fort Worth, TX (Fac. ID No. 71200); WBAP-FM, Flower Mound, TX (Fac. ID No. 26468); KSCS(FM), Fort Worth, TX (Fac. ID No. 71201); KLIF(AM), Dallas, TX (Fac. ID No. 35061); KPLX(FM), Fort Worth, TX (Fac. ID No. 54675); KLIF-FM, Haltom, TX (Fac. ID No. 27299); KTCK(AM), Dallas, TX (Fac. ID No. 8773); and the Station.

⁵ See www.cumulus.com.

⁶ See mediaservicesgroup.com/location.cfm?id=2.

⁷ See mediaservicesgroup.com/index.cfm?pg=loc. That page, titled “Relationships Matter,” leads with the following paragraph:

At Media Services Group, our directors have spent decades developing strong relationships with clients and customers. They work with us because we are trustworthy and reliable. We get the job done with integrity.

⁸ This appears to be a typographical error in which “b” appears instead of “a.” The intent of the parties appears to be that the \$100 will be payable to Cumulus at the closing between Cumulus and Whitley and the balance of the Purchase Price will be payable to Cumulus at the closing between Whitley and the future buyer of the Station.

⁹ See Assignment Application, Exhibit 5 and Attachment 5 (emphasis in original).

Discussion. Section 310(d) of the Communications Act of 1934, as amended (the “Act”) requires Commission review and approval of any assignment of a broadcast station license.¹⁰ In assessing transactions, Commission precedent holds that “we must examine the economic realities of the transactions under review and not simply the labels attached by the parties.”¹¹ A review of Commission case law, as set forth below, shows that the Commission and its staff have done so in a variety of circumstances, focusing on risk of loss and potential for profits as key indicia of ownership and control of a broadcast station.

In a transaction involving a time brokerage arrangement that was found to violate the Commission’s policy on licensee control of broadcast stations, the Mass Media Bureau examined the financial relationships among the licensee (“King”), the time broker (“Coleman”) and another licensee in the market (“KSRM”) and concluded that “the time brokerage, and indeed the assumption of control of the stations from King, were essentially a joint venture between Coleman and [KSRM].”¹² The Bureau emphasized that Coleman and KSRM, rather than the licensee, shared the risk of loss and potential for profit from the operation of the stations.¹³ The Bureau found the facts similar to a prior case in which a time brokerage payment of a mere \$20 a month to the permittee was found to be significant evidence of abdication of financial control of a radio station in Salem, West Virginia.¹⁴

Similarly, a Commission-level decision rejected a misleading, self-serving characterization of a stock transfer by a radio licensee based on an analysis of the financial terms.¹⁵ The parties to a purchase of radio stations from a receiver obtained Commission approval for the purchase based on a representation that Robert Melton, a proposed 50% owner, would not be a stockholder in the licensee and would not be a manager of the stations. Subsequently, the licensee notified the Commission that it

¹⁰ 47 U.S.C. § 310(d).

¹¹ *Fox Television Stations, Inc.*, Second Memorandum Opinion and Order, 11 FCC Rcd 5714, 5719 (1995) (finding that a \$1.4 billion intracorporate loan is actually equity rather than debt for purposes of Section 310(b) of the Act).

¹² *See King Broadcasters, Inc.*, Notice of Apparent Liability, 13 FCC Rcd 25317, 25337 (MMB 1998), Forfeiture Order, 14 FCC Rcd 6393 (MB 1999). Coleman had entered into agreements to purchase King’s stations and to program those stations, subject to a monthly offset that would reduce the purchase price by an amount equal to the monthly time brokerage payments that Coleman made to King. The FM station had not been built yet, and Coleman assumed responsibility to constructing that station. *Id.* at 25318-19. Coleman subsequently reached an agreement with KSRM, which operated other stations in the market, for KSRM to assume Coleman’s rights under the time brokerage agreement. *Id.* at 25323. From that point forward, KSRM received the advertising income from the King stations while Coleman continued to receive the benefit of the purchase price offset. *Id.* at 25337. In addition, Coleman and KSRM had entered into an option agreement that provided for the parties to share the proceeds of a sale of King’s stations to a third party. *Id.* The Bureau rejected the argument by Coleman and KSRM that the arrangements were merely a time brokerage agreement by Coleman and a joint sales agreement by KSRM, permitted under the Rules at that time. The Bureau concluded: “These financial terms are indicative of a joint venture in the construction, operation, and acquisition of [the King stations].” *Id.*

¹³ *Id.*, 13 FCC Rcd at 25337.

¹⁴ *Id.*, 13 FCC Rcd at 25333 (citing *Salem Broadcasting, Inc.*, Notice of Apparent Liability, 6 FCC Rcd 4172 (MMB 1991). *See also* *KHNL/KGMB License Subsidiary LLC*, Memorandum Opinion and Order and Notice of Apparent Liability, 26 FCC Rcd 16087, 16093 (MB 2011), and *Shareholders of Ackerley Group, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 10828, 10841 (2002) (a licensee must retain the economic incentive to control programming aired over its station).

¹⁵ *Tri-State Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 2604 (1991).

considered Melton to have been rehabilitated and that he would acquire a 49% interest in the licensee and become a manager. The Commission found:

Additionally, the record indicates that Melton's 1978 "reinstatement" and supposed purchase of a 49% stock interest was also misleading. . . . The evidence shows that the transaction was not, as Tri-State originally represented, a straightforward sale at "book value" or at any rationally chosen sales price. . . . The price chosen, \$114,556, was arbitrary and had no relation to the station's market value. . . . (Two years later the stations were listed with a broker for \$6 – 7.5 million. *Id.*) The record indicates that Melton's salary was increased to cover his payments for the 49 percent interest and, in any event, Melton did not make all of the specified payments.¹⁶

In the present case, we find that the parties' characterization of the transaction is untenable.¹⁷ Although the APA presents the transaction as a "sale" of the Station's assets, in reality the transaction is a brokerage agreement in which Whitley is tasked with finding a buyer for the Station and is to be compensated for doing so by the payment of a \$50,000 flat fee when that transaction closes.

We recognize, of course, that the Cumulus – Whitley transaction differs from a typical brokerage agreement in that the Station would be "parked" with Whitley temporarily, to give Cumulus the flexibility to acquire an attributable interest in another FM station in the Dallas – Ft. Worth radio market. However, the economics of the transaction clearly indicate that the assignment of the Station's license and the conveyance of legal title for the Station's remaining assets to Whitley would not be a true sale.¹⁸ The \$100 payment from Whitley to Cumulus for the Station is a nominal amount that bears no relationship to the Station's actual market value.¹⁹ The APA itself makes the substance of the transaction clear by requiring Whitley to (a) "use commercially reasonable efforts to sell the Station Assets for the maximum amount of consideration available in the market," and (b) remit to Cumulus the full proceeds of the sale of the Station to a third party, minus Whitley's expenses and minus a \$50,000 brokerage fee. Clearly, Cumulus is relying on Whitley's expertise as a broker and promising to compensate him for brokerage services, while entrusting him to hold the Station's FCC license and legal title to the Station's other assets temporarily for purposes of offloading the Station from Cumulus's portfolio of five attributable FM stations in the market.²⁰

¹⁶ *Id.*, 6 FCC Rcd at 2605.

¹⁷ In *Tri-State*, the facts were developed through a hearing and Tri-State was disqualified for misrepresentations in its communications to the Commission over a period of several years. In the present case, there is no need for a hearing because there is no substantial and material question of fact under Section 309(e) of the Act – the facts are apparent from the Assignment Application itself.

¹⁸ The Commission's case law assessing risk of loss in the analysis of broadcast transactions is consistent with precedent analyzing "true sales" of indebtedness under Article 9 of the Uniform Commercial Code. *See, e.g., Major's Furniture Mart, Inc. v. Castle Credit Corp.*, 602 F.2d 538 (3d Cir. 1979) (courts will not be controlled by the nomenclature the parties apply to their relationship; the agreement to "sell" accounts receivable was a secured loan, and not a true sale, because the assignor retained all conceivable risks of uncollectibility of the accounts).

¹⁹ From 2010 to the present, the other single-station commercial radio transactions in this market involved an average sale price exceeding \$2.2 million.

²⁰ *See* notes 6 and 7 and associated text *supra*.

The APA, by providing for Whitley to be reimbursed out of the sale proceeds for any losses and expenses he incurs in operating the Station, makes it clear that all of the economic risk of operating the Station would remain with Cumulus. Likewise, because Whitley is required to remit to Cumulus all of the proceeds from the sale of the Station, less his expenses and his brokerage fee, Cumulus would retain all of the risk of loss and potential for profit from the sale of the Station to a third party. Whitley will receive his brokerage fee and no more, whether the Station is sold for \$1 million or \$10 million. Given these “economic realities,” we conclude that the agreement between Cumulus and Whitley cannot be reasonably characterized as a proposed \$100 sale of the Station to Whitley and that Cumulus would remain the owner of the Station.

Conclusion/Actions. Based on the above, we find that the Assignment Application is patently defective and must be dismissed as inadvertently accepted for filing. Accordingly, IT IS ORDERED, That the application for approval to assign the license for Station KTDK(FM), Sanger, Texas (File No. BALH-20130701ADA) IS DISMISSED as inadvertently accepted for filing, pursuant to 47 C.F.R. § 73.3566(a).

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau