Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of	)	
	)	
Hispanic Broadcast System, Inc.	)	
	)	File Nos. BMPED-970124JG and
For an Extension and License to Cover the	)	BLED-970414KA
Construction Permit of WLAZ(FM),	)	
Clermont, Florida and	)	
	)	
For a License to Cover the Construction	)	File No. BLED-9980401KA
Permit of WWKQ(FM), Kissimmee, Florida	)	

MEMORANDUM OPINION AND ORDER

Adopted: March 23, 2001 **Released: April 2, 2001**

By the Commission:

1. The Commission has before it an Application for Review and a related Petition for Reconsideration from Florida Broadcasters ("Florida"). Florida argues that the staff erred in finding another broadcaster, Hispanic Broadcast System, Inc. ("HBS"), qualified to operate two new noncommercial educational ("NCE") stations, WLAZ(FM), Clermont and WWKQ(FM), Kissimmee, Florida.[1] At the staff level, Florida alleged that HBS made misrepresentations in applications to extend the period allowed for construction and violated our rules by airing underwriting announcements that are not of the limited type permitted on noncommercial educational stations. Although the staff found that HBS's extension applications were moot and therefore dismissed Florida's objections to those applications,[2] the staff nevertheless considered Florida's allegations of misrepresentations and rule violations and found that they did not warrant designation for hearing on the question of whether HBS is qualified to be a Commission licensee. Florida seeks reversal of this decision.[3] For the reasons discussed below, we deny

[1] Florida is the licensee of stations WONQ(AM) Oviedo and WRMQ(AM), Orlando, Florida. It states that HBS's new stations will compete with its existing stations for Spanish-speaking audiences. Specifically, before us for review in this consolidated decision are: 1) Florida's April 5, 2000, Application for Review, of a February 29, 2000, letter ruling, regarding station WLAZ(FM), Clermont, Florida. *Letter to James L. Oyster, Esq. and Roy F. Perkins, Esq.*, Ref. No. 1800B3-IB/HM (Audio Services Division, February 29, 2000) ("Clermont letter ruling") and 2) Florida's March 16, 2000 Petition for Reconsideration of a February 10, 2000, letter ruling, regarding station WWKQ(FM), Kissimmee, Florida. *Letter to Roy F. Perkins, Esq. and James L. Oyster, Esq.*, Ref. No. 1800B3-IB/HM (Audio Services Division, February 10, 2000) ("Kissimmee letter ruling"), and 3) responsive pleadings.

[2] The Commission's "streamlining order" gave all broadcast permittees with valid authorizations or extensions on the effective date of the order additional time to construct. *See 1998 Biennial Regulatory Review - Streamlining of Mass Media Applications, Rules, and Processes, Report and Order*, MM Docket No. 98-43, 13 FCC Rcd 23056 (1998); *Memorandum Opinion and Order*, 14 FCC Rcd 17525 (1999).

the Application for Review and the Petition for Reconsideration.

Allegations of Misrepresentation

2. In its pleadings before the staff, Florida raised four allegations of misrepresentation, all of which concerned the truthfulness of statements that HBS made in extension applications about problems HBS was having at WWKQ's authorized antenna site and its attempts to find a new site.[4] The staff issued decisions in summary form which included brief statements indicating that it had considered HBS's allegations of misrepresentation but found them to be too speculative to demonstrate any intent to deceive and therefore insufficient to raise a substantial and material question of fact as to HBS's qualifications to be a Commission licensee. On reconsideration, in addressing Florida's allegation that it did not adequately consider the facts, the staff indicated that it was not required under case law to engage in an exhaustive discussion of the facts, provided that it considered the record then before it. The staff also rejected Florida's suggestion that it should infer an intent to deceive.

3. In the subject pleadings, Florida repeats the same argument about the inadequacy of the staff's discussion of the facts and challenges the staff's reliance on *Wendell & Associates*, 14 FCC Rcd 1671 (1998) *aff'd sub nom. Long Island Multimedia v. FCC*, No. 99-1027 (D.C. Cir. 1999), for the proposition that disposition without lengthy discussion is acceptable. Additionally, Florida reiterates its argument that direct evidence of an intent to deceive is not necessary to support allegations of misrepresentation. Florida now relies on *Weyburn Broadcasting L.P. v. FCC*, 984 F.2d 1220 (D.C. Cir. 1993), for the proposition that intent can be raised by inferences from the allegations of facts presented.

4. Initially, we note that under *Wendell*, all that is required when we dispose of arguments raised in an informal objection, the type of pleading at issue here, is a clear indication that the pleadings were considered. *See Wendell*, 14 FCC Rcd at 1679. The letter rulings at issue were clearly adequate under this standard.

5. In any event, Florida's allegations -- even if not discussed in depth -- were correctly resolved by the staff. Florida alleged that HBS falsely stated in its construction permit extension requests: (1) that construction for WWKQ could not commence due to HBS's inability to secure a satisfactory lease; (2) that an alternative antenna site was technically feasible under Commission rules; (3) that it had signed a tower lease with "the owner;" and (4) that difficulties remained and an extension was necessary because there was a dispute over the exact location of the antenna on the tower. In each case, as the staff concluded, HBS satisfactorily addressed the allegation. Specifically, regarding the first two allegations,[5] HBS

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[3] Florida states that it also seeks Commission review of the staff's denial of its informal objection to WLAZ's license application. However, it makes no substantive arguments on this issue, and the record indicates that, with one exception, HBS previously resolved all questions related to that application. See Clermont Letter Ruling at page 3. The last remaining problem has now been resolved through the submission of an engineering exhibit containing tower coordinates and we grant that application infra.

[4] Although the alleged misrepresentations involve WWKQ's antenna site, Florida initially raised the allegations in its informal objection to an extension of the construction permit of HBS's other station -- WLAZ, Clermont -- and then incorporated these allegations by reference in its subsequent pleadings filed against WLAZ and WWKQ.

[5] These allegations were in any event untimely. They pertained to HBS's 1994 application for a first extension of the WWKQ construction permit but were not raised until nearly a year after the application was granted.

explained that the lease was unsatisfactory because the contract costs were excessive by industry standards, and that its engineers believed an alternative site using a non-directional antenna could be feasible but would require a specific antenna design, power reduction or the use of filters. They ultimately recommended remaining at the present site. With regard to the third allegation, HBS explained that its statement that it "signed a tower lease with the tower owner" referred to a new owner. Therefore Florida's arguments, which assumed that the claimed agreement was with the former owner, were based on a faulty premise. With regard to the fourth allegation, HBS explained that, though correspondence from the owner indicates that it was in fact willing to lease space to HBS on top of the tower, that correspondence did not present the entire "picture" and therefore Florida's reliance on it for the proposition that HBS *could* have constructed when it did not was flawed. Specifically, HBS explains that the owner's willingness to lease space to HBS on top of the tower was contingent upon his ability to obtain all necessary approvals to increase the height of the tower and thus avoid overloading. According to HBS, the overloading problem was ultimately resolved only when the tower owner obtained permits to build an adjacent tower and planned to relocate some of the antennas to the new tower. In short, Florida has not raised a substantial and material question of fact regarding the accuracy of HBS's statements.

6. Furthermore, intent to deceive the Commission is a necessary element of a *prima facie* case of misrepresentation. *See Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983). Even if HBS's statements were inaccurate, which Florida has not shown, the staff correctly declined to infer an intent to deceive merely because HBS submitted the statements in several applications on which it wanted favorable action and therefore had a "motive." Were the Commission to infer an intent to deceive on such a basis, applicants would have to defend themselves in costly hearings, any time someone made allegations concerning representations in applications, no matter how unsupported or speculative the allegations might be.[6]

Alleged Broadcasts of Prohibited Promotional Announcements

7. Our rules prohibit noncommercial educational stations from broadcasting announcements that promote the sale of goods and services of for-profit entities in exchange for consideration paid to the station. Those who contribute funds to a noncommercial station may receive on-air acknowledgements for identification purposes only. *See* 47 U.S.C. § 399B; 47 C.F.R. § 73.503(d). Florida alleged that HBS broadcast 173 prohibited announcements on NCE station WLAZ during its start up period of program tests, while its application to be licensed was pending. Florida provided the staff with transcripts of the announcements, translated from Spanish to English, with HBS challenging the accuracy of some of the translations. HBS, while professing a belief that all of its announcements fall within permissible underwriter acknowledgements, expressed a desire to make any corrections that may be necessary, and asked for Commission advice. Upon review of the transcripts, the staff determined that in some of the alleged instances HBS exceeded the limits on permissible donor and underwriter acknowledgments. *See Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations, First Report and Order and Notice of Proposed Rule Making*, 69 FCC 2d 200 (1978); *Second Report and*

[6] The *Weyburn* case on which Florida relies for the proposition that the Commission should infer intent here is inapposite. That case presented the question of whether to add a misrepresentation issue to a case already in hearing, when a document in the hearing record was indisputably incorrect on its face and the applicant's three conflicting explanations for this occurrence could not be reconciled. The court found that, under such circumstances, the question of intent should have been addressed in the ongoing hearing. Unlike *Weyburn*, the objector here seeks to designate an applicant for hearing in the first instance. Thus, the question is whether a hearing is necessary at all, when there are no undisputed falsehoods and when HBS's responses consistently explain each disputed statement.

Order, 86 FCC 2d 141 (1981); *Memorandum Opinion and Order*, 90 FCC 2d 895 (1982), *on reconsideration*, 97 FCC 2d 255 (1984); *see also Public Notice, "In the Matter of the Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations,"* 7 FCC Rcd 827 (1986). The staff determined that such violations, which consisted of relatively brief donor acknowledgements that contained some qualitative descriptions of donors, were not of sufficient magnitude to warrant adverse action, but must be corrected. The staff thus cautioned HBS to take steps to ensure that all future announcements are consistent with Commission policy, and to make reasonable good faith judgments as to whether future announcements identify rather than promote. *See Xavier University*, 5 FCC Rcd 4920 (1990).

8. In the subject petition for reconsideration, Florida argues that the staff erred because, again, it did not adequately consider or discuss the factual allegations. Further, Florida argues that the staff's caution to HBS was inadequate in light of the allegedly large number of such announcements. Florida argues that WLAZ's program test authority should have been revoked and the license application designated for hearing for broadcasting advertisements.

9. The staff was not required to address each alleged announcement individually; it was adequate that it gave an example of a violation it considered representative. *See Wendell*, 14 FCC Rcd at 1679. Further, we agree that the staff's caution of the applicant was sufficient, especially given that this was a new NCE broadcaster in its program test period, which expressed a desire to correct any errors resulting from its misinterpretation of our rules. *Compare Window to the World Communications, Inc.*, 12 FCC Rcd 20,239 (MMB 1997) (forfeiture imposed for repetitive promotional announcements on a NCE station, where licensee previously cautioned to take greater care to avoid such broadcasts). Even when a violation is found for which sanction is warranted, the sanction generally falls short of a denial of license. Furthermore, we note that we have received no complaints from petitioner or anybody else concerning alleged violations of underwriter rules subsequent to September 28, 1998, the last date for which petitioner submitted a transcript.

10. Accordingly, IT IS ORDERED that the Application for Review and the Petition for Reconsideration filed by Florida Broadcasters, ARE HEREBY DENIED. IT IS FURTHER ORDERED that the license application for station WLAZ(FM), Clermont, Florida, (file no. BLED-19970414KA), IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Sales
Secretary