

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

In re Application of)	
)	
Western New York Public Broadcasting Association)	File No. BALCT-20001122AAU
)	Facility ID No. 71905
)	
Application For Assignment of License of)	
WNLO(TV), Channel 23)	
Buffalo, New York)	

MEMORANDUM OPINION AND ORDER

Adopted: January 29, 2003

Released: February 6, 2003

By the Commission:

1. Before us for consideration is the Application for Review filed by the Coalition for Noncommercial Broadcasting (Coalition), seeking review of a decision by the Chief of the Television Branch of the former Mass Media Bureau (MMB Decision) denying the Coalition's petition to deny the application for assignment of license of WNLO(TV) (formerly WNEQ-TV), Channel 23, Buffalo, New York, from Western New York Public Broadcasting Association (WNPBA) to WIVB Broadcasting, LLC (WIVB). WNPBA and WIVB oppose the Application for Review. For the reasons set forth below, we deny the Coalition's Application for Review.

I. Background

2. WNPBA was the licensee of two Buffalo, New York television stations - WNED-TV which operates on unreserved Channel 17 and WNLO(TV) which operated on reserved Channel *23. While Channel 17 was not a reserved channel, WNPBA nevertheless operated WNED-TV as a noncommercial educational station beginning in 1987. In July 1998, WNPBA filed a Petition for Rulemaking seeking to change the reserved channel in Buffalo from Channel *23 to Channel *17. WNPBA explained that WNLO(TV), Channel *23 was "an expensive and unproductive enterprise" that "drained funds and resources from" WNED-TV, Channel 17.¹ WNPBA stated that it wished to switch the channel reservation of its two stations so it could sell WNLO(TV) to a commercial broadcaster. WNPBA argued that the proposed change to the Table of Allotments would produce improved noncommercial television service in Buffalo as it would use the funds from the sale of the station to create an endowment fund for WNED-TV which would continue to operate as a noncommercial station. WNPBA also noted that the

¹ WNPBA's Petition for Rulemaking at 5.

proceeds from the sale would help defray the costs of the WNED-TV's conversion to digital broadcasting service (DTV).

3. The Coalition filed comments in the rulemaking proceeding opposing WNPBA's proposal. The Coalition also submitted a counterproposal suggesting that the Commission reserve both Channels 17 and 23 for noncommercial use. The Coalition also requested that the Commission reserve all other unreserved channels that were being used by public television stations.

4. On July 23, 1999, the Bureau issued an order granting WNPBA's petition for rulemaking to amend the Television Table of Allotments to change the reserved channel in Buffalo from Channel 23* to Channel 17*.² The Bureau determined that the proposed change of reservation would lead to enhanced noncommercial service in Buffalo and facilitate WNED-TV's conversion to DTV. The Bureau found further that the proposal would not result in the elimination of any noncommercial channel reservations in Buffalo, but would merely change the reservation for noncommercial use from one UHF channel to another. The Bureau concluded that it was permitted under Commission rules and policy to implement the proposed amendments without soliciting competing expressions of interest for dereserved Channel 23. The Bureau dismissed the Coalition's counterproposal as not "appropriately filed" because it was not mutually exclusive with WNPBA's proposal.

5. The Coalition filed an Application for Review of the *R&O*. In its Application for Review, the Coalition argued that: (1) the Bureau failed to consider its counterproposal to reserve a second noncommercial channel in Buffalo; (2) the Commission should have reserved all unreserved channels now occupied by noncommercial stations; and (3) WNPBA did not make a sufficiently strong case for approval of its proposal. In April 2000, the Commission denied the Coalition's Application for Review.³ The Commission concluded that the Bureau had properly rejected the Coalition's counterproposal, finding that a third party may not petition for a change in another station's authorization particularly if the licensee has disavowed an interest in the particular proposed change. The Commission also agreed with the Bureau's finding that the WNPBA's proposal and the Coalition's counterproposal were not mutually exclusive because there was no short-spacing between the two proposals. The Commission also affirmed the Bureau's dismissal of the Coalition's counterproposal to reserve all unreserved channels being used by noncommercial stations, stating that such a proposal would be an appropriate subject for a general rulemaking, but should not be considered in an adjudicatory proceeding. Finally, the Commission rejected the Coalition's attempt to analogize this case to a case involving two

² See In the Matter of Revision of the Television Table of Allotments (Buffalo, New York), *Report and Order*, 14 FCC Rcd 11856 (MMB 1999) (*R&O*).

³ See In the Matter of Revision of the Television Table of Allotments (Buffalo, New York), *Report and Order*, 16 FCC Rcd 4013 (2000) (*MO&O*).

noncommercial stations in Pittsburgh.⁴ In that case, the Commission considered whether to dereserve a channel to allow a noncommercial licensee to sell the station and help finance its other reserved channel noncommercial station. The Commission found that the proposal it rejected in that case would have caused a loss of a reserved channel in that community, unlike this case which involves no loss of a reserved channel.

6. On June 1, 2001, the United States Court of Appeals for the District of Columbia Circuit issued its decision affirming the Commission's *MO&O*.⁵ The Court found that "[T]he Commission's dismissal of these two counterproposals was reasonable and adequately explained."⁶

7. While the court proceeding was pending, WNPBA filed application to assign the now non-reserved Channel 23 in Buffalo to WIVB. The Coalition filed a petition to deny the application, rehashing the same arguments that had been raised in the rulemaking proceeding and rejected. The Bureau reviewed the Coalition's arguments and in the MMB Decision denied the petition to deny and granted the assignment application. The parties subsequently consummated the sale of now WNLO(TV) to WIVB.

II. Discussion

8. Under the Communications Act, the Commission is required to hold an evidentiary hearing on transfer of control applications in certain circumstances.⁷ Parties challenging an application to assign an license by means of a petition to deny under Section 309(d) of the Communications Act must satisfy a two-step test.⁸ First, the petition to deny must set forth "specific allegations of fact sufficient to show that . . . a grant of the application would be *prima facie* inconsistent with [the public interest]."⁹ Second, the petition must present a "substantial and material question of fact."¹⁰ If the Commission concludes that the protesting party has met both prongs of the test, or if it cannot, for any reason, find that grant of the application would be

⁴ See Deletion of Noncommercial Reservation of Channel *16, Pittsburgh, Pennsylvania, *Memorandum Opinion and Order*, 11 FCC Rcd 11700 (1996) (*Pittsburgh MO&O*).

⁵ See *Coalition for Noncommercial Media v. FCC*, 249 F.3d 1005 (D.C. Cir. 2001).

⁶ See *Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁷ See 47 U.S.C. § 309.

⁸ 47 U.S.C. § 309(d).

⁹ 47 U.S.C. § 309(d)(1); *Gencom Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987)(*Gencom*); and *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1562 (D.C. Cir. 1988)(*Astroline*).

¹⁰ 47 U.S.C. § 309(d)(2); *Gencom*, 832 F.2d at 181; and *Astroline*, 857 F.2d at 1562.

consistent with the public interest the Commission must formally designate the application for a hearing in accordance with Section 309(e) of the Communications Act.¹¹

9. To satisfy the first prong of the test, a petitioning party must set forth allegations, supported by affidavit, that constitute "specific evidentiary facts, not ultimate conclusionary facts or mere general allegations"¹² The Commission determines whether a petitioner has met this threshold inquiry in a manner similar to a trial judge's consideration of a motion for directed verdict: "if all the supporting facts alleged in the affidavits were true, could a reasonable fact finder conclude that the ultimate fact in dispute had been established."¹³

10. If the Commission determines that a petitioner has satisfied the threshold standard of alleging a *prima facie* inconsistency with the public interest, it must then proceed to the second phase of the inquiry and determine whether, "on the basis of the application, the pleadings filed, or other matters which [the Commission] may officially notice," the petitioner has presented a "substantial and material question of fact."¹⁴ If the Commission concludes that the "totality of the evidence arouses a sufficient doubt" as to whether grant of the application would serve the public interest, the Commission must designate the application for hearing pursuant to section 309(e).¹⁵

11. We find that the Bureau correctly concluded that the Coalition had failed to either set forth specific allegations of fact sufficient to show that grant of the above-captioned application would be *prima facie* inconsistent with the public interest or to raise a substantial and material question of fact concerning the WNLO(TV) assignment application. In its petition to deny, the Coalition again rehashed the same arguments raised and rejected by the Bureau in the previous rulemaking proceeding. That decision was affirmed by the Commission and by the Court of Appeals. The Bureau was correct in rejecting the Coalition's improper attempt to raise them in the context of this proceeding, where the sole issue was the assignment of WNLO(TV) to a new licensee. The arguments raised by the Coalition were ones that are more properly the subject of a rulemaking proceeding and had nothing to do with the qualifications of WIVB to be the licensee of WNLO(TV). The Coalition had a full opportunity to raise those issues in the prior rulemaking proceeding, and they were correctly rejected by the Bureau, the Commission and subsequently the Court. There was no reason to review those arguments again in this proceeding. Nevertheless, the Coalition chose to improperly raise them again and the Bureau correctly rejected them.

¹¹ 47 U.S.C. § 309(e).

¹² *United States v. FCC*, 652 F.2d 72, 89 (D.C. Cir.1980) (*en banc*) (quoting *Columbus Broadcasting Coalition v. FCC*, 505 F.2d 320, 323-24 (D.C. Circuit 1974)).

¹³ *Gencom*, 832 F.2d at 181.

¹⁴ 47 U.S.C. § 309(d)(2); *see also Gencom*, 832 F.2d at 181.

¹⁵ *Serafyn v. FCC*, 149 F.3d 1213, 1216 (D.C. Cir. 1998) (quoting *Citizens for Jazz on WRVR Inc. v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985)).

12. Subsequent to filing its petition to deny, the Coalition filed a motion for injunctive relief seeking to prevent the initiation of a Local Marketing Agreement (LMA) executed by WNPBA and WIVB. The LMA permitted WIVB to broker time on WNLO(TV), while review of the sale of the station was ongoing at the Commission. Having granted the assignment of the station and rejected the Coalition's petition to deny, the Bureau dismissed as moot the Coalition's motion for injunction. The use of an LMA is a common practice in the broadcasting business and the mere execution of such an agreement does not constitute an unauthorized transfer of control. The Coalition offered no other evidence to support its allegation that an unauthorized transfer of control had or could occur and the Bureau correctly dismissed its request for injunction. We see no reason to revisit the issues advanced by the Coalition and we affirm the Bureau's decisions.

13. ACCORDINGLY, IT IS ORDERED, That the Application for Review filed by the Coalition for Noncommercial Broadcasting IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary