

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

| | | |
|---|---|--------------------------|
| In of the Matter of |) | |
| |) | |
| Florida SportsTalk, LLC (Assignor) |) | |
| And |) | |
| Hitmaker Music Group, LLC (Assignee) |) | |
| |) | |
| Applications for Consent to Assignment of |) | |
| Licenses of |) | |
| |) | File No. BAL-20200828AAJ |
| Station WGGG(AM), |) | Facility ID No. 72101 |
| Gainesville, FL, |) | |
| |) | File No. BAL-20200828AAK |
| Station WMOP(AM), |) | Facility ID No. 73278 |
| Ocala, FL, and |) | |
| |) | File No. BAL-20200828AAL |
| FM Translator Station W221DX, |) | Facility ID No. 147176 |
| Gainesville, FL |) | |

MEMORANDUM OPINION AND ORDER

Adopted: March 23, 2022

Released: March 23, 2022

By the Commission:

I. INTRODUCTION

1. We have before us an Application for Review (AFR) filed by UOBN Broadcasting Network, LLC (UOBN) on February 26, 2021, and a responsive pleading.¹ UOBN requests review of a January 26, 2021, Media Bureau (Bureau) staff decision that granted an application (Application) to assign the licenses of Station WGGG(AM), Gainesville, Florida, WMOP(AM), Ocala, Florida, and FM Translator Station W221DX, Gainesville, Florida (collectively, Stations), from Florida SportsTalk, LLC (SportsTalk) to Hitmaker Music Group, LLC (Hitmaker), and denied UOBN’s Informal Objection (Objection) to the assignment.² We find no error in the *Staff Letter* and, for the reasons set forth below, we dismiss, and on alternative and independent grounds, deny the AFR.

II. BACKGROUND

2. This case stems from a contractual dispute between UOBN and SportsTalk concerning the sale of the Stations. In its Objection to the Application, UOBN asked the Bureau to dismiss SportsTalk’s application for permission to assign the licenses of the Stations to Hitmaker. UOBN claimed it had entered into a local marketing agreement (LMA) with SportsTalk which provided UOBN with brokered time on the Stations, as well as the option to buy the Stations. UOBN further maintained

¹ Application for Review by the Full Commission En Banc, File No. BAL-20200828AAJ (filed Feb. 26, 2021) (AFR). SportsTalk filed a pleading styled as a Response to the AFR, which we will treat as an opposition. Response to Application for Full Commission Review, BAL-20200828AAJ (filed Mar. 11, 2021) (AFR Response).

² Letter from Albert Shuldiner, Chief, Audio Division, Media Bureau, FCC to Florida SportsTalk, LLC (Jan. 26, 2021) (on file in File No. BAL-20200828AAJ) (*Staff Letter*). The Bureau initially released the *Staff Letter* on January 15, 2021. The Bureau rescinded the *Staff Letter* on January 19, 2021, due to SportsTalk’s delinquent regulatory fees, and later reissued it on January 26, 2021, upon payment of said fees.

SportsTalk engaged in racial discrimination against UOBN by selling the Stations to Hitmaker instead of UOBN. It did not challenge Hitmaker's qualifications to become the licensee of the Stations. In its Opposition to the Objection, SportsTalk asserted that although the parties had exchanged proposals concerning a possible LMA and sale of the Stations, there was no executed contract between SportsTalk and UOBN. SportsTalk went on to explain that its decision to sell the Stations to Hitmaker was a business decision based on financial need and that UOBN failed to pursue discussions about entering into an agreement to broker and acquire the Stations.³ In its Reply, UOBN reiterated its claims.⁴

3. The *Staff Letter* denied UOBN's Objection and granted the assignment application, finding that UOBN had failed to provide sufficient justification to deny or defer consideration of the assignment application.⁵ Specifically, the *Staff Letter* found that (1) the matter is rooted in a private contractual dispute that falls within the purview of a court of competent jurisdiction and not the Commission and (2) UOBN's claim of racial discrimination is unsupported.⁶

4. In its AFR, UOBN bases its claim on "U.S. civil rights laws that prohibit business practices involving disparate treatment of those persons belonging to protected classes under Title VII of the equal employment laws."⁷ UOBN's primary contention is that the Bureau failed to conduct an inquiry into whether SportsTalk's actions had such a disparate impact on UOBN.⁸ UOBN also maintains that the *Staff Letter* is inconsistent with *Metro Broadcasting*, *Adarand*, and *Lutheran Church*.⁹ UOBN argues that, pursuant to *Metro Broadcasting*, the FCC has a "compelling interest in promoting diversity in the broadcasting industry."¹⁰ UOBN states that while *Adarand* and *Lutheran Church* "overturned the analysis upheld in *Metro Broadcasting*" and employed a strict scrutiny standard for race-based regulations, *Adarand* and *Lutheran Church* did not overturn *Metro Broadcasting*'s "recognition of a government interest in 'diverse' programming."¹¹ UOBN argues that these cases do not "preclude the FCC from promoting diversity of broadcasting or diversity of ownership"¹² nor do they "preclude the FCC from promoting policies that favor diversity."¹³ UOBN similarly contends that section 309 of the Communications Act of 1934, as amended (Act), permits the Bureau to "give preferences to applicants where the granting of a license would result in media diversification."¹⁴ Accordingly, UOBN states that the *Staff Letter* was decided "arbitrarily and in a biased manner."¹⁵

³ Opposition, File No. BAL-20200828AAJ (filed Oct. 14, 2020).

⁴ Reply, File No. BAL-20200828AAJ (filed Oct. 27, 2020).

⁵ *Staff Letter* at 3-5 (explaining that UOBN failed to make a *prima facie* case that the transaction is tainted by discrimination, thus finding that the case involves a private controversy rather than a public interest matter).

⁶ *Id.* at 4.

⁷ AFR at 3.

⁸ AFR at 3. UOBN asserts that, even absent any discriminatory intent, SportsTalk's business practices are illegal under Title VII based upon a disparate impact standard.

⁹ *Id.* at 4-5 (citing *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (*Metro Broadcasting*), *overruled in part by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (*Adarand*); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998) (*Lutheran Church*)).

¹⁰ *Id.* at 5.

¹¹ *Id.* at 4-5.

¹² *Id.* at 4.

¹³ *Id.* at 5.

¹⁴ *Id.* at 5-6; *see also* 47 U.S.C. § 309(j).

¹⁵ AFR at 1. In the AFR, UOBN also states that it "will show" that the *Staff Letter* involves "the application of precedent that should be overturned or revised" pursuant to *Melody Music v. FCC*. AFR at 2. UOBN, however, does not present any facts or arguments associated with this allegation, and we, therefore, do not address it herein.

5. In its AFR Response, SportsTalk continues to deny that it had any contractual obligation to UOBN, and reiterates its assertion that the current matter involves a private contractual dispute and that “the correct forum is a local court in the venue with jurisdiction to resolve local issues on contractual matters, not the FCC.”¹⁶ The AFR Response further notes that, as of its date of filing, UOBN had not initiated a proceeding in civil court.¹⁷

III. DISCUSSION

6. *Procedural.* We dismiss the AFR on procedural grounds. Specifically, we find that each of the claims contained in UOBN’s AFR was not previously presented to the Bureau. Section 1.115(c) of the Commission’s rules (Rules) explicitly prohibits parties from raising new arguments on review.¹⁸ Accordingly, we dismiss UOBN’s new arguments as procedurally barred.

7. *Substantive.* As an alternative and independent basis for our decision, we deny UOBN’s arguments on the merits. At the outset, we reiterate our long-standing policy that “discrimination simply has no place” in the broadcast industry,¹⁹ and, accordingly, we take claims of discrimination in broadcasting seriously. Section 73.2090 of the Rules, explicitly prohibits any person or entity from engaging in discrimination on the basis of race, color, religion, national origin or sex in the sale of commercially operated AM, FM, TV, Class A TV or international broadcast stations.²⁰ In the context of an assignment of license or transfer of control application, section 73.2090 means that approval of any commercial broadcast transaction tainted by any type of discrimination within the ambit of the rule would be inconsistent with the public interest pursuant to section 310(d) of the Act.²¹ An objector, such as UOBN, however, must make a *prima facie* case that the transaction is tainted by such discrimination.²² The Bureau found, in this instance, that UOBN had failed to do so, a decision UOBN does not challenge.

8. We also find UOBN’s reliance on “Title VII of the equal employment laws” and the disparate impact provisions contained therein is misplaced.²³ Title VII prohibits employment discrimination based on race, color, religion, sex and national origin.²⁴ Specifically, Title VII protects employees from discrimination from their employers. The instant case does not involve any discriminatory practices occurring within an employer/employee relationship. We therefore deny UOBN’s request that we conduct an inquiry into whether SportsTalk’s actions had a disparate impact on

¹⁶ AFR Response at 2.

¹⁷ *Id.* UOBN did not file a Reply to the AFR Response.

¹⁸ See 47 C.F.R. § 1.115(c). While UOBN quoted Section 309(j) in its Informal Objection, it made no attempt to argue in the Informal Objection why that provision would support the relief it requested. Informal Objection, File No. BAL-20200828AAJ (filed Sept. 29, 2020), at 6.

¹⁹ *Promoting Diversification of Ownership in Broad. Servs.*, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922, 5939, para. 41 (2008) (*Diversity Order*).

²⁰ 47 CFR § 73.2090. To promote compliance with this rule, the Commission revised FCC Form 314 (Application for Consent to Assignment of Broadcast Station Construction Permit or License) and FCC Form 315 (Application for Consent to Transfer Control of Entity Holding Broadcast Station Construction Permit or License) to require assignors and transferors to certify compliance with this rule. See *Diversity Order*, 5922 at 5940, para. 42. In the Application, SportsTalk certified compliance with this rule. Application at Section II, Question 10.

²¹ *Mr. William Johnson*, Letter Order, 27 FCC Rcd 1471 (MB 2012).

²² See 47 U.S.C. § 309(d).

²³ AFR at 3.

²⁴ 42 U.S.C. § 2000e *et seq.*

UOBN. In any event, we note that the appropriate venue for a Title VII claim is not the Commission but rather the Equal Employment Opportunity Commission and a federal court of competent jurisdiction.²⁵

9. We similarly reject UOBN's contention that the *Staff Letter* is inconsistent with *Metro Broadcasting*, *Adarand*, and *Lutheran Church*.²⁶ We find UOBN's reliance on these judicial decisions to be misplaced because none of the decisions dealt with the matter at hand—allegations of racial discrimination in a private contractual dispute. Based on the record before us and UOBN's failure to challenge the Bureau's finding that UOBN did not establish a *prima facie* case of a violation of Section 73.2090,²⁷ we agree with the *Staff Letter*'s determination that this case involves a private contractual dispute that is inappropriate for Commission resolution.²⁸ Accordingly, we reject UOBN's claim.

10. Finally, we reject UOBN's allegation that the Commission failed to act in accordance with section 309 of the Act.²⁹ UOBN posits that the Bureau should have favored UOBN because, it states, there are no commercial radio stations in the Gainesville-Ocala Florida markets that are African-American owned.³⁰ Section 309(j), *inter alia*, directs the Commission to prescribe regulations pertaining to a competitive bidding system that (1) specify “area designations and bandwidth assignments that promote . . . economic opportunity for a wide variety of applicants, including . . . businesses owned by members of minority groups”; and (2) “ensure that . . . businesses owned by members of minority groups . . . are given the opportunity to participate in the provision of spectrum-based services.”³¹ However, section 309(j) is inapplicable to the instant case as it does not involve mutually exclusive applications for an initial construction permit or license for which the Commission must grant an application through an auction or competitive bidding process.³² Rather, this case involves the assignment of existing authorizations to which section 309(j) does not apply. Indeed, in acting on such assignment applications, “the Commission may not consider whether the public interest, convenience, and necessity might be served by [such] assignment . . . to a person other than the proposed . . . assignee.”³³ In addition, as the *Staff Letter* correctly noted, the Commission does not intervene in matters involving the interpretation and enforcement of contracts for the sale of broadcast stations in the absence of a *prima*

²⁵ U.S. Equal Employment Opportunity Commission, *Filing a Lawsuit*, <https://www.eeoc.gov/filing-lawsuit> (last visited Dec. 20, 2021) (“To file a Title VII lawsuit in court, you must have filed a charge with EEOC and received a Notice of Right to Sue.”). UOBN has not identified any other “U.S. civil rights laws” that would apply here.

²⁶ The Commission's interest in promoting broadcast diversity is not disputed in the record here. UOBN's primary point is that our public policy interest in promoting diversity in broadcasting recognized in *Metro Broadcasting* was not overturned by *Adarand* and *Lutheran Church*. AFR at 5.

²⁷ *Staff Letter* at 4-5 (finding UOBN failed to make a *prima facie* case of discrimination to support a violation of 47 CFR § 73.2090).

²⁸ See *Stockholders of Renaissance Comm. Corp.*, Memorandum Opinion and Order, 12 FCC Rcd 11866, 11869 (1997) (Commission is not the proper forum for the adjudication of private contractual disputes).

²⁹ AFR at 5-6; 47 U.S.C. § 309.

³⁰ See AFR at 6.

³¹ 47 U.S.C. § 309(j)(4)(C)-(D). See also 47 U.S.C. § 309(j)(3)(B) (“In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission . . . shall seek to promote . . . the following objectives: . . . (B) . . . ensuring that new and innovative technologies are readily accessible to the American people . . . by disseminating licenses among a wide variety of applicants, including . . . businesses owned by members of minority groups and women”).

³² 47 U.S.C. § 309(j)(1).

³³ 47 U.S.C. § 310(d).

facie showing of discrimination.³⁴ Therefore, we find the suggestion that the Bureau's *Staff Letter* ran afoul of section 309 by not favoring UOBN in its contractual dispute over the sale of the Stations is untenable and we reject this claim.

11. Upon careful review of the AFR and the entire record, we conclude that UOBN has failed to demonstrate that the Bureau erred. The Bureau properly decided the matters raised, and we uphold its decision. Accordingly, for the aforementioned reasons, we dismiss, and on alternative and independent grounds, deny the AFR.

IV. ORDERING CLAUSE

12. For the foregoing reasons, **IT IS ORDERED** that the Application for Review filed by UOBN on February 26, 2021, **IS DISMISSED AND IN THE ALTERNATIVE IS DENIED.**

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁴ *Staff Letter* at 3 (citing *A.L.Z. Broadcasting, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 23200, 23201, para. 3 (2000)). For example, as noted above, while 47 CFR § 73.2090 prohibits discrimination in the sale of a broadcast station, the Bureau found UOBN failed to make a *prima facie* case of such discrimination here. *Staff Letter* at 4-5.