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multiple copies were used by the station for promotional purposes, such as on-the-air giveaways, and for archival purposes. 4 FCC Rcd at 887-88 ¶¶ 351-52. We agree that this practice does not violate § 317 absent an indication that the multiple copies were consideration for playing the records. *Id.* at 8155 ¶ 38. Here, Metroplex's showing specifically rebuts any such inference. *Id.* at 887-88 ¶¶ 355-57.⁵ The use of records for on-the-air giveaways (in which the records are incidentally identified) falls within the provision of § 317 exempting from announcement property furnished in connection with a broadcast. *See Amendments, 1960*, 40 FCC 88, 90 (1960), example 7. In the same vein, other similar uses of the records by the station do not constitute a violation unless the record was furnished "with an agreement by the station, express or implied, that the record will be used on a broadcast." *Id.*, example 1. As noted, Metroplex specifically rebutted any inference of such an understanding here.

III. EEO

8. In light of WHYI-FM's past EEO deficiencies, it is appropriate to state explicitly that we do not believe Southeast has raised a substantial and material question about Metroplex's EEO compliance during the one-year short-term renewal period. As the Mass Media Bureau found in declining to designate an EEO issue against Metroplex when it designated this case for hearing, Metroplex's overall EEO record was satisfactory. *Metroplex Communications, Inc.*, 2 FCC Rcd 1542 (Mass Media Bureau 1987). Nonetheless, as Southeast points out in seeking the addition of issues by the ALJ, Metroplex failed to follow its EEO procedures as to one particular position -- that of program director. Petition to Enlarge Issues filed April 20, 1987, Att. 5. This isolated matter, however, does not undermine Metroplex's otherwise adequate record of compliance. This is especially so since the record discloses no intent on Metroplex's part to discriminate against minorities in filling the program director position. Indeed, two of the three individuals in the final running for the position, including the one actually hired, were minorities. *See Baltimore Metropolitan Broadcasting Stations*, 89 FCC 2d 1183, 1187 ¶ 10, 1191 ¶ 22 (1982).

9. Additionally, we see no basis to pursue Southeast's allegations made before the ALJ that Metroplex improperly classified the position of WHYI-FM's music research director in the official and manager category. Southeast bases its allegations on the declaration of a former station receptionist, who has not been shown qualified to evaluate the responsibilities of the music research director. Petition to Enlarge Issues filed April 20, 1987, Att. 3. In contrast, Metroplex provided declarations corroborating the music research director's responsibilities by the music research director herself and by WHYI-FM's top management. Opposition to Petition to Enlarge Issues filed May 12, 1987, Att. 4-7. Thus, the Bureau and the ALJ acted correctly in not designating an EEO issue against Metroplex.

IV. RENEWAL EXPECTANCY

10. The Board found that WHYI-FM's performance during the one-year short-term renewal period was substantial and therefore warranted awarding Metroplex a renewal expectancy preference, even if its record was considered diminished to some extent because WHYI-FM

presented certain public affairs programming during early morning fringe hours. In making this finding, the Board stated the relevant criteria in a manner somewhat at variance with the Commission's own general statements of these criteria. In particular, the Board separately listed the ascertainment of the community's needs and "community outreach" as among the relevant criteria, which the Commission has not explicitly done in its own general statements of the relevant criteria. *Compare Formulation of Policies and Rules Relating to Broadcast Renewal Applicants*, 4 FCC Rcd 6363, 6368 n.11 with *Metroplex Communications, Inc.*, 4 FCC Rcd at 8151 ¶ 16. Nonetheless, despite this discrepancy in the Board's general statement of the relevant criteria, the Board's specific evaluation and discussion of the record is consistent with Commission precedent. We agree with the Board that WHYI-FM's record is "sound, favorable and substantially above a level of mediocre service which might just warrant renewal." *Cowles Broadcasting, Inc.*, 86 FCC 2d 993, 1006 ¶ 40 (1981), *aff'd sub nom. Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983). We also find that WHYI-FM made a "diligent, positive, and continuing effort to discover and fulfill the tastes, needs, and desires of [its] community or service area." *WPIX, Inc.*, 68 FCC 2d 381, 400 ¶ 56 (1978).⁶

V. SOUTHEAST'S ORGANIZATION

11. Southeast is organized as a limited partnership consisting of one general partner, Gloria Butler (four percent equity), and ten limited partners. The Board, however, concluded that this form of organization was a sham designed to artificially enhance Southeast's integration and diversification showings. The Board found that Butler had nothing to do with the formation of Southeast and had virtually no contact with the limited partners thereafter. (Rather, the law firm Cohen and Berfield recruited Southeast's limited partners and met with several of them, on May 16, 1986, to decide on Southeast's organization, financing, and other important matters.) Cohen and Berfield also recruited Butler, who was interviewed by two of the limited partners on June 13, 1986, the only occasion that she met with any of the limited partners before the evidentiary hearing.

12. The Board found that Butler has no broadcast experience⁷ and would make no investment in Southeast. Under these circumstances, the Board concluded that Butler could not be expected to exercise sole control over Southeast, as her title, general partner, would indicate. 4 FCC Rcd at 8160 ¶¶ 53-55.

13. Southeast contends that the Board had no basis to disregard its ownership structure. Application for Review at 10-13. Southeast asserts that it is irrelevant that Butler did not participate in the formation of the limited partnership because she has been actively involved in the prosecution of the application since then. In this regard, Southeast maintains that the Board's decision conflicts with the Commission's holdings in *Victory Media, Inc.*, 3 FCC Rcd 2073 (1988), and *Susan S. Mulkey*, 4 FCC Rcd 5520 (1989). Southeast also asserts that Butler's four percent interest represents a sizable stake in the station and that, although Butler has no broadcast experience, she has business experience. Southeast emphasizes that its limited partnership agreement is a legally binding document.

14. We agree with the Board that Southeast's organization should be rejected as unreliable. It is not credible that a group of experienced investors (including those with past broadcast ownership) would grant exclusive control of their station to a virtual stranger with no broadcast experience, who would make no investment in the station. On the facts before us, we fail to see any legitimate quid pro quo by Butler for becoming general partner. We have in the past rejected such instances of "giving away the store" as unworthy of credence. See *KIST Corp.*, 102 FCC 2d 288, 292 ¶ 8 (1985).⁸ We wish to stress, however, that the parties' conduct after the formation of the limited partnership reinforces this conclusion. In this regard, Butler signed Southeast's limited partnership agreement in late June 1986. 4 FCC Rcd at 863 ¶ 153. The agreement was filed with the state of Delaware on July 22, 1986. Southeast Exh. 12. (Southeast's application was filed October 30, 1986.) After these significant dates, we would expect that Southeast would conduct itself consistent with its purported status as a limited partnership controlled by its nominal general partner. In our view, however, as discussed below, the record compiled subsequent to the formation of Southeast discloses several circumstances inconsistent with the claim that Butler will exercise sole control over the partnership. These circumstances establish a pattern of conduct indicating that there is no assurance that the lack of control on Butler's part suggested by the manner in which Southeast was formed will not continue. Thus, there is no basis for awarding credit for Butler's integration.

15. *Limited partners power to withdraw*: The record indicates that, at the May 16 meeting between Lewis Cohen, of Cohen and Berfield, and key limited partners, an agreement was made that the limited partners could abort the broadcast venture if, at the time of designation, Southeast's case looked weak. 4 FCC Rcd at 861 ¶ 140. This agreement contemplated the possible exercise of control by the limited partners, contrary to their assertedly passive status.

16. *Southeast's financing*: The circumstances surrounding Southeast's financial arrangements reflects a pattern of relative passivity on Butler's part. At the May 16 meeting, Cohen and Robert Davidoff (a principal of CMNY Capital, L.P.) agreed (before Butler became involved with Southeast) that CMNY would loan Southeast necessary funds. 4 FCC Rcd at 862 ¶ 142, 871 ¶ 225. Butler had no input in negotiating the terms of the loan commitment. Rather, on July 24, after Butler had accepted the position of general partner, Cohen sent a draft commitment letter, which he had prepared, directly to Davidoff, with a courtesy copy to Bernard Perry (a key limited partner), but not Butler. *Id.* at 863-64 ¶ 155; Metroplex Exh. 17. Additionally, Davidoff did not consult with Butler when, at counsel's urging, he later decided to increase the amount of the loan commitment. 4 FCC Rcd at 876 ¶¶ 269-70.

17. Additionally, Davidoff's expectations in making the loan commitment are inconsistent with the sole exercise of control by Butler. Davidoff testified that CMNY does not participate in ventures unless it is satisfied that the enterprise has competent management. 4 FCC Rcd at 865 ¶ 166. Thus, he could insist, as a condition for making the loan, that individuals with broadcast experience be hired to run the station. *Id.* at 876 ¶ 275.⁹ Davidoff also testified that his participation in Southeast was prompted

by his confidence in Perry, which contradicts the claim that Butler, not Perry, would be active in the partnership. *Id.* at 866 ¶ 175.

18. Likewise, the circumstances surrounding the preparation of Southeast's budget after Butler accepted the position of general partner reflects a lack of control by Butler. Southeast's initial budget was prepared by Cohen. Although Butler discussed the budget with Cohen, she did not know the basis for Cohen's figures. 4 FCC Rcd at 867 ¶¶ 193-95. In this regard, Cohen hired Dr. Robert L. Hoover, an engineer, and Rafael Diaz Gutierrez to assist in preparing cost estimates.¹⁰ Butler had no contact with Hoover and Diaz, who dealt only with Cohen. *Id.* at 868 ¶ 205, 871 ¶ 231. Thus, the record indicates that Butler had no significant input in the preparation of Southeast's financial arrangements.

19. *Transfer of limited partners interests*: The record also indicates that Southeast disregarded the provisions of its limited partnership agreement. The limited partnership agreement requires that limited partners must obtain approval from the general partner and counsel before transferring their interests. Nonetheless, when Arthur Baer wished to transfer part of his interest to his wife and another individual, he obtained approval from Cohen without notifying Butler. 4 FCC Rcd at 864 ¶ 156. Similarly, the record does not indicate that CMNY sought approval from Butler when CMNY Capital, L.P. was substituted for CMNY Capital Company, Inc. At the hearing, Butler was unable to explain why the limited partnership agreement required counsel's (*i.e.*, Cohen's) approval in addition to hers. *Id.* at 903 n.12.¹¹

20. *Butler's role at the station*: Testimony concerning Butler's proposed role at the station suggests that the parties are attempting to inflate Butler's authority. At the hearing, Butler claimed that she would serve as the station's general manager and receive the \$75,000 a year salary specified in Southeast's financial showing for the general manager. 4 FCC Rcd at 864 ¶ 163; Tr. 1471-72; Southeast Exh. 3, Att. 1 at 2. However, neither the limited partnership agreement, Southeast's integration statement, nor Southeast's hearing exhibit on integration specifies that she would serve as general manager (they specify only that she would be involved in station management full-time). *Id.* In depositions, key limited partners testified that the question of who would be general manager (Butler or an experienced outsider) was undecided. At the hearing, however, they changed their testimony to indicate that Butler would serve as general manager. *Id.* at 864-65 ¶¶ 164-66.¹²

21. Moreover, the limited partnership agreement specifies that Butler's salary is to be determined based on comparable rates in the industry. 4 FCC Rcd at 864 ¶ 163; Southeast Exh. 12 at 8 ¶ 11. Butler admitted that no such determination supported the \$75,000 figure. As in the case of Butler's management role, the record contains inconsistent testimony concerning when and how Butler's salary would be determined. *Id.* at 866 ¶ 184.¹³ These factors indicate that hearing testimony regarding Butler's role at the station is "result-oriented" and undeserving of credit.

VI. OVERALL COMPARISON

22. We agree with the Board that Metroplex should be preferred over Southeast whether or not Southeast is deemed financially qualified. Because Southeast's organization as a limited partnership should be disregarded, we will not treat Butler as Southeast's sole owner for integration purposes. Southeast therefore deserves no credit for Butler's proposed integration.¹⁴ Southeast is also chargeable with the media interests held by its limited partners in radio stations in Rhode Island and the Virgin Islands, newspapers, and cable systems. 4 FCC Rcd at 866-67 ¶¶ 187-88. Metroplex claims no integration and is chargeable with the ownership of radio stations in Florida, North Carolina, Virginia, and Ohio. 4 FCC Rcd at 849 ¶¶ 10-11. Southeast is entitled to no significant integration preference and a moderate diversification preference. *Id.* at 903 ¶ 51. Metroplex's renewal expectancy, as described above, is more than sufficient to overcome this advantage. See generally *Cowles Broadcasting, Inc.*, 86 FCC 2d at 1015-17 ¶¶ 66-71.

VII. ORDERS

23. ACCORDINGLY, IT IS ORDERED, That the Motion to Expedite Disposition of Application for Review filed December 28, 1989 by Metroplex Communications, Inc. IS DISMISSED as moot.

24. IT IS FURTHER ORDERED, That, good cause having been shown, the Motion for Leave to File Supplement to Application for Review filed April 20, 1990 by Southeast Florida Broadcasting Limited Partnership IS GRANTED and the associated supplement IS ACCEPTED.

25. IT IS FURTHER ORDERED, That, pursuant to 47 C.F.R. § 1.115(g), the Application for Review filed December 12, 1989 and supplemented April 20, 1990 by Southeast Florida Broadcasting Limited partnership IS GRANTED to the extent indicated herein and otherwise IS DENIED.¹⁵

26. IT IS FURTHER ORDERED, That the decision of the Review Board, FCC 89R-67 (Nov. 17, 1989) (4 FCC Rcd 8149) IS MODIFIED to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

¹ The following pleadings are pending: (1) an Application for Review filed December 12, 1989 by Southeast Florida Broadcasting Limited Partnership, and oppositions filed December 28, 1989 by Metroplex Communications, Inc. and the Mass Media Bureau; (2) a Motion to Expedite Disposition of Application for Review filed December 28, 1989 by Metroplex, and a response filed January 8, 1990 by Southeast; and (3) a Supplement to Application for Review and a Motion for Leave to File Supplement to Application for Review filed April 20, 1990 by Southeast, and an opposition filed April 27, 1990 by Metroplex.

² Southeast complains that it was termed an abusive applicant in *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants*, 4 FCC Rcd 4780, 4783 ¶ 23 (1989). We have, however, specifically disavowed any such intention. *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants*, FCC 90-190 (Jul. 2, 1990) at n.15.

³ We wish, however, to express our concern as to one matter in particular. Some of the allegations under this issue involved the use of drugs by station employees off the station premises, although the admitted drug user in this case is no longer employed by Metroplex. 4 FCC Rcd at 898 Conc. ¶ 23, 8164 n.32. While the record persuades us that Metroplex did not violate § 317 or implicate the concerns underlying our new character policy (*Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252 (1990)) in this regard, we nonetheless wish to emphasize that drug use represents a matter of grave concern. Moreover, we encourage licensees to make the "maximum effort" on their part to stem drug trafficking. *Public Notice*, 4 FCC Rcd 7533 (1989).

⁴ The Department of Justice had a similar understanding. "... the person in control of the broadcasting would not be required to make such an announcement if neither he nor any officer or employee of such person had knowledge of such payment or lack of such knowledge was not due to failure to use reasonable diligence." Letter from Lawrence E. Walsh, Deputy Attorney General to Congressman Oren Harris (Apr. 15, 1960), *reprinted in*, [1960] U.S. CODE CONG. & AD. NEWS 3534-36.

⁵ The evidence indicates that some spare copies of the records were taken by employees. 4 FCC Rcd at 887 ¶ 374. Despite the fact that this occurred, the evidence indicates that the multiple copies of records were furnished for promotional purposes rather than for personal use. See *id.* at 888 ¶¶ 358-60. Thus, the occurrence of this practice does not indicate that either the record companies or the station viewed the multiple copies as consideration.

⁶ In particular, we find no significance in the fact that some of WHYI-FM's programming was prepared by volunteers or by part-time employees.

⁷ Butler and her husband own three McDonald's restaurants. Butler proposes to terminate her day-to-day involvement with the restaurants but would continue to participate in overall policy decisions concerning the restaurants. Metroplex originally sought to prove that Butler's franchise agreement obligated her to devote full-time to the restaurants. However, Metroplex later abandoned this position and withdrew the relevant hearing exhibits. See Tr. 4246-49. In light of Metroplex's failure to pursue this point after it had an opportunity to review the pertinent documents relating to Butler, we see no reason to assume, based on an asserted understanding of the terms of a "standard" McDonald's contract, that doubts exist about Butler's ability to fulfill her integration proposal. See 4 FCC Rcd at 8160 ¶ 56. Accordingly, although we agree that Butler's integration proposal should be discounted because of the unreliability of Southeast's ownership structure, we disagree with this specific aspect of the Board's analysis.

⁸ In *Coast TV*, 5 FCC Rcd 2751 (1990), the Commission reaffirmed the principle set forth in *KIST* that it is appropriate to examine the totality of facts in determining whether an applicant's ownership proposal is bona fide. *Id.* at 2753 n.4. *Coast* also limits *Victory*, which by implication discounted the significance of pre- and post-organizational activities of an applicant's principals in determining whether an applicant's ownership structure should be credited. Compare *Mulkey*, in which neither the passive owner's post-organizational conduct nor the totality of the circumstances was otherwise inconsistent with the applicant's stated ownership structure.

⁹ At hearing, Davidoff contradicted his deposition testimony that he and others would decide whether to hire experienced management and testified that the general partner would make this decision. 4 FCC Rcd at 866 ¶ 185.

¹⁰ Roughly \$198,000 of the \$200,000 contributed by the limited partners was transferred to counsel. Butler has probably spent less than \$1,000 on behalf of the partnership. 4 FCC Rcd at 864 ¶ 158.

¹¹ Butler has never called a partnership meeting, although the partnership agreement authorizes her to do so. 4 FCC Rcd at 864 ¶ 159.

¹² Nonetheless, Perry admitted that, on September 14, 1987, he, Davidoff, and Baer met with Cohen to discuss Butler's appointing another person to serve as general manager. *Id.* at 864-65 ¶¶ 164-65.

¹³ Similarly, the record contains conflicting testimony as to whether the limited partners could remove Butler for incompetence, further suggesting that the parties' hearing testimony represents an attempt to inflate Butler's importance in comparison with their original understanding of her role. 4 FCC Rcd at 866 ¶¶ 182-83.

¹⁴ Our disposition of this case should not be construed as giving any indication of what determination will be made with respect to the questions concerning the " *Anax* " doctrine, raised in our recent *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, FCC 90-194 (Jun. 26, 1990).

¹⁵ In its supplement, Southeast argues that a recent decision, *Monroe Communications Corp. v. FCC*, No. 89-1092 (D.C. Cir. Apr. 10, 1990), warrants reconsideration of the Board's award of a renewal expectancy to Metroplex. In *Monroe*, the court faulted the Commission for failing to take into account a licensee's downward trend in performance in determining whether it was entitled to a renewal expectancy. That issue is not involved in this case.