

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

MM Docket No. 89-357

In re Applications of

PALMETTO
COMMUNICATIONS
COMPANY
WDIX, Yadkinville, North Carolina

File No. BP-870331BK

For a Construction Permit
For a Modification of Facilities

TRIAD NETWORK, INC.
Greensboro, North Carolina

File No. BP-870928AA

For a Construction Permit
for a New AM Station

Appearances

Peter Gutmann on behalf of Palmetto Communications Company; *Stephen T. Yelverton* on behalf of Triad Network, Inc.; *Gary S. Smithwick* on behalf of Robert Carroll Rickenbacker, Jr.; and *Charles E. Dziedzic* and *Larry A. Miller* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

Adopted: June 18, 1992;

Released: June 26, 1992

By the Review Board: MARINO (Chairman) and BLUMENTHAL. Board Member ESBENSEN absent.

1. The Board has before it the *Supplemental Initial Decision* (*S. I. D.*), 7 FCC Rcd 1611 (1992), of Administrative Law Judge Edward J. Kuhlmann (ALJ) in the above-captioned case. It also has the exceptions of Robert C. Rickenbacker, Jr.; the "limited" exceptions of Triad Network; a reply to Rickenbacker's exceptions from the Commission's Mass Media Bureau; and the "partial" reply of Palmetto Communications.¹

2. The *S. I. D.* concluded that Palmetto Communications failed to notify the Commission of a significant ownership change, and that it "withheld information and misrepresented facts" about its ownership during the course of this proceeding. It therefore found Palmetto not qualified. *Id.*, paras. 19 *et seq.* Palmetto has filed no exceptions, either with respect to its own disqualification or to the grant of the Construction Permit to Triad. Rather, the pleadings before us are directed toward subsidiary conclusions that do not relate to, or effect, the award of the permit.

3. Thus, Rickenbacker, a (reported) 50% Palmetto partner who was afforded separate party status in the wake of a remand to the ALJ,² excepts to the *S. I. D.*'s view that he was, at least at the outset, a major Palmetto principal with

a duty to timely report his (alleged) withdrawal as an equal partner.³ Rickenbacker also protests the *S. I. D.*'s conclusion that he misrepresented that he had never "consummated" a partnership agreement with William R. Hallman, the other Palmetto "partner." Rickenbacker seeks reversal of the *S. I. D.* on these points and a Board determination "that he is qualified to be a Commission licensee."⁴

4. The Mass Media Bureau disagrees, and its reply pleading asserts that "[t]he *S. I. D.* correctly concluded that a partnership existed between Hallman and Rickenbacker";⁵ that even if Rickenbacker believed that he had "withdrawn" from Palmetto, he had a duty to timely report that fact to the Commission;⁶ that Rickenbacker's letter of February 27, 1991 (*see supra* note 3) "was inaccurate and very misleading" to the extent that Rickenbacker claimed "that he never had an ownership interest in [Palmetto's] WDIX";⁷ and, hence, that "Rickenbacker's misrepresentations to the Commission indicate that he lacks the essential trait of truthfulness which the Commission requires of its licensees."⁸

5. For its part, and while *not* excepting to the grant of the permit to Triad,⁹ Palmetto objects to that portion of Rickenbacker's exceptions that urge the disqualification of Palmetto's counsel. It claims that its representation of Palmetto -- as a Hallman/Rickenbacker partnership -- was "effectively ordered" by the ALJ, until a resolution of the "ownership" question at the remand hearing.¹⁰

DISCUSSION

6. We start with the obvious observation that *no* party to this case excepts to the award of the permit to Triad. Instead, the parties continue to argue (1) the question of whether Rickenbacker was ever a 50% Palmetto partner and whether he had a duty to report his (alleged) 1989 withdrawal from the partnership; and (2) which, if any, of the attorneys involved in this case should have been disqualified for maintaining a conflict of interest.¹¹

7. As to the first matter, and while the Board did afford Rickenbacker separate party status because of his claims adverse to Palmetto, and *vice versa*, we find that no useful purpose would be served in further protracting this now uncontested licensing proceeding by speculating at length over whether Rickenbacker ever formally "consummated" his Palmetto partnership agreement with Hallman. As our remand order signaled, our focus was not upon the vicissitudes of state contract law, but upon *Palmetto's* failure to report a 50% ownership change, alleged or otherwise. *See* 6 FCC Rcd at 2194-95. In that regard, we agree with the Mass Media Bureau that, being fully aware of his written agreement to purchase WDIX and of his application to the FCC to purchase that station as a 50% partner in Palmetto, Rickenbacker had an inalienable duty to report his (alleged) withdrawal as soon as *he* believed he was no longer an applicant principal in this case. Because, as the Mass Media Bureau observes, "any decision on Rickenbacker's qualifications will apply only if he seeks to become a Commission licensee,"¹² we will however vacate the *S. I. D.*'s conclusions of law as to his basic qualifications, but will not disturb the ALJ's findings of fact for the reasons best expressed by the Commission in *ASD Answer Service, Inc.*, 1 FCC Rcd 753, 756 (1986). There stating that it would not resolve lingering questions "unless they are necessary to our statutory mandate" merely because certain "principals are unhappy" that the resolution of the

underlying case "fail[ed] to exonerate them," the Commission vacated the conclusions of law but did not disturb the ALJ's findings of fact so as to avert, if ever pertinent, a duplicative rehearing on the ambient facts. Apart from the ALJ's finding here that Rickenbacker was, at least for a time, a Palmetto partner, the findings of fact of the *S. I. D.* are unchallenged in any material way; it is, instead, the ALJ's inferences and conclusions that Rickenbacker chiefly attacks. We, thus, agree with the Bureau insofar as it contends that Rickenbacker's conduct in this proceeding can be examined under the tenets of the *Policy Regarding Character Qualifications*, 102 FCC 2d 1179 (1986),¹³ if and if ever Rickenbacker should apply for a permit or license. Cf. *Allegan County Broadcasters, Inc.*, 83 FCC 2d 371, 373 (1987)(unresolved character issues "can be revisited in a future proceeding should the applicant again seek to obtain a Commission license").¹⁴

8. As to Palmetto's reply requesting a determination on Rickenbacker's exceptions with respect to the conduct of Palmetto's counsel, we point, first, to footnote 11 of our margin wherein we refused to address matters not relating to a claim of error in the *S. I. D.*; and, second, to *Scioto Broadcasters*, 5 FCC Rcd 5158, 5161-62, (Rev. Bd. 1990), *review denied*, 6 FCC Rcd 1893 (1991), where we held that we would not pass judgment on questions of attorney ethics, unless these questions were vital to the maintenance of record untainted with serious prejudice, so as to require a hearing *de novo*.¹⁵ As Palmetto does not except to the *S.I.D.* on the merits of the case, and its running dispute with Triad's counsel is wholly extraneous to our delegated function, we leave its "reply" pleading as we find it.

9. ACCORDINGLY, IT IS ORDERED, That the Conclusions of the *Supplemental Initial Decision*, FCC Rcd 1611 (ALJ 1991), ARE VACATED to the extent indicated in paragraph seven above; and

10. IT IS FURTHER ORDERED, That the application of Triad Network, Inc. (File No. BP-870928AA) for a Construction Permit for a New AM Broadcast Station at Greensboro, North Carolina, IS GRANTED, and the application of Palmetto Communications Company (File No. BP-870331BK) for Modification of Facilities of Standard Station WDIX, Yadkinville, North Carolina IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

¹ Triad also filed, on April 21, 1992, a "Statement For The Record." This unauthorized pleading is dismissed.

² See *Palmetto Communications Co.*, 6 FCC Rcd 5023 (Rev. Bd. 1991).

³ Rickenbacker himself triggered the remand hearing when, after the release of our original *Decision*, 6 FCC Rcd 1527 (Rev. Bd. 1991), he supplied Triad with a letter of February 27, 1991 that averred that he was *not* Palmetto's 50% owner, as represented in Palmetto's instant application and at all pertinent times thereafter. See *Memorandum Opinion and Order*, 6 FCC Rcd 2193 (Rev. Bd. 1991).

⁴ Rickenbacker Exceptions at 17.

⁵ Bureau Reply at 4.

⁶ See *id.*, at 6.

⁷ *Id.* It is undisputed that: (1) "On August 23, 1989, Hallman and Rickenbacker signed a sales agreement" to purchase WDIX, *S.I.D.*, para. 5; (2) Rickenbacker concedes that "he filed as a general partner of Palmetto [in] an application for assignment of the license of WDIX" to Palmetto; but that (3) he did not notify the Commission until after the Board's *Decision* of his surprise claim that he was not a 50% Palmetto partner. Rickenbacker Exceptions at 3.

⁸ Bureau Reply at 6-7.

⁹ Palmetto Partial Reply at 1 n.1.

¹⁰ See *id.*, at 3-4.

¹¹ See *id.*, *passim*. See also Triad "Limited Exceptions" at 10, seeking resolution "in favor of Triad's counsel" of a point raised in the Board's 1991 remand order (see 6 FCC Rcd at 2195 n.7). Triad's "exception" does not pertain to the *S.I.D.*; indeed, Triad's "Limited Exceptions" (at 10) state that neither the parties nor the ALJ "pursued this matter at hearing." We will not address this matter further. 47 CFR § 1.277(a) (exceptions shall be directed to "alleged material errors" in the Initial Decision).

¹² Bureau Reply at 6.

¹³ Thus, and consistent with our vacation of the *S.I.D.*'s conclusions of law, no final determination is made as to Rickenbacker's basic qualifications, a matter which will, if ever necessary, be analyzed more fully under *Character Qualifications*, see 102 FCC 2d at 1227-29.

¹⁴ See also *LA STAR Cellular Telephone Co.*, FCC 92-243, released June 15, 1992 at n.3, where the Commission dismissed as moot exceptions directed to an ALJ's determination that applicant principals lacked candor at hearing, because:

Questions regarding the conduct of [applicant principals] in this case may be revisited in light of the relevant findings and conclusions here in future proceedings where the other interests of these parties have decisional significance. See *Character Qualifications*, 102 FCC 2d 1179, 1123-24 para. 92 (1986), *recon. denied*, 1 FCC Rcd 421 (1986).

¹⁵ Compare *Palmetto Communications Co.*, 7 FCC Rcd 676 (1992) (apparent conflict of interest of Triad counsel, Stephen T. Yelverton, *until* he withdrew his simultaneous representation of Rickenbacker and Triad).