

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

In re Applications of)	MM Docket No. 90-106
)	
INTERMART BROADCASTING)	File No. BPH-880224MN
GULF COAST, INC.)	
)	
SOUTHWEST FLORIDA FM)	File No. BPH-880303MG
BROADCASTING, LTD.)	
)	
BYRON DOUGLAS KIGHT & MARY)	File No. BPH-880303MH
GIGLIA MARTINEZ JOHNSON d/b/a)	
KIGHT BROADCASTING LIMITED)	
PARTNERSHIP)	
)	
PALM TREE LIMITED PARTNERSHIP)	File No. BPH-880303MQ
)	
For Construction Permit for a New FM Station)	
on Channel 249A at Punta Rassa, Florida)	

ORDER

Adopted: July 21, 1997 ; Released: July 24, 1997

By the Assistant General Counsel, Administrative Law Division:

1. This Order accepts amendments reporting changes in the technical portion of Intermart Broadcasting Gulf Coast, Inc.'s application; approves a settlement agreement providing that each of the above-captioned applicants would receive monetary payments not exceeding their legitimate and prudent expenses and that three of the applicants will merge their interests into a single entity; grants Intermart's amended application; dismisses the competing applications filed by Southwest Florida FM (Southwest), Kight Broadcasting Limited Partnership (Kight), and Palm Tree Limited Partnership (Palm Tree); and terminates this proceeding. It finds that the proposed arrangement complies fully with section 311(c) of the Communications Act, 47 U.S.C. § 311(c), and section 73.3525 of the Commission's Rules, 47 C.F.R. § 73.3525(a), which govern settlement agreements among broadcast applicants in initial licensing proceedings.

2. Intermart, Southwest, Kight, and Palm Tree are mutually exclusive applicants for a new FM station on Channel 249 in Punta Rassa, Florida. The Commission, affirming the Review Board's award of a dispositive integration preference to Kight, granted its application and denied competing applications filed by Intermart, Southwest, and Palm Tree.¹ This proceeding is therefore subject to the comparative freeze instituted by the Commission on February 25, 1994 in response to Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993), which held that the integration criterion is arbitrary and capricious and therefore unlawful.²

3. The Mass Media Bureau initially opposed the settlement agreement, but has withdrawn its objections. The parties subsequently revised the agreement in response to concerns raised by the Office of General Counsel as to whether the proposed merger of three applicants (Intermart, Kight and Palm Tree) into a single entity (Intermart) was a *bona fide* merger. (Section 73.3525(a)(3) provides that a *bona fide* merger is exempt from the prohibition against any party to a settlement agreement receiving money or other consideration in excess of its legitimate and prudent expenses.) Finally, the parties, aware that in another case "the Commission is considering a request for waiver of its limitations on settlement payments to dismissing applicants," filed a Statement for the Record on July 7, 1997. There, the parties specifically request "the Commission to continue to process their Joint Request for Approval of Settlement Agreements as presently before the Commission . . . [n]otwithstanding that the Commission may grant such a waiver." Statement at 2. The Joint Request is therefore ripe for consideration.

4. The Joint Request for Approval of Settlement Agreements, as revised, complies fully with the provisions of 47 U.S.C. § 311(c) and 47 C.F.R. § 73.3525, governing settlement agreements among mutually exclusive applicants for new broadcast stations, and is therefore approved. The parties have submitted copies of the agreements between Intermart and each of the dismissing applicants. In addition, each party to the agreement has submitted a statement certifying that its application was not filed for the purpose of entering into a settlement agreement, that (except for those parties participating in the merger) the dismissing applicants will not receive payments in excess of their legitimate and prudent expenses, and that approval of the settlement agreement will serve the public interest since it will result in

¹Intermart Broadcasting Gulf Coast, Inc., 8 FCC Rcd 8382 (1993), affirming, 8 FCC Rcd 2937 (Rev. Bd. 1994). One applicant filed a petition for reconsideration, and two applicants sought judicial review Intermart Gulf Coast Broadcasting, Inc., et al. v. FCC, Nos. 93-1876 & 93-1877 (D.C. Cir. filed 1993). The court remanded the appeals to the Commission on August 12, 1994. The petition for reconsideration, a joint motion to enlarge issues and various related pleadings are pending before the Commission. In light of the approval of the settlement agreement, they may be dismissed as moot.

²Public Notice, 9 FCC Rcd 1055 (1994), modified, 9 FCC Rcd 6689 (1994).

the inauguration of service to the community of Punta Rassa sooner than would otherwise be possible. And, with respect to provisions that provide for payments of \$100,000 to Southwest, \$180,000 to Palm Tree, \$200,000 to Kight, and \$112,000 to Intermart, each party has submitted declarations and documentation representing that these amounts are less than their legitimate and prudent expenses in prosecuting their respective applications.³

5. In addition, Intermart will enter into a merger with Kight and Palm Tree whereby Kight will have a 20% non-voting stock interest in, Palm Tree will have a 7.5% non-voting stock interest in, and Intermart will have a 72.5% voting stock interest in, the merged entity. The arrangement has been examined to determine whether it is consistent with section 73.3525(a)(3)'s payment limitations or exempt from those limitations as a *bona fide* merger (i.e., "a consensual allocation of economic risks and rewards among the merging parties which presumably reflects the assets brought to the joint undertaking by the various participants.") Amendment of Section 73.3525 of the Commission's Rules Regarding Settlement Agreements Among Applicants for Construction Permits, 6 FCC Rcd 2901, 2902 ¶ 9 (1991), citing, Venton Corporation, 90 FCC 2d 307 (1982). In this respect, the parties are correct that, where the dismissing applicants are reimbursed for their reasonable and prudent expenses and in addition receive stock in the merged entity, the stock is not subject to the restriction on reimbursements, provided the merger itself is *bona fide*. Venton Corporation, 90 FCC 2d at 312-13 ¶¶ 8-9.

6. The agreement, as amended on June 6, 1997, reflects a *bona fide* merger. In contrast to Intermart, which has made a capital contribution in exchange for its 72.5% equity interest in the merged entity, neither Palm Tree nor Kight has contributed capital to the joint venture. However, the parties have documented that Palm Tree incurred no less than \$201,073.41 in legitimate and prudent expenses, and that Kight has incurred legitimate and prudent expenses of \$263,251.49. Thus, Palm Tree, which will receive \$180,000, is foregoing reimbursement of at least \$21,073.41 in exchange for a 7.5% non-voting stock interest and

³ Southwest's declaration contains an itemized accounting reflecting reimbursable expenses of \$109,405.01. Palm Tree has submitted declarations reflecting reimbursable expenses totaling at least \$201,073.41. (The parties state that due to the inaccessibility of certain records, this figure is inexact and the actual amount is higher. In addition, the total excludes legal fees of \$1392.50, which are attributable to Palm Tree's participation in GC Docket No. 92-52 (Reexamination of the Policy Statement on Comparative Broadcast Hearings) an expense that the Mass Media Bureau challenged in Comments filed on January 25, 1997). A declaration under penalty of perjury, dated January 28, 1997, from Kight's general partner, B. Douglas Kight, reflects reimbursable expenses of \$263,251.49. A declaration under penalty of perjury, dated May 30, 1997, from the corporate officer responsible for paying Intermart's bills, Patricia S. Dahlin, details expenses of \$121,827.27 incurred in the prosecution of its application.

Kight, which will receive \$200,000 in cash, is foregoing \$63,251.49 in exchange for a 20% non-voting stock. In this respect, each of the dismissing applicants has put at risk a significant amount of capital in exchange for its equity interest in the merged entity.

7. Further, the provisions relating to the sale of the dismissing applicants' interests in the merged entity, as revised, reflect that the stock interests are not simply deferred cash payments to Kight and Palm Tree in excess of what they could be reimbursed for dismissing their applications. First, Kight and Palm Tree have options ("Put Option") to require that Intermart purchase their stock on the third and sixth anniversaries after Program Test Authority, but each will receive only its pro rata share of the fair market value of the Punta Rassa station, less liabilities. Presumably a decision to sell the Intermart stock, whether at the third or sixth anniversary after Program Test Authority or at another time, will be based on the financial success or failure of the station, since there is no guaranteed minimum share price. Second, the parties have deleted Intermart's Call Option, which allowed it to purchase for fair market value any outstanding stock held by Kight and Palm Tree at the end of the six year period if either had failed to exercise its Put Option. This permits Kight and Palm Tree to retain their interests in the merged entity indefinitely, thereby supporting a conclusion that the parties intend to share the economic benefits and risks of operating the Punta Rassa station. Third, the parties have modified the provision providing for minimum payments in the event of a group sale (i.e., sale of the Punta Rassa station in connection with any other station owned or controlled by Intermart's sole stockholder, James Martin). Under the revised agreement, Kight and Palm Tree may veto any sale in which the value assigned for the Punta Rassa station falls below certain agreed upon levels. This provision, however, does not amount to a deferred payment, since it merely allows these parties to reject purchase offers that are below specified amounts.

8. Because all participants in the merged entity have assumed significant economic risks and the agreement, as revised, supports a conclusion that the equity interests in the merged applications are not deferred cash payments in excess of what Kight and Palm Tree may receive as reimbursement pursuant to section 73.3525(a)(3), the parties have met their burden of showing that the arrangement is a *bona fide* merger under which the parties intend to share the risks and rewards of that broadcast venture.

9. ACCORDINGLY, IT IS ORDERED, That, pursuant to the authority delegated under 47 C.F.R. § 0.251(c), the Petitions for Leave to Amend, filed January 15, 1997 and February 25, 1997, by Intermart Broadcasting Gulf Coast, Inc. ARE GRANTED, and that the attached amendments ARE ACCEPTED.⁴

⁴In its January 15, 1997 petition for leave to amend, Intermart specified a new transmitter site, which is located on an existing tower that supports the antennae of three other FM stations. By its February 25, 1997 petition for leave to amend, Intermart submitted a

10. IT IS FURTHER ORDERED, That the Joint Request for Approval of Settlement Agreements, filed January 13, 1997 by Intermart Broadcasting Gulf Coast, Inc., et al., as revised by Supplements to the Joint Request filed on January 16, February 24, and June 6, 1997 by Intermart Broadcasting Gulf Coast, Inc., et al. IS GRANTED; that the settlement agreements, as supplemented, ARE APPROVED; that the application of Intermart Broadcasting Gulf Coast, Inc., as amended, (File No. BPH-880224MN) IS GRANTED; and that the applications of Southwest Florida FM, Ltd.(File No. BPH-880303MG), Kight Broadcasting Limited Partnership (File No. BPH-880303MH), and Palm Tree FM Limited Partnership (File No. BPH-880303MQ) ARE DISMISSED.

11. IT IS FURTHER ORDERED, That the following pleadings ARE DISMISSED: (a) Petition for Reconsideration, filed on December 29, 1993 by Palm Tree FM Limited Partnership; (b) Joint Motion to Enlarge Issues and Reopen the Record, filed on July 14, 1994 by Intermart Broadcasting Gulf Coast, Inc. and Southwest Florida FM, Ltd.; (c) Petition for Leave to Amend, filed on August 18 1994 by Kight Broadcasting Limited Partnership; and (d) Petition for Leave to Amend, Supplement to Petition for Leave to Amend, and Motion for Leave to File Reply to Joint Opposition, filed on September 2, 1994, September 7, 1994 and September 27, 1997, by Kight Broadcasting Limited Partnership.

12. IT IS FURTHER ORDERED, That the adjudicatory proceeding in MM Docket No. 90-106 IS TERMINATED.

John I. Riffer
Assistant General Counsel
Administrative Law Division
Office of General Counsel

Technical Statement in response to the Mass Media Bureau's concerns that the proposed FM antenna and transmission line might disrupt the directional pattern of co-located WJST(FM), Fort Myers Villas, Florida and that Intermart did not fully understand its obligation to eliminate objectionable interference to other facilities and radio receivers. The Bureau's engineering staff has reviewed both amendments and has concluded that Intermart has adequately met its concerns. See Comments, filed March 6, 1997, by the Mass Media Bureau. Granting the petitions for leave to amend and accepting the amendments therefore serves the public interest.