



Federal Communications Commission
Washington, D.C. 20554

October 19, 2007

DA 07-4353

In Reply Refer to:
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Artistic Media Partners, Inc.
5520 East 75th Street
Indianapolis, IN 46250

Oasis Radio 1 Corp. and
Oasis Radio 2 Corp.
4840 SW 80th Street
Miami, FL 33143

Three Amigo's Broadcasting, Inc.
4534 Parnell Avenue
Fort Wayne, Indiana 46825

In re: WBTU(FM), Kendallville, IN
Facility ID No. 22106
File No. BALH-20070108ABQ

WVBB(FM), Columbia City, IN
Facility ID No. 29204
File No. BALH-20070108ABR

Applications for Assignment of Licenses

Dear Applicants and Petitioner:

We have before us the above-referenced applications seeking consent to assign the licenses of Stations WBTU(FM), Kendallville, Indiana, and WVBB(FM),¹ Columbia City, Indiana (collectively "the Stations"); from Artistic Media Partners, Inc. ("Artistic Media") to Oasis Radio 1 Corp. and Oasis Radio 2 Corp., respectively (collectively "Oasis Radio"). Also before us are Petitions to Deny the Applications filed by Three Amigo's Broadcasting, Inc. ("Three Amigo's") (the "Petitions").² For the reasons stated below, we deny the Petitions and grant the Applications.

Background. Section 310(d) of the Communications Act of 1934, as amended, (the "Act"),³ requires the Commission to make a determination whether the proposed transfer or assignment of a

¹ On April 25, 2007, the Columbia City station changed its call sign to WVBB(FM) from WSHY(FM). We will refer to this Station by its current call sign in this document.

² The Petitions were filed on February 13, 2007. On February 21, 2007, Three Amigo's filed Supplements to the Petitions ("Supplements"). On February 22, 2007, Oasis Radio filed a consolidated Opposition to Petition to Deny ("Opposition") and, on February 23, 2007, an Erratum to the Opposition. On March 5, 2007, Three Amigo's filed a Reply to the consolidated Opposition ("Reply").

³ 47 U.S.C. § 310(d).

broadcast license would be in the public interest. Pursuant to Section 309(d)(1)⁴ of the Act any party in interest may file a petition to deny an application. In order to assess the merits of a petition to deny, a two-step analysis is required. First, the petition must make specific allegations of fact sufficient to demonstrate that the petitioner is a party in interest and that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity.⁵ This threshold determination is made by evaluating the petition and the supporting affidavits. If the petition meets this threshold requirement, the Commission must then examine all of the material before it to determine whether there is a substantial and material question of fact calling for further inquiry and requiring resolution in a hearing.⁶ If no such question is raised, the Commission will deny the petition and grant the application if it concludes that such grant otherwise serves the public interest, convenience, and necessity.

In the Petitions, Three Amigo's states that it is the licensee of Station WGBJ(FM), Auburn, Indianapolis, and that WGBJ(FM) competes with WBTU(FM) and WVBB(FM) for listeners and advertisers.⁷ Three Amigo's alleges that Russell A. Oasis ("Oasis"), president and sole shareholder of Oasis Radio, attempted to extort monies from Three Amigo's in exchange for an agreement not to use on its Stations the same Spanish language format that was used on WGBJ(FM).⁸ According to Three Amigo's, on February 6, 2007, Oasis told John Henry ("Henry"), a Three Amigo's director and spouse of a Three Amigo's shareholder, that he was "planning on doing Spanish on one of my radio stations, but would consider not doing it for the right price."⁹ Three Amigo's claims that this "offer was clearly intended to be understood in *Godfather* terms as one that 3 Amigos could not refuse"¹⁰ Furthermore, Three Amigo's asserts, Oasis Radio's proposal amounted to a "restraint of trade in violation of Section 24-1-2-1 of the Indiana Code and it may well violate federal anti trust laws"¹¹

In opposition, Oasis Radio contends that its proposal was never a "take it or else" offer,¹² but rather was one of several business options that Oasis and Henry discussed.¹³ Regarding Three Amigo's

⁴ 47 U.S.C. § 309(d)(1).

⁵ See *id.*; *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

⁶ 47 U.S.C. § 309(d)(2).

⁷ Petitions at 2.

⁸ Petitions at 3.

⁹ *Id.* In support, of this contention, Three Amigo's attaches two unsigned written proposals which it claims it received from Oasis Radio: "Option 1" is a basic agreement to refrain from using a Spanish language format in the Fort Wayne Metropolitan Statistical Area for consideration of \$200,000 in one lump sum payment; "Option 2" is a similar agreement for \$250,000 in Installment Payments. See February 22, 2007, Supplements.

¹⁰ Petitions at 4.

¹¹ *Id.*

¹² Opposition at 4.

¹³ According to Oasis Radio, while the parties agreed that the Fort Wayne market could support two Spanish stations "Mr. Oasis approached Mr. Henry to discern Three Amigo's interest in purchasing a temporary commitment by Oasis [Radio] not to operate [on the Stations] . . . a Spanish language format . . . [to] defray Oasis [Radio's] additional costs in implementing a non-Spanish format." Opposition at 3. Another option proposed by Henry, according to Oasis Radio, was "the idea of combining the 3 Amigos' station with Oasis [Radio's] Fort Wayne stations under Oasis [Radio's] management." *Id.* at 4.

accusations of violation of Indiana law, Oasis Radio argues that the Commission is not the proper forum to resolve this issue. Finally, Oasis Radio dismisses Three Amigo's claim of a possible violation of federal antitrust law as purely speculation.

In Reply, Three Amigo's counters that Oasis's proposal violated the Commission's character qualifications because it "falls within the category of 'abuse of broadcast facilities through fraudulent or anticompetitive commercial practices.'"¹⁴ Three Amigo's states that the covering e-mail to Oasis's written proposals underscored the seriousness and immediacy of the threat, that "if 3 Amigos did not accept the proposal almost immediately, Mr. Oasis would have no option but to go into competition with 3 Amigos in Spanish."¹⁵ In addition, Three Amigo's submits evidence that it has contacted authorities and urges that if "the Commission is disinclined to consider the alleged misconduct . . . it should nevertheless defer action on the Applications until a decision has been made by federal and Indiana authorities as to whether to launch a criminal investigation, and if such investigation is initiated, until it has been completed."¹⁶

Discussion. Generally, absent a specific Commission rule or policy to the contrary, the Commission does not consider broadcast-related anticompetitive and antitrust activity in the context of evaluating a licensee or applicant's character qualifications unless it "rises to the level of an *adjudicated violation* of either anticompetitive or antitrust laws. . . ." ¹⁷ While the Commission observed that such activity may hold potential relevance as to a licensee's or applicant's character, the Commission stated that it did not want to engage in initial determinations, but rather sought to defer to those entities with primary authority over such matters. Rather, in the *Policy Statement*, the Commission held that "for purposes of a character determination, consideration should be given only to adjudications involving antitrust or anticompetitive violations from a court of competent jurisdiction, the Federal Trade Commission, or other governmental unit charged with responsibility of policing such activity."¹⁸

¹⁴ Reply at 2. (quoting *Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order, and Policy Statement, 102 FCC 2d 1179, 1191 ¶26 (1986), recon. granted in part and denied in part, Memorandum Opinion and Order, 1 FCC Rcd 421 (1986) (subsequent history omitted) ("*Policy Statement*").

¹⁵ Reply at 5. The exact text of this covering email, sent at 1:22 p.m. on Thursday February 8, 2007, is as follows:

John,

I beg of you to expedite this. My opportunities to select the Anglo format that is open to me will diminish greatly by the end of next week. If you are *not* interested in this Non Compete Agreement, I understand. If you *are* interested please tell me ASAP so that I can grab the Anglo format.

Russ

Opposition, Attachment 1 (emphasis original).

¹⁶ *Id.* at note 2. See also Letter to Steve Carter, Attorney General from Nikos C. Nakos, Esq. (dated Mar. 2, 2007); and Letter to Marvin N. Price, Jr., Section Chief, United States Attorney General's Office (dated Mar. 2, 2007).

¹⁷ *Policy Statement*, 102 FCC 2d at 1201 ¶43. (emphasis added). Subsequently, the Commission expanded this to include adjudicated violations of antitrust or anticompetitive laws involving any media of mass communications. See *Policy Regarding Character Qualifications in Broadcast Licensing*, Policy Statement and Order, 5 FCC Rcd 3252 (1990), *modified*, 6 FCC Rcd 3448 (1991), *further modified*, 7 FCC Rcd 6564 (1992).

¹⁸ *Id.* at 1202 ¶44.

Three Amigo's does not claim that Oasis's proposal has been adjudicated by any court or other government agency, but instead requests that the Commission make this initial determination or at least defer action on the Applications on speculation of adjudication. We decline to take either of these actions. As stated above, primary expertise and responsibility for reviewing the alleged anticompetitive misconduct rests with the courts and other government agencies. We note that Three Amigo's has referred this matter to the federal and state authorities with jurisdiction over antitrust matters.

While the record reveals, and the parties agree, that Oasis and representatives of Three Amigo's held discussions regarding the Stations, the parties simply, albeit vehemently, disagree as to the characterization of these discussions. Nevertheless, Three Amigo's argument is founded principally on its characterization of the parties' discussions, but not on any adjudicated violation of state law and/or antitrust statutes. While we remain concerned with any broadcaster conduct that could be viewed as anti-competitive or attempted extortion, these are matters most appropriately considered in the first instance in other fora. Thus, we find that Three Amigo's allegations do not raise a substantial and material question of fact calling for further inquiry by the Commission regarding Oasis Radio's qualifications to be the licensee of the stations.¹⁹ Moreover, we decline to defer action on the Applications on the basis of an as yet uninitiated state or federal action.

Conclusions/Actions. Accordingly, IT IS ORDERED, that the Petitions to Deny filed by Three Amigo's Broadcasting, Inc, ARE DENIED.

IT IS FURTHER ORDERED, that the Applications (File Nos. BALH-20070108ABQ and BALH-20070108ABR) for consent to assignment of the licenses of Station WBTU(FM), Kendallville, Indiana, from Artistic Media, Inc. to Oasis Radio 1 Corp. and Station WVBB(FM), Columbia City, Indiana, from Artistic Media, Inc. to Oasis Radio 2 Corp. ARE GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Gregory L. Masters, Esquire, Counsel for Oasis Radio 1 Corp.
Lee W. Shubert, Esquire, Counsel for Artistic Media Partners, Inc.
David Tillotson, Esquire, Counsel for Three Amigo's Broadcasting, Inc.

¹⁹ While the Commission retains the discretion to consider unadjudicated matters in cases raising particularly egregious misconduct, we do not find the alleged conduct in the present case to rise to that level. *See generally Policy Statement*, 102 FCC2d at 1205. n. 60.