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

In re Applications of	)	
	)	
Mid Atlantic Network, Inc.,	)	NAL/Acct. No. 200841410021
Assignor	)	FRN: 0007164544
	)	
and	)	
	)	
Centennial Licensing II, L.L.C.,	)	
Assignee	)	
	)	
For Consent to Assignment of Licenses of	)	
	)	
WINC(AM), Winchester, Virginia	)	Facility ID No. 41809
	)	File No. BAL-20070514AEN
	)	
WINC-FM, Winchester, Virginia	)	Facility ID No. 41810
	)	File No. BALH-20070514AEO
	)	
WFVA(AM), Fredericksburg, Virginia	)	Facility ID No. 41813
	)	File No. BAL-20070514AEP
	)	
WBQB(FM), Fredericksburg, Virginia	)	Facility ID No. 41812
	)	File No. BALH-20070514AEQ
	)	
WWRE(FM), Berryville, Virginia	)	Facility ID No. 60363
	)	File No. BALH-20070514AER
	)	
WWRT(FM), Strasburg, Virginia	)	Facility ID No. 60362
	)	File No. BALH-20070514AES

MEMORANDUM OPINION AND ORDER
AND
NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: May 7, 2008 **Released: May 8, 2008**

By the Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. The Commission has before it the above-captioned applications (the "Applications"), as amended,[1] of Mid Atlantic Network, Inc., ("Mid Atlantic") for consent to assign to Centennial Licensing II, L.L.C. ("Centennial Licensing II") the licenses for the following stations: WINC(AM) and WINC-FM, Winchester, Virginia; WFVA(AM) and WBQB(FM), Fredericksburg, Virginia; WWRE(FM),

[1] The applications were amended on July 6, 2007, and July 27, 2007.

Berryville, Virginia; and WWRT(FM), Strasburg, Virginia (collectively the "Stations"). We also have before us a June 18, 2007, Informal Objection ("Objection") filed jointly by Gary E. Burns ("Burns") and 3 Daughters Media, Inc. ("3 Daughters" and collectively, the "Objectors").[2] In this *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture ("NAL")* issued pursuant to Sections 309(e) and 503(b) of the Communications Act of 1934, as amended (the "Act"), and Section 1.80 of the Commission's Rules (the "Rules"),[3] by the Chief, Audio Division, Media Bureau, by authority delegated under Section 0.283 of the Rules,[4] we grant in part and deny in part the Objection, conclude that Centennial Licensing II is apparently liable for a monetary forfeiture in the amount of eight thousand dollars ($8,000), and grant the Applications as conditioned herein.

II. BACKGROUND

2. Previously, Burns assigned the license of Station WLNI(FM),[5] Lynchburg, Virginia, part of the Roanoke-Lynchburg Arbitron Metro (the "Metro Area") to Centennial Broadcasting, L.L.C. ("Centennial Broadcasting"), which has an attributable interest[6] in Centennial Licensing II. As part of that assignment, on February 28, 2005, Burns, 3 Daughters' sole shareholder, officer, and director, entered into a "Non-Solicitation and Consulting Agreement"[7] ("Non-Compete Agreement") with Centennial for which he received $25,000 in additional and separate compensation.[8] A provision in the Non-Compete Agreement prohibits Burns, directly or through a business entity, from operating a radio station in the Metro Area for a period of five years if the station utilizes a "format substantially similar" to that used by WLNI(FM) on its consummation date.[9]

3. Subsequently, 3 Daughters acquired Station WBLT(AM),[10] Bedford, Virginia, also in the Metro Area, and changed its programming to a format which Centennial believed was in violation of the Non-Compete Agreement. On February 17, 2006, Centennial filed a motion in the United States District Court for the Western District of Virginia ("District Court") seeking an injunction against the Objectors. On March 20, 2006, the District Court issued a preliminary injunction against the Objectors which

---

[2] On July 6, 2007, Centennial Licensing II filed an "Opposition to Informal Objection" ("Opposition") to which the Objectors replied on July 17, 2007 ("Reply"). Later, on November 19, 2007, the Objectors filed a "Supplement to the Informal Objection" ("Supplement") that Centennial Licensing II responded to on November 21, 2007 ("Response Letter").

[3] 47 U.S.C. §§ 309(e), 503(b); 47 C.F.R. § 1.80.

[4] See 47 C.F.R. § 0.283.

[5] File No. BALH-20041110ACM. Subsequently, Centennial Broadcasting assigned Station WLNI(FM) to its wholly owned subsidiary Centennial Licensing, L.L.C. ("Centennial Licensing"). *See* File No. BALH-20060309AAD.

[6] In its July 6, 2007 amendments, Centennial Licensing II corrected Exhibit 11 to the Applications to identify Centennial Broadcasting II, L.L.C., ("Centennial Broadcasting II") as its parent company, rather than Centennial Broadcasting as previously listed. For convenience, unless referring to a specific Centennial entity only, we will collectively refer to the Centennial companies: "Centennial Licensing;" "Centennial Licensing II;" "Centennial Broadcasting;" and "Centennial Broadcasting II" as "Centennial."

[7] A copy of the Agreement was submitted in conjunction with the WLNI(FM) assignment application.

[8] Non-Compete Agreement at ¶2, Exhibit B, Objection.

[9] *Id.* at 1-2.

[10] File No. BAL-20050721ABJ.

became permanent on September 29, 2006, and was affirmed, on appeal, by the United States Court of Appeals for the Fourth Circuit.[11] The Permanent Injunction provided that:

> Burns is PERMANENTLY ENJOINED from participating in or being in any manner connected with the ownership, operation, management or control of any commercial AM or FM broadcast business at any broadcasting station that is included in the Roanoke-Lynchburg Arbitron Metro radio market for a period of five years if that business station uses the following programming formats [defined in a footnote]: All Talk, News/Talk, Full Service Talk or Specialized Talk with a focus on current events and/or politics. Defendant 3 Daughters, Inc. is PERMANENTLY ENJOINED from the same so long as Gary Burns is directly or indirectly its licensee, principal, agent, consultant, employee, proprietor, partner, lender, shareholder, director, or officer.[12]

4. While Centennial's litigation was pending, the Objectors filed, on June 13, 2006, a complaint with the Enforcement Bureau (the "Complaint") which raises nearly identical issues as presented in the Objection; the Complaint was also submitted in this proceeding as an attachment to the Reply.[13] Therefore, we will also consider the Complaint herein. The Objectors contend that, when Centennial sought to judicially enforce the Non-Compete Agreement's format restriction, it violated Section 310(d) of the Act.[14] Furthermore, the Objectors argue, Centennial's violation of the Act is ongoing due to the District Court's Permanent Injunction enforcing the format restriction. Therefore, the Objectors request that the Commission deny the Applications, issue the maximum permissible forfeiture ($325,000), and order that Centennial move to dissolve the Permanent Injunction, or alternatively, designate the Applications for hearing.

III. DISCUSSION

5. Pursuant to Section 309(e) of the Act, informal objections must provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with the public interest.[15] We will consider the Objection based on this standard of review.

---

[11] Exhibits C and E, Objection, (*Centennial Broadcasting, LLC v. Gary E. Burns; 3 Daughters Media, Inc.*, Memorandum Opinion and Order, CA No. 6:06-CV00006 (W.D. Va. Sep. 29, 2006) ("Permanent Injunction") *aff'd* No. 06-2098, slip op (4th Cir. Nov. 16, 2007)). In addition, on June 8, 2006, the District Court denied the Objectors' *Motion to Dissolve Preliminary Injunction,* Memorandum Opinion and Order, CA No. 6:06-CV00006 (W.D. Va. Jun. 8, 2006) ("Motion to Dissolve"), Exhibit C, Reply.

[12] Permanent Injunction at 22-23, Exhibit E, Objection (footnotes omitted).

[13] Exhibit A, Reply. We note that pursuant to 47 C.F.R. § 1.1202(d)(2), the filing of the previously unserved informal Complaint did not create any parties (or a proceeding) for purposes of the *ex parte* rules.

[14] Section 310(d) of the Act, provides that "[n]o construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, . . . to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby." 47 U.S.C. § 301(d). The authority to determine whether a Section 310(d) violation has occurred lies *exclusively* with the Commission. *See Radio Station WOW v. Johnson*, 326 U.S. 120, 130, 131-132 (1945). In contrast, the cases cited by Centennial, in its Opposition, where *res judicata* was applied did not concern issues under the Commission's sole jurisdiction. Reply at 3-4.

[15] 47 U.S.C. § 309(e). *See also Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 R.R. 2d 862 (1986) (informal objections, like petitions to deny, must contain adequate and specific factual allegations sufficient to warrant the relief requested).

6. *Procedural Issues.* Centennial raises two procedural issues against the Objection. First, Centennial argues that the Objection should be dismissed because "Centennial Broadcasting—the entity against which the allegations in the Informal Objection are directed—is not a party to the Applications."[16] Centennial concedes, however, that Centennial Broadcasting and Centennial Broadcasting II, the parent of the assignee, are "affiliated."[17] Moreover, Centennial admits that the original Exhibit 11 to the Applications mistakenly identified Centennial Broadcasting as the assignee's parent company.[18] Subsequently, after Centennial corrected its error, the Objectors amended the Objection to include "those entities and individuals with attributable interests in both Centennial Broadcasting and Centennial Broadcasting II."[19] Therefore, we find this procedural argument warrants no further consideration.

7. Next, Centennial asserts that the doctrine of *res judicata*[20] precludes the Commission's consideration of the Objection. Centennial contends that the District Court has previously considered and rejected the Objectors' argument that Centennial violated Section 310(d) of the Act by enforcing the Non-Compete Agreement.[21] The Objectors counter that at issue before the District Court was the contractual enforceability of the Non-Compete Agreement whereas the issue before the Commission in the Objection is whether Centennial's enforcement of the Non-Compete Agreement violates Section 310(d) of the Act.

8. In order for *res judicata* to apply the following factors must be present:

> The prior action must have: (1) shared a common nucleus of operative facts with the subsequent action; (2) resulted in a final judgment on the merits; and (3) involved the same parties or their privies. If these elements are present, *res judicata* operates to bar the subsequent litigation not only of the claims actually litigated in the earlier action, but also of any claims that could have been litigated in the earlier action.[22]

9. The alleged violation of the Act is an issue separate and distinct from the issue of whether the Non-Compete Agreement is enforceable under state contract law.[23] The Fourth Circuit acknowledged these distinct issues when it stated, "that a party may violate (the Act) by invoking equitable remedies for breach of contract without obtaining the FCC's consent has no bearing on the enforceability of the underlying contract."[24] A review of the District Court's ruling plainly reveals that its decision addressed

---

[16] Opposition at 3.

[17] *Id.* In addition, a review of the Commission's records indicates that both Centennial Broadcasting II and Centennial Broadcasting essentially share the same ownership structure. *See* Application File No. BOA-20070531AGW and Exhibit 11, as amended, to the Applications.

[18] Opposition at 3. *See also* note 6 *supra.*

[19] Reply at 3.

[20] *Res judicata* is a doctrine by which "the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action" by those parties. *Teleservices Industry Association, Complainant v. AT&T Corp. Defendant,* Memorandum Opinion and Order, 15 FCC Rcd 21454 (EB 2000) ("*TIA v AT&T*") quoting *Cromwell v. Sac County,* 94 US 351, 352 (1876). *See also, Allen v. McCurry,* 449 U.S. 90, 94 (1980) ("a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action").

[21] Opposition at 3-4.

[22] *TIA. v AT&T,* 15 FCC Rcd at 21454.

[23] *See e.g .Citicasters,* Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 3415, 3419 (EB 2001) *application for review denied,* 16 FCC Rcd 14137 (2001), *reconsideration denied,* 17 FCC Rcd 1997 (2002) ("*Citicasters*") (assessment of licensee obligations under the Act is not an adjudication of contractual rights and obligations).

[24] Supplement at 17 note 8.

the Non-Compete Agreement's enforceability under Virginia state contract law and not the Act. For example, the District Court declared that the Non-Compete Agreement "clearly qualifies for the relaxed standards that apply in the sale of business context, and is enforceable under Virginia law."[25] Moreover, the District Court, in specifically rejecting the Objectors' argument that the Non-Compete Agreement was unenforceable under state law because it violated the Act, observed:

> The FCC will not approve license applications or transfers when the new licensee's ability to operate a station or select programming is unduly inhibited by contractual terms, and will make removal of those terms a condition of approval. Defendant [the Objectors] has not, however, cited any cases for the proposition that FCC rules and decisions governing license transfers and applications – which are FCC actions – alter state contract law or are mandatory on courts. In *In Re Roman*, the FCC took quite the opposite position, stating, "Congress has not preempted the field of contracts relating to broadcasting [and] there is no conflict between State and Federal policy as to the covenant not to compete . . ." Indeed it is precisely because such terms are valid that the FCC requires that they be deleted from contracts . . . . If such terms were preempted and therefore unenforceable, there would be no need to delete them.
>
> According to Defendants, the FCC was not informed of the agreement in Burns' license application for WBLT(AM), and thus had no opportunity to pass on its appropriateness, or to demand the restriction be modified as a condition of licenses approval. Any conflict between his duties as licensee and his contractual obligations is of his own making and does not merit relief from the Court.[26]

10. With regard to the breach of contract issues, the Commission's longstanding policy is that it will defer to courts of competent jurisdiction in the interpretation and enforcement of contractual rights between parties.[27] The Commission has noted that "by this approach, we have preserved the Commission's exclusive authority to make public interest determinations on licensing matters while recognizing the role of state and local courts in adjudicating private contractual disputes."[28] Therefore, we find that *res judicata* applies to the state contract issue, but it does not apply to the issue of whether Centennial's successful enforcement of the Non-Compete Agreement violates the Act.

11. *Substantive Issue.* The Objectors argue that Centennial lacks the requisite character to be a Commission licensee because it obtained unauthorized control over Station WBLT(AM) when the District Court granted Centennial's motion to enforce the parties' Non-Compete Agreement. In support, the Objectors cite the *Citicasters* decision, in which the Enforcement Bureau issued a $25,000 forfeiture "for seeking equitable relief from a court that effectively restricted a licensee's ability to control

[25] Permanent Injunction at 17, Exhibit E, Objection.

[26] *Id.* at 18-19 (footnote and citations omitted). Previously, the District Court considered whether to dissolve the injunction due to Commission precedent in *Cumulus Licensing, LLC,* Letter, 21 FCC Rcd 2998 (MB 2006) (*"Cumulus"). See* Motion to Dissolve at 6-7, Exhibit C, Reply. In *Cumulus,* the Media Bureau required the parties to an assignment application to delete from the purchase agreement a format restriction that limited the assignee's ability to program its newly acquired station. In dicta, the District Court opined that "neither the rule of *Cumulus Licensing* nor the Commission's policy concerns are applicable [here, because] . . . it is the assignor-vendor (Burns) who is subject to a restrictive covenant, not the assignee-vendee (Centennial)." *Id.* at 7.

[27] *See Abundant Life, Inc.,* Memorandum Opinion and Order, 16 FCC Rcd 4972, 4974 (2001), citing *North American Broadcasting, Inc.*, Memorandum Opinion and Order, 15 FCC 2d 979, 983 (Rev. Bd. 1969).

[28] *Arecibo Radio Corporation v. FCC*, Memorandum Opinion and Order, 101 FCC 2d 545 (1985).

programming policies and decisions."[29] Thus, the Objectors argue, "just as in *Citicasters*, Centennial initiated litigation here in an effort to enforce a private contract and thereby restrict 3 Daughters' ability to program WBLT(AM) . . . ."[30] In addition, the Objectors cite *Cumulus* for the proposition that "contract provisions that contain radio station format restrictions . . . are impermissible because they deprive the licensee of control over station programming."[31] According to the Objectors, "the effect of the Format Restriction here . . . is identical to the format restriction rejected by the FCC in *Cumulus* . . . ."[32]

12. In response, Centennial argues that the Commission has previously approved the Non-Compete Agreement. It notes that the Non-Compete Agreement was submitted to the Commission in connection with the 2004 WLNI(FM) assignment application.[33] Moreover, Centennial observes that "Burns certified to the Commission [in the application] . . . that the attached Non-solicitation and Consulting Agreement fully complied with Commission rules and policies."[34] Thus, Centennial asserts that the Commission approved the Non-Compete Agreement when it granted the WLNI(FM) assignment application. We disagree. As the Objectors note, Commission staff do not routinely scrutinize contracts submitted as part of the review of assignment applications.[35] Hence, the Commission has declared that the grant of an assignment application does not "establish either the acceptability of a particular contract term or the correctness of an applicant's rule interpretation in future application proceedings. Reliance on a prior Commission action would be appropriate only where a decision disposing of the prior application plainly considered and found acceptable the pertinent contract term or rule interpretation."[36] No such decision was issued in connection with the WLNI(FM) assignment application. Were the staff to have reviewed the Non-Compete Agreement in connection with the WLNI(FM) assignment application, it would have requested deletion of that contractual provision as in *Cumulus*. Accordingly, it is now apparent that Burns and Centennial Broadcasting each falsely certified that the contractual documents complied fully with the Commission's Rules and policies. However, it is well settled that the Commission's authority to revisit final actions is generally limited to the correction of ministerial errors that underlie or occur in the process of taking action.[37] The decision to grant a license application is typically a discretionary, rather than ministerial, action.[38] Accordingly and regrettably, we are without authority to initiate forfeiture proceedings with regard to these false certifications, which occurred in the context of the now-final proceeding granting the WLNI(FM) assignment application. Nevertheless, we express our strong disapprobation to Burns and Centennial Broadcasting for agreeing to this contract term and for failing to make the requisite application disclosures. Any future application filed by either of these parties will be subject to a higher level of scrutiny.

---

[29] Objection at 7. In *Citicasters,* the licensee for Station WBTJ(FM) agreed in a TBA to accept the broker's programming. Subsequently, after the licensee sought to terminate the TBA, the broker obtained a temporary restraining order requiring the licensee to receive court approval before providing programming on the Station.

[30] Objection at 7-8.

[31] *Id.* at 9.

[32] *Id.*

[33] *See supra* note 7.

[34] Opposition at 6.

[35] *1998 Biennial Regulatory Review—Streamlining of Mass Media Applications,* Report and Order, 13 FCC Rcd 23056, 23076 (1998).

[36] *Id.*

[37] *County of San Mateo, CA*, Memorandum Opinion and Order, 14 FCC Rcd 16501, 16503-04 (2001) (*citing American Trucking Ass'n v. Frisco Transp. Co.*, 358 U.S. 133, 145-46 (1958)).

[38] *Id.* at 16504 (finding that grant of application was not ministerial and, thus, could not be reconsidered more than thirty days after it became final).

13. Next, Centennial contends, in *Citicasters* judicial enforcement had the effect of stripping the current licensee of ultimate control over programming at a brokered station. Here, Centennial states, the restrictive covenant in the Non-Compete Agreement was executed before 3 Daughters acquired WBLT(AM) and merely "carves out a narrow restriction on programming that does not approach the wholesale delegation addressed by the *Citicasters* decision."[39] The degree to which the provision contained in the Non-Compete Agreement restricts 3 Daughters' control over Station WBLT(AM), while relevant, is not dispositive. Although there is no general Commission proscription on the scope of non-compete covenants,[40] such agreements cannot interfere with licensee control over the basic operating policies of the station, i.e., programming, personnel, and finances.[41] A licensee must retain "the ultimate responsibility for selecting programming material and establishing programming policies . . . and . . . this responsibility cannot be 'unduly fettered by contractual arrangements restricting the licensee in his free exercise of his independent judgments.'"[42] Under the Non-Compete Agreement, however, 3 Daughters is not permitted to utilize on its Station a "format substantially similar" to that used by WLNI(FM) on its consummation date.[43] While we need not repeat the parties' arguments, detailed extensively in their litigation, as to what constitutes "substantially similar" programming, we find that the Non-Compete Agreement unquestionably restricts 3 Daughters' ability to control Station WBLT(AM)'s programming. In particular, the restriction limits 3 Daughters' "flexibility to address the needs and interests of its local communities, to react to changing audience tastes and preferences, to respond to other competitors in the market, and to select its programming accordingly."[44]

14. We find unpersuasive Centennial's contention that the format restriction is permissible because it is "reasonable as to duration and geographic scope."[45] In *Citicasters*, the broker's unauthorized

[39] Opposition at 7.

[40] *See e.g. Raul Santiago Roman*, Decision, 38 FCC Rcd 290, 294 (Rev.Bd.1965) (permitting non-compete covenants where: 1) ancillary to the sale of a business; 2) designed to prevent a seller with an ongoing, competing business from impairing the value of the property or business sold by immediately attracting the existing customers of the transferred business; and 3) reasonably limited as to duration and geographic scope.).

[41] *Stereo Broadcasters, Inc.*, Memorandum Opinion and Order, 87 FCC 2d 87 (1981), *recon denied*, 50 RR 2d 1346 (1982).

[42] *Cumulus*, 21 FCC Rcd at 3005 (quoting *Report on Editorializing*, 13 FCC 2d 1246, 1248 (1949)).

[43] The restriction provides:

> Except as provided in the next sentence, Covenantor [Burns] further agrees that at no time during the Restricted Period will he directly or indirectly, whether as owner licensee, principal, agent, consultant, employee, proprietor, partner, lender, or shareholder, director or officer of a corporation (or similar position in any other entity), or in any other capacity, other than as employee or contractor of Buyer, engage in, own, manage, operate, control, or otherwise participate in or be in any manner connected with the ownership, operation, management or control of any commercial AM or FM broadcast business at any radio broadcasting station that is included in the Roanoke-Lynchburg Arbitron Metro radio market *if such station utilizes a programming format substantially similar to any format used by the Station* [WLNI(FM)] *on the date Buyer acquires the Station*; provided, however, that ownership of less than 5% of the outstanding stock of any publicly traded corporation shall not be prohibited solely by reason thereof. Covenantor's ownership and operation of Radio Stations WMNA-FM and WMNA(AM), Gretna, Virginia, are specifically excluded from the restrictions in this paragraph.

Non-Compete Agreement at ¶ 2, Exhibit B, Objection. (emphasis added).

[44] *See, e.g., National Ass'n for Better Broadcasting*, Letter, 55 FCC 2d 800 (1975) ("this duty [for programming decisions] cannot be delegated and a licensee cannot, even unilaterally, foreclose its discretion and continuous responsibility to determine the public interest and operate in accordance with that determination.").

[45] Opposition at 8.

control over the licensee's programming occurred over only three months.[46] Similarly, in *Cumulus,* the Media Bureau objected to a provision that restricted the assignee from certain programming formats for a period of five years, the same length of time specified in the Non-Compete Agreement here.[47] These decisions are consistent with the Commission longstanding policy that a licensee must "retain control over programming content at all times."[48] In short, "a contract barring the use of such formats, even for a limited period, is impermissible."[49]

15. Thus, we find that Centennial apparently violated Section 310(d) of the Act and Section 73.3540[50] of the Rules when it sought and received an injunction restricting the programming format that 3 Daughters could utilize at WBLT(AM). In this regard, we note that control over any one of the three areas essential to station operation is sufficient for a finding of an unauthorized transfer or an unauthorized assumption of control.[51] The unauthorized control commenced on March 20, 2006, when the District Court issued the preliminary injunction enforcing the format restriction contained in the Non-Compete Agreement and continues unabated to the present.

16. *Proposed Forfeiture.* Next, having found that Centennial apparently violated the Act and the Rules, we must determine the appropriate sanction for the violations. The Objectors request that Centennial be cited for the maximum allowable forfeiture amount ($325,000) and be ordered to move to dissolve the District Court's injunction; or in the alternate, that a Commission hearing be ordered to determine, among other things, whether Centennial possesses the requisite character qualifications to be a Commission licensee. In opposing the requested relief, Centennial notes that neither licensee in *Citicasters* or *Cumulus* was found to have lacked the necessary character qualifications. As discussed below, we believe that a forfeiture is appropriate in this case.

17. Under Section 503(b)(1)(B) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.[52] Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.[53] The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,[54] and the Commission has so interpreted the term in the Section 503(b) context.[55] Section 312(f)(2) of the Act provides that "[t]he term 'repeated,' when used with reference to the commission or omission of any act,

[46] 16 FCC Rcd at 3420 (violation continued from August 22, 2000, until November 12, 2000).

[47] 21 FCC Rcd at 3005.

[48] *Cosmopolitan Broadcasting Corp.*, Decision, 59 FCC 2d 558, 561 (1976) (quoting *United Broadcasting of New York*, 4 RR 2d 167, 173 (1965).

[49] *Cumulus*, 21 FCC Rcd at 3006.

[50] 47 § 73.3540.

[51] *See, e.g., Hicks Broadcasting of Indiana, LLC,* Hearing Designation Order, 13 FCC Rcd 10662, 10677 (1998) ("Control over any one of the areas of personnel, programming and finances would be sufficient for a finding of *de facto* control.").

[52] 47 U.S.C. § 503(b)(1)(B). *See also* 47 C.F.R. 1.80(a)(1).

[53] 47 U.S.C. § 312(f)(1).

[54] *See* H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

[55] *See Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day."[56]

18. The Commission's *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules establish a base forfeiture amount of $8,000 for an unauthorized substantial transfer of control.[57] In determining the appropriate forfeiture amount, we may adjust the amount upward or downward by considering the factors enumerated in Section 503(b)(2)(D) of the Act, including "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[58]

19. After review of the record, we find that imposition of a forfeiture for the base amount is warranted. As an initial matter, we note that, unlike *Citicasters*, where the broker obtained judicial enforcement of an agreement to *provide all* of the station's programming, here the Non-Compete Agreement does not require the licensee to accept a third party's programming, but instead is limited to restricting Station WBLT(AM)'s choice of formats. Also, the record indicates that Burns shares culpability with Centennial for the violation because he was separately compensated $25,000 for agreeing to the format restriction and actively negotiated the unlawful provision.[59] Moreover, Burns previously certified to the Commission that the Non-Compete agreement complied with the Act and Commission rules and policies. As a going forward matter, we caution all applicants that they will be held strictly accountable for disclosing *any* contract terms that may not fully comply with this Commission policy. If any transaction agreement contains a provision that does not fully comply with Commission rules and policies, the relevant certification in the application form should be "No" and an explanatory exhibit attached.

20. Thus, based upon the information before us and taking into consideration the factors expressed in Section 503(b)(2)(D)of the Act, we find that a forfeiture in the amount of eight thousand dollars ($8,000) is appropriate. We do not find, on the basis of the record before us, that Centennial's actions seeking judicial enforcement of the Non-Compete Agreement raise a substantial and material question of fact regarding Centennial Licensing II's basic qualifications to be Commission licensee of the subject stations. However, we will condition the grant of the Applications on Centennial's compliance with the Act by taking all necessary actions to dissolve the Permanent Injunction against 3 Daughters and Gary Burns and refraining from further attempts to enforce the format restriction covenant in the Non-Compete Agreement.[60]

IV. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's Rules, that Centennial Licensing II, L.L.C., is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of eight

[56] 47 U.S.C. § 312(f)(2).

[57] *See Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997) *("Forfeiture Policy Statement"), recon. denied*, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section I.

[58] 47 U.S.C. § 503(b)(2)(D); *see also Forfeiture Policy Statement,* 12 FCC Rcd at 17100; 47 C.F.R. § 1.80(b)(4).

[59] The District Court, citing Burns' testimony, observed that the format restriction represented a "compromise, between Burns, who wished to continue in the radio business in his home area, and Centennial, which had originally proposed a non-compete prohibiting Burns from owning any radio stations in the area." Permanent Injunction at 4-5, Exhibit E.(citing Burns' Affidavit).

[60] Any contractual causes of actions that the parties may have against each other as a result of our decision should be presented to a court of competent jurisdiction. *See supra* note 27.

thousand dollars ($8,000) for its apparent willful and repeated violation of Section 310(d) of the Communications Act of 1934, as amended, and Section 73.3540 of the Commission's Rules.

22. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's Rules, that, within thirty (30) days of the release date of this Letter, Centennial Licensing II, L.L.C., SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

23. Payment of the proposed forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced in the caption above. Payment by check or money order may be mailed to Federal Communications Commission, at P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank—Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank: TREAS NYC, BNF: FCC/ACV--27000001 and account number as expressed on the remittance instrument. If completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code).

24. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington D.C. 20554, ATTN: Peter H. Doyle, Chief, Audio Division, Media Bureau, and MUST INCLUDE the NAL/Acct. No. referenced above.

25. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

26. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director-Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.[61]

27. IT IS FURTHER ORDERED IT IS ORDERED, that the Informal Objection filed by Gary E. Burns and 3 Daughters Media, Inc., IS GRANTED in part and DENIED in part.

28. IT IS FURTHER ORDERED, that the Applications (File Nos. BAL-20070514AEN; BALH-20070514AEO; BAL-20070514AEP; BALH-20070514AEQ; BALH-20070514AER and BALH-20070514AES) for consent to assign the licenses of Stations WINC(AM), Winchester, Virginia; WINC-FM, Winchester, Virginia; WFVA(AM) Fredericksburg, Virginia WBQB(FM), Fredericksburg, Virginia; WWRE(FM), Berryville, Virginia; and WWRT(FM), Strasburg, Virginia, from Mid Atlantic Network, Inc. to Centennial Licensing II, L.L.C., ARE GRANTED, SUBJECT TO THE FOLLOWING CONDITIONS:

> (1) That the Permanent Injunction against Gary E. Burns and 3 Daughters Media, Inc. shall be dissolved prior to the consummation of the transaction approved herein, and
>
> (2) That all Centennial companies defined herein (*i.e.*, Centennial Broadcasting, L.L.C., Centennial Broadcasting II, L.L.C., Centennial Licensing, L.L.C., and Centennial Licensing II, L.L.C.) all of their

[61] *See* 47 C.F.R. § 1.1914.

principals, agents, and persons or entities with attributable interests in any Centennial company shall refrain from any further attempts to enforce the format restriction covenant contained in the February 28, 2005, Non-Solicitation and Consulting Agreement by and between Centennial Broadcasting, L.L.C., and Gary E. Burns.

29. IT IS FURTHER ORDERED that copies of this letter shall be sent, by First Class and Certified Mail, Return Receipt Requested, to Centennial Licensing II, L.L.C., c/o Michael H. Shacter, Esquire, Womble Carlyle Sandridge & Rice, Seventh Floor, 1401 Eye Street, N.W.,Washington, DC 20005; Mid Atlantic Network, Inc., c/o David M. Silverman, Esquire, Davis Wright Tremaine, L.L.P., 1919 Pennsylvania Avenue, N.W., Suite 200,Washington, DC 20006; and Gary E. Burns and 3 Daughters Media, Inc., c/o Mark J. Prak, Esquire, Brooks Pierce McLendon Humphrey & Leonard, L.L.P., Wachovia Capitol Center, Suite 1600, P.O. Box 1800,Raleigh, NC 27602.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau