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Washington, D.C. 20554

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In Reply Refer to:

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In re: KFCD(AM) Farmersville, TX
Facility ID No. 43757
File No. BAL-20070216ABA

KHSE(AM), Wylie, TX
Facility ID No. 133464
File No. BAL-20070216ABB

**Applications for
Assignment of License**

Petition for Reconsideration

Dear Counsel:

This letter concerns the Petition for Reconsideration (the "Petition") filed by David Schum *et al.* ("Petitioners") on March 20, 2008. The Petition seeks reconsideration of the February 19, 2008, letter decision¹ granting the above-referenced applications (the "Applications") for the assignment of the

¹ Letter to Richard R. Zaragoza, Esq., *et al.*, 23 FCC Rcd 2642 (MB 2008) ("Bernard-to-Principle Decision"). In addition to Mr. Schum, Petitioners include J. Michael Lloyd, Frank D. Timmons, Carol D. Kratville, Brian M. Brown, Robert E. Howard, Edwin E. Wodka, John W. Saunders, Richard J. Drendel, and Joy Crain Johns, individually and as executrix of the Estate of Albert Crain. Petition at 1. Petitioners are equity owners of The Watch, Ltd., the parent company of DFW Radio, a former licensee of KFCD(AM) and former permittee of KHSE(AM). *Bernard-to-Principle Decision*, 23 FCC Rcd at 2643 n.1.

license of Station KFCD(AM), Farmerville, TX (“KFCD”), and the construction permit of Station KHSE(AM), Wylie, TX (“KHSE”) (collectively, the “Station Authorizations”), from Bernard Dallas, LLC (“Bernard”) to Principle Broadcasting Network – Dallas, LLC (“Principle”).² For the reasons set forth below, we dismiss the Supplement, deny the Second Supplement, admonish the Petitioners for filing frivolous and obstructive pleadings and deny the Petition.

Background. This is the latest chapter in the saga of Stations KFCD and KHSE. At one time, both stations were licensed to DFW Radio License LLC (“DFW”) of which The Watch, Ltd. (“The Watch”) was the parent company. The Watch and DFW defaulted on loans with B.B. Zwirn Special Opportunities Fund, L.P. (“Zwirn”) and a bankruptcy court ordered that the DFW assets be sold at auction.³ Zwirn prevailed at the auction and its designee, Bernard, became the licensee of Stations KFCD and KHSE.⁴ The Petitioners unsuccessfully sought to deny that transaction⁵ and, currently, the Media Bureau (“Bureau”) decision denying reconsideration of that decision⁶ is the subject of an Application for Review filed by Petitioners. Subsequently, the instant Applications were filed seeking consent to the assignment of the Station Authorizations from Bernard to Principle. The Petitioners unsuccessfully sought to deny this transaction too and now seek reconsideration of the *Bernard-to-Principle Decision*.

In support of their reconsideration request, Petitioners initially allege that the Bureau incorrectly determined that Bernard complies with the alien ownership provisions of the Communications Act of 1934, as amended (the “Act”)⁷ and assert that Bernard has never disclosed all of its ownership to the Commission.⁸ Additionally, Petitioners contend that Bernard engaged in an unauthorized transfer of control of KHSE(AM), in violation of Section 310(d) of the Act.⁹ Petitioners claim that the foregoing demonstrate that Bernard lacks the basic character qualifications to be a Commission licensee and that, accordingly, the staff could not have lawfully granted the Applications. Petitioners attempt to incorporate

² Also before us are: an Opposition to Petition for Reconsideration (“Opposition”) filed by Bernard on April 2, 2008; a Reply to “Opposition to Petition for Reconsideration” (“Reply”) filed by Petitioners on April 9, 2008; a Motion for Leave to File “Supplement to Petition for Reconsideration” (“Motion”) together with a Supplement to Petition for Reconsideration (“Supplement”) filed by Petitioners on May 15, 2008; an Opposition to Motion for Leave to File Supplement, Response to Supplement, and Request for Administrative Sanctions Against Petitioners (“Response”) filed by Bernard on June 4, 2008; a Reply (“Reply to Response”) filed by Petitioners on June 16, 2008; and a Motion for Leave to File “Second Supplement to Petition for Reconsideration” (“Second Motion”) and a Second Supplement to Petition for Reconsideration (“Second Supplement”) filed by Petitioners on September 4, 2008.

³ See *Letter to David A. Schum et al.*, 21 FCC Rcd 14996, 14997-98 (MB 2006)(“*DFW-to-Bernard Decision*”).

⁴ See *DFW-to-Bernard Decision*, 21 FCC Rcd at 14998.

⁵*Id.*

⁶ See *Letter to David A. Schum et al. re KFCD(AM) and KHSE(AM)*, Letter, 23 FCC Rcd 2646 (MB, 2008)(“*DFW-to-Bernard Reconsideration Decision*”).

⁷ See 47 U.S.C. §§ 310(a) and (b).

⁸ Petitioners state that Bernard disclosed only one principal, David Bernard Zwirn, who is represented to own a 1% equity interest in Bernard. It states that “Bernard has intentionally withheld disclosing the other 99% of its ownership.” Petition at 3.

⁹ See 47 U.S.C. § 310(d). Petitioners allege that Zwirn usurped control over the construction of KHSE(AM) and froze DFW out of decision making. Further, they state that Zwirn’s agent hired an antenna design engineer, attempted to cancel tower studies that had been made at DFW’s request, and otherwise made changes to the station without the consent of DFW.

by reference the “facts and arguments” set forth below and in their Application for Review filed with regard to the assignment of these station licenses from DFW to Bernard.¹⁰

These claims were previously made by Petitioners and have been addressed in the *DFW-to-Bernard Petition Decision*, the *DFW-to-Bernard Reconsideration Decision*, and the *Bernard-to-Principle Decision*. As Bernard argues in its Opposition, and as Petitioners have previously been informed,¹¹ the Commission will not grant reconsideration “merely for the purpose of again debating matters on which the tribunal has once deliberated and spoken.”¹² Because we have already addressed these issues multiple times, we will not address these matters further herein.

Petitioners also claim that newly discovered facts warrant reconsideration. In this regard, they point to articles reporting that the D. B. Zwirn Special Opportunities Fund was liquidating its two largest hedge funds as a consequence of accounting issues.¹³ Additionally, they claim that Zwirn has been under investigation by the Securities and Exchange Commission (“SEC”) since 2006 and that the audit has now been completed. They contend that the Commission must review the results of this investigation before making any decision on Zwirn’s basic qualifications to be a Commission licensee.

In their additional filings, Petitioners expand on these allegations. They now claim that the SEC investigation is for fraud.¹⁴ Additionally, they contend that an August 3, 2006, “Letter of Offer” looking toward the acquisition of shares of Dhandapani Finance Limited demonstrates Zwirn misrepresented its ownership to the Commission.¹⁵ Petitioners also include a March 7, 2008, memorandum in which Zwirn

¹⁰ We have previously informed Petitioners that using incorporation by reference to reprise arguments already made and rejected is improper. *DFW-to-Bernard Reconsideration Decision*, 23 FCC Rcd at 2648. As we noted, the “kitchen sink” approach to filings, as apparently preferred by Petitioners, is disfavored by the Commission and is not permitted. *DFW-to-Bernard Reconsideration Decision*, 23 FCC Rcd at 2648 n.19 citing *Red Hot Radio*, Memorandum Opinion and Order, 9 FCC Rcd 6737, 6745 n.63 (2004). Accordingly, we reject this further attempt by Petitioners to incorporate herein its numerous prior pleadings in this matter and in the DFW to Bernard assignment matter.

¹¹ *DFW-to-Bernard Reconsideration Decision*, 23 FCC Rcd at 2648 n.20.

¹² *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff’d sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

¹³ See “Troubled Firm to Close 2 Funds Worth \$4 Billion,” NYTIMES.com (Feb. 23, 2008); *see also* “D.B. Zwirn to liquidate \$4 billion in assets,” moneycentral.msn.com (Feb. 22, 2008).

¹⁴ See Reply at 2.

¹⁵ See Supplement at 2 - 5 and Exhibit B. This “Letter of Offer” is a letter pursuant to the requirements of the Securities and Exchange Board of India, by which D.B. Zwirn Mauritius and D.B. Zwirn Special Opportunities Fund, L.P. notify Dhandapani Finance Limited that they were making, at a price-certain-per-share, an offer to purchase shares of Dhandapani. Petitioners state that the Letter of Offer contains the statement that “D.B. Zwirn & Co. is owned by Zwirn Holdings, LLC, DBZ GP, LLC, Dubin & Sweica Asset Management, LLC, and certain individuals.” Petitioners claim that Zwirn/Bernard did not previously inform the Commission of the existence and interests of Dubin & Sweica Asset Management, LLC, and the “certain individuals” mentioned in the “Letter of Offer,” and therefore misrepresented its ownership to the Commission in disclosing only 1% equity principal Daniel Bernard Zwirn in the Applications. In its Response, Bernard states that it has consistently reported to the Commission that D.B. Zwirn & Co. has limited partners that are insulated from involvement in the partnership’s media enterprises pursuant to Commission requirements. Dubin & Sweica, it states, is owned by U.S. citizens and is an insulated limited partner. Accordingly, it states, there is nothing inconsistent between the 2006 Letter of Offer and Bernard’s ownership disclosure in this proceeding. Finally, Bernard alleges that Petitioners are conflating four separate funds managed by D.B. Zwirn & Co., L.P. whereas only one of these funds (*i.e.*, D.B. Zwirn Special Opportunities Fund, L.P.) holds an indirect ownership interest in Bernard.

advises investors that it intends to dissolve the D. B. Zwirn Special Opportunities Fund, L.P.,¹⁶ and a May 9, 2008, article from the *Wall Street Journal* concerning Zwirn's difficulties and the SEC's investigation of them.¹⁷ Petitioners also attempt to rebut Bernard's claim that the newspaper articles Petitioners have filed are hearsay by asserting that courts have ruled that judicial notice may be taken of newspaper articles to determine whether a fact is within public knowledge.¹⁸ Finally, Petitioners submit a newspaper article from the *New York Post* claiming that, on August 20, 2008, the Commission's Enforcement Bureau issued a letter commencing an investigation into whether Straight Way Radio, Bernard Radio LLC, D. B. Zwirn Special Opportunities Fund, L.P. and/or D.B. Zwirn & Co. LP engaged in an unauthorized transfer of control regarding stations in Florida and Georgia.¹⁹ They claim that Zwirn had an obligation under Section 1.65 of the Commission's Rules (the "Rules")²⁰ to report this investigation to the Commission.²¹

Discussion. Procedural Matters. As an initial matter, we will deny Petitioners' Motion and dismiss their first Supplement. Section 1.106(f) of the Rules²² provides that supplements to petitions for reconsideration be filed "within 30 days from the date of public notice of the final Commission action" unless leave to file is granted pursuant to a separate request. Petitioners' Motion is a separate request for leave to file their first Supplement. They have not, however, provided grounds for us to grant such leave. As Bernard points out, the "Letter of Offer" Petitioners proffer is dated August 3, 2006, and, accordingly, was available at the time the Petition was filed. Therefore, the material they present in their first Supplement could have been provided earlier and does not warrant consideration pursuant to Section 1.106(c) of the Rules as set forth above. Additionally, even were we to consider the first Supplement, that material does not contain facts indicating that aliens own or control Bernard in excess of the limits set forth in Section 310(a) and (b) of the Act or that Zwirn misrepresented its ownership. Finally, the fact that Zwirn is dissolving the D. B. Zwirn Special Opportunities Fund is irrelevant to our consideration of the Applications.

We will, however, grant the Petitioners' Second Motion and consider their Second Supplement which pertains to an Enforcement Bureau investigation involving D.B. Zwirn & Co., L.P., the ultimate parent of Bernard. That investigation commenced on August 20, 2008,²³ and, therefore, could not have been known to the Petitioners until subsequent to the expiration of the filing period for supplements to petitions for reconsideration as set forth in Section 1.106(f) of the Rules.

Substantive Matters. Section 1.106(c) of the Rules and established case law provide that, "reconsideration is appropriate only when the petitioner either shows a material error or omission in the

¹⁶ See Supplement at 4-5 and Exhibit C.

¹⁷ *Id.* at 5 and Exhibit D.

¹⁸ Reply at 2-3 citing *United States v. Microsoft, Inc.*, 253 F.3d 34, 108-09 (D.C. Cir. 2001); *Washington Post v. Robinson*, 935 F.2d 282, 291 (D.C. Cir. 1991).

¹⁹ See Second Supplement at 2-3 and Exhibit B.

²⁰ 47 C.F.R. § 1.65.

²¹ See Second Supplement at 3.

²² 47 C.F.R. § 1.106(f).

²³ *Tama Broadcasting, Inc.*, Order, 24 FCC Rcd 1612 (EB 2009); *Tama Broadcasting, Inc.*, Consent Decree, 24 FCC Rcd 1615, 1616 (EB 2009).

original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters."²⁴ Petitioners have not met this burden.

In the one new argument raised in the Petition, Petitioners, citing articles from the webpages of *The New York Times*²⁵ and MSN's Moneycentral,²⁶ contend that Zwirn has been under investigation for fraud by SEC since 2006. The Commission, they contend, should review the results of that investigation when available. The *New York Times* article mentioning the investigation was not published until subsequent to the issuance of the *Bernard-to-Principle Decision*. Accordingly, we will assume that the SEC investigation was unknown to Petitioners prior to our grant of the Applications. Nevertheless, we will not grant reconsideration on the basis of that allegation. First, the allegation is supported only by newspaper articles. Hearsay, such as that contained in newspaper articles, is not reliable evidence of the truth of the matters related in the article.²⁷ Second, even if we were to consider the articles, they wholly fail to raise a substantial and material question of fact that requires further inquiry as to whether any of the parties lacks the character necessary to be a Commission licensee. Generally, only if the investigation had resulted in an adjudication, and that adjudication was that Zwirn committed a fraud before the SEC or another governmental agency, would such non-FCC conduct be actionable under our *Character Policy*.²⁸ Neither of these factors is present here.

Additionally, the Enforcement Bureau investigation noted by Petitioners in their Second Supplement does not pertain to the stations involved herein. We have previously determined that there should be no presumption that misconduct at one station is necessarily predictive of the operation of the licensee's other stations.²⁹ Moreover, the Commission has terminated that investigation.³⁰ The parties thereto have entered into a Consent Decree that bars the Commission from considering the facts developed in that investigation in the instant case.³¹ We also find that Petitioners have failed to show that

²⁴ 47 C.F.R. §1.106(c); *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC at 686 (1964); *see also National Association of Broadcasters*, Memorandum Opinion and Order, 18 FCC Rcd 24414, 24415 (2003).

²⁵ "Troubled Firm to Close 2 Funds Worth \$4 Billion," NYTIMES.com (Feb. 23, 2008).

²⁶ "D.B. Zwirn to liquidate \$4 billion in assets," moneycentral.msn.com (Feb. 22, 2008).

²⁷ *Pikes Peak Broadcasting Co.*, Memorandum Opinion and Order, 12 FCC Rcd 4626, 4630 (1997) citing *RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982) and *Rothschild Broadcasting, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 7226, 7227 (1995).

²⁸ *See Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order, and Policy Statement, 102 FCC 2d 1179, 1204 (1985), *recon. granted in part, denied in part*, 1 FCC Rcd 421 (1986), *as modified*, 5 FCC Rcd 3252 (1990) ("*Character Policy*"). The Commission did create an exception to the general rule that non-Commission related misconduct must result in an adjudication before the Commission will consider it. In adopting the *Character Policy* the Commission acknowledged "that there may be circumstances in which an applicant has engaged in nonbroadcast misconduct so egregious as to shock the conscience and evoke almost universal disapprobation." In such cases, it indicated, the misconduct might, of its own nature, constitute *prima facie* evidence that the applicant lacks the traits of reliability and/or truthfulness necessary to be a licensee and might be a matter of Commission concern even prior to adjudication by another body. *Character Policy*, 102 FCC 2d at n.60. We do not believe that the alleged unadjudicated misconduct herein, even if true, "shocks the conscience." Accordingly, it would not fit within this exception to the adjudication requirement.

²⁹ *Character Policy*, 102 FCC 2d at 1223-24.

³⁰ *Tama Broadcasting, Inc.*, 24 FCC Rcd at 1613.

³¹ The Consent Decree provides that, "[t]he Bureau further agrees that, in the absence of new material evidence, it will not use the facts developed in this Investigation through the Effective Date, or the existence of this Consent Decree, to institute any proceeding, formal or informal, or take any action against Tama Broadcasting, Inc., D.B.

the investigation concerned matters that would be of decisional significance in the instant application proceeding. Accordingly, Section 1.65(a) of the Rules³² did not require that the pendency of the investigation be reported to us in this proceeding.

Finally, the staff previously cautioned the Petitioners that pleadings filed with the Commission are not to be “used for other than their intended purpose, *e.g.*, for private financial gain, to settle personal claims or as an emotional outlet.”³³ The Petitioners have ignored that caution. The Petition, the Supplement and the Second Supplement are frivolous and obstructive pleadings which are wholly devoid of merit. Accordingly, we admonish the Petitioners³⁴ for their attempts to further delay this proceeding.

Conclusion/Actions. For the reasons set forth above, we find that Petitioners have failed to show a material error or omission in the *Bernard-to-Principle Decision*, and they have failed to demonstrate new facts which would otherwise warrant reconsideration. Accordingly, IT IS ORDERED, that Petitioners’ Motion for Leave to File “Supplement to Petition for Reconsideration” IS DENIED and Petitioners’ Supplement to Petition for Reconsideration IS DISMISSED. IT IS FURTHER ORDERED, that Petitioners’ Motion for Leave to File “Second Supplement to Petition for Reconsideration” IS GRANTED to the extent indicated herein and DENIED in all other respects. IT IS FURTHER ORDERED, that David Schum, J. Michael Lloyd, Frank D. Timmons, Carol D. Kratville, Brian M. Brown Robert E. Howard, Edwin E. Wodka, John W. Saunders, Richard J. Drendel, and Joy Crain Johns, individually and as executrix of the Estate of Albert Crain, ARE ADMONISHED for filing frivolous and obstructive pleadings. IT IS FURTHER ORDERED, that Petitioners’ Petition for Reconsideration filed on March 20, 2008, IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

Zwirn & Co., L.P., or their affiliates, with respect to their basic qualifications, including character qualifications, to be a Commission licensee.” *Tama Broadcasting, Inc.*, 24 FCC Rcd at 1618-19.

³² 47 C.F.R. § 1.65(a).

³³ *DFW-to-Bernard Decision*, 23 FCC Rcd at 2644 n.12 (citing *Amendment of Sections 1.420 and 73.3584 of the Commission’s Rules Concerning Abuses of the Commission’s Processes*, Report and Order, 5 FCC Rcd 3911, 3912 (1990), *recon. denied*, 6 FCC Rcd 3380 (1991)).

³⁴ This admonishment applies only to the Petitioners, not to their counsel. Attorney misconduct associated with frivolous pleadings is referred to the Office of General Counsel under seal.