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**DA 11-1352**  
*In Reply Refer to*  
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In re: **W272BA, Cocoa Beach, Florida**  
Facility ID No. 144133  
File No. BALFT-20110107AER

**W264AS, Rockledge, Florida**  
Facility ID No. 144128  
File No. BALFT-20110107AER

**Application for Assignment of License  
Petitions to Deny**

Gentlemen:

We have before us: (1) the referenced application (“Application”) seeking Commission consent to the proposed assignment of license of FM Translator Stations W272BA, Cocoa Beach, Florida and W264AS, Rockledge, Florida (collectively, the “Stations”), from David Carus & Associates (“Carus”) to National Christian Network (“NCN”);<sup>1</sup> (2) a Petition to Deny (“Brevard Petition”) the Application filed on February 11, 2011, by Brevard Youth Education Broadcasting Corporation, Inc. (“Brevard”); and (3) a Petition to Deny

<sup>1</sup> See File No. BALFT-20110107AER.

(“Community Petition”) the Application filed on February 15, 2011, by Community Radio Foundation of Florida (“Community”).<sup>2</sup> For the reasons stated below, we deny the Petitions and grant the Application.

**Background.** Carus is the original owner of the Stations, successfully applying for them during the Commission’s 2003 filing window for new FM translator applications.<sup>3</sup> In February, 2006, Carus filled applications for consent to assign the Stations to Community, for no consideration.<sup>4</sup> An Enforcement Bureau investigation delayed action on these applications, and Carus ultimately requested their dismissal. The staff dismissed the 2006 Assignment Applications on May 12, 2010.<sup>5</sup> On June 3, 2011, Carus and the Enforcement Bureau entered into a consent decree (“Consent Decree”) terminating the Enforcement Bureau investigation against Carus for possible violations of Sections 399B and 310(d) of the Communications Act of 1934, as amended, (“Act”)<sup>6</sup> and Sections 73.503(d), 73.3540, and 74.1231(g) of the Commission’s Rules (“Rules”),<sup>7</sup> including the unauthorized transfer of control of the Stations and the broadcast of underwriting messages in excess of the thirty-second per hour limitation set forth in the Rules.<sup>8</sup>

On January 10, 2011, Carus filed the Application to assign the Stations to NCN.<sup>9</sup> Brevard and Community filed their Petitions on February 11, 2011, and February 15, 2011, respectively. NCN filed applications (“NCN Modification Applications”) to change the transmitter sites for Stations W264AS and W272BA and rebroadcast primary station WWBC(AM), Cocoa Beach, FL, as an AM fill-in translator on them on January 7, 2011, and January 11, 2011, respectively.<sup>10</sup> The staff granted the NCN Modification Applications on February, 25 2011 (W264AS), and March 4, 2011 (W272BA), respectively.

In their Petitions, Brevard and Community (collectively, “Petitioners”) argue that: (1) Carus breached a 2004 agreement (“Donation Agreement”) pursuant to which it was to donate the Stations to Community;<sup>11</sup> (2) the Commission should not permit Carus to “secretly walk away” from a current enforcement inquiry by entering into the Consent Decree with the Commission;<sup>12</sup> (3) Carus’ principal served in a “close professional legal capacity” for both Brevard and Community and “certain past board members” of those organizations and, therefore, had direct access to internal business matters that he may have misrepresented to the Commission in order to obtain the Consent Decree;<sup>13</sup> and (4) the public

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<sup>2</sup> On March 3, 2011, Carus filed oppositions to both the Brevard Petition (“Opposition to Brevard Petition”) and Community Petition (“Opposition to Community Petition”).

<sup>3</sup> See File No. BNPFT-20030825AFV (W272BA, granted on February 24, 2004); File No. BNPFT-20030825AFS (W264AS, granted on February 20, 2004).

<sup>4</sup> See File No. BAFPT-20060221AAQ; File No. BAFPT-20060221AAR (“2006 Assignment Applications”).

<sup>5</sup> See *Broadcast Actions*, Public Notice, Report No. 42737 (May 17, 2010).

<sup>6</sup> 47 U.S.C. §§ 399B, 310(d).

<sup>7</sup> 47 C.F.R. § 73.503(d); 47 C.F.R. § 73.3540; 47 C.F.R. § 74.1231(g).

<sup>8</sup> *David Carus & Associates*, Order, 2011 WL 2195567 (EB 2011).

<sup>9</sup> See File No. BALFT-20110107AER.

<sup>10</sup> See File No. BPFT-20110107AET (W272BA); File No. BPFT-20110112ADC (W264AS).

<sup>11</sup> Brevard Petition at 2; Community Petition at 2-3.

<sup>12</sup> Brevard Petition at 3; Community Petition at 3.

<sup>13</sup> Brevard Petition at 2; Community Petition at 4.

interest will not be served by the NCN Modification Applications filed by the assignee, NCN, to move the Stations into congested areas more than adequately served by numerous signals to link a translator network.<sup>14</sup> Brevard also argues the Application should be denied because, despite a carriage agreement between them, Carus improperly removed Brevard's programming from the Stations without any notice to the communities involved.<sup>15</sup>

In its Opposition to the Petitions, Carus responds that: (1) it removed Brevard's programming from the Stations due to technical difficulties related to delivery and that, regardless, any breach of a carriage agreement is a private dispute for which the proper forum is a local court of competent jurisdiction, not the Commission; (2) its principal, David Carus, has not served as counsel for Brevard, Community, or any of their board members; (3) Carus' alleged breach of the Donation Agreement is a private dispute for which the proper forum is a local court of competent jurisdiction, not the Commission; (4) a consent decree is a well-established vehicle for resolving investigations in order to avoid further expenditure of public resources; and (5) the NCN Modification Applications serve the public interest because NCN provides local programming to the Rockledge and Cocoa Beach areas.<sup>16</sup>

**Discussion.** Section 309(d)(1) of the Act requires a two-step analysis for judging the Petitions.<sup>17</sup> We first determine whether Petitioners have made specific allegations of fact that, if true, demonstrate that grant of the Application is *prima facie* inconsistent with the public interest. These specific allegations must be supported by the affidavit of a person with knowledge of the facts alleged, except for those of which we may take official notice.<sup>18</sup> If the specific allegations make a *prima facie* case, we next examine and weigh the evidence presented to determine "whether the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for."<sup>19</sup> We must also assess whether granting the Application serves the public interest.<sup>20</sup>

*Carriage and Donation Agreements.* With respect to the arguments that Carus breached a carriage agreement with Brevard and the Donation Agreement with Community, the Commission has consistently held that it is not the proper forum for the resolution of private disputes.<sup>21</sup> The parties, if they are so inclined, should seek redress for such matters in a local court of competent jurisdiction.<sup>22</sup>

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<sup>14</sup> Brevard Petition at 3; Community Petition at 4.

<sup>15</sup> Brevard Petition at 1-2.

<sup>16</sup> Opposition to Brevard Petition at 1-5; Opposition to Community Petition at 1-3.

<sup>17</sup> 47 U.S.C. § 309(d)(1).

<sup>18</sup> *Id.*

<sup>19</sup> *Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985). *See also* 47 U.S.C. § 309(d)(1) ("The petition shall contain specific allegations of fact sufficient to show that . . . grant of the application would be *prima facie* inconsistent with [Section 309(a)]. Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof."); 47 C.F.R. § 73.3584(b).

<sup>20</sup> *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988); *see also Rocky Mountain Radio Co., LLP*, Memorandum Opinion and Order, 15 FCC Rcd 7166, 7167 (1999).

<sup>21</sup> *Beyond the Bay Media Group*, Memorandum Opinion and Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 6967, 6974 (MB 2006); *John F. Runner, Receiver (KBIF)*, Memorandum Opinion and Order, 36 RR 2d 773, 778 (1976).

<sup>22</sup> *Id.*

Moreover, grant of the Application is permissive only and does not prejudice any relief to which the parties may ultimately be entitled pursuant to a subsequent ruling by a local court.<sup>23</sup>

*Legal Capacity.* As for Petitioners' contention that Carus' principal served them in a "legal capacity,"<sup>24</sup> Petitioners fail to support this argument or even specify in what specific capacity Carus worked for them. For its part, Carus denies its principal served as counsel for Brevard, Community or their boards.<sup>25</sup> This argument does not warrant further discussion.

*Consent Decree.* Petitioners' argument that the Commission granted Carus "special treatment" by entering into a Consent Decree<sup>26</sup> is likewise meritless. In fact, consent decrees do not constitute "special treatment" but represent a tool the Commission commonly uses to efficiently resolve investigations.<sup>27</sup> Indeed, Section 0.111 of the Rules expressly authorizes the Enforcement Bureau to enter into consent decrees,<sup>28</sup> and Commission decisions about whether to enter into a consent decree are committed to the agency's nonreviewable discretion.<sup>29</sup> Therefore, this argument fails.

*NCN Modification Applications.* Finally, Petitioners argue that NCN's plan to move the Stations solely to link a translator network is not in the public interest.<sup>30</sup> We disagree. The staff has previously evaluated the unchallenged NCN Modification Applications and found that they complied with all pertinent statutes, rules and policies and that their grant served the public interest; the grants are now final. Petitioners' argument thus constitutes an impermissible collateral attack on the grant of the NCN Modification Applications and will not be considered.<sup>31</sup>

**Conclusion/Actions.** We find that the Petitioners have not raised a substantial and material question of fact warranting further inquiry. We further find that grant of the Application is consistent with the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, that the February 11, 2011, Petition to Deny filed by Brevard Youth Education Broadcasting Corporation, Inc., IS DENIED, and the February 15, 2011, Petition to Deny filed by Community Radio Foundation of Florida, Inc., IS DENIED.

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<sup>23</sup> *Peggy Haley, N.C.M.*, Letter, 23 FCC Rcd 12687, 88-89 (MB 2008).

<sup>24</sup> Brevard Petition at 2; Community Petition at 4.

<sup>25</sup> Opposition to Brevard Petition at 3; Opposition to Community Petition at 3.

<sup>26</sup> Brevard Petition at 3.

<sup>27</sup> See *United States v. Armour*, 402 U.S. 673, 681 (1971) (noting that by entering into a consent decree, the parties "save themselves the time, expense and inevitable risk of litigation").

<sup>28</sup> 47 C.F.R. § 0.111.

<sup>29</sup> *New York State Department of Law v. FCC*, 984 F.2d 1209, 1211 (D.C. Cir. 1993).

<sup>30</sup> Brevard Petition at 1-3; Community Petition at 2-4.

<sup>31</sup> *Rechannelization of the 17.7-19.7 GHz Frequency Band for Fixed Microwave Services Under Part 101 of the Commission's Rules*, 21 FCC Rcd 10900, 10909 n.40 (2006) (noting that claims which collaterally attack earlier Commission decisions are procedurally flawed). In any case, the fill-in service NCN proposed in those applications is high translator priority. See, e.g., *Implementation of Section 309(J) of the Communications Act- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licensees*, 13 FCC Rcd 15920 (1998) (holding that translator stations proposing to provide fill-in service of the commonly owned primary station will be given priority over all other applications).

The application for approval to assign the license for Stations W272BA, Cocoa Beach, Florida, and W264AS, Rockledge, Florida (BALFT-20110107AER) from David Carus & Associates to National Christian Network, Inc., IS GRANTED.

Sincerely,

Peter H. Doyle  
Chief, Audio Division  
Media Bureau