



**Federal Communications Commission
Washington, D.C. 20554**

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DA 12-186

In Reply Refer to

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Mr. William Johnson
1101 North Main Street
Gainesville, FL 32601

A. Wray Fitch III, Esq.
Stephanie J. Patton, Esq.
Gammon & Grange, P.C.
8280 Greensboro Drive, 7th Floor
McLean, VA 22102

John Trent, Esq.
Putbrese Hunsaker & Trent, P.C.
200 South Church Street
Woodstock, VA 22664

In re: **W244BC, Ocala, Florida**
Facility ID No. 83190
File No. BALFT-20101118AIX

**Application for Consent to Assignment of
License
Petition to Deny**

Gentlemen:

We have before us the above-captioned application (“Application”) seeking approval for the proposed assignment of license for FM Translator Station W244BC, Ocala, Florida (“Station”), from Radio Training Network, Inc. (“RTN”), to Generations Broadcasting Corporation (“GBC”). On January 3, 2011, William Johnson (“Johnson”) filed a Petition to Deny (“Petition”) and Petition to Issue Letter of Inquiry.¹ For the reasons stated below, we deny the Petition, dismiss the Petition to Issue Letter of Inquiry as an unauthorized pleading,² and grant the Application.

Background. On November 18, 2010, RTN filed the Application for consent to assign the Station license to GBC. Johnson opposes grant of the Application, arguing that the proposed assignment

¹ RTN filed a Consolidated Opposition to the Petition to Deny and Petition to Issue Letter of Inquiry (“Opposition”) on January 19, 2011 and a Supplement to Consolidated Opposition to the Petition to Deny and Petition to Issue Letter of Inquiry (“Supplement”) on January 27, 2011. The Bureau granted the Application on January 3, 2011, but rescinded the grant on January 28, 2011, to consider Johnson’s Petition. Johnson filed a Reply on March 14, 2011.

² See 47 C.F.R. § 1.45 (establishing rules governing a pleading cycle consisting only of petitions, oppositions, and replies).

of license is not in the public interest and that RTN has otherwise violated the Commission's Rules ("Rules") and the Communications Act of 1934, as amended ("Act"). Specifically, Johnson alleges that: (1) the Station was silent for more than twelve months and that the license has therefore expired as a matter of law; and (2) RTN discriminated against him in agreeing to sell to GBC, in violation of Section 73.2090 of the Rules.³ Johnson also requests that the Commission direct RTN to file its renewal application immediately.⁴

Discussion. Section 310(d) of Act⁵ requires the Commission to make a determination whether the proposed transfer or assignment of a broadcast license would be in the public interest. Pursuant to Section 309(d)(1) of the Act,⁶ 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.⁷ This threshold determination is made by evaluating the petition and the supporting affidavits. Second, 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.⁸ 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.

Section 312(g) Allegation. Section 312(g) of the Act⁹ states that "[i]f a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period." Johnson's Petition and supporting affidavit allege that the Station was silent during each of his weekly trips to Ocala between October 1, 2009, and November 30, 2010.¹⁰ Johnson further alleges that the Station was silent for the entire two-week period between December 1, 2010, and December 15, 2010.¹¹ RTN responds that the Station was never silent for more than one year.¹² In support, RTN offers the sworn affidavit of its president, James Campbell ("Campbell"),¹³ and "Station Logs" detailing monthly power measurements for the Station,¹⁴ accompanied by a sworn affidavit from the Station's chief engineer.

We find Johnson's allegation that the Station was silent for more than one year to be without merit. Johnson does not provide any evidence to demonstrate that RTN violated Section 312(g) beyond

³ 47 C.F.R. § 73.2090.

⁴ Petition at 2.

⁵ 47 U.S.C. § 310(d).

⁶ 47 U.S.C. § 309(d)(1).

⁷ See *id.*; *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

⁸ 47 U.S.C. § 309(d)(2).

⁹ 47 U.S.C. § 312(g).

¹⁰ See Petition, Exhibit A. Johnson fails to explain the inconsistency between his Section 312(g) argument and his argument that he should be allowed to purchase the Station.

¹¹ *Id.*

¹² See Opposition at 3; Opposition, Exhibit 1.

¹³ See Opposition, Exhibit 1.

¹⁴ See Supplement, Exhibit A.

his claim that the Station was silent during each of his weekly visits to Ocala. Even assuming this, the fact that the Station may have been silent once per week is insufficient to establish that RTN violated Section 312(g) by “fail[ing] to transmit broadcast signals for any *consecutive 12-month period*.”¹⁵ Moreover, the sworn affidavit from the Station’s chief engineer and Station Logs submitted by RTN, detailing the Station’s power levels throughout much of the period during which it was allegedly silent, strongly rebut Johnson’s allegation. Therefore, Johnson fails to provide the specific allegations of fact sufficient to show that grant of the Application would be *prima facie* inconsistent with the public interest, as required by Section 309(d)(1) of the Act.¹⁶

Discrimination Allegation. Johnson’s allegation that RTN has engaged in “price discrimination” against him is based on the fact that Johnson is a minority and that he allegedly offered \$50,000 for the purchase of the Station, while RTN is now selling the Station to GBC, “who happens to be a non-minority purchaser,”¹⁷ for \$25,000. Johnson contends that these facts demonstrate that RTN developed a racially discriminatory “predisposition bias”¹⁸ in violation of Section 73.2090 of the Rules,¹⁹ which prohibits discrimination in the sale of commercially operated broadcast stations. Johnson submits a copy of his proposal to RTN (“Proposal”), claiming that his is the “highest competitive offer,” and that RTN is therefore required to sell the Station to him.²⁰ RTN responds that it declined to sell to Johnson because it had agreed to sell the Station to GBC almost a month before Johnson made his higher offer.²¹ As support, RTN attaches an email from Campbell to RTN’s counsel (“Campbell Email”) notifying counsel of the agreement with GBC, dated September 20, 2010.²² According to Johnson’s own Petition and Proposal, he did not submit any offer or proposal to RTN until October 11, 2010.²³

We have not previously interpreted Section 73.2090. In the context of an assignment of license or transfer of control application, we interpret Section 73.2090 to mean that approval of any commercial broadcast transaction tainted by any type of discrimination within the ambit of the rule – “race, color, religion, national origin or sex” – would be inconsistent with the public interest pursuant to Section 309(d)(1) of the Act.²⁴ However, if a petitioner fails to make a *prima facie* case that the transaction is tainted by such discrimination, then we will find that the case involves a private controversy rather than a public interest matter. The Commission has consistently held that it is not the proper forum for the resolution of private disputes, and that parties should seek redress for such matters in local courts of

¹⁵ 47 U.S.C. § 312(g) (emphasis added).

¹⁶ 47 U.S.C. § 309(d)(1).

¹⁷ See Reply at 3.

¹⁸ *Id.* at 4.

¹⁹ 47 C.F.R. § 73.2090.

²⁰ See Petition at 2; Reply, Exhibit A.

²¹ See Opposition at 4. RTN also indicates that it has a track record of selling stations to entities controlled by minorities. See Opposition at 4, citing File Nos. BALFT-20100309AAC (assignment of station to licensee whose sole owner is African-American) and BAL-20041013AAH (assignment of station to Hispanic licensee).

²² See Opposition, Appendix A. Within the email is a forwarded conversation between Campbell and a GBC representative indicating that the parties agreed to the sale terms as early as September 13, 2010.

²³ See Petition, Exhibit A.

²⁴ 47 U.S.C. § 309(d)(1). We need not reach the issue of potential sanctions for a violation of the Rule, as we find no violation here, for the reasons set forth below.

competent jurisdiction.²⁵ Furthermore, Section 310(d) of the Act²⁶ states that “the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee” in evaluating assignment and transfer applications. To the extent any party seeks to present itself as a superior potential buyer of a station for any reason, we find that Section 310(d) prohibits the Bureau from considering that issue.

In this case, on the basis of the Petition and supporting affidavits, Johnson has not demonstrated that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity. Johnson claims that he offered \$50,000 to purchase the Station and because RTN is now selling the Station to GBC, a non-minority purchaser, for \$25,000, Johnson infers that RTN’s actions are racially motivated. We disagree. First, we find that the Campbell Email – which included the purchase price and the down payment amount - demonstrates that RTN and GBT had entered into a “handshake agreement” *before* Johnson submitted his offer. While the formal agreement had not yet been executed,²⁷ RTN obviously felt bound by the deal and would have risked a potential lawsuit if it backed out.²⁸

Second, the premise on which Johnson’s inference of racial discrimination hinges – that he offered to “purchase” the Station for \$50,000 – is flawed. Based on our review of the Proposal, Johnson in fact proposed a programming agreement, under which he would pay RTN \$1,200 monthly for up to two years to rebroadcast the programming of Station WSKY HD2FM, with an option – not a commitment – to purchase the Station for \$50,000 after the first year.²⁹ A programming agreement is substantially different than a purchase offer. In our view, the fact that the Proposal is not a purchase offer vitiates Johnson’s argument that RTN’s decision to accept GBC’s lower purchase price was motivated by race. Johnson does not provide any further evidence to demonstrate that any RTN conduct concerning the transaction was based on, or influenced by, race. Accordingly, on this issue Johnson fails to provide the specific allegations of fact sufficient to show that grant of the Application would be *prima facie* inconsistent with the public interest, as required by Section 309(d)(1) of the Act.³⁰ Rather, the contractual issues raised by Johnson constitute a private controversy. We also reject Johnson’s arguments pursuant to Section 310(d) of the Act to the extent Johnson seeks to present himself as a superior potential buyer of the Station.³¹

Request to Direct Filing of FCC Form 303-S. Johnson’s Petition requests that the Commission direct RTN to file FCC Form 303-S for renewal of its license.³² However, the Commission does not “direct” licensees to submit renewal applications. Rather, the Rules require that RTN file its renewal

²⁵ See *John F. Runner, Receiver (KBIF)*, Memorandum Opinion and Order, 36 RR 2d 773, 778 (1976) (the Commission is not the appropriate forum to resolve the contractual, property, and bankruptcy issues raised by petitioner); *Decatur Telecasting, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 8622 (1992).

²⁶ 47 U.S.C. § 310(d).

²⁷ The formal agreement was executed on November 10, 2010. See File No. BALFT-20101118AIX, Exh. 1.

²⁸ See, e.g., *Edwards v. Wyatt*, 2009 WL 1395472 (3rd Cir. 2009) (calculating damages based on handshake agreement); *Canet v. Gooch Ware Travelstead*, 917 F.Supp. 969 (E.D.N.Y. 1996) (enforcing handshake agreement).

²⁹ Reply, Exhibit A.

³⁰ 47 U.S.C. § 309(d)(1).

³¹ See Petition at 2.

³² *Id.*

application by October 1, 2011, four months before its expiration date of February 1, 2012.³³ RTN timely filed its renewal application on September 27, 2011, and it was granted on January 27, 2012.³⁴ Thus, Johnston's request is moot.

Conclusion/Actions. We find that Johnson has 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 Petition to Deny filed by William Johnson IS DENIED, the Petition to Issue Letter of Inquiry IS DISMISSED, and that the application for approval to assign the license for FM Translator Station W244BC, Ocala, Florida (File No. BALFT-20101118AIX) from Radio Training Network to Generations Broadcasting Corporation IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Radio Training Network
Generations Broadcasting Corporation

³³ See 47 C.F.R. § 73.3539(a).

³⁴ See BRFT-20110927AHB. The renewal application was uncontested.