

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

In the Matter of)
)
Gresham Communications, Inc.) Facility ID No. 25374
Licensee of Station WPAL-FM, Ridgeville, South)
Carolina;)
Assignor)
and)
Charles W. Cherry, II Receiver)
Assignee)
For Involuntary Assignment of License) File No. BALH-20070327AEK; and
and)
Charles W. Cherry, II Receiver for Gresham)
Communications, Inc.)
Licensee of Station WPAL-FM, Ridgeville, South)
Carolina;)
Assignor)
and)
Caswell Capital Partners, LLC) File No. BALH-20070406ADD
Assignee)
For Voluntary Assignment of License)

MEMORANDUM OPINION AND ORDER

Adopted: August 25, 2011

Released: August 25, 2011

By the Commission: Commissioner Clyburn not participating.

I. INTRODUCTION

1. The Commission has before it an Application for Review filed on April 2, 2009, by

1 On November 4, 2010, the Station's call sign was changed to WAYA-FM. For administrative convenience, we will refer to the Station by its prior call sign, WPAL-FM.

Gresham Communications, Inc. (“Gresham”), former licensee of WPAL-FM, Ridgeville, South Carolina (the “Station”).² Gresham seeks review of the March 3, 2009, action of the Chief, Audio Division, Media Bureau (the “Division”), which granted in part and denied in part Gresham’s petition for reconsideration of the grant of an application for the involuntary assignment (“Involuntary Assignment Application”) of the Station License (the “Station License”) to a court-appointed receiver.³ The *Letter Decision* also denied Gresham’s petition to deny the Station’s subsequent assignment (“Voluntary Assignment Application”) to Caswell and granted the Voluntary Assignment Application. For the reasons stated below, we deny Gresham’s Application for Review and dismiss the Receiver’s and Caswell’s Motion to File Supplement, the Supplement, and Gresham’s Opposition to Motion.

II. BACKGROUND

2. On September 22, 2006, the Colleton County, South Carolina Court of Common Pleas (the “Court”) ordered the attachment of the Station License and its judicial sale to satisfy a judgment held by Caswell against Gresham.⁴ As part of the judicial proceedings, William Saunders (“Saunders”), president of Gresham, testified that Gresham’s sole asset was the Station License.⁵ On February 15, 2007, the sheriff auctioned the Station License to the high bidder, Caswell.⁶ When Gresham failed to participate in the assignment of the Station License to Caswell, the Court appointed the Receiver to effectuate the transfer.⁷ On March 27, 2007, the Receiver filed the Involuntary Assignment Application, which the staff granted on April 3, 2007. Thereafter, on April 6, 2007, the Receiver filed the Voluntary Assignment Application for consent to assign the Station to Caswell. Gresham filed a petition for

² Also before us are the following pleadings: an Opposition to Application for Review (“Opposition”) jointly filed by Charles W. Cherry, II (the “Receiver”) and Caswell Capital Partners, LLC (“Caswell”) on April 17, 2009; a Motion for Extension of Time filed by Gresham on April 30, 2009, which was unopposed; a Reply to Opposition to Application for Review (“Reply”) and an associated Errata to the Reply, filed by Gresham on May 11, 2009, and May 18, 2009, respectively; a Motion for Leave to File Supplement (“Motion to File Supplement”) and a Supplement (“Supplement”), both jointly filed by the Receiver and Caswell on September 3, 2009; an Opposition to Motion to File Supplement (“Opposition to Motion”) filed by Gresham on October 8, 2009; and a Joint Request for Expedited Action filed by the Receiver and Caswell on May 27, 2010. Also, Caswell’s representative electronically submitted on July 22, 2010, for the first time a copy of the Colleton County, South Carolina Court of Common Pleas order, *Beach v. Gresham Communications of Waltherboro, Inc. et al*, No. 92-CP-15-1508 (S.C. Ct. of Com. Pleas, Colleton County, June 30, 2010) (“*June 30, 2010 Order*”) (directing Gresham to submit objections to Caswell’s and the Receiver’s attorney’s fees). Caswell is the successor-in-interest of the original judgment held by Nancy R. Beach.

³ *Letter to Charles W. Cherry, II, et. al*, 24 FCC Rcd 2894 (MB 2009) (the “*Letter Decision*”).

⁴ *Beach v. Gresham Communications of Waltherboro, Inc. et al*, No. 92-CP-15-1508 (S.C. Ct. of Com. Pleas, Colleton County, Sep. 22, 2006) (“*License Attachment Order*”), at 3, Attachment A, Opposition (directing judicial sale of Station License).

⁵ *Id.* at 2.

⁶ *Beach v. Gresham Communications of Waltherboro, Inc. et al*, No. 92-CP- 15-1508 (S.C. Ct. of Com. Pleas, Colleton County, Feb. 21, 2007) (“*February 21, 2007 Order*”), at 1-2, Attachment A, Opposition (dismissing Gresham’s Motion to Stay the judicial sale).

⁷ *Beach v. Gresham Communications of Waltherboro, Inc. et al*, No. 92-CP- 15-1508 (S.C. Ct. of Com. Pleas, Colleton County, Mar. 26, 2007)(“*Receiver Appointment Order*”), at 1, Attachment A, Opposition (appointing the Receiver).

reconsideration of the grant of the Involuntary Assignment Application, on May 7, 2007, and a petition to deny the Voluntary Assignment Application (collectively, “the Petitions”), on May 11, 2007. In the Petitions, Gresham contended that: (1) the Court order attaching the Station License violated the Communications Act of 1934, as amended (the “Act”); (2) the judicial sale of the Station License further violated the Act because it involved the sale of a “bare license;” and (3) Caswell lacked candor by making misrepresentations to the Commission concerning ownership of assets sufficient to operate the Station.

3. In the *Letter Decision*, the Division recognized the Commission’s long-standing policy to accommodate the actions of state courts, thereby avoiding conflicts between state and federal authority, unless a public interest determination under the Act would compel a different result.⁸ Under the facts of this case, however, the Division found that the Commission’s general deference to state court orders was not warranted because the Court’s attachment of the Station License conflicted with long-standing Commission policy against the attachment of a broadcast license, exceeded the Court’s authority and violated the Act.⁹ Accordingly, the Division granted Gresham’s Petitions on this issue. The Division found Gresham’s other arguments meritless, however, and concluded that the Court’s appointment of a receiver was a valid exercise of its authority under state law.¹⁰ Specifically, the Division concluded that the assignment to Caswell encompassed tangible assets including “the local public inspection file and [the Station’s] advertiser lists”¹¹ and that Caswell had acquired sufficient assets through other transactions to operate the Station.¹² Therefore, the Division denied Gresham’s Petitions in part, affirmed the grant of the Involuntary Assignment Application, and granted the Voluntary Assignment Application.¹³

4. In the Application for Review, Gresham reiterates its arguments below. First, Gresham contends that the Division erred in approving the involuntary assignment to the Receiver and the subsequent voluntary assignment to Caswell because the assignments relied on invalid Court orders. Additionally, Gresham asserts that the assignments violated the Commission’s bare license policy and that Caswell misrepresented its ownership interests in the Station’s physical assets. In particular, Gresham relies on a December 2008 order in which the Court observed that the Station License alone was subject to the judicial sale¹⁴ to refute Caswell’s claims to ownership of other Station assets.¹⁵

⁸ *Letter Decision*, 24 FCC Rcd at 2896-97.

⁹ *Id.* at 2897.

¹⁰ *Id.* at 2898.

¹¹ *Id.*

¹² *Id.* at 2898–2899.

¹³ *Id.* at 2899.

¹⁴ See *Beach v. Gresham Communications of Walterboro, Inc. et al*, No. 92-CP- 15-1508 (S.C. Ct. of Com. Pleas, Colleton County, Dec. 3, 2008) (“*December 3, 2008 Order*”), at 2, Attachment A, Opposition (order on reconsideration).

¹⁵ Application for Review at 16-17.

5. In the Opposition, the Receiver and Caswell argue that the Division correctly approved the assignments. They object, however, to the Division's finding that the *License Attachment Order* is "facially inconsistent with the Commission's policy prohibiting attachment of a Station license."¹⁶ Rather, they contend that the Court's *License Attachment Order*, as modified by the *November 27, 2007 Order*,¹⁷ conforms the Court actions to Commission policy. In particular they note that the *November 27, 2007 Order* amended the judicial sale to "include proceeds from the sale of the WPAL-FM license and the interest of Gresham in any and all radio station assets as part of the 'license' . . ."¹⁸ With regard to the bare license and misrepresentation allegations, the Receiver and Caswell assert that they obtained rights to use or acquire equipment from other sources and, therefore, the Division correctly found that the transfers did not involve a bare license and that the misrepresentation allegation was meritless. In its Reply, Gresham repeats its prior arguments and also declares that the Opposition is deficient because it contains arguments and introduces evidence that the Division has not had an opportunity to review.¹⁹

III. DISCUSSION

6. *Procedural Matter.* As an initial matter, we deny the Receiver's and Caswell's Motion to File Supplement and dismiss the Supplement.²⁰ Section 1.115(d) of the Commission's Rules (the "Rules")²¹ requires that applications for review and any supplementals thereto be filed within 30 days of public notice of the action appealed, oppositions within 15 days of the application for review, and replies within 10 days of the opposition.²² Furthermore, the Rules prohibit the parties from raising matters of law or fact which the delegated authority has not been afforded an opportunity to consider.²³ The Commission has long held that enforcement of the procedural rules, including the proscription against the filing of untimely supplements, is necessary to manage the decision-making process in an efficient manner.²⁴ Here, the Supplement was filed on September 3, 2009, several months after the pleading cycle

¹⁶ Opposition at 8. (footnote omitted).

¹⁷ *Beach v. Gresham Communications of Walterboro, Inc. et al*, No. 92-CP-15-1508 (S.C. Ct. of Com. Pleas, Colleton County, Nov. 27, 2007) ("*November 27, 2007 Order*"), Attachment A, Opposition (granting plaintiff's motion to Show Cause as to why Gresham should not be held in contempt for failure to give truthful testimony).

¹⁸ Opposition at 8. (quoting *November 27, 2007 Order*).

¹⁹ Gresham cites as new evidence presented for the first time on appeal the arguments regarding an unconsummated assignment, File No. BALH-20020620AAD ("*2002 Assignment*") between Gresham and Caswell's predecessor (Caswell Communications, Inc.); a "Declaration of Judith Aidoo" and numerous Station property receipts submitted in connection with the Receiver's and Caswell's discussion of the *2002 Assignment*; the objections to the *Letter Decision's* finding that the Court improperly attached the Station's License; and an unsigned "Chronology of South Carolina State Court Judicial Proceedings and Orders." Reply at 2-5.

²⁰ See *supra*, n.2.

²¹ 47 C.F.R. § 1.115(d).

²² *Id.*

²³ See 47 C.F.R. § 1.115(c).

²⁴ See, e.g. *BDPCS, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 17590, 17596-97 (2000) (supplements to application for review that are untimely filed and which raise matters on which the delegated authority has not had an opportunity to consider are procedurally deficient and warrant dismissal on their face).

had closed. We find that there is not good cause to waive these procedural restrictions because the supplemental filings involve matters that are not directly relevant to the issues before the Commission in this application proceeding.²⁵ Therefore, we deny the Receiver's and Caswell's Motion to File Supplement and dismiss the Supplement.²⁶

7. *Substantive Issues.* The Commission will grant an application for review only if the applicant demonstrates that the staff's decision: (1) conflicts with statute, regulation, case precedent, or established Commission policy; (2) involves a question of law or policy that has not been previously resolved by the Commission; (3) involves precedent or policy that should be overturned or revised; (4) makes an erroneous finding as to an important or material question of fact; or (5) commits a prejudicial procedural error.²⁷ For the reasons set forth below, we conclude that the Application for Review fails to meet any of the criteria set forth under Section 1.115(b)(2) of the Rules.

8. *Validity of Court Orders.* It is well established that a broadcast license does not confer a property right, but rather is a valuable privilege to utilize the airwaves, subject to certain limitations, including restrictions on the right to its assignment.²⁸ The Commission has opined, "[t]he extraordinary notion that a station license issued by this Commission is a mortgageable chattel in the ordinary commercial sense is untenable."²⁹ Rather, the Commission has repeatedly stated, a "license, as distinguished from a station's physical assets, is not subject to a mortgage, security interest, or lien, pledge, *attachment*, seizure, or similar property right."³⁰

9. This controversy arises from two Court orders issued in the underlying state court litigation: 1) the *License Attachment Order* and 2) the *Receiver Appointment Order*. Gresham challenges both orders solely on the grounds of violating Commission policy. With respect to the *License Attachment Order*, Gresham argues that the Court's attachment of the Station License violated the Commission's prohibition against treating a broadcast license as a property right. Gresham further contends that the *Receiver Appointment Order* also violates Commission policy because the Court appointed the Receiver solely to effectuate a *pro forma* assignment of the Station License which had already been "sold" to Caswell. Hence, Gresham asserts, the two-step process by which the Station License was assigned first

²⁵ The Supplement includes copies of a September 2, 2009 Court order concerning the Receiver's and Caswell's legal costs and a September 10, 2009 order by the South Carolina Court of Appeals which, *inter alia*, allows the *Letter Decision* to be incorporated into the appellate record.

²⁶ For the same reasons, we decline to consider the *June 30, 2010 Order* that was electronically submitted on July 22, 2010, by counsel for the Receiver and Caswell. *See supra* n.2. Moreover, to the extent that the Receiver and Caswell seek to raise questions of fact in the Opposition, with the submission of receipts for purchases of the Station's equipment and the Declaration of Judith Aidoo, *see supra* n.19, we have not considered this evidence pursuant to Section 1.115(c) of the Rules.

²⁷ *See* 47 C.F.R. § 1.115(b)(2)(i)-(v). *See also Paging Systems, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 450, 452 (2010).

²⁸ *See* 47 U.S.C. § 310(d).

²⁹ *Radio KDAN*, Memorandum Opinion and Order, 11 FCC 2d 934, n.1, *recon. denied*, 13 RR 2d 100 (1968), *aff'd on procedural grounds sub nom., W.H.Hansen v. FCC*, 413 F.2d 374 (D.C. Cir. 1969).

³⁰ *Kirk Merkley II*, Memorandum Opinion and Order, 56 RR 2d 413, 416 (1984) (emphasis added) ("*Merkley II*").

to the Receiver and then to Caswell is no more sustainable under Commission policy than the assignment directly to Caswell as both are “illegal and contrary to Commission policy. . . .”³¹

10. The Commission's long-standing policy is to accommodate the actions of state courts, thereby avoiding conflicts between state and federal authority, unless a public interest determination under the Act would compel a different result.³² Indeed, the U.S. Supreme Court has stated that “the principle of fair accommodation between State and federal authority . . . *should* be observed” if the state's laws “can be effectively respected while at the same time reasonable opportunity is afforded for the protection of that public interest” which underlies licensing decisions.³³ The Commission defers to judicial determinations in many areas, including bankruptcy matters. The Commission, in contrast, retains exclusive authority to approve the assignment or transfer of broadcast station licenses.³⁴ In these circumstances, the Commission is neither bound by nor need approve a state court decision that is contrary to the Commission’s rules or policies.³⁵

11. Applying this framework to review of the *License Attachment Order*, we find that the order’s plain language establishes that the Court, although stating the correct legal standard for broadcast license rights, improperly sought to attach the Station License in violation of Commission policy. Specifically, the Court acknowledged that proceeds from the sale are subject to attachment and may be used to satisfy a judgment.³⁶ Nevertheless, the Court then held that “the FCC license held by Gresham

³¹ Application for Review at 14.

³² *Radio Station WOW v. Johnson*, 326 US 120, (1945). (“*Radio Station WOW*”); *Arecibo Radio Corporation*, Memorandum Opinion and Order, 101 FCC 2d 545 (1985). (“*Arecibo Radio*”).

³³ *Radio Station WOW*, 326 US at 132. (emphasis added).

³⁴ See e.g. *Arecibo Radio*, 101 FCC 2d at 549 (honoring court order requiring licensee to execute assignment application in favor of another party).

³⁵ See, e.g., *Kirk Merkle*, Memorandum Opinion and Order, 94 FCC 2d 829 (1983), (“*Merkley I*”), *recon. denied*, *Merkley II*, 56 RR 2d 413 (1984), *aff’d sub nom.*, *Merkley v. FCC*, 776 F.2d 365 (1985). (declining to recognize court order based on contract with a prohibited reversionary interest that was tantamount to a vested security interest in a license).

³⁶ In particular, the Court quoted the following passage from *MLQ Investors L.P. v Pacific Quadracasting, Inc.* 146 F.3d 746, 749 (9th Cir. 1998):

Government licenses, as a general rule, are considered to be “general intangibles” under the Uniform Commercial Code, “i.e., personal property interests in which security interests may be perfected.” *In re Ridgely*, 139 B.R. at 379. As discussed *supra*, *In re Ridgely* makes it clear that license holders have no property rights in the “actual broadcast frequencies themselves as against the federal government,” 139 B.R. at 376 (citing *In re Bill Welch*, 3 FCC Rcd 6502 (1988)). However, *In re Ridgely* and *In re Cheskey* [9 FCC Rcd 986 (CCB 1994)] stand for the proposition that licensees do have a proprietary right in the proceeds from a sale of a license, and may grant a security interest in those proceeds. See also *In re Beach Television Partners*, 38 F.3d 535, 537 (11th Cir. 1994) (holding that a creditor has a valid security interest in the proceeds of an FCC-approved sale of a broadcast license).

License Attachment Order at 2, Attachment A, Opposition.

Communications, Inc. is properly subject to attachment. I hereby direct that such FCC license . . . be and hereby is attached. I further direct that the license be sold in the normal course of [the] sheriff's sales"³⁷ In a subsequent ruling, the Court described the *License Attachment Order* as ordering "that such license was thereby attached."³⁸

12. Additionally, we find the Court's *November 27, 2007 Order* amending its *February 21, 2007 Order* did not rescind the original attachment of the license set forth in the *License Attachment Order*. Rather than removing the improper attachment, in the *November 27, 2007 Order* the Court merely expanded the *February 21, 2007 Order* "to include in the judicial sale the proceeds from the sale of the WPAL-FM license and the interest of Gresham in any and all radio station assets as part of Gresham's interest in the 'licenses'"³⁹ Moreover, the Court's subsequent pronouncements reaffirm our conclusion the Court improperly attached the Station license.⁴⁰ In particular, in the *December 3, 2008 Order* the Court declared three times that "the only asset identified and levied upon was the FCC license [which] was sold . . . at a judicial sale in order to satisfy the judgment."⁴¹

13. Turning next to the *Receiver Appointment Order*, we conclude that it does not conflict with Commission policy and hence, consistent with our long-standing precedent of accommodation of state court actions compliant with the Commission's rules and policies, we will defer to the Court's appointment of a Receiver.⁴² Compliance with Commission policy is the critical distinction in our decision to defer to the *Receiver Appointment Order*, but not the *License Attachment Order*. Gresham misconstrues the Commission's Rules and policies when it argues that the Commission should not honor the *Receiver Appointment Order* because that order facilitates the ultimate assignment of the Station License to Caswell. When a Commission broadcast authorization is involved, Section 310(d) of the Act stipulates that only the Commission can approve the assignment or transfer of a broadcast authorization.⁴³ Under our Rules, assignments to bankruptcy trustees or receivers may be processed under *pro forma* procedures.⁴⁴ As the Division opined in the *Letter Decision*, "in cases of bankruptcy or receivership, the

³⁷ *Id.* at 3, Attachment A, Opposition.

³⁸ *February 21 2007 Order* at 2, Attachment A, Opposition.

³⁹ *November 27, 2007 Order* at 10 Attachment A, Opposition.

⁴⁰ Also included in the record is *Beach v. Gresham Communications of Walterboro, Inc. et al*, No. 92-CP-15-1508 (S.C. Ct. of Com. Pleas, Colleton County, June 10, 2008), Attachment A, Opposition, in which the Court held that Gresham's privilege to tender payment of the underlying judgment had been extinguished. In addition, the Court found that Gresham and Saunders "willfully disobeyed [the] . . . Court's orders of February 21, 2007; March 26, 2007; April 25, 2007 [not included in the record] and November 27, 2007" *Id.* at 2.

⁴¹ *December 3, 2008 Order* at 3, Attachment A, Opposition (emphasis added). *See also id.* at 2, 4.

⁴² *See e.g., Merkley II*, 56 RR 2d at 413.

⁴³ Section 310(d) provides, in pertinent part: "No . . . station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily . . . except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby." 47 U.S.C. § 310(d).

⁴⁴ *See* 47 C.F.R. § 73.3541(b); *see also* FCC Form 316, General Instructions A.8 (assignments or transfers involving bankruptcy trustees and receivers file on FCC Form 316).

Commission does permit trustees or receivers to hold licenses on a temporary basis pending disposition of station assets.”⁴⁵

14. The *Receiver Appointment Order* here is no different. Under the *Receiver Appointment Order*, after Commission approval, the Receiver was authorized to take possession of, operate, and manage Gresham’s property and station license “to conserve the business and assets of the Station until a sale of the Station’s assets is confirmed and a purchaser is found for the station acceptable to the Receiver and the FCC and the FCC has granted its consent for transfer of the FCC license to such purchaser.”⁴⁶ There is nothing unique, or violative of the Commission’s policies, in the Court appointing a receiver to facilitate the orderly disposition of the Station’s license for the benefit of the judgment holder and assignee, Caswell. Additionally, although the Station’s physical assets and license passed through separate transfers to Caswell,⁴⁷ the Commission has long held, “these assets would be of comparatively little value if the Commission did not permit the operating authorization to accompany them pending ultimate passage of all [assets] to a qualified buyer.”⁴⁸ As the Division previously noted, the *Receiver Appointment Order* furthers the public interest by ultimately uniting the Station License with the assets necessary to enable the licensee to operate the Station.⁴⁹ Accordingly, we affirm the Division’s decision to give effect to the *Receiver Appointment Order*. Therefore, notwithstanding the improper *License Attachment Order*, we find that the Receiver’s appointment and the transfer of the Station through the Involuntary Assignment Application were in accord with Commission policy and conclude, as the Division did in approving the Voluntary Assignment Application, that the Receiver’s actions in operating and assigning the Station to Caswell were consistent with the Commission’s Rules and practice. However, to the extent the *Letter Decision*’s statement that the *Receiver Appointment Order* “was a valid exercise of the Court’s authority under state law”⁵⁰ could be interpreted as upholding the Court’s authority to issue the *Receiver Appointment Order*, we clarify that the issue of whether a particular Court order constitutes a valid exercise of its authority under state law is a question appropriately resolved under state judicial procedures.⁵¹

⁴⁵ *Letter Decision*, 24 FCC Rcd at 2898 (citations omitted).

⁴⁶ *Receiver Appointment Order* at 2. Additionally, “[a]fter a purchaser (or purchasers) is found acceptable to Receiver and the FCC, Receiver is directed to make all necessary application with the FCC in order to effect the proper transfer or assignment of the licenses, together with such further assets as the Receiver should deem appropriate, to such purchaser.” *Id.*

⁴⁷ See *Letter Decision*, 24 FCC Rcd at 2898.

⁴⁸ *O.D.T. International, et. al.*, Memorandum Opinion and Order, 9 FCC Rcd 2575, 2576 (1994).

⁴⁹ *Id.*; see also *Arecibo Radio*, 101 FCC 2d at 545.

⁵⁰ *Letter Decision*, 24 FCC Rcd at 2898.

⁵¹ See, e.g., *Paxson Management Corporation and Lowell W. Paxson*, Memorandum Opinion and Order, 22 FCC Rcd 22224, 22235 (2007), citing *Northwest Broadcasting, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 3289, 3293 (1997); *John F. Runner, Receiver*, Memorandum Opinion and Order, 36 RR 2d 773, 778 (1976) (questions of state law and private contract, matters which the Commission has historically and consistently left to local courts of appropriate jurisdiction).

15. Bare License/Misrepresentation. In evaluating a bare license allegation, the Commission examines “the entirety of the proposed transaction”⁵² and whether the assignee would have the ability to maintain broadcast operations.⁵³ In the *Letter Decision*, the Division found that the transaction did not implicate the prohibition on the transfer of a bare license. In particular, the Division noted that the assignment to Caswell included “some tangible assets, specifically, the local public inspection file and [the Station’s] advertiser lists.”⁵⁴ Additionally, the Division stated that “the Asset Purchase Agreement references other tangible assets that Caswell has acquired through other transactions;” . . . [these assets included] “the WPAL-FM tower, antenna and most of the station’s furniture fixtures and equipment.”⁵⁶ Therefore, the Division held, correctly, that all of these constituted evidence of assets sufficient under established precedent to counter Gresham’s allegations.⁵⁷ A review of the Station’s record in the Commission’s database reveals that it has been fully operational under Caswell’s stewardship. Thus, we agree with the Division’s finding that “Caswell possess[ed] the technical assets required to assure continuation of broadcast service.”⁵⁸

16. Misrepresentation is a false statement of material fact made with an intent to deceive the Commission.⁵⁹ The party alleging misrepresentation has the burden of proof to make a *prima facie* showing of an intent to deceive.⁶⁰ Intent to deceive may be found from the false statement of fact coupled with proof that the party making it had knowledge of its falsity.⁶¹ Intent may also be inferred from motive.⁶²

⁵² *FM Broadcasters of Douglas County*, Memorandum Opinion and Order, 10 FCC Rcd 10429 (1995).

⁵³ See *American Music Radio*, Memorandum Opinion and Order, 10 FCC Rcd 8769, 8772-73 (1995). See also *Eileen S. Bailey*, Memorandum Opinion and Order, 14 FCC Rcd 16755 (1999) (acquisition of operational assets from a third party is consistent with Commission policy and does not implicate the “bare license” policy), and *Arecibo Radio*, 101 FCC 2d at 550-551 (physical assets and license assigned from different parties to assignee does not constitute assignment of bare license).

⁵⁴ *Letter Decision*, 24 FCC Rcd at 2898.

⁵⁵ *Id.* (citing to the Asset Purchase Agreement). Specifically, the Asset Purchase Agreement provided that “Seller [the Receiver] acknowledges that Buyer [Caswell] holds various assets which are used or useful in the operation of the Station, which are not the subject of this Agreement.” Agreement at 1, Article I, Section 1.2, Voluntary Assignment Application.

⁵⁶ *Id.* (quoting Caswell’s Opposition to Petition to Deny at i). The *Letter Decision* inadvertently attributed this quotation listing specific assets to the Asset Purchase Agreement instead of the correct citation noted here.

⁵⁷ *Id.* at 2899.

⁵⁸ *Id.*

⁵⁹ See *Fox River Broadcasting, Inc.*, Order, 93 FCC 2d 127, 129 (1983).

⁶⁰ See *id.* See also *Merrimack Valley Broadcasting, Inc.*, Memorandum Opinion and Order, 99 FCC 2d 680, 683 n.9 (1984).

⁶¹ See *David Ortiz Radio, Corp., v. FCC*, 941 F.2d 1253, 1260 (D.C. Cir. 1991).

⁶² See *Joseph Barr*, Memorandum Opinion and Order, 10 FCC Rcd 32, 33 (Rev. Bd. 1994).

17. Gresham argues that Caswell made material misrepresentations to the Commission concerning ownership of certain real and personal property: “Caswell (or an entity controlled by Judith Aidoo, Caswell’s sole Member) currently owns the WPAL-FM tower and antenna, the tower building and leases, and most of the station’s fixtures and broadcast equipment.”⁶³ Gresham states that Caswell fails to submit “even *one* single document or declaration backing up these questionable, false statements.”⁶⁴ Gresham further alleges that “Caswell even went so far as to falsify Commission records to buttress its case,”⁶⁵ claiming that until April 2007, the WPAL-FM tower was registered to Gresham, but on April 5, 2007, counsel for both the Receiver and Caswell re-registered it in Caswell’s name.⁶⁶ Additionally, Gresham challenges Caswell’s claim that it “acquired the rights to a significant number of assets that are used and useable in the operation.”⁶⁷

18. After review of the complete record in this proceeding, we find that Gresham has failed to produce credible evidence of material misrepresentations by Caswell. First, we note that Caswell lacked a motive for misrepresenting that it owned station assets. As noted above, under longstanding Commission precedent, there were sufficient assets accompanying the license, apart from the disputed equipment and fixtures, to find that there was no sale of a bare license in this proceeding;⁶⁸ accordingly, there was no reason for Caswell to misstate its inventory of owned Station assets. Additionally, the record supports Caswell’s claims that it owns the WPAL-FM tower and antenna, the tower building and leases, and most of the station’s fixtures and broadcast equipment. In fact, the Asset Purchase Agreement between the Receiver and Caswell explicitly acknowledged that Caswell acquired Station assets through “other transactions,”⁶⁹ which is consistent with the judicial sale of only the Station license. Indeed, Gresham concedes that Caswell had acquired “indeterminate other equipment.”⁷⁰ We also find unpersuasive Gresham’s sworn declarations professing ownership of the Station’s assets primarily because the Court found, after an in-person hearing, that Saunders was guilty of perjury for these claims.⁷¹ As for the re-registration of the WPAL-FM tower, we find that the Receiver’s action was

⁶³ Application for Review at 17 (citing Opposition to Petition to Deny at 7).

⁶⁴ *Id.* (emphasis original).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 18. (citing Opposition to Petition to Deny at 7).

⁶⁸ See e.g. *KPAL Broadcasting Corp.*, Memorandum Opinion and Order, 28 FCC 2d 46, 48 (1970) (presence of rights and commitments along with license outweighs bare license allegation).

⁶⁹ See *supra* n.55. Caswell states that since 2002 it has expended nearly \$890,000 on the following: (1) an option to acquire an existing mortgage against the real property of WPAL-FM; (2) the build out of a Station construction permit; (3) to purchase equipment for the Station; (4) the release of certain judgments and corporate debts against Gresham; and (4) transactional and legal expenses related to the Station. Opposition at 4 n.1. Although Gresham characterizes these expenses as vague and undocumented, it has provided no probative evidence that they are false.

⁷⁰ Reply at 6.

⁷¹ *November 27, 2007 Order* at 6, Attachment A, Opposition. (“Therefore, I find Saunders’ declaration to the FCC on May 11, 2007 . . . was not true when given.”).

appropriate and necessary.⁷²

19. In light of these findings, we conclude that Gresham has not raised a *prima facie* case that Caswell's statements regarding ownership of Station facilities and equipment were, in fact, false. Moreover, the Station's ongoing service since the assignment to Caswell establishes conclusively that Caswell possessed sufficient equipment to operate the Station. Thus, no substantial and material question of fact warranting further inquiry exists as to whether Caswell made misrepresentations regarding its ownership of assets necessary to operate the Station.⁷³

IV. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED that the Motion for Leave to File Supplement filed by Charles W. Cherry, II Receiver for Gresham Communications, Inc., and Caswell Capital Partners, LLC IS DENIED and the Supplement is DISMISSED.

21. IT IS FURTHER ORDERED, that the April 2, 2009, Application for Review filed by Gresham Communications, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁷² In fact, 47 U.S.C. § 17.57 *requires* the owner of an antenna structure for which an ASRN has been obtained to notify the Commission immediately using FCC Form 854 upon any change in ownership information.

⁷³ *See, e.g., Citizens for Jazz on WRVR, Inc.*, 775 F.2d 392, 395 (D.C. 1985) (finding of misrepresentation must rest on a "substantial and material question of fact").