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Washington, D.C. 20554

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In Reply Refer to:

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In re: **WFJO(FM), Folkston, Georgia**
Facility ID No. 22005

WHJX(FM), Baldwin, Florida
Facility ID No. 52032

**WSJF(FM), St. Augustine Beach,
Florida**
Facility ID No. 53672
File No. BALH-20090427ABP

WTHG(FM), Hinesville, Georgia
Facility ID No. 7816
File No. BALH-20090310ADD

**Applications for Assignment of
Licenses**

Informal Objections

Dear Counsel:

We have before us (1) the referenced application (the "Georgia Application") seeking approval for the proposed voluntary assignment of the license of Station WTHG(FM), Hinesville, Georgia, from Scott Savage, Receiver ("Receiver") to WRGO-FM Radio, LLC d/b/a Savannah Radio; and (2) an April 21, 2009, Informal Objection (the "Georgia Objection") filed by Dr. Glenn Cherry ("Cherry"), former Chief Executive Officer ("CEO") of Tama Broadcasting, Inc. ("Tama").¹ We also have before us (3) the referenced applications (the "Florida/Georgia Applications") seeking approval for the proposed voluntary assignment of the licenses of Stations WFJO(FM), Folkston, Georgia; WHJX(FM), Baldwin, Florida; and WSJF(FM), St.

¹ The Receiver, Tama, and WRGO-FM Radio, LLC d/b/a Savannah Radio, filed a consolidated Opposition to the Georgia Objection on April 29, 2009.

Augustine Beach, Florida, from Receiver to Family Broadcasting, LLC; and (4) a May 22, 2009, Informal Objection (“Florida/Georgia Objection”) to the Florida/Georgia Applications filed by Cherry.² The referenced licenses were formerly held by Tama. For the reasons set forth below, we deny the Georgia and Florida/Georgia Objections, admonish Cherry for filing frivolous and obstructive pleadings, and grant the Georgia and Florida/Georgia Applications.

Background. On September 5, 2008, the Honorable Emily Jane Goodman of the Supreme Court of the State of New York, County of New York, appointed Scott Savage as Receiver of Tama and its assets.³ On February 26, 2009, the staff denied a Cherry informal objection⁴ and granted an involuntary assignment of the licenses of the referenced stations, among others, from Tama to the Receiver.⁵ On March 31, 2009, Cherry filed an Application for Review of the staff action, which the Receiver opposed on April 7, 2009.⁶ On April 10, 2009, Cherry and his brother William W. Cherry II, Esq., filed a Complaint (the “Complaint”) with the United States District Court for the Middle District of Florida, Tampa Division (Case No. 09-CV-00680-T),⁷ alleging, among other things, that the Commission: (1) failed to honor a Cherry Freedom of Information Act (“FOIA”)⁸ request; (2) violated its own *ex parte* rules;⁹ and (3) failed to enforce Section 310(d) of the Communications Act of 1934, as amended (the

² The Receiver filed an Opposition to the Florida/Georgia Objection on May 28, 2009.

³ See *D.B. Zwirn Special Opportunities Fund, L.P. v. Tama Broadcasting Inc., et al*, Order Pursuant to CPLR § 6401 Appointing a Temporary Receiver, Index No. 600692/2008 (Sept. 5, 2008) (“New York Court Order”).

⁴ Cherry filed this informal objection on October 17, 2008. The Receiver opposed it on October 23, 2008.

⁵ See *Letter to Percy Squire, Esq., and Mark J. Prak, Esq.*, 24 FCC Rcd 2453 (MB 2009). The assignment was consummated on February 26, 2009. In a related matter, on February 17, 2009, the Enforcement Bureau released an Order and associated Consent Decree which, *inter alia*, dismissed a Cherry complaint alleging unauthorized transfer of control. See Case No. EB-08-IH-0692. The Enforcement Bureau found that Tama and its creditor D.B. Zwirn Opportunities, LP (“Zwirn”), provided a plan to ensure future compliance with Section 310(d) of the Act and Section 73.3540 of the Commission’s Rules (the “Rules”). The Enforcement Bureau also concluded that there was no substantial or material question of fact as to whether Tama and Zwirn possessed the basic qualifications to hold or obtain any Commission license or authorization. See *Tama Broadcasting, Inc.*, Order, 24 FCC Rcd 1612 (EB 2009); *Tama Broadcasting, Inc.*, Consent Decree, 24 FCC Rcd 1615 (EB 2009) (collectively, the “*EB Order*”). On February 24, 2009, Cherry filed a petition for reconsideration of the *EB Order*. This pleading remains pending.

⁶ These pleadings remain pending.

⁷ On May 28, 2009, United States Magistrate Elizabeth Jenkins recommended to the court that it grant the Commission’s motion to dismiss. See *Glenn W. Cherry v. FCC*, No. 09-CV-00680-T-33EAJ (D. Florida May 28, 2009) (report recommending grant of motion to dismiss). We also note that counsel, on behalf of Cherry, filed a similar Complaint with the United States District Court for the Southern District of Ohio, Eastern Division (Case No. 09-CV-00428) on May 29, 2009. On August 7, 2009, the court granted the Commission’s motion to dismiss for lack of jurisdiction and denied counsel’s motions for a temporary restraining order. See *Percy Squire Co. v. FCC*, No. 09-CV-00428 (D. Ohio Aug. 7, 2009) (order granting motion to dismiss).

⁸ See 5 U.S.C. § 552; see also 5 U.S.C. § 701 *et seq.*

⁹ See 47 C.F.R. §§ 1.1206 and 1.1208. We note that on February 19, 2009, Cherry filed a “Complaint” with the Commission’s Office of General Counsel (“OGC”) alleging improper *ex parte* communications between the Enforcement Bureau and Tama and Zwirn. OGC concluded that this and all other allegations raised by Cherry were meritless in its May 8, 2009, letter response.

“Act”).¹⁰ On April 21, 2009, Cherry filed the one-sentence Georgia Objection, attaching a copy of the Complaint. On May 22, 2009, Cherry filed the one-sentence Florida/Georgia Objection, also attaching a copy of the Complaint. In each filing, Cherry requests that the staff consider the arguments raised in the Complaint and in the “additional objections” pending before the Commission relating to the licenses formerly held by Tama.¹¹

Discussion. Procedural Matter. Neither the Georgia Objection nor the Florida/Georgia Objection was supported by an affidavit of a person or persons with personal knowledge of the allegations made in the respective filings as required by Section 309(d)(1) of the Act.¹² Each of the objections is signed by Cherry’s counsel. Further, neither counsel nor Cherry has provided an affidavit stating that he has personal knowledge of the identical facts alleged in each of the Objections. Accordingly, we find that objector Cherry has not provided a sufficient affidavit or declaration in support of either the Florida/Georgia or Georgia Objection. Because these filings do not comply with the Act or the Rules regarding petitions to deny, we will consider each as an informal objection pursuant to Section 73.3587 of the Rules.¹³

Substantive Matters. Section 310(d) of the Act 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 Sections 309(d) and (e) of the Act,¹⁴ informal objections must provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact calling for further inquiry regarding whether grant of the assignment application would be *prima facie* inconsistent with Section 309(a) of the Act.¹⁵ This section provides that we are to grant an application if, upon consideration of the application and pleadings and other such matters of which we may officially take notice, we find that the public interest, convenience, and necessity will be served by the granting of such application. If, however, the applicant fails to meet that standard, the Commission may deny the application after notice and opportunity for a hearing under Section 309(e) of the Act.

In the Complaint, Cherry reiterates his argument that Tama creditor Zwirn has continuously exercised “premature” control over the Tama licenses, leading to an unauthorized assignment of the Tama

¹⁰ See 47 U.S.C. § 310(d).

¹¹ Cherry fails to identify any of these “additional objections” or the manner in which these “additional objections” would be of decisional significance in the referenced application proceedings. Accordingly, we will limit our consideration to the matters raised in the Complaint.

¹² 47 U.S.C. § 309(d)(1) (“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.”); see also *Stephan Myers and James M. Lout*, Letter, 23 FCC Rcd 16606, 16698 (MB 2008).

¹³ 47 C.F.R. § 73.3587.

¹⁴ 47 U.S.C. §§ 309(d), (e).

¹⁵ 47 U.S.C. § 309(a). See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff’d sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *rehearing denied* (Sept. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (informal objections, like petitions to deny, must contain adequate and specific factual allegations sufficient to warrant the relief requested).

stations' licenses to the Receiver in violation of Section 310(d) of the Act and the firing of Cherry as CEO of Tama.¹⁶ Cherry claims that the Enforcement Bureau ignored his October 2008 FOIA request to review the Tama and Zwirn responses to an Enforcement Bureau letter of inquiry leaving Cherry unable to file a "meaningful opposition" to the assignment to the Receiver or to participate fully in the Commission's consideration of the alleged Section 310(d) violation.¹⁷ Cherry contends that his being denied "notice or opportunity . . . to participate" is also a violation of Sections 1.1206 and 1.1208 of the *ex parte* Rules.¹⁸ Finally, Cherry asserts that rather than retaliate¹⁹ against him, the Commission should grant his request for "an injunction against the transfer by the FCC of any formerly held [Tama] licenses"²⁰ In opposition, the Receiver claims that Cherry's Objection is just one of a "long, ever-growing list of frivolous" filings and that Cherry should be "admonished" for his actions.²¹

Cherry has raised these unauthorized transfer of control and improper *ex parte* communication arguments previously in related proceedings. We find that Cherry's claims were thoroughly considered and properly resolved by the Media Bureau, the Enforcement Bureau, and OGC. Additionally, we note that the Enforcement Bureau investigation to which Cherry objects does not pertain to the referenced application proceedings. Moreover, the Commission has terminated that investigation.²² Importantly, Tama and Zwirn, the parties in the Enforcement Bureau investigation, have entered into a Consent Decree that bars the Commission from considering the facts developed in that investigation in the instant case.²³ We also find that Cherry has failed to show that the investigation concerned matters that would be of decisional significance in the instant application proceedings. Finally, OGC has found Cherry's claim of improper *ex parte* communication to be meritless.²⁴

¹⁶ Complaint at 4, 5, and 8.

¹⁷ *Id.* at 8 and 9.

¹⁸ *Id.* at 6.

¹⁹ In the *EB Order*, the Enforcement Bureau states: "[It] retains its authority to investigate the conduct of Dr. Glenn Cherry, Board of Directors member and former President/CEO of Tama, and of Charles W. Cherry II, Board of Directors member and former Vice President/General Counsel and Board Secretary of Tama. The Bureau expressly reserves the right to use facts developed during the course of . . . [its] Investigation in any subsequent investigation of Glenn and Charles Cherry." See *EB Order*, 24 FCC Rcd at 1621, n.12.

²⁰ Complaint at 9.

²¹ Opposition at 1 and 2.

²² See *EB Order*, 24 FCC Rcd at 1613.

²³ 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. Zwirn & Co., L.P., or their affiliates, with respect to their basic qualifications, including character qualifications, to be a Commission licensee." See *EB Order*, 24 FCC Rcd at 1618-19.

²⁴ See, *supra*, n. 9.

The Complaint does raise two new issues. First, Cherry alleges that the Commission has failed to provide materials requested under FOIA.²⁵ However, the Enforcement Bureau responded to the Cherry request on June 4, 2009. Although not fully resolved as of the date of this letter, any concerns regarding the FOIA process should be directed to that Bureau. In any event, Cherry has failed to establish that allegations of Commission misconduct raise a substantial and material question of fact regarding the qualifications of the parties to these applications. Next, Cherry challenges Tama's authority to enter into a Consent Decree. It contends that Tama is not a corporation in good standing in the state of Delaware and that the board members executing the Consent Decree had no authority to do so. It is well settled that the Commission is not the proper forum in which to raise initially such issues. The Commission has traditionally declined to consider issues of a licensee's compliance with the requirements of state corporation law, "where no challenge has been made in a state court and the determination is one that is more appropriately resolved by a local court of competent jurisdiction."²⁶ Accordingly, we shall not consider further the matter of Tama's compliance with relevant state law concerning its corporate status or governance.

We caution Cherry 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."²⁷ The Georgia Objection and the Florida/Georgia Objection are frivolous and obstructive pleadings which are wholly devoid of merit. Accordingly, we admonish Cherry²⁸ for his attempts to further delay this proceeding.

Moreover, it is well-established that the Commission will accommodate court decrees, such as the appointment of the Receiver for the Stations, unless a public interest determination compels a different result.²⁹ Thus, we will continue to honor the New York Court Order, and in light of the conclusions made in the *EB Order*, we will grant the Georgia and Florida/Georgia Applications. In doing so, we note that a grant of an assignment application is merely permissive; the Commission's action does not compel the parties to consummate the approved transaction.³⁰ In granting the Georgia and Florida/Georgia Applications, therefore, the Commission is concluding only that these transactions do not violate the Act, the Rules or the Commission's policies, and would otherwise serve the public interest, convenience and

²⁵ Complaint at 7.

²⁶ See *Aspen FM, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 17852, 17855 (1997).

²⁷ See, e.g., *Richard R. Zaragoza, Esq. et al.*, Letter, 23 FCC Rcd 2642, 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)).

²⁸ This admonishment applies only to Cherry, not to his counsel. Attorney misconduct associated with frivolous pleadings is referred to OGC under seal.

²⁹ See *Arecibo Radio Corp.*, Memorandum Opinion and Order, 101 FCC 2d 545 (1985); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 131-32 (1945).

³⁰ *Paso Del Norte Broadcasting Corporation*, Memorandum Opinion and Order, 12 FCC Rcd 6876, 6878 (MMB 1997).

necessity. For these reasons, our decision on these applications will not prejudice the outcome of any potential court proceeding or any injunctive relief which Cherry may seek or be entitled.³¹

Conclusion/Actions. Based on the above, we find that Cherry has not raised a substantial and material question of fact warranting further inquiry and that none of the allegations demonstrate that grant of the Georgia and Florida/Georgia Applications would be inconsistent with the public interest. We further find that Family Broadcasting, LLC, and WRGO-FM Radio, LLC d/b/a Savannah Radio are qualified to hold the referenced broadcast licenses, and that grant of the Georgia and Florida/Georgia Applications are consistent with the public interest, convenience and necessity. Accordingly, IT IS ORDERED, that Dr. Glenn Cherry IS ADMONISHED for filing frivolous and obstructive pleadings. IT IS FURTHER ORDERED, that the Georgia and Florida/Georgia Objections filed by Dr. Glenn Cherry ARE DENIED, and that the application (File No. BALH-20090427ABP) for approval to voluntarily assign the licenses for Stations WFJO(FM), Folkston, Georgia; WHJX(FM), Baldwin, Florida; WSJF(FM), St. Augustine Beach, Florida, from Scott Savage, Receiver, to Family Broadcasting, LLC, and the application (File No. BALH-20090310ADD) for approval to voluntarily assign the license for Station WTHG(FM), Hinesville, Georgia from Scott Savage, Receiver to WRGO-FM Radio LLC d/b/a Savannah Radio ARE GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Glenn Cherry, D.V.M.
William W. Cherry II, Esq.
Tama Broadcasting, Inc.
Family Broadcasting, LLC
Mr. Scott Savage
Larry D. Perry, Esq.

³¹ See, e.g., *David Oxenford, Esq., Tom W. Davidson, Esq.*, Letter, 21 FCC Rcd 6895, 6896 (MB 2006).