



Federal Communications Commission
Washington, D.C. 20554

May 16, 2011

In Reply Refer to:
1800B3-SLW

SOS-WXEL!
c/o Mr. James M. Roth and Mr. Robert Brown
P.O. Box 7037
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In re: **WXEL(FM), West Palm Beach, Florida**
Facility ID No. 58363
File No. BALED-20101228AAS

**Application for Assignment of License
Petitions to Deny and Informal Objections**

Dear Gentlemen:

We have before us the above-referenced application ("Application") seeking approval for the proposed assignment of license for noncommercial educational ("NCE") Station WXEL(FM), West Palm Beach, Florida ("Station"), from Barry Telecommunications, Inc. ("Barry") to Classical South Florida, Inc. ("CSF"). On January 31, 2011, the Community Broadcast Foundation of Palm Beach and the Treasure Coast, Inc. ("CBF") filed a Petition to Deny ("CBF Petition") the Application. On February 3, 2011, the WXEL Community Advisory Board ("CAB") filed a Petition to Deny ("CAB Petition"), and on the same day, James M. Roth and Robert Brown, the co-founders of SOS-WXEL! ("SOS-WXEL"), also filed a Petition to Deny

("Roth Petition") (collectively the "Petitions").¹ A number of station listeners ("Objectors") submitted letters opposing the proposed transaction ("Informal Objections").² For the reasons stated below, we deny the Petitions and Informal Objections, and grant the Application.

Background. Petitioners oppose grant of the Application, arguing that the proposed license assignment is not in the public interest and that assignment of the Station license to CSF will violate the Commission's policies in favor of broadcast localism. Specifically, Petitioners allege that: (1) the assignment will involve a format change that will undermine the station's ability to serve the public interest of the local community; (2) the assignment of the license to CSF, a wholly-owned subsidiary of American Public Media Group ("APMG"), a Minnesota corporation, contradicts the Commission's policies in favor of broadcast localism; (3) the Florida State Board of Education failed to adequately review the sale of the Station; and (4) Barry seeks to profit from the sale of the Station. The Informal Objections reiterate the claims raised by Petitioners.

Discussion. Section 310(d) of the Communications Act of 1934, as amended ("Act"),³ requires the Commission to make a determination whether the proposed transfer or assignment of a broadcast license would be in the public interest. In doing so, the Commission may not consider whether the public interest might be served by a transfer or assignment of the license to any party other than the proposed buyer.⁴ Pursuant to Section 309(d)(1) of the Act,⁵ 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.⁶ This threshold determination is made by evaluating the petition and the supporting affidavits. 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.⁷ 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.

Format Change. Petitioners oppose CSF's proposal to change the Station's format change to all classical music programming and question CSF's ability to adequately provide programming of significant local impact.⁸ They contend that the change in format contravenes the Commission's policies promoting broadcast localism and ask the Commission to deny the Application to preserve the Station's

¹ Barry and CSF each filed an Opposition to the Petitions to Deny on February 9, 2011 ("Barry Opposition" and "CSF Opposition" respectively; collectively the "Oppositions"). CBF filed a reply on March 4, 2011, and SOS-WXEL filed a reply on February 28, 2011.

² See 47 C.F.R. § 73.3587. Thirty-one listeners filed Informal Objections pursuant to Section 73.3587 of the Commission's rules. A list of the Objectors is attached at Appendix A.

³ 47 U.S.C. § 310(d).

⁴ *Id.*

⁵ 47 U.S.C. § 309(d)(1).

⁶ See *id.*; *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

⁷ 47 U.S.C. § 309(d)(2).

⁸ See CBF Petition at 8-11; CAB Petition at 3.

current programming format.⁹ However, the Commission, based on well-established policy, does not scrutinize or regulate programming, nor does it take potential changes in programming formats into consideration in reviewing assignment applications. In 1976, the Commission issued a Policy Statement in which it concluded that review of program formats was not required by the Act, would not benefit the public, would deter innovation, and would impose substantial administrative burdens on the Commission.¹⁰ The Supreme Court of the United States has upheld this policy.¹¹ In doing so, the Court accepted the Commission's findings that "the public interest is best served by promoting diversity in entertainment formats through market forces and competition among broadcasters . . ." and that a change in programming is not a material factor that should be considered by the Commission in ruling on applications for license transfer.¹² This is particularly so with regard to the programming decisions of NCE broadcast stations, based on the Commission's historically "limited role of facilitating the development of the public broadcasting system rather than determining the content of its programming."¹³

Additionally, assignees need no longer file a specific program service proposal with an assignment application.¹⁴ The primary reason for Commission review of assignment applications is to consider the legal qualifications of the parties.¹⁵ Furthermore, CSF certified that it satisfies its programming obligations as a prospective licensee on its Application.¹⁶ Accordingly, we find that Petitioners have failed to raise a substantial and material question of fact warranting further inquiry regarding these matters.

Broadcast Localism. Petitioners further claim that CSF does not meet the Commission's localism requirements.¹⁷ Specifically, Petitioners allege that: (1) CSF's status as a wholly-owned subsidiary of APMG, a Minnesota corporation, is a violation of the Commission's localism requirements;¹⁸ (2) the location of CSF's main offices in Ft. Lauderdale, Florida (outside the WXEL service area) violates Commission localism requirements;¹⁹ and (3) CSF's maintenance of the Station's main studio within the Station's service area is ensured for only one year and beyond that is uncertain.²⁰ Petitioners' claims fail

⁹ *Id.*

¹⁰ See *Changes in the Entertainment Formats of Broadcast Stations*, Memorandum Opinion and Order, 60 FCC 2d 858, 865-66 (1976), *recon. denied*, Memorandum Opinion and Order, 66 FCC 2d 78 (1977), *rev'd sub nom. WNCN Listeners Guild v. FCC*, 610 F.2d 838 (D.C. Cir. 1979), *rev'd*, 450 U.S. 582 (1981) ("*WNCN Listeners Guild*").

¹¹ *WNCN Listener's Guild*, 450 U.S. 582 (1981).

¹² *Id.* at 585.

¹³ *Revision of Programming Policies and Reporting Requirements Related to Public Broadcasting Licensees*, Notice of Proposed Rule Making, 87 FCC 2d 716, 732 (1981). See also *License Renewal Applications of Certain Commercial Radio Stations Serving Philadelphia, Pennsylvania*, Memorandum Opinion and Order, 8 FCC Red 6400, 6401 (1993) (licensees have broad discretion over programming decisions).

¹⁴ FCC Form 314.

¹⁵ *Request for Declaratory Ruling Concerning Programming Information in Broadcast Applications for Construction Permits, Transfers and Assignments*, Memorandum Opinion and Order, 3 FCC Red 5467 (1988).

¹⁶ See File No. BALED-20101228AAS; see also, FCC Form 314, Section III, Item 11.

¹⁷ See CBF Petition at 9-11; CAB Petition at 2-7; Roth Petition at 2-3.

¹⁸ See CBF Petition at 9-10; CAB Petition at 3-4; Roth Petition at 2-3.

¹⁹ See CAB Petition at 7; Roth Petition at 2-3.

²⁰ See CAB Petition at 7-8.

to articulate any violation of Commission Rules (“Rules”) or defect in CSF’s Application. The Rule most relevant to Petitioners’ concerns is Section 73.1125(a) (main studio location) of the Rules.²¹ As discussed further below, the Application complies with this rule.

Section 73.1125(a) establishes requirements for the location of a station’s “main studio.” In relevant part, it provides that:

Each AM, FM, and TV broadcast station shall maintain a main studio at one of the following locations:

- (1) Within the station’s community of license;
- (2) At any location within the principal community contour of any AM, FM, or TV broadcast station licensed to the station’s community of license; or
- (3) Within twenty-five miles from the reference coordinates of the center of its community of license as described in § 73.208(a)(1).

The Station’s current studios are located at 3401 South Congress Avenue, Boynton Beach, Florida. This location satisfies both Options (2) and (3) of Section 73.1125(a) of the Rules. Petitioners do not argue that this location is a violation of the Rules. Instead, they argue that CSF’s main business office is outside the Station’s community of license, CSF may move the Station’s studios in the future, and cuts to local staff will make the studio irrelevant. While the Commission expects licensees to fully comply with its Rules, the Rules do not preclude a licensee from maintaining offices outside the community of license or the station’s principal community contour. The location of CSF’s main office is not relevant to the analysis of its compliance with Section 73.1125(a) of the Rules.

Petitioners’ fears that CSF will move the studios or reduce the staff at the Station’s studios in violation of the Rules are entirely speculative.²² Petitioners worry that CSF will move the Station’s studios after the one-year lease at the Station’s current location expires, as purportedly required in the purchase agreement.²³ Petitioners also worry CSF will significantly cut local staff and that the majority of the remaining staff would be underwriting staff.²⁴ The Rules prohibit relocation of the Station’s studios to a location that does not comply with Section 73.1125(a) of the Rules. Furthermore, the Main Studio Rule requires a licensee to maintain full-time managerial and staff personnel who “report to work at the main studio on a daily basis, spend a substantial amount of time there, and ... use the studio as a ‘home base.’”²⁵ The Commission expects full compliance with its Rules from all licensees. The Petitioners’ speculative claims that a violation of the Rules may occur in the future do not provide a substantial or material question of fact warranting further inquiry.

²¹ 47 C.F.R. § 73.1125(a).

²² See, e.g., *Andrea Cano*, Letter, 23 FCC Rcd 1942 (MB 2008) (rejecting objector’s speculative fears that a station’s EAS system would not function properly in the event of an emergency).

²³ See CAB Petition at 7-8.

²⁴ See CBF Petition at 8.

²⁵ See *J.M.J. Radio, Inc.*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 16882, 16883 (EB 2010) (quoting *Jones Eastern of the Outer Banks, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 6800, 6802 (1992)).

State Board of Education. Petitioners allege that the State Board of Education failed to approve the sale of the Station as required by a 1997 Three-Party Agreement.²⁶ To the extent that a dispute does exist between CSF, Barry, and the State Board of Education, the Commission does not have the responsibility, authority, or resources to investigate or resolve alleged violations of state law.²⁷ The Commission generally only considers three types of adjudicated non-FCC misconduct which are not specifically proscribed by the Act or the Rules: (1) fraudulent statements to government agencies; (2) felony convictions; and (3) mass media related violations of anti-competitive and antitrust statutes.²⁸ Because the claims raised by Petitioners do not fall into one of these enumerated categories, under our current policy, we would not consider Petitioners' claims even if adjudicated. Therefore, we find that Petitioners have failed to raise a substantial and material question of fact warranting further inquiry on this matter.

Purchase Price. Petitioners argue that Barry is attempting to profit by selling the Station to CSF. They further argue that this has priced out local groups that wanted to purchase the Station.²⁹ The Commission is barred by Section 310(d) of the Act from considering any potential alternative purchaser of the Station, and we do not examine the purchase price in a station sale unless it appears from other facts that the arrangement may not have been an arm's length transaction between the parties.³⁰ Petitioners make no allegations that the transaction was conducted at anything less than arm's length. Barry asserts that the transaction took place following extensive arms-length negotiations with all potential acquirers.³¹ Therefore, the proposed sales price of the Station does not present a substantial and material question of fact calling for further inquiry on this matter.

Conclusion/Actions. We find that neither the Petitioners nor the Objectors have 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

²⁶ See CBF Petition at 11.

²⁷ *WGBH Educational Foundation*, Memorandum Opinion and Order, 43 RR 2d 1436, 69 FCC 2d 1250, 1253 (1978).

²⁸ See *Policy Regarding Character Qualifications in Broadcast Licensing*, Policy Statement and Order, 5 FCC Rcd 3252, 3252-53 (1990), modified, 6 FCC Rcd 3448 (1991), and 7 FCC Rcd 6564 (1992).


²⁹ See CAB Petition at 8.

³⁰ *Applications for Assignment of License/Transfer of Control of Television Stations WTTE(TV), WNUV(TV), and WTAT(TV)*, Letter, 19 FCC Rcd 3897 (2004).

³¹ See Barry Opposition at 7-8.

Petitions to Deny filed by the Community Broadcast Foundation of Palm Beach and the Treasure Coast, Inc., the WXEL Community Advisory Board, and SOS-WXEL! ARE DENIED, the Informal Objections submitted by the Objectors ARE DENIED, and the application for approval to assign the license for NCE Station WXEL(FM), West Palm Beach, Florida (BALED-20101228AAS) from Barry Telecommunications, Inc., to Classical South Florida, Inc. IS GRANTED.

Sincerely,


Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Barry Telecommunications, Inc.
Classical South Florida, Inc.
The Community Broadcast Foundation of the Palm Beach and the Treasure Coast, Inc.

Appendix A

Lisa D. Combs, MAE
Karen T. Marcus, Chair
Robert W. Ganger
Cyrelle N. Ratzkin
Brook M. Paschkes
Paul Gionfriddo
Sonja Hudson
Cynthia H. Plockelman
Sandra Safran
Mike Winokur
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