Federal Communications Commission
Washington, D.C. 20554

August 9, 2011

In Reply Refer to:
1800B3-ML

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In re: **WFJO(FM), Folkston, Georgia**
Facility ID No. 22005
File No. BALH-20090427ABP

WHJX(FM), Baldwin, Florida
Facility ID No. 52032
File No. BALH-20090427ABP

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

Petition for Reconsideration

Dear Counsel:

We have before us: (1) a petition for reconsideration ("Petition") filed on September 11, 2009, by Dr. Glenn Cherry ("Cherry") and Charles Cherry[1] requesting reconsideration of a letter decision ("*Letter*

[1] As Charles Cherry was not a party to the proceeding and has not shown why he could not have participated earlier in the proceeding, he lacks standing to file the Petition and the Petition with respect to Charles Cherry's participation will be dismissed. 47 C.F.R. § 1.106(b)(1) ("If the petition is filed by a person who is not a party to the proceeding, it shall state with particularity the manner in which the person's interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding."). *See also Lawrence E. Steelman*, Letter, 22 FCC Rcd 4819, 4820 (MB 2007) (dismissing non-party's petition for reconsideration because did not show good reason why was unable to participate in the earlier proceeding).

Decision") released by the Media Bureau on August 12, 2009,[2] granting the referenced applications (collectively, the "Applications") for Commission consent to the voluntary assignment of WTHG(FM), Hinesville, Georgia, WFJO(FM), Folkston Georgia, WHJX(FM), Baldwin, Georgia, and WSJF(FM), St. Augustine Beach, Florida, denying Cherry's objections to the Applications, and admonishing Cherry for filing frivolous and obstructive pleadings. For the reasons set forth below, we deny the Petition.

Background. The underlying issues in this case have been considered and properly resolved by the Media Bureau, Enforcement Bureau, and full Commission and require little further exposition here. Cherry formerly sat on Tama Broadcasting, Inc.'s ("Tama") board of directors and served as corporate executive officer ("CEO") and treasurer. On May 29, 2008, Tama's board voted to remove Cherry as CEO. On February 26, 2009, the staff granted an involuntary assignment of the licenses of the referenced stations from Tama to Savage[3] over Cherry's objection.[4]

On March 10, 2009, Savage filed the Application seeking approval for the voluntary assignment of the license of Station WTHG(FM) to Savannah Radio. On April 27, 2009, Savage filed an application seeking approval for the proposed voluntary assignment of the licenses of WFJO(FM), WHJX(FM), and WSJF(FM) to Family Broadcasting, LLC. Cherry objected to the Applications on April 29, 2009, and May 22, 2009, respectively (collectively, "the Objections").

The *Letter Decision* treated Cherry's filings as informal objections, denied the Objections on the merits, granted the Applications, and admonished Cherry for filing frivolous and obstructive pleadings.[5] Cherry and Charles Cherry subsequently filed the Petition, asserting that reconsideration is warranted because: (1) the staff's decision to classify Cherry's objections as informal objections was erroneous; (2) action on the assignments should have been held in abeyance pending final judgment in the parties' civil

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[2] *See Letter to Percy Squire, Esq., and Mark J. Prak, Esq.*, 24 FCC Rcd 10669, 10669 (MB 2009). We also have before us (2) an Opposition ("Opposition") filed on September 21, 2009, by Scott Savage, court-appointed Receiver for Tama ("Savage"); and (3) a Reply filed on October 1, 2009, by Petitioners.

[3] Savage was appointed receiver of Tama and its assets by the Supreme Court of the State of New York on September 5, 2008. *See D.B. Zwirn Special Opportunities Fund, L.P. v. Tama Broadcasting, Inc.*, Order Pursuant to CPLR § 6401 Appointing a Temporary Receiver, Index No. 600962/2008 (Sept. 5, 2008).

[4] *See Letter to Percy Squire, Esq., and Mark J. Prak, Esq.*, 24 FCC Rcd 2453, 2453 (MB 2009). On March 31, 2009, Cherry filed an Application for Review of the staff action, which the Commission dismissed on June 1, 2010. *Tama Radio License of Tampa, Florida, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 7588, 7590 (2010). On April 12, 2011, the United States District Court for the District of Columbia dismissed Cherry's appeal of the Commission's June 1, 2010, ruling for lack of standing. *Cherry v. FCC*, No. 10-1151 (D.C. Cir. April 12, 2011). 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 ("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.

[5] *Letter Decision*, 24 FCC Rcd at 10671.

suits;[6] and (3) the admonition is contrary to the public interest and contributes to the demise of black owned and formatted broadcast stations.[7]

Discussion. Petitions for reconsideration are granted only in limited circumstances.[8] Absent a material error or omission in the underlying order, or, unless a petitioner raises additional facts not known or existing until after the petitioner's last opportunity to present such matters, reconsideration is not warranted.[9]

Cherry first argues that the decision to treat his filings as informal objections because he failed to support them with affidavits as required by Section 309(d) of the Communications Act of 1934, as amended, ("Act")[10] was erroneous.[11] We disagree. Although Cherry states that he supported the Objections with various affidavits regarding other matters at the Commission,[12] he does not assert that he provided (and did not in fact provide) an affidavit affirming personal knowledge of the facts alleged in the Objections, as required by Section 309(d) of the Act.[13] Even were we to consider the Objections as Petitions to Deny, however, doing so would not warrant reconsideration because the *Decision Letter* also considered and properly rejected the Objections' substantive arguments.

Similarly, Cherry's claim that the staff should have held "the application in abeyance" until the parties' civil court cases were resolved[14] lacks merit. We have consistently declined to involve ourselves in private disputes such as that involved here, especially when it is already before a court of competent jurisdiction.[15] In the absence of a stay or injunction issued by a court, the Commission has routinely acted favorably on license assignment applications pending resolution of private disputes such as those at issue

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[6] The cases in question are *Glenn W. Cherry, et al. v. FCC*, case no. 09-cv-00680 (M.D. FL.) and *Glenn W. Cherry, et al. v. DBZ, et al.*, Case No. 08-cv-0033-T33 (M.D. FL.).

[7] Petition at 1-2.

[8] *See* 47 C.F.R. § 1.106, *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sum nom., Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966); *National Association of Broadcasters*, Memorandum Opinion and Order, 18 FCC Rcd 24414, 24415 (2003).

[9] *Id.*

[10] 47 U.S.C. § 309(d) (2006) (Allegations of fact in petition to deny, except for those facts of which official notice has been taken, must "be supported by an affidavit of a person or persons with personal knowledge thereof").

[11] Petition at 7.

[12] *Id.*

[13] Petitioners satisfy Section 309(d) of the Act by including with their pleading a signed affidavit certifying that the information contained in the pleading is correct to the best of their knowledge. *See, e.g., World Revivals, Inc.*, Letter, 24 FCC Rcd 2835, 2838 (MB 2009) (dismissing petition to deny because, although petitioner included a general statement that "the facts and statements therein are true and correct to the best of my knowledge and belief," petitioner did not include an affidavit or declaration under penalty of perjury that the factual allegations alleged in the Petition were true).

[14] Petition at 4.

[15] *Beyond the Bay Media Group*, Memorandum Opinion and Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 6967, 6974 (MB 2006); *Letter to James L. Oyster, Esq. (WFLK(FM), Geneva, New York)*, reference 1800 B3-ALV, DA 11-1363, 26 FCC Rcd ____ (MB Aug. 5, 2011).

here.[16] We note, however, that Commission grant of an assignment or transfer of control application merely finds that the parties to the Application are qualified under, and the proposed transaction does not violate, the Act, or the Commission's rules and policies. As such, it is permissive only and does not prejudice any relief to which any party may ultimately be entitled under state or federal law.[17]

Finally, Cherry contends that the admonition contravenes the public interest and contributes to the demise of black owned and formatted broadcast stations.[18] In particular, Cherry alleges the staff based its admonishment on an opinion issued by the Southern District of New York, which contained a "totally baseless and unfair diatribe against Tama, not Dr. Cherry."[19] Although we are uncertain why Cherry apparently believes that the admonishment was somehow based on the New York court's opinion, he is incorrect. The staff admonished Cherry for filing frivolous and obstructive pleadings in *this* proceeding to delay the assignment of the Tama licenses.[20] Admonishment was well within the staff's discretion,[21] and Cherry points to no Commission Rule or precedent to demonstrate that the admonishment was issued in error. Finally, Cherry's baseless claim that the admonishment contributes to the demise of black-owned and formatted broadcast stations does not warrant further discussion.

Conclusion/Actions. Accordingly, for the reasons discussed above, IT IS ORDERED, that the Petition for Reconsideration filed by Dr. Glenn W. Cherry and Charles W. Cherry II, Esq., on September 11, 2009, IS DENIED.

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.

[16] *See, e.g., Farm and Home Broadcasting Company*, Letter, 24 FCC Rcd 11814, 11815 (MB 2009).

[17] *Peggy Haley, N.C.M.*, Letter, 23 FCC Rcd 12687, 12688-89 (MB 2008).

[18] Petition at 1-2.

[19] *Id.* at 13, citing *D.B. Zwirn Special Opportunities Fund, L.P. v. Tama Broadcasting, Inc.*, 550 F.Supp. 2d 481, 488 (S.D.N.Y. 2008).

[20] *Letter Decision*, 24 FCC Rcd at 10673 (noting that the Objections were "frivolous and obstructive pleadings which are wholly devoid of merits" and constituted attempts to delay the proceeding).

[21] *See, e.g., Richard R. Zaragoza, Esq.*, Letter, 24 FCC Rcd 5743, 5744 (MB 2009) (admonishing petitioners for filing frivolous and obstructive pleadings).