



Federal Communications Commission
Washington, D.C. 20554

February 17, 2012

In Reply Refer to:
1800B3-BSH

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In re: **KFNL(FM), Kindred, North Dakota**
Facility ID No. 10066
File No. BALH-20110811AAM

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

Dear Counsel:

We have before us the above-captioned application (the "Assignment Application") seeking approval for the proposed assignment of license for Station KFNL(FM), Kindred, North Dakota (the "Station"), from Northwestern College ("Northwestern") to Mediactive, LLC ("Mediactive"). On September 15, 2011, Monterey Licenses, LLC ("Monterey"), licensee of Stations KPFX(FM), Fargo, North Dakota; KQWB(AM), West Fargo, North Dakota; KLTA(FM), Breckenridge, Minnesota; KBMW(AM), Breckenridge, Minnesota; KQWB-FM, Moorhead, Minnesota; and KVOX-FM, Moorhead, Minnesota, filed a Petition to Deny or Request for FCC Investigation ("Petition") the Assignment Application.¹ For the reasons stated below, we deny the Petition and grant the Assignment Application.

Background. On January 9, 2007, the Commission granted the assignment of the Station from Radio Fargo-Moorhead, Inc. ("RFM") to Northwestern ("2007 Assignment").² As noted by Monterey, the sale of the Station from RFM to Northwestern was related to RFM's acquisition of a cluster of

¹ Mediactive filed an Opposition to Petition to Deny or Request for FCC Investigation ("Opposition") on October 3, 2011, and Monterey filed a Reply to Opposition to Petition to Deny or Request for FCC Investigation ("Reply") on October 14, 2011.

² File No. BALH-20061121AJJ.

stations from Clear Channel Communications subsidiaries in the Fargo-Moorhead, ND-MN radio market,³ and was a spin off sale that was necessary in order to achieve compliance with the Commission's multiple ownership rule.⁴ Specifically, the 2007 Assignment was required in order to prevent RFM from exceeding the maximum number of stations permitted to be owned by one entity in the Fargo-Moorhead, ND-MN radio market.⁵ As further noted by Monterey, the 2007 Assignment Asset Purchase Agreement ("APA") provided RFM with an assignable right of first refusal if Northwestern was to subsequently sell the Station to a commercial entity.⁶ James D. Ingsted holds 100 percent of the voting interest in RFM. James Ingsted is the uncle of Mediactive principal Robert J. Ingsted.

Monterey raises three issues in the Petition. First, concerning the 2007 Assignment, "Monterey questions whether the right of first refusal itself gives RFM an improper right of reversion" in violation of Section 73.1150(a) of the Commission's rules (the "Rules").⁷ Second, Monterey states that "there is nothing in the currently pending assignment application mentioning any actions taken pursuant to the right of first refusal," and the Petition argues that "any documents dealing with that right" should be disclosed to the Commission.⁸ Finally, Monterey expresses suspicion that Mediactive and RFM "will truly act independently in Fargo should the instant transaction be approved" because James and Robert Ingsted are related and have previously been involved together in a business venture.⁹

Discussion. Section 309(d)(1) of the Communications Act of 1934, as amended (the "Act"), requires a two-step analysis for judging the adequacy of Monterey's Petition.¹⁰ We must first determine whether Monterey has made specific allegations of fact that, if true, would demonstrate that grant of the Assignment Application would be *prima facie* inconsistent with the public interest. These specific allegations must be supported by the affidavit of a person with knowledge of the facts alleged, except for those of which we may take official notice.¹¹ If the specific allegations make a *prima facie* case, we next examine and weigh the evidence presented, to determine "whether the totality of the evidence arouses a

³ See File Nos. BAL-20061121AIP-AIT. At the time, Clear Channel Communications, Inc. was the parent company of Capstar TX Limited Partnership, the former licensee of the Station.

⁴ The Fargo-Moorhead, ND-MN radio market has 29 stations. In a market this size, a single entity may own, operate or control up to six stations, no more than four in the same service. See 47 C.F.R. § 73.3555(a)(1)(iii).

⁵ RFM is the licensee of the following stations in the Fargo-Moorhead, ND-MN radio market: KBVB(FM), Barnesville, Minnesota; KFGO(AM), Fargo, North Dakota; KMJO(FM), Hope, North Dakota; KRWK(FM), Fargo, North Dakota; KVOX(AM), Fargo, North Dakota; and WDAY-FM, Fargo, North Dakota.

⁶ Petition at 4; 2007 Assignment, APA, Article 7 – Special Covenants. Station KFNL(FM) is currently operating on a noncommercial basis.

⁷ Petition at 5. In transferring a broadcast station, 47 C.F.R. § 73.1150(a) prohibits a licensee from retaining a right of reversion of the license, or right to reassignment of the license in the future.

⁸ *Id.* at 4-5.

⁹ *Id.* at 6-7.

¹⁰ 47 U.S.C. § 309(d)(1).

¹¹ *Id.*

sufficient doubt on the point that further inquiry is called for.”¹² We must also determine whether grant of the Assignment Application would serve the public interest.¹³

We find that Monterey fails to provide the necessary specific allegations of fact required by Section 309(d)(1) of the Act to make a *prima facie* case concerning any allegation. Monterey’s argument that the right of first refusal provision contained in the 2007 Assignment APA may violate the Commission’s reversionary interest prohibition is an untimely objection to the assignment to Northwestern, which was granted and became final in 2007. Moreover, as stated in the Opposition, when RFM learned that Northwestern was interested in finding a buyer for the Station, “James [Ingsted] suggested that Robert [Ingsted] (as well as another, unrelated party) might be interested and did not exercise his right of first refusal when Robert was identified as the ultimate buyer.”¹⁴

Nonetheless, it is open to question if the inclusion of the right of first refusal provision in the 2007 Assignment was inconsistent with Section 73.1150(a) of the Rules.¹⁵ Commission staff do not routinely scrutinize contracts submitted as part of the review of assignment applications.¹⁶ The Commission has therefore declared that the grant of a specific assignment application does not “establish either the acceptability of a particular contract term or the correctness of an applicant’s rule interpretation in future application proceedings. Reliance on a prior Commission action would be appropriate only where a decision disposing of the prior application plainly considered and found acceptable the pertinent contract term or rule interpretation.”¹⁷ No such decision was issued in connection with the 2007 Assignment. However, in light of the fact that RFM is not a party to the instant Assignment Application, the arguably improper right of first refusal in the 2007 Assignment is not relevant to the instant Assignment Application and, accordingly, there is no reversion at issue in the proposed assignment before us. Moreover, we will not now take any corrective action concerning the 2007 Assignment because it is well settled that the Commission’s authority to revisit final actions is generally limited to the correction of

¹² *Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985). See also 47 U.S.C. § 309(d)(1) (“The petition shall contain specific allegations of fact sufficient to show that . . . grant of the application would be *prima facie* inconsistent with [Section 309(a)]. 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.”); 47 C.F.R. § 73.3584(b).

¹³ *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988). See also *Rocky Mountain Radio Co., LLP*, Memorandum Opinion and Order, 15 FCC Rcd 7166, 7167 (1999).

¹⁴ Opposition at 4.

¹⁵ See *Cumulus Licensing LLC*, Letter, 21 FCC Rcd 2998, 3005 (MB 2006).

¹⁶ See 1998 Biennial Review - - *Streamlining of Mass Media Applications, Rules, and Processes*, Report and Order, 13 FCC Rcd 23056, 23076 (1998) (streamlining sales application processing scheme to eliminate routine staff review of sales contracts in every case).

¹⁷ *Mid Atlantic Network, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability, 23 FCC Rcd 7582, 7587-88 (MB 2008).

ministerial errors that underlie or occur in the process of taking action.¹⁸ The decision to grant a license application is typically a discretionary, rather than ministerial, action.¹⁹

Concerning Monterey's questioning of the independence of Robert Ingsted from James Ingsted, Mediactive first states that "Robert is not working for or with James."²⁰ In response to Monterey's contention, the Opposition provides the Declaration of Robert J. Ingsted, made subject to penalty of perjury, which states that Robert is a 40-year old who has worked in broadcasting his entire life, has successfully owned and operated stations since 2004, and currently is the licensee of ten stations in the Klamath Falls, Oregon, and Fairbanks, Alaska, markets.²¹ The Opposition further states that Robert's business relationship with James, which involved ownership of four stations in and near Aberdeen, South Dakota, ended in October 2006.²² Moreover, the Opposition asserts that "Robert's entry into the Fargo market makes sense as Fargo is a mere 55 miles away from Robert's home in Valley City."²³ Finally, we note that Monterey neither alleges nor demonstrates that the Station should be attributed to James Ingsted pursuant to the Commission's familial relationship policies.²⁴

Regarding Monterey's call for the full disclosure of any relevant documents, the Opposition states that "neither Robert nor Mediactive has entered into any contracts or agreements (executory or otherwise) with RFM, James, or anyone else for that matter, with respect [to] any aspect (including those for studio/office space or programming) of his proposed ownership of KFNL"²⁵ Mediactive adds that it "intends to make decisions about its studios, sales, programming and other operational matters following grant of the Application and subsequent consummation and that all such decisions will be in full compliance with the rules and policies of the Commission."²⁶ The Opposition concludes that "simply put, there are no other documents or agreements to provide to the Commission."²⁷

Based on the above, we find that Monterey fails to provide evidence that RFM will have any interest in or influence over the Station after assignment to Mediactive. Furthermore, Monterey provides no evidence that grant of the Assignment Application will result in any anti-competitive behavior, nor any

¹⁸ *County of San Mateo, CA*, Memorandum Opinion and Order, 14 FCC Rcd 16501, 16503-04 (2001) (citing *American Trucking Ass'n v. Frisco Transp. Co.*, 358 U.S. 133, 145-46 (1958)).

¹⁹ *Id.* at 16504 (finding that grant of application was not ministerial and, thus, could not be reconsidered more than thirty days after it became final).

²⁰ Opposition at 6.

²¹ *Id.*, Exhibit 1.

²² *Id.* at 3.

²³ *Id.*

²⁴ See *Clarification of Commission Policies Regarding Spousal Attribution*, Policy Statement, 7 FCC Rcd 1920 (1992) (citing criteria for determining if relevant family relationships give rise to attributable interests).

²⁵ Opposition at 5.

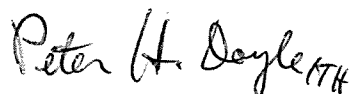
²⁶ *Id.*

²⁷ *Id.*

factual basis to infer that James Ingsted would be involved in the ownership or operation of Station KNFL(FM). In light of this conclusion, Monterey has failed to present a substantial and material question of fact sufficient to demonstrate that grant of the Assignment Application would be inconsistent with the public interest.

Conclusion/Actions. Accordingly, we find that Monterey has not raised a substantial and material question of fact warranting further inquiry. We further find that Mediactive is qualified to hold the Station KNFL(FM) license and that grant of the Assignment Application is consistent with the public interest, convenience and necessity. Accordingly, IT IS ORDERED, that the Petition to Deny filed by Monterey Licenses, LLC IS DENIED, and that the application for approval to assign the license for Station KNFL(FM), Kindred, North Dakota (File No. BALH-20110811AAM) from Northwestern College to Mediactive, LLC IS GRANTED.

Sincerely,

A handwritten signature in black ink that reads "Peter H. Doyle" followed by a stylized flourish or initials.

Peter H. Doyle
Chief, Audio Division
Media Bureau