

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

In re Application of)	
)	
Nameloc, Inc.)	Facility ID No. 47309
(Assignor))	
)	File No. BALH-20030319AEZ
and)	
)	
ABC, Inc.)	
(Assignee))	
)	
for Assignment of License)	
of Station KDIS-FM,)	
(formerly KYFX(FM)),)	
Little Rock, Arkansas)	

MEMORANDUM OPINION AND ORDER

Adopted: September 24, 2008

Released: September 30, 2008

By the Commission:

1. The Commission has before it an Application for Review submitted by Nameloc, Inc. ("Nameloc"), an Application for Review submitted by Arkansas Regional Minority Supplier Development Council, *et al.* ("Arkansas"), a Petition for Reconsideration submitted by Dale Charles, *et al.* ("Charles"), and various other pleadings submitted by Nameloc, Arkansas, Charles, and ABC, Inc. ("ABC").¹ Nameloc, Arkansas, and Charles seek to stay and reverse a staff decision issued on May 30, 2003 ("Staff Decision").² That decision granted an application to assign the license of station KYFX(FM), Little Rock, Arkansas (the "Station") from Nameloc to ABC.³ For the reasons discussed below, we deny Nameloc's Application for Review, Arkansas's Application for Review, and Charles's Petition for Reconsideration, and dismiss as moot all of the related motions.⁴

¹ Specifically, we have: (1) the Application for Review and (2) a Motion for Stay, both filed on June 13, 2003, by Nameloc; (3) a Request for Emergency Relief and Motion to Dismiss filed on July 2, 2003, also by Nameloc; (4) the Application for Review and (5) an Emergency Motion for Stay, both filed on July 7, 2003, by Arkansas; (6) the Petition for Reconsideration filed on June 16, 2003, and (7) a Motion to Dismiss ABC's Opposition to Nameloc's Motion for Stay filed on July 1, 2003, both by Charles. ABC filed oppositions to all seven pleadings. Additionally, Charles filed a Reply to ABC's Opposition to Petition for Reconsideration. Because the issues raised in Charles's Petition for Reconsideration are related to those raised in the Nameloc and Arkansas Applications for Review, the staff has referred the Petition for Reconsideration to the Commission pursuant to 47 C.F.R. § 1.106(a)(1) and we address it herein. *See Manahawkin Communications Corp.*, 17 FCC Rcd 342, 342-43 (2001).

² *See Letter to Susan L. Fox, et al.*, Ref. No. 1800B3-BSH (MB May 30, 2003) ("Staff Decision").

³ Following consummation of the assignment, the Station's call sign was changed to KDIS-FM. In this Order, however, we will refer to the Station by its former call sign, KYFX.

⁴ The assignment has already been consummated. Nameloc in its Motion for Stay asks the Commission to stay the assignment of license until the Commission has acted upon Nameloc's Application for Review. Nameloc's stay request will be dismissed as moot, as will Charles's Motion to Dismiss ABC's Opposition to Nameloc's Motion for
(continued....)

I. BACKGROUND

2. This case stems from an adjudicated contractual dispute between Nameloc, a minority-owned company, and ABC, concerning the sale of the Station. On March 25, 2002, Nameloc entered into an Asset Purchase and Sale Agreement (“Sale Agreement”) with ABC, under which ABC would acquire the license of the Station, subject to approval by the Commission, as well as substantial tangible and intangible Station assets. Use of the KYFX call letters and trademarks held by Nameloc for “FOXY 99.5” was explicitly excluded from the assets being sold. Nameloc agreed to deliver the completed and signed seller’s portion of an assignment application to ABC by April 15, 2002. The transaction did not proceed as planned because a dispute developed concerning the conveyance of Nameloc’s lease for the Station’s transmission tower. On November 8, 2002, ABC sued Nameloc for breach of contract in the United States District Court for the Eastern District of Arkansas (“U.S. District Court”). On February 18, 2003, the U.S. District Court granted ABC’s motion for summary judgment and held that ABC was entitled to specific performance for the sale of the Station.⁵ The U.S. District Court ordered Nameloc to execute an assignment application by March 17, 2003.⁶ Nameloc filed a Motion for Stay. On March 18, 2003, upon denial of that motion by the U.S. Court of Appeals for the Eighth Circuit, Nameloc delivered the executed assignment application to ABC.⁷ ABC filed the assignment application with the Commission on March 19, 2003.

3. On March 10, 2003, one week prior to delivering the assignment application to ABC, Nameloc filed a complaint with the Commission’s Enforcement Bureau. Nameloc alleged that ABC had violated Section 310(d) of the Act⁸ by engaging in an unauthorized transfer of control of the Station, and was thus not qualified to hold a Commission license. Specifically, Nameloc alleged that ABC, by posting job availability notices on the internet for “Radio Disney KYFX” before an assignment application was even filed, was identifying ABC as the owner of the Station with rights to the KYFX call sign. Nameloc’s enforcement complaint also alleged that Nameloc’s objection to ABC’s use of the KYFX call sign was met by ABC’s retaliation in not renewing a programming agreement for the Station to broadcast *The Tom Joyner Show* (“*Joyner Show*”).

4. The Enforcement Bureau denied Nameloc’s complaint.⁹ In the Enforcement Letter, the staff found that “the facts alleged by Nameloc do not create a basis for believing that an unauthorized transfer of control has occurred”¹⁰ The staff concluded that “Nameloc’s allegations, if taken as true,

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Stay. Similarly, we will dismiss as moot Nameloc’s Request for Emergency Relief and Arkansas’s Emergency Motion for Stay of the assignment grant (both of which cited to the “emergency” of the previously scheduled July 9, 2003, date for consummation of the KYFX sale).

⁵ See *ABC, Inc., v. Nameloc, Inc.*, No. 4:02-CV0714 GTE (E.D. Ark. Feb. 18, 2003) (order granting summary judgment) (“*Summary Judgment Order*”) (copy submitted as Exhibit A to ABC’s Opposition to Nameloc’s Application for Review), *aff’d*, 362 F.3d 449 (8th Cir. 2004).

⁶ See ABC’s Opposition to Nameloc’s Application for Review at 4-5 n.16 (citing *ABC, Inc. v. Nameloc, Inc.*, (E.D. Ark. Mar. 11, 2003)).

⁷ *Id.* at 5 n.17 (citing *ABC, Inc. v. Nameloc, Inc.*, No. 03-1691 EA (8th Cir. Mar. 18, 2003) (denying Nameloc’s request for stay)).

⁸ See 47 U.S.C. § 310(d).

⁹ See *Letter to James L. Winston, Esq., et al.* (EB Apr. 18, 2003) (“Enforcement Letter”).

¹⁰ Enforcement Letter at 2.

do not suggest to us that Nameloc itself has not retained actual control of the basic policies concerning operation of the station, including its programming, personnel, and finances.”¹¹

5. On April 28, 2003, Arkansas filed a Petition to Deny the assignment application. Arkansas argued that the proposed assignment to ABC raised issues of market concentration, loss of minority ownership, and unauthorized transfer of control that should be investigated. As noted above, the staff granted the assignment on May 30, 2003. The Staff Decision explained that changes in Commission policies regarding market concentration and the promotion and retention of minority ownership would be appropriately addressed in the omnibus review of the broadcast ownership rules that was then ongoing.¹² The staff concluded that the proposed transaction raised no market concentration concerns because ABC would not own any other stations in the Little Rock market. The assignment also complied with the local radio multiple ownership rules then (and still) in effect. The Staff Decision rejected Arkansas’s attempts to re-argue private contractual matters between Nameloc and ABC.¹³ Finally, the Staff Decision noted that the transfer of control allegations had already been considered and rejected in the Enforcement Letter. The Media Bureau staff found that further consideration of the allegations was not warranted because Arkansas did not present any additional evidence. On July 10, 2003, Nameloc and ABC consummated the assignment of license to ABC. Nameloc, supported by Arkansas and Charles, now challenges the assignment’s validity.

II. DISCUSSION

A. Unauthorized Transfer of Control

6. Nameloc’s and Arkansas’s primary argument is that ABC is not qualified to be a Commission licensee because ABC prematurely assumed control of the Station.¹⁴ As stated previously,

¹¹ *Id.* at 2 (citing *WGPR, Inc.*, 10 FCC Rcd 8140, 8141 (1995), *vacated on other grounds sub nom. Serafyn v. FCC*, 149 F.3d 1213 (D.C. Cir. 1998)).

¹² The omnibus review was concluded on June 2, 2003. *See 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620 (2003) (“Broadcast Ownership Order”), *aff’d in part and remanded in part sub nom. Prometheus Radio Project v. F.C.C.*, 373 F.3d 372 (2004).

¹³ As noted by the staff, the Commission has consistently held that it is not the proper forum for the resolution of private contractual disputes. *See John R. Runner, Receiver (KBIF)*, 36 R.R. 773, 778 (1976) and *Decatur Telecasting, Inc.*, 7 FCC Rcd 8622 (1992) (*cited in* Staff Decision at 5 n.18).

¹⁴ In the instant pleadings, Nameloc and Arkansas, as well as Charles, also argue that the Staff Decision failed to consider pleadings that were filed in the initial stages of this proceeding. Arkansas seeks a reversal and remand of the Staff Decision to consider its June 2, 2003, reply. Arkansas also asserts that its due process rights were violated because: (1) the staff did not provide notice that its May 21, 2003, motion for an extension of time to file a late reply would be denied; and (2) it did not receive the two business days from denial to file pursuant to 47 C.F.R. § 1.46(b). Ideally, of course, the staff would have been aware of the motion prior to issuing the Staff Decision and thus would have addressed the extension issue therein. We find, however, that Arkansas was not prejudiced under the circumstances. Section 1.46(b) which pertains to rulemaking proceedings is inapplicable here. The untimely reply was properly not considered in the Staff Decision. *See* 47 C.F.R. § 1.46(a) (“It is the policy of the Commission that extensions of time shall not be routinely granted.”). We nevertheless address below Arkansas’s assertion that the Staff Decision erroneously found that there were no market concentration concerns and ignored specific evidence of “market failure,” *i.e.*, that two groups in the Little Rock market control 69.1 percent of the market’s advertising revenue which warrants an investigation of the instant transaction. *See infra* ¶¶ 8-9. Charles states that his timely filed Petition to Deny was not considered by the staff. The Staff Decision did not directly address Charles’s Petition (continued....)

the alleged transfer of control is based solely on ABC's posting of job advertisements on the Internet for "Radio Disney KYFX" before the assignment application was filed with the Commission. We reject the argument that the Media Bureau staff erred by relying on the Enforcement Bureau's finding that there had not been an unauthorized transfer of control. The Media Bureau staff action was proper given that Arkansas merely repeated the same evidence that Nameloc had presented in its complaint to the Enforcement Bureau. The Enforcement Letter has long been final; neither Nameloc nor any other party appealed it. Nameloc and Arkansas are thus without legal basis to raise the issue anew.¹⁵

7. On our own motion, however, we have reviewed the Enforcement Letter and agree with it. To determine whether an unauthorized transfer of control has occurred, the Commission looks to whether a new entity has the right to determine the basic operating policies of the licensee or station, particularly with respect to programming, personnel, and finances.¹⁶ ABC's use of the Station's call sign in employment advertisements does not establish any ABC control of the station's programming, personnel, or finances.¹⁷ To the extent that Nameloc and Arkansas argue that the use of call sign KYFX in ABC's ads disrupted the station's operations, resulted in the loss of advertising revenues, and interfered with Nameloc's ability to retain staff, these are private contractual disputes. The Commission has consistently declined to intervene in such matters and we see no reason to deviate from that course here. Nameloc's President and sole shareholder stated that she "at all times served as the General Manager of the station, providing day-to-day supervision . . ."¹⁸ Moreover, the U.S. District Court's *Summary Judgment Order* found that "ABC's use of the call letters in the job listing was for identification purposes only . . ."¹⁹ There is no indication that ABC's employment advertisements on the internet were anything more than planning efforts to identify staff available to begin work at the Station immediately following Commission approval of the assignment application and consummation of the sale.²⁰

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to Deny, nor, as Nameloc points out, did the staff mention an objection filed by D.A. Lams, President of the Student Government Association of Philander Smith College. The staff did not timely receive a filing from Philander Smith College, which in any event, though captioned as a Petition to Deny, failed to satisfy the requirements of 47 U.S.C. § 309(d)(1) and 47 C.F.R. § 73.3584. We have now reviewed both the Charles Petition to Deny and the Lams pleading. Charles's and Lams's primary concerns were about retaining and promoting minority broadcast ownership. The staff considered similar concerns raised by other petitioners, and hence, the absence of direct references to the Charles and Lams pleadings was not prejudicial. Charles also objected to "generic Radio Disney programming," but that objection is immaterial because the Commission does not regulate or scrutinize programming formats. *See* 47 U.S.C. § 326. *See also, e.g., Brawley Broadcasting Co.*, 13 FCC Rcd 21119, 21123 (1998).

¹⁵ *See* 47 C.F.R. § 1.103 (referencing 47 C.F.R. § 1.4(b)).

¹⁶ *See, e.g., Stereo Broadcasters, Inc.*, 87 FCC 2d 87 (1981), *recon. denied*, 50 R.R.2d 1346 (1982); *WHDH, Inc.*, 17 FCC 2d 856, 863 (1969), *aff'd sub nom. Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

¹⁷ *See North Idaho Broadcasting Co.*, 8 FCC Rcd 1637, 1638 (1993) (allegations which "consist of ultimate, conclusory facts or more general allegations on information and belief, supported by general affidavits . . . are not sufficient" to establish a *prima facie* case) (quoting *Gencom v. FCC*, 823 F.2d 171 n.11 (D.C. Cir. 1987)).

¹⁸ *See* Declaration of Ms. Loretta Lever House, President and sole shareholder of Nameloc, Enforcement Complaint, Exhibit 1.

¹⁹ *Summary Judgment Order* at 24.

²⁰ *See, e.g., Secret Communications II, LLC*, 18 FCC Rcd 9139, 9149 (2003) ("allegations based on internet website idiom are speculative and inadequate to raise a substantial and material question of fact concerning abdication of control") ("*Secret Communications*").

B. Market Concentration

8. Nameloc and Arkansas assert that the Staff Decision failed to give full consideration to market concentration concerns. Arkansas contends that the staff did not address “specific evidence of market failure – namely, that two firms [Citadel Communications Corp. and Clear Channel Communications] in the Little Rock market presently control 69.1 percent of the market’s advertising revenue.”²¹ Arkansas asserts that such market concentration rises to the standard of the “50/70 screen” then used by the staff to “flag” applications with possible concentration issues.²² Arkansas appears to conclude from these facts that a hearing is needed to determine whether anti-competitive market conditions and the loss of a female/minority-owned station warrant a denial of the assignment application. In opposition, ABC asserts that the 69.1 percent advertising revenue figure is irrelevant because it would not be affected by ABC’s purchase of the Station.

9. The staff correctly did not flag the Nameloc/ABC application. Arkansas previously acknowledged that at the time of the proposed transaction, KYFX garnered only 2.2 percent of the advertising revenues in the Arbitron-rated metropolitan area of Little Rock (the “Metro”).²³ The transaction would result in ABC owning only one radio station in the Metro, and ABC would not be one of the top two owners.²⁴ The existence of two other large group owners in the Metro – whose combined revenues in any event fell below the 70 percent screen – is irrelevant. Arkansas’s and Nameloc’s market concentration argument is frivolous.

C. Anti-Competitive Practices

10. Nameloc and Arkansas assert that the staff erred in failing to find that ABC engaged in anti-competitive practices. Specifically, they allege that ABC abused its national market power and unlawfully attempted to manipulate or coerce the sale of the Station to ABC by not renewing the programming agreement for KYFX to broadcast the *Joyner Show*. Arkansas asserts that ABC’s award of the show to the Station’s main competitor provides evidence that ABC was seeking to cause a

²¹ Arkansas’s Application for Review at 10-11 nn.25 & 27 (citing Declaration of Kofi A. Ofori, Esq., Ofori & Associates (“Ofori Declaration”) (attached to Arkansas’s Petition to Deny)). The Ofori Declaration (at 4 n.2) cites *Investing in Radio 2003, BIA Financial Network, Inc.*

²² See *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd 19861, 19870, 19894-97 (2001) (adopting interim policy procedures for subjecting certain transactions to competition analysis); *AMFM, Inc.*, 15 FCC Rcd 16062, 16066 n.10 (2000).

²³ See Ofori Declaration at 4. Arkansas now erroneously states that it did not receive sufficient notice to file comments in the ownership proceeding that resulted in the *Broadcast Ownership Order* (see *supra* note 12) because the Staff Decision was issued on “June 2, 2003, more than four hours after the commissioners had voted to issue a decision in the rulemaking proceeding.” Arkansas’s Application for Review at 13. First, the Staff Decision was issued on May 30, 2003, prior to the Commission’s June 2, 2003, adoption of the *Broadcast Ownership Order*. More importantly, the ownership proceeding was long pending and provided ample opportunity for the filing of comments. See also *FCC’s Media Bureau Extends Comment Deadlines for 2002 Biennial Regulatory Review of Commission’s Media Ownership Rules*, 17 FCC Rcd 22172 (MB 2002).

²⁴ In 2007, Citadel Communications Corp. acquired most of the radio stations operated by ABC, but the Station, along with all other radio stations operated as part of Radio Disney, was excluded from that transaction. See *Citadel Broadcasting Co.*, 22 FCC Rcd 7083, 7105 n. 133 (2007). Accordingly, the Station remains ABC’s sole radio station in the Little Rock, Arkansas market.

devaluation of the Station to force the sale to ABC. In response, ABC states that it “simply opted not to renew the programming agreement [for the *Joyner Show*,] a right expressly granted to ABC by the [programming] Contract itself.”²⁵ According to ABC, this was a business decision related to the anticipated acquisition of KYFX and change in its format. ABC also asserts that the decision could not be an attempt to coerce the sale of the Station because Nameloc had already entered into the Sale Agreement eight months prior to non-renewal of the *Joyner Show*.

11. Adjudicated anti-competitive broadcast practices can be relevant to a licensee’s character.²⁶ In the present case, however, there has been no court finding of any anti-competitive violation by ABC. To the contrary, the U.S. District Court found that “ABC acted pursuant to the plain language of the [programming] contract in not renewing the agreement [for the *Joyner Show*]; the contract did not require either party to give cause for its non-renewal.”²⁷ We find that ABC’s decision not to renew the programming agreement for the *Joyner Show* does not raise any character issues, nor is it indicative of any abuse cognizable under our current policies.²⁸

III. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, that the Application for Review filed on June 13, 2003, by Nameloc, Inc., the Application for Review filed on July 7, 2003, by Arkansas Regional Minority Supplier Development Council, *et al.*, and the Petition for Reconsideration filed on June 16, 2003, by Dale Charles, *et al.*, ARE DENIED.

13. IT IS FURTHER ORDERED, that the Motion for Stay filed on June 13, 2003, by Nameloc, Inc., the Request for Emergency Relief and Motion to Dismiss filed on July 2, 2003, by Nameloc, Inc., the Emergency Motion for Stay filed on July 7, 2003, by Arkansas Regional Minority Supplier Development Council, *et al.*, and the Motion to Dismiss ABC, Inc.’s Opposition to Nameloc, Inc.’s Motion for Stay filed on July 1, 2003, by Dale Charles, *et al.* ARE DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁵ ABC’s Opposition to Arkansas’s Application for Review at 7.

²⁶ See *Secret Communications*, 18 FCC Rcd at 9151 n.57.

²⁷ *Summary Judgment Order* at 25.

²⁸ See *Secret Communications*, 18 FCC Rcd at 9149-50 (rejecting as not properly supported petitioner’s allegation that “Clear Channel uses its market power to bully and abuse its competitors and advertisers”).