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

In the Matter of	)	
	)	
SHAREHOLDERS OF STOP 26 RIVERBEND, INC. (Transferor)	)	File No. BTC-20060203AAC Facility ID No. 22341
	)	
and	)	File No. BTCH-20060203AAD Facility ID No. 58633
BRADLEY E. SCHER, CHIEF RESTRUCTURING OFFICER (Transferee)	)	File No. BTCH-20060203AAE Facility ID No. 63498
WVKO(AM), Columbus, Ohio, WVKO-FM, Johnstown, Ohio, WRBP(FM), Hubbard, Ohio, WASN(AM), Youngstown, Ohio, and WGFT(AM), Campbell, Ohio	)	File No. BTC-20060203AAF Facility ID No. 72100 File No. BTC-20060203AAG Facility ID No. 74164
For Consent to Involuntary Transfers of Control	)	
	)	
In the Matter of	)	File No. BAL-20060301ACU File No. BALH-20060301ACV
STOP 26 RIVERBEND LICENSES, LLC, DEBTOR-IN-POSSESSION (Assignor)	)	File No. BALH-20060301ACW File No. BAL-20060301ACX File No. BAL-20060301ACY
and	)	
	)	
BERNARD OHIO, LLC (Assignee)	)	
	)	
For Consent to Assignment of Licenses	)	

MEMORANDUM OPINION AND ORDER

Adopted: June 8, 2012 **Released: June 8, 2012**

By the Commission:

I. INTRODUCTION

1. The Commission has before it an Application for Review filed on February 21, 2007, by Percy Squire Co., LLC ("PSC") and Frank Halfacre[1] seeking review of a January 22, 2007, letter decision ("*Decision*") of the Audio Division of the Media Bureau ("Bureau").[2] In the *Decision,* the Audio

[1] Bernard Ohio, LLC ("Bernard") and Stop 26 Riverbend Licenses, LLC, Debtor-in-Possession ("SRL DIP") – respectively, the current and former licensee of the captioned radio stations – filed a Joint Opposition to Application for Review on March 8, 2007. On March 21, 2007, PSC filed a Reply. The Application for Review informed the Commission that Mr. Halfacre is deceased. *See* Application for Review at 1 n.1. Accordingly, we will reference Mr. Halfacre and Percy Squire Co., LLC as PSC.

[2] *Mark S. Litton, et al.*, Letter, 22 FCC Rcd 641 (MB 2007).

Division, *inter alia*: (1) denied PSC's April 10, 2006, Petition to Deny and granted the captioned applications seeking consent for the assignment of the five captioned stations' ("Stations") licenses from SRL DIP to Bernard ("Assignment Applications");[3] and (2) dismissed PSC's April 28, 2006, Petition for Reconsideration ("PSC Petition for Reconsideration") of the Bureau's March 30, 2006, dismissal of Associated Radio Inc.'s ("ARI") February 13, 2006, Petition for Reconsideration ("ARI Petition for Reconsideration"). The ARI Petition for Reconsideration sought reconsideration of the February 9, 2006, grant of an application for involuntary transfer of control of SRL DIP ("Transfer Applications")[4] from the Shareholders of Stop 26 Riverbend, Inc. to Bradley E. Scher, Chief Restructuring Officer ("CRO"). For the reasons set out below, we deny the Application for Review.[5]

II. BACKGROUND

2. Stop 26 Riverbend Licenses, LLC ("SRL") and its ultimate parent company, Stop 26 Riverbend, Inc. ("SRI"), filed for Chapter 11 bankruptcy in July 2005.[6] On August 17, 2005, the United States Bankruptcy Court, Southern District of Ohio, Western Division ("Bankruptcy Court") issued an order ("CRO Order") appointing Mr. Scher as the CRO for SRL DIP and SRI.[7] The CRO Order gave the debtor companies and Percy Squire, their then-Managing Member and Chief Executive Officer, until December 1, 2005, to sell or refinance the obligations of the Stations. No such sale or refinancing occurred by the required deadline. At that time and pursuant to the CRO Order's terms, all corporate powers shifted to the CRO.

3. On January 12, 2006, the Bureau granted an application filed by the CRO for the involuntary assignment of the Stations' licenses from SRL to SRL DIP.[8] On February 9, 2006, the Bureau granted applications filed by the CRO for the involuntary transfer of control of SRL DIP from the

[3] File Nos. BAL/BALH-20060301ACU-ACY.

[4] File Nos. BTC/BTCH-20060203AAC-AAG.

[5] On May 11, 2012, Percy Squire filed a Supplemental Memorandum in Support of Application for Review and Declaration of Percy Squire ("Supplement"). We dismiss the Supplement. Percy Squire, individually, is not a party to this proceeding. The filing does not show good reason why it was not possible for him to participate earlier in the proceeding. *See* 47 C.F.R. § 1.115(a). It is also untimely. *See* 47 C.F.R. § 1.115(d) (application for review and "any supplement thereto" shall be filed within 30 days of public notice of action). In any event, we note that PSC has not sought review regarding the issue to which the Supplement allegedly pertains, i.e., whether the grant of the Assignment Applications violated the alien ownership limitations set forth in 47 U.S.C. § 310.

[6] *In re Esq. Communications, Inc. et al.* (jointly administered under Case No. 05-16685 (Bankr. S.D. Ohio)). The immediate parent of SRL, Associated Radio, Inc. ("ARI"), did not file for Chapter 11 bankruptcy at that time. ARI filed a Chapter 11 bankruptcy petition on March 3, 2006. *See In re Associated Radio, Inc.* (Case No. 06-Bk-10497 (Bankr. S.D. Ohio)).

[7] Joint Stipulation and Order Resolving Trustee and Stay Motions and Appointing Chief Restructuring Officer, (Case No. 05-16704, *et al.,* Aug. 17, 2005). Pursuant to a September 16, 2005, order, the Bankruptcy Court authorized Bradley Scher as CRO on a *nunc pro tunc* basis as of August 18, 2005. *See* Order Under 11 U.S.C. §§ 105(a), 327 and 328 Authorizing Retention of Bradley Scher as Chief Restructuring Officer (Case No. 05-16685, Sep. 16, 2005).

[8] File Nos. BAL/BALH-20060106ABE-ABI.

shareholders of SRI to the CRO.[9] On February 13, 2006, ARI, then under the control of certain SRI principals, filed a petition for reconsideration of this action.[10]

4. Notwithstanding the terms of the CRO Order, SRL principal Percy Squire continued to occupy and operate the Stations until, at a hearing on March 7, 2006, the Bankruptcy Court obtained agreement from Squire to cease his ongoing efforts to prevent the CRO from gaining access to the Stations' premises and facilities. Thus, despite repeated prior attempts to gain entry, the first day that the CRO had access to the Stations was March 8, 2006. On March 9, 2006, the Bankruptcy Court issued its Compliance Order, which ordered, *inter alia*, Percy Squire not to interfere with the CRO's access to the Stations.[11] On March 20, 2006, ARI, now controlled by the CRO,[12] requested the dismissal of the ARI Reconsideration Petition, and on March 30, 2006, the Bureau dismissed the ARI Petition for Reconsideration pursuant to that request. On April 28, 2006, PSC filed the PSC Petition for Reconsideration.

5. Also pending at this time were the contested WVKO(AM) and WVKO-FM license renewal applications.[13] On March 7, 2006, the Audio Division issued an inquiry letter[14] pursuant to Section 1.88 of the Commission's rules (the "Rules"),[15] concerning allegations raised against SRL in order to determine whether SRL had the requisite character qualifications to remain a Commission licensee. On March 23, 2006, in light of the CRO's assumption of control of SRL DIP and the Compliance Order, Bureau staff informally advised counsel for the CRO that SRL DIP (as now controlled by the CRO) need not respond to the Section 1.88 Inquiry Letter, because the SRL principals responsible for the alleged behavior had been removed pursuant to the mandate of the Bankruptcy Court.

6. On January 22, 2007, Bureau staff granted the assignment of the Stations' licenses from SRL DIP to Bernard.[16] It also dismissed the PSC Petition for Reconsideration on procedural grounds because PSC, which was not a party, failed to provide good reason why it did not participate in the earlier stages of the proceeding.[17] Additionally, the *Decision* granted the Stations' then-pending applications for renewal of license.[18]

7. In its Application for Review, PSC contends that issues remain unresolved with respect to the Assignment and Transfer Applications. First, it argues that the Bureau erred in dismissing the PSC

[9] File Nos. BTC/BTCH-20060203AAC-AAG.

[10] Prior to the bankruptcy, ARI was a wholly owned subsidiary of SRI. The officers, directors and/or shareholders of SRI were: William Cusak, Robert Douglas, Frank Halfacre, Adrian Roe, and Percy Squire.

[11] Order Directing Compliance with 11 U.S.C. §§ 362(a) and 1108 and Prohibiting Percy Squire from Prosecuting Action (Case No. 06-Bk-10497, Mar. 9, 2006) ("Compliance Order").

[12] The Bankruptcy Court, in the March 9, 2006, Compliance Order, found, *inter alia*, that the CRO acted properly in removing each of the members of the ARI board of directors and commencing the Chapter 11 bankruptcy case for ARI.

[13] File Nos. BR/BRH-20040601ASR, AST. These applications were granted in the *Decision*, and the Application for Review does not contest the grant of the renewal applications.

[14] *Joseph M. DiScipio, Esq.*, Letter, Ref. 1800B3-SS (MB Mar. 7, 2006) ("Section 1.88 Inquiry Letter").

[15] 47 C.F.R. § 1.88.

[16] *See supra* note 2, and accompanying text.

[17] *See* 47 C.F.R. § 1.106(b)(1).

[18] *See supra* note 13.

Petition for Reconsideration on procedural grounds, contending that it should be treated as a previously participating party. It argues that PSC principals were former principals of ARI who were improperly removed by the CRO.

8. Second, PSC alleges that the CRO was not authorized to file the Assignment Applications and that Bernard had prematurely assumed control of the Stations. Third, PSC posits that Bernard and/or the CRO may have engaged in racially discriminatory terminations at the Stations.

9. Finally, the Application for Review alleges that the Bureau erred in its application of the Commission's *Second Thursday* doctrine,[19] which permits the assignment of the license of a bankrupt licensee whose qualifications to hold a license are at issue in order to accommodate federal bankruptcy law, if certain conditions are met. Specifically, the doctrine permits grant of the assignment if the party whose character is at issue "will have no part in the proposed operations and will either derive no benefit from favorable action on the applications or only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors."[20] PSC argues that the *Decision* should not have applied the *Second Thursday* doctrine because none of the allegations in the Section 1.88 Inquiry Letter had put its character at issue. The Application for Review argues that the Commission should rescind the grant of the assignment and hold the applications in abeyance until the United States Court of Appeals for the Sixth Circuit ("Court of Appeals") rules on PSC's numerous appeals that, *inter alia*, challenge the CRO's authority. On June 23, 2008, in a consolidated appeal from three orders of the United States District Court for the Southern District of Ohio, the Court of Appeals affirmed the dismissal of PSC's appeals that arose from various Bankruptcy Court orders.[21]

III. DISCUSSION

A. Transfer of Control Applications

1. The Bureau Properly Dismissed PSC's April 28, 2006 Petition for Reconsideration Because It Was Procedurally Defective

10. PSC is not a party to this proceeding. On April 28, 2006, PSC filed its Petition for Reconsideration of the Bureau's March 30, 2006, dismissal of the ARI Petition for Reconsideration to permit the Commission to "consider the merits of the ARI Petition for Reconsideration."[22] The Commission's rules state that a petitioner who is not a party to the proceeding must "show good reason" why it was not possible to participate earlier.[23] PSC does not argue that it was unable to separately object to the Transfer Applications or to seek reconsideration of the Bureau's February 9, 2006, grant of the Transfer Applications. We find that the Bureau correctly dismissed the PSC Petition for Reconsideration

[19] *See Second Thursday Corp.*, Memorandum Opinion and Order, 22 FCC 2d 515, *recon. granted*, Memorandum Opinion and Order, 25 FCC 2d 112 (1970) ("*Second Thursday*").

[20] *Second Thursday*, 22 FCC 2d at 516.

[21] *Percy Squire, Debtor, Percy Squire; Percy Squire Co., LLC v. CRO Bradley E. Scher, et al.*, Nos. 06-4292; 06-4508; 06-4599, 2008 WL 2497706 (6th Cir. June 23, 2008). *See also Percy Squire, et al., v. Bradley Scher, CRO, et al*., District Court Case No. 1:06-CV-112, Amended Order (S.D. Ohio, Sept. 12, 2006) (dismissing appeal of Bankruptcy Court Sale Order); *Percy Squire, et al., v. Bradley Scher, CRO, et al*., District Court Case No. 1:06-CV-244, Order (S.D. Ohio, Sept. 28, 2006); *Percy Squire, et al., v. Bradley Scher, CRO, et al.*, District Court Case No. 1:05-CV-267, *et seq.*, Order (S.D. Ohio, Nov. 22, 2006) (consolidated, then dismissed five Percy Squire appeals from orders of the Bankruptcy Court, including orders regarding the scope of the CRO's authority).

[22] Application for Review at 6.

[23] 47 C.F.R. § 1.106(b)(1).

solely on this basis.[24] It is well settled that a person who has a right to participate in "a proceeding before the Commission cannot delay exercising that right until after the Commission has acted and then expect to be allowed to participate by filing post-grant pleadings."[25] Accordingly, PSC's reliance on *Aspen FM*[26] is misplaced. In *Aspen FM* the Commission found good reason for the objector's failure to oppose a *pro forma* assignment application granted five days after public notice of filing. In this case, the PSC Petition for Reconsideration was filed 73 days after public notice of the grant of the Transfer Applications.

11. To the extent that PSC seeks reconsideration of the grant of the Transfer Applications, the filing is untimely.[27] Frank Halfacre and Percy Squire Co., LLC, however, argue that the Commission should have allowed them to benefit from ARI's status as a previously participating party because Halfacre and Squire, individually, had formerly served as principals of ARI, but had been removed "by the illegal action of the CRO."[28] As previously noted, the ownership of ARI included three additional individuals not seeking review but did not include one entity, Percy Squire Co., LLC, that is. Accordingly, the ownership of ARI and the entities seeking review here are not identical and, therefore, must be treated as distinct entities.[29] Moreover, PSC has not cited any Commission precedent which found that a person had satisfied the Section 1.106(b)(1) participation requirement based on relationships to parties that had timely participated. In fact, Commission precedent supports dismissal in this situation. The Commission has rejected tardy attempts to participate in circumstances where, as here, pleadings of another party were voluntarily withdrawn.[30] It also has found that a non-party's erroneous belief that a party would continue to oppose an application is insufficient to satisfy the Section 1.106(b)(1) "good cause shown" requirement.[31] Moreover, standing will not be accorded to persons who failed to participate earlier merely because they satisfy the separate Section 1.106(b)(1) requirement to establish that their interests were "adversely affected." These include situations in which the person was a creditor of the assignor,[32] otherwise satisfied "associational" standing requirements,[33] or had their interests or interests of their membership affected by the Commission action.[34] Accordingly, the Bureau properly dismissed the

[24] *See Office of Communication of the United Church of Christ v. FCC*, 911 F.2d 803, 808 (D.C. Cir. 1990) ("interested persons seeking to participate in FCC proceedings are required to join the proceedings at the *earliest* opportunity") (emphasis added).

[25] *Concord Telephone Exchange, Inc*., Memorandum Opinion and Order, 56 RR 2d 653, 656-57 (1984).

[26] *Aspen FM Inc*., Memorandum Opinion and Order, 12 FCC Rcd 17852 (1997) ("*Aspen FM*").

[27] *See* 47 U.S.C. § 405; 47 C.F.R. § 1.106(f).

[28] Application for Review at 4.

[29] *See supra* note 10.

[30] *See KDUB-TV, Inc.*, Memorandum Opinion and Order, 83 FCC 2d 153, 156 (1980), *recon. denied*, Memorandum Opinion and Order, 85 FCC 2d 572 (1981). *See also North Texas Radio, Inc*., Memorandum Opinion and Order, 11 FCC Rcd 8531, 8534 (1996) (failure to anticipate "material error" is not a "good reason" for Section 1.106(b)(1) standing purposes).

[31] *See Teleprompter Corp.*, Memorandum Opinion and Order, 89 FCC 2d 417, 432 (1989).

[32] *See Morton J. Victorson, Bankruptcy Trustee*, Memorandum Opinion and Order, 10 FCC Rcd 9499, 9499-9500 (1995) (where applications appeared on public notice, inability to timely petition is not good cause to excuse lack of prior participation).

[33] *See Neil A. Jackson*, Letter, 25 FCC Rcd 7123, 7126 (MB Audio Div. 2010) (reliance on doctrine of associational standing not relevant in determining whether petitioner had impermissibly sat on its rights).

[34] *See Monterey Peninsula TV Cable,* Memorandum Opinion and Order, 98 FCC 2d 1281, 1282-83 (1984).

PSC Petition for Reconsideration as procedurally defective pursuant to Section 1.106(b)(1) of the Rules.[35] Finally, the Compliance Order provides additional support for rejecting PSC's assertion that it be considered a party based on its prior relationship with ARI, and that it should be allowed to proffer an otherwise untimely challenge to the Bureau's dismissal of the ARI Petition for Reconsideration pursuant to ARI's request. Specifically, the Compliance Order decrees that "Percy Squire and any other former ARI directors, officers and/or employees have no legal standing to take any action on behalf of ARI."[36] Thus, to the extent that PSC's position is that it should be considered to be acting for ARI, the Compliance Order establishes that it lacks authority to act in this capacity.

2. PSC's Merits Arguments Are Wrong

12. Alternatively, and as an independent basis for our decision, we find that PSC is wrong on the merits. The record before us directly refutes the assertions that the CRO's actions were outside of the authority granted to him by the Bankruptcy Court. As to the CRO's authority over ARI, the Compliance Order states that "[T]he CRO shall operate the business and manage the affairs of ARI in accordance with Section 1108 of Title 11 of the United States Code."[37] Concerning the propriety of the CRO's removal of previous ARI principals, the Compliance Order adjudges that the CRO "has acted properly in accordance with Orders of this Court with respect to all actions taken, including, without limitation, removing and replacing ARI's board of directors . . . ."[38] In light of the above, we find that the record refutes rather than supports PSC's assertion that the CRO acted outside of its authority in removing and replacing the ARI principals. The PSC Petition for Reconsideration provided no other justification for PSC's failure to timely contest the Transfer Applications. Hence, even if PSC's Petition for Reconsideration was not procedurally infirm, it was meritless.

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[35] 47 C.F.R. § 1.106(b)(1) (if a petition for reconsideration is filed by an entity that is not a party to the proceeding, that entity shall show good cause why it was not possible for it to participate in the earlier stages of the proceeding).

[36] Compliance Order at 3.

[37] Compliance Order at 2. PSC also argues that the ARI Petition for Reconsideration demonstrated that the CRO misrepresented facts in the Transfer Applications because the CRO sought a transfer from Stop 26 Riverbend, Inc., which was neither the licensee nor a member of the licensee. As noted at note 4, *supra*, and accompanying text, the Transfer Applications accurately depicted the transaction as an involuntary transfer of control of the then-licensee SRL DIP from the Shareholders of Stop 26 Riverbend, Inc. to the CRO. SRL and its ultimate parent company SRI filed for bankruptcy in July 2005, and the cases were jointly administered by the Bankruptcy Court. Pursuant to the CRO Order, the Bankruptcy Court appointed Mr. Scher as the CRO for SRL DIP and the parent company, SRI. The Court-ordered Transfer Applications correctly indicated that "control of the licensee and its ultimate parent company, SRI, is being assumed by Bradley E. Scher, as CRO of those entities, in accordance with orders of the [Bankruptcy Court]." Transfer Applications, Exhibits 6, 12. There is simply no merit to the argument that the CRO misrepresented any facts by specifying a transfer of control at the level of SRI, the ultimate parent of the former licensee, SRL.

[38] Compliance Order at 2. PSC also argues that the ARI Petition for Reconsideration had noted that the February 9, 2006, notice of consummation filed by the CRO indicates that the transfer of control was consummated on December 2, 2005. PSC contends that this demonstrates an assumption of control of the licenses prior to grant of the involuntary transfer of control application by the Commission on February 9, 2006. However, the fact that the Commission consent to the involuntary transfer of control to the CRO post-dated December 1, 2005, the date the transfer became effective pursuant to the CRO Order, is not grounds for invalidating the consent. Long-standing Commission case law holds that the assumption of control by a court-appointed and court-supervised temporary operator prior to Commission consent is not disqualifying, given the extraordinary circumstances of such cases and the need to reconcile the actions of Federal Bankruptcy Courts with communications laws. *See D.H. Overmyer Telecasting Co. Inc*., Memorandum Opinion and Order, 94 FCC 2d 117, 126 (1983). *See also LaRose v. FCC*, 494 F.2d 1145, 1147 n.2 (D.C. Cir. 1974) (Commission, in making its own public interest determinations, should accommodate other federal policies to the extent possible).

B. Assignment Applications

13. PSC also challenges the Bureau's grant of the Assignment Applications based on the argument that the CRO was acting beyond his court-sanctioned authority in filing the Assignment Applications. PSC's characterization of the CRO's filing of the Assignment Applications as outside of his authority is also without merit. Our conclusion in this regard is supported by the decision that the Court of Appeals issued subsequent to PSC's filing of the Application for Review.[39] In that ruling, the Court of Appeals affirmed district court judgments which had dismissed various PSC appeals challenging the validity of Bankruptcy Court orders.[40]

14. With respect to the PSC challenge of the Assignment Applications based on the allegation that Bernard had prematurely assumed control of the Stations, PSC's sole support is the affidavit of Charles Traylor ("Traylor"), a former employee at the Stations. In that affidavit, Traylor alleged that the CRO stated at a staff meeting that Bernard had directed the CRO to take WVKO(AM) off the air.[41] This affidavit was contradicted by the sworn statement of Charles Jennings ("Jennings"), another station employee, who stated that he was present at the same meeting and denies that the CRO made such a statement.[42] Additionally, the sworn Declaration of the CRO states that the CRO personally made the decision to take WVKO(AM) off the air because the station's tower lease was set to expire and the station was about to lose its tower site.[43] We find the evidence submitted by PSC in support of its premature assumption of control contention to be unpersuasive. As a general matter, declarations such as Traylor's that rely on hearsay are inadequate to support a petition.[44] In this particular instance, we find the CRO affidavit, which unequivocally states that the CRO said nothing to indicate that the decision to suspend service by WVKO was made by anyone other than the CRO himself, to be reasonable and of greater relevance. In fact, Traylor's claim that the CRO told the employees that he "got the word ... from Bernard Radio that I should take WVKO-AM off the air today"[45] is not necessarily inconsistent with the CRO's statement that Bernard concurred in his judgment to take the station off the air. In any event, conflicting

[39] *See supra* note 21 and accompanying text.

[40] *Id. See also Percy Squire, et al., v. Bradley Scher, CRO, et al.*, District Court Case No. 1:05-CV-267, *et seq.*, Order (S.D. Ohio, Nov. 22, 2006).

[41] PSC June 19, 2006, Supplement to Petition to Deny, Exhibit 1 at 2.

[42] SRL DIP July 5, 2006, Opposition to Request for Leave to File a Supplement to Petition to Deny, Exhibit A.

[43] *Id.*, Exhibit B at 1-2. As noted by SRL DIP, the CRO did acknowledge in his discussions with the Station WVKO staff that he had informed the then-proposed assignee Bernard of his decision to seek silent authority for the station pending approval and build-out of the new tower site. The proposed assignee was entitled to such notice by virtue of a local marketing agreement ("LMA") under which Bernard brokered time on WVKO. Bernard, in its capacity as LMA broker, concurred with the CRO's analysis that the licensee was acting within its rights to suspend station operations. SRL DIP July 5, 2006, Opposition to Request for Leave to File a Supplement to Petition to Deny at 3-4. Pursuant to a January 26, 2006, Sales Order, the Bankruptcy Court, *inter alia*, provided for SRL DIP to enter into an LMA with the purchaser of the assets or its designee, Bernard. *See* Order under 11 USC §§ 105(a), 363, 365 and 1146(c) and Fed. R. Bankr. P, 2002, 6004, 6006 and 9014 (Case No. 05-16685, January 26, 2006). The *Decision* found that the LMA complied with all Commission requirements and that Bernard's conduct under the LMA represented appropriate broker involvement with the station. The Application for Review does not contest these findings regarding the LMA.

[44] *See, e.g., Excellence in Education Network*, Memorandum Opinion and Order, 8 FCC Rcd 6269, 6272 n.9 (1993) ("an affidavit of a party attesting to another person's assertions . . . is hearsay and as such has no probative value under Section 309(d)"); *Living Proof, Inc. Big Pine, California*, Letter, 24 FCC Rcd 2382, 2385 n.29 (MB 2009) (declining to credit hearsay statements of third party).

[45] PSC June 19, 2006, Supplement to Petition to Deny, Exhibit 1 at 2.

affidavits do not invariably necessitate an evidentiary hearing before the Commission can judge whether an assignment would be in the public interest.[46] In light of the totality of the evidence, we conclude that the record does not establish that there is a material and substantial question of fact warranting further inquiry in a hearing.[47] Thus, we affirm the staff's determination that PSC's allegations do not justify denial of the Assignment Applications.[48]

15. The Application for Review also submits that Bernard and/or the CRO "may have engaged" in racially discriminatory terminations.[49] PSC fails to identify any fired employee or allege the reason for any dismissal. PSC bases its conjecture solely on the statement of Traylor, who claims to have personal knowledge that every African American employed at WVKO(AM) was discharged, but that one white employee was retained.[50] Traylor does not identify any such employee, the reason for any discharge, or the source for this assertion. Additionally, Traylor does not claim that any of these allegations have resulted in an adjudicated finding of unlawful employment discrimination. The CRO responds that all of the layoffs were a function of the decision to temporarily silence the station, and that the laid-off employees performed work that was not required at a silent radio station, such as advertising

[46] "Where factual disputes exist, a hearing is not automatically required, for "[c]ontradictory allegations and affidavits which create some possibly unresolved factual issue do not invariably necessitate an evidentiary hearing before the Commission can judge whether an assignment would be in the public interest.'" *Tele-Media Corp. v. FCC*, 697 F.2d 402, 409 (D.C. Cir. 1983) (quoting *Broadcast Enterprises, Inc. v. FCC*, 390 F.2d 483, 485 (D.C. Cir. 1968)).

[47] *See* 47 U.S.C. § 310(d). PSC further contends that by authorizing the assignment to Bernard and allowing it to take WVKO(AM) dark, the Commission has thus "allowed the applicants to deprive the African American community of Columbus of an important voice." Application for Review at 11. Section 310(d) of the Communications Act of 1934, as amended (the "Act"), specifically prohibits the Commission from considering any entity other than the assignee proposed in the application before us. *See* 47 U.S.C. § 310(d) (when acting on assignment or transfer applications, the Commission may not consider whether the public interest, convenience and necessity might be served by assignment or transfer of the license to an entity other than the proposed assignee or transferee). Moreover, the Commission does not 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. *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). The Supreme Court of the United States has upheld this policy and the Commission's determination that a change in programming is not a material factor that should be considered in ruling on applications for license transfer. *FCC v. WNCN Listener's Guild*, 450 U.S. 582, 585 (1981).

[48] We note that staff determined that PSC failed to make a *prima facie* case that grant of the applications would be contrary to the public interest. *Decision*, 22 FCC Rcd at 648-49. To the extent that staff considered the countervailing evidence in reaching this determination, it erred. *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988) (the threshold inquiry "is limited to consideration of the petition and its supporting affidavits"). We agree with the staff's ultimate disposition, however, and because we conclude that the totality of the evidence is insufficient to establish that there are material and substantial questions of fact, the question of whether PSC made out a *prima facie* case is moot. *Mobile Communications Corp. of Am. v. FCC*, 77 F.3d 1399, 1409-10 (D.C. Cir.) (quoting *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 396 (D.C. Cir. 1985)), *cert. denied*, 519 U.S. 823 (1996).

[49] Application for Review at 10-11; *see* 47 C.F.R. § 73.2080 (prohibiting employment discrimination by broadcast licensees).

[50] Supplement to Petition to Deny, Exhibit 1 at 2.

sales, on-air programming, production and engineering.[51] The CRO adds that the layoffs included African Americans and Caucasians, and that the one employee retained was the business manager, who maintained minimal office operations, including the processing and collection of accounts receivable, and updating and providing access to the public files. It is well established that unadjudicated allegations of misconduct not involving the Communications Act or Commission rules or policies normally do not constitute the basis of a *prima facie* showing that an applicant lacks the character qualifications to be a Commission licensee.[52] Moreover, based on our review of the record as a whole, PSC's allegations fail to establish that there is a material and substantial question of fact warranting further inquiry in a hearing.

16. Finally, we find that the *Decision* properly applied the *Second Thursday* doctrine to grant the Stations' Renewal and Assignment Applications. As noted earlier, the *Second Thursday* doctrine permits the assignment of the license of a bankrupt licensee whose qualifications to hold a license are at issue in order to accommodate federal bankruptcy law under certain conditions. Specifically, the Commission may grant an assignment application if the party whose character is at issue "will have no part in the proposed operations and will either derive no benefit from favorable action on the applications or only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors."[53] In April 2006, shortly after the Bureau advised counsel for CRO that SRL DIP need not respond to the Section 1.88 Inquiry Letter, SRL DIP amended its then-pending Renewal and Assignment Applications with a public interest showing under *Second Thursday*.[54] The public interest showing demonstrated that no party whose character had been put at issue would have a role in the ongoing operations of the Stations, and that grant of the pending applications would benefit innocent creditors in accommodating the Bankruptcy Court's orders. PSC does not challenge the substance of that showing, but argues generally that *Second Thursday* is inapplicable because no character-related violation was at issue. We reject PSC's contention that nothing in the Section 1.88 Inquiry Letter would warrant a character issue being designated against the licensee. The Section 1.88 Inquiry Letter cited "serious issues" as to the licensee's qualifications, as well as its "apparent lack of candor" in the then-pending Renewal Applications regarding the content of the Stations' public inspection file, which clearly put at issue the licensee's character conduct.[55] The *Decision* correctly determined that the Section 1.88 Inquiry Letter "sufficiently put SRL's character qualifications at issue, rendering consideration of the *Second Thursday*

[51] SRL DIP July 5, 2006, Opposition to Request for Leave to File a Supplement to Petition to Deny, Exhibit B at 2.

[52] *See Southern Broadcast Corp. of Sarasota*, 16 FCC Rcd 3655, 3659 (2001) ("Our policy with respect to discrimination complaints is only one of several circumstances in which we will not inquire into arguably relevant alleged misconduct unless it has first been adjudicated by an agency or court with primary responsibility in the pertinent area.") (citing *Policy Regarding Character Qualifications In Broadcast Licensing*, Report, Order and Policy Statement, 102 FCC 2d 1179, *recon. granted in part and denied in part*, Memorandum Opinion and Order, 1 FCC Rcd 421 (1986), *modified*, 5 FCC Rcd 3252 (1990) (subsequent history omitted)).

[53] *Second Thursday*, 22 FCC 2d at 516.

[54] SRL DIP's *Second Thursday* showing satisfied the purpose of the *Second Thursday* doctrine, which is to allow the renewal and assignment of bankrupt stations for the benefit of innocent creditors, notwithstanding potential misconduct arising out of actions of former principals, if those former principals will not obtain a substantive benefit. *See supra* note 20 and associated text.

[55] Section 1.88 Inquiry Letter at 1, 3. To the extent PSC is concerned about having to address this potential character issue in a future application, we note that our application forms give any party in this situation an opportunity to "explain why the unresolved character issue is not an impediment to the grant" of such application. FCC Form 314, Application for Consent to Assignment of Broadcast Station Construction Permit or License, Instructions at 9, Section III, Items 7 and 8, Character Issues/Adverse Findings. *See also Allegan County Broadcasters*, Memorandum Opinion and Order, 83 FCC 2d 371, 373-4 (1980).

policy relevant."[56] The *Decision* also found that "the CRO has removed all those connected to alleged misconduct from any station operations" and that the entire "purchase price for the Stations will be used solely to reduce the bankrupt entities' obligations to" its creditors.[57] In light of the above, we find that the Bureau properly invoked the *Second Thursday* doctrine, renewed the licenses, and granted their assignment.

IV. ORDERING CLAUSE

18. Accordingly IT IS ORDERED, that the Application for Review filed by Percy Squire Co., LLC, and Frank Halfacre IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[56] *Decision*, 22 FCC Rcd at 645.

[57] *Id.* at 646.