

Short Form

BEFORE THE
Federal Communications Commission
WASHINGTON, D. C. 20554

FILED/ACCEPTED

APR 11 2007

Federal Communications Commission
Office of the Secretary

In re Application of)
)
 GOLDEN GULF COAST BROADCASTING, INC.) File No. BALH-20031125ALX
 Assignor) Facility ID No. 24513
)
 and)
)
 CAPSTAR TX LIMITED PARTNERSHIP)
 Assignee)
)
 For Assignment of License of)
 FM Broadcast Station WQYZ,)
 Ocean Springs, Mississippi)

In re Application of)
)
 GOLDEN GULF COAST BROADCASTING, INC.) File No. BRH-20040202AHI
) Facility ID No. 24513
 For Renewal of License of)
 FM Broadcast Station WQYZ,)
 Ocean Springs, Mississippi)

TO: Honorable Marlene H. Dortch, Secretary

ATTN: The Commission

APPLICATION FOR REVIEW

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April 11, 2007

WJZD, Inc.

SUMMARY

This pleading seeks reconsideration of letter rulings of the Audio Division, Media Bureau, DA 05-1537, released May 26, 2005, and DA 07-1240 on reconsideration, released March 12, 2007 granting the applications for renewal of license of WQYZ(FM), Ocean Springs, Mississippi and for assignment of license of WQYZ(FM) from Golden Gulf Coast Broadcasting, Inc. to Capstar TX Limited Partnership, a subsidiary of publicly traded Clear Channel Broadcasting, Inc.

WJZD, Inc., a competitor of WQYZ(FM) in the Biloxi/Gulfport, Mississippi radio market, timely filed Petitions to Deny both applications. The Media Bureau committed procedural and substantive reversible errors in its decision.

Of particular note was that the Letter Ruling found that a violation of the "main studio rule", 47 CFR §73.1125, had taken place, but that an unauthorized transfer of control of Station WQYZ had not. This has no basis in reason or logic. Golden violated the main studio rule precisely because it abdicated control of WQYZ on a "wholesale" basis, and allowed its main studio to be moved into the Capstar/Clear Channel building. By walking away

from WQYZ, having neither management nor staff employees at WQYZ, by allowing Capstar/Clear Channel to feed the WQYZ transmitter with an illegal STL station, and by not correcting any of these things until they were "caught in the act" by WJZD, Golden and Capstar/Clear Channel's actions constitute a *prima facie* case that a "wholesale" delegation of control by Golden to Capstar/Clear Channel, in violation of Section 310 of the Communications Act. The grants must be vacated, and a full and fair public hearing before an Administrative Law Judge must be held. Furthermore, Capstar/Clear Channel committed a violation of Section 1.1200 of the FCC's Rules by making *ex parte* contacts as to 18 U.S.C. §1464 matters pertaining to it.

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APPLICATION FOR REVIEW

WJZD, Inc. (WJZD), by its attorney, and pursuant to Section 1.115 of the Commission's Rules, hereby respectfully submits this Application for Review of the following rulings in the above-captioned proceeding: (1) the Initial Ruling of the Chief, Audio Division, Media Bureau, DA 05-1537, released May 26, 2005 (the "Initial

Ruling"), denying WJZD's separate Petitions to Deny against the above-captioned applications and granting both of them; and (2) the Initial Ruling of the Chief, Audio Division, Media Bureau, DA 07-1240, released March 12, 2007 (the "Order on Reconsideration") denying WJZD's Petition for Reconsideration of the Initial Ruling. For the reasons stated herein, it is respectfully submitted that the Audio Bureau made a number of procedural and substantive errors which require the vacating of the Initial Ruling and Order on Reconsideration and the designation of the above-captioned applications for hearing. In support whereof, the following is shown:

Preliminary Statement

1. As this is being filed on the 30th day subsequent to the release of DA 07-1240, March 12, 2007, it is timely. 47 CFR §1.115(d).

Section 1.115(b)(2) Statement

2. This matter warrants Commission review for the following reasons:

- The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy (47 CFR §1.115(b)(2)(i)).
- One or more erroneous findings of fact as to an important or material question of fact (47 CFR §1.115(b)(2)(iv)).

- Prejudicial procedural error (47 CFR §1.115(b)(2)(v)).

Questions for Review

2. WJZD assigns the following as questions for review:

- Whether based on the facts on this record the ruling in this case that there was no unauthorized transfer of control is arbitrary, capricious and contrary to statute and established case precedents;
- Whether there was an unauthorized transfer of control at WQYZ(FM), given that Golden did not maintain any employees at WQYZ between February 16, 2003 and March 22, 2004.
- Whether there should have been an evidentiary hearing before an Administrative Law Judge, give that there is a prima facie case that Golden Gulf Coast Broadcasting, Inc. (Golden) engaged in a wholesale abdication of control of station WQYZ to Capstar TX Limited Partnership, a Clear Channel subsidiary (Capstar or Clear Channel), which under substantial FCC precedent required a hearing to be held.
- Whether Clear Channel engaged in an illegal *ex parte* contact relative to the settlement of the Commission investigations relative to Clear Channel's violations of 18 U.S.C. §1464 and 47 CFR §73.3999.

Argument

3. **The Result in this Case is Contrary to Statute and Case Precedent.** By never dealing with the legal standard as to when the threshold is crossed and a prima facie case has been made out that an unauthorized transfer of control

has taken place, the Media Bureau made a ruling which at the same time is contrary to statute (47 U.S.C. §310(d)) and Commission case precedents. As a result, both the Initial Ruling and Order on Reconsideration are arbitrary, capricious and irrational, in violation of the Administrative Procedure Act, 5 U.S.C. §706(2)(A).

4. WJZD presented a significant number of legal precedents in this matter. The Media Bureau has failed to come to grips with any of them. As a result, WJZD and the public have not been informed why they wouldn't be apposite as to the above-captioned applications. Further, the Media Bureau has seemed to be oblivious to the fact that Clear Channel had been involved in at least one other premature takeover case, *Citicasters Co. (WBTJ(FM), Hubbard, OH)*, 16 FCC Rcd 3415 (1991).

5. In *Citicasters*, the Commission made the following statement about "time brokerage agreements" and transfers of control:

Licenses are permitted under Section 310(d) of the Act to delegate day-to-day operations, **but such delegation may not be wholesale.**

6. In the past, the Commission has designated for hearing on an "unauthorized transfer of control" issue, after making a "case by case" determination, in the following cases: *In re Ronald Brasher et al*, 15 FCC Rcd

16326 (HDO, 2000)¹; *William L. Zawila*, 18 FCC Rcd 14938, ¶¶99-100 (HDO, 2003); *Reading Broadcasting, Inc. (WTVE-TV) (MM Docket No. 99-153)*, DA 99-865 (HDO, 1999); *Hicks Broadcasting of Indiana, LLC*, 13 FCC Rcd 10662, 10677 (1998); *Gerard A. Turro*, 12 FCC Rcd 6264 (HDO, 1997); *Pine Tree Media, Inc.*, 8 FCC Rcd 7591 (HDO, 1993); *Petroleum V. Nasby Corporation*, 8 FCC Rcd 4035 (HDO, 1993); *Center for Study and Application of Black Economic Development*, FCC 91-197, 56 FR 37213 (1991); *Bennett Gilbert Gaines, Interlocutory Receiver*, FCC 90M-1760 (Frysiak, ALJ, 1990); *Black Television Workshop of Los Angeles*, 3 FCC Rcd 5443 (HDO, 1988); *Oyate, Inc.*, 2 FCC Rcd 4528 (HDO, 1987).

7. It isn't clear why the instant case is different from the above-cited cases. The record as a whole demonstrates that there was a wholesale abdication of control of station WQYZ by Golden to Capstar/Clear Channel.

8. **The Result Below Does Not Follow from the Record Facts.** Golden basically walked away from WQYZ and turned the station over to Capstar/Clear Channel prior to having received consent of the Commission to do so. The WQYZ studio was moved out of a building controlled by Golden and

¹ In fact, ALJ Arthur Steinberg recommended the revocation of licenses in that case. *In re Ronald Brasher et al (EB Docket No. 00-156)*, 18 FCC Rcd 16707 (ALJ, 2003).

into a building controlled by Capstar/Clear Channel. At the very least, as as the Initial Ruling concedes at page 8, Golden had "no meaningful management presence" at WQYZ's physical facility "between February 16, 2003 and March 22, 2004". Further, on page 9 of the Initial Ruling, there is a tacit acknowledgement by the Audio Division that between February 16, 2003 and January 19, 2004, Golden had no employees at all at WQYZ, in that Golden principal Debra Sanford's "spouse" began some nebulous employment relationship with WQYZ on that date. Hand in hand with those findings is the fact alluded to by the Audio Division that Capstar/Clear Channel were feeding WQYZ's transmitter via an unlicensed, unauthorized STL station between February, 2003 and sometime in 2004 (Initial Ruling at 9-10). The Bureau, in its Order on Reconsideration at p. 3, totally mischaracterizes WJZD's factual showing—certainly, WJZD made out *prima facie* facts that Capstar/Clear Channel had control over the programming and finances of WQYZ, because Capstar/Clear Channel moved WJZD's studios and offices into its building, and there were no employees of Golden on the station's premises involved with the operations of the stations. Under these undisputed facts, it would be hard to comprehend how Capstar/Clear Channel *would not* have control of WQYZ's programming and finances.

9. Page 4 of Initial Ruling places blind faith in the language of the time brokerage agreement (LMA) between Golden and Capstar/Clear Channel. This blind reliance, without a review of all of the external facts and circumstances as to how the LMA worked in practice, is in stark contrast to the historic practice of the Commission, where a multitude of comparative hearing cases were dedicated to looking at the bona fides of limited partnership or other exotic corporate agreements to determine whether or not they were "sham" in nature. See e.g. *Shawn Phalen*, 6 FCC Rcd 2789, ¶¶96-107 (Miller, ALJ, 1991); *Carta Corporation*, 5 FCC 3696, ¶¶3-18 (Rev. Bd. 1990); *Edward R. Stolz II*, 5 FCC Rcd 7063 (1990); *Tequesta Television, Inc.*, 2 FCC Rcd 7324 (1987); *Louisiana Super Communications, L.P.*, 102 FCC 2d 1293, ¶6 (Rev. Bd. 1985); *KIST Corporation*, 102 FCC 2d 288 (1985).

10. In other words, it is arbitrary, capricious and irrational for the Commission to approve a time brokerage arrangement by the verbiage in the agreement, where the conduct of the parties renders the control provisions as not credible. That is the case here.

11. Remarkably, the Initial Ruling found that a violation of the "main studio rule", 47 CFR §73.1125, had taken place, but that an unauthorized transfer of control

had not. This has no basis in reason or logic. Golden violated Section 73.1125 of the Rules **precisely because it abdicated control of WQYZ on a "wholesale" basis,** and allowed its main studio to be moved into the Capstar/Clear Channel building. Prior to Golden's agreement with Capstar/Clear Channel, it was, so far as we know, in compliance with Section 73.1125. However, by walking away from WQYZ, having neither management nor staff employees at WQYZ, by allowing Capstar/Clear Channel to feed the WQYZ transmitter with an illegal STL station, and by not correcting any of these things until they were "caught in the act" by WJZD, Golden and Capstar/Clear Channel's actions constitute a *prima facie* case that a "wholesale" delegation of control by Golden to Capstar/Clear Channel, in violation of Section 310 of the Communications Act.

12. The result in this case is one more piece of evidence that the Commission treats large, wealthy and well-connected licensees like Clear Channel differently than it does the similarly situated but "small fry" listed in paragraph 6 above subjected to the full measure of Commission proceedings.

13. **Clear Channel's Control over the Management of WQYZ (FM)**. The Media Bureau has made variously erroneous findings of fact and/or failure to give substantial weight

to the matter of "Brian Rust" and "Jo Valentine", management employees at WQYZ(FM); in the case of Valentine, it appears that he was an employee of Clear Channel, not the licensee, Golden Gulf. On pages 8-9 of the Initial Ruling, there is a discussion relative to an individual named "Brian Rust" which Golden claims to have hired as its management-level person to work at WQYZ on the Capstar/Clear Channel premises. This individual was brought to the Audio Division's attention in a response filed May 13, 2004 to a Commission Letter of Inquiry dated April 23, 2004. The Initial Ruling credited this as a fact, without any reference to WJZD's "Consolidated Reply" filed on May 25, 2004. It was procedural and substantive error for the staff to credit the May 13, 2004 responses of Golden and Capstar without consideration of WJZD's response, which was quite substantive in nature. With respect to "Brian Rust", WJZD submitted the following to the FCC on May 25, 2004 (attachments and exhibits omitted from the instant pleading):

6. Interestingly, the WQYZ website contact page (Exhibit A) fails to list Brian Rust as either "station manager" or "program director". In fact, the website fails to list Brian Rust at all. By contrast, the WQYZ website indicates that an individual named "Jo Valentine" is the program director of WQYZ, and that that person has an e-mail address of jvalentine@clearchannel.com.

7. Who is "Jo Valentine" and for whom does he actually work? Are he and "Brian Rust" one and the same individual? The

pages of an on-line broadcast industry newsletter called "The Crescent City Radio Connection" (Exhibit B), in a dispatch dated March 8, 2004 entitled "A Valentine's Kiss" stated as follows:

It is past February 14th, so you'd think the title has no meaning. However, Jo Valentine, 97 WABB (Mobile) PM driver, is headed to the PD post at Clear Channel-owned "92.5 KISS-FM" in Gulfport/ Biloxi. Valentine will start at KISS-FM on March 22.

8. Mr. Valentine confirms his departure from WABB-FM, Mobile and his association with WQYZ in a "Latest News" statement e-signed by him which appears on his radio program's own website, www.valentineontheradio.com (Exhibit C).

9. As it turns out, Mr. Valentine is a disc jockey that hosts a program on WQYZ every weekday between 2 p.m. and 6 p.m. local time (Exhibit D)—time that Clear Channel has brokered from Golden. Clearly, Mr. Valentine is an employee of Clear Channel. That Mr. Valentine works for Clear Channel is further proven by the fact that he performs a weekend air shift for Clear Channel's WXXM(FM), Sun Prairie (Madison), Wisconsin. The "Crescent City Radio Connection" (Exhibit B) commented on Clear Channel's WQYZ/WXXM connection in a dispatch dated April 27, 2004, "Jeff Jordan to the Coast . . . OK, Not Really!":

Clear Channel New Orleans production guy (and former PM driver on 104.1 KISS-FM) Jeff Jordan is headed to the Mississippi Gulf Coast to do mornings on 92.5 KISS-FM. However, Jordan will handle his 6 AM - 9 AM shift via cyberjocking from New Orleans.

Also, in exchange for 92.5 KISS-FM PD/PM driver Jo Valentine doing a cyberjocked weekend shift for WXXM in Madison, WI, WXXM PD Jon Reilly will cyberjock a weekend shift for KISS-FM.

10. A webpage on the WXXM website (www.madisonmix.com) describing "Jo Valentine" is appended as Exhibit E.

14. Thus, in the face of this probative showing, the Initial Ruling failed to question whether Brian Rust was who Golden said he was. We have the specter of Golden

telling the Commission that it had a "program director" at WQYZ named "Brian Rust", but the WQYZ website telling the world that its program director was an individual named "Jo Valentine".

15. This matter is quite significant, because, without "Brian Rust", this whole matter was a ruse designed by Golden and Capstar/Clear Channel to throw the Commission off the track. Quite clearly from Clear Channel's WQYZ "KISS 92.5" website, Jo Valentine was represented to the world to be the "program director" of WQYZ, and he was a Clear Channel employee, not a Golden employee. This would be further gasoline on the fire that Golden engaged in a wholesale delegation of control of WQYZ to Capstar/Clear Channel (as well as a misrepresentation/lack of candor).

16. There is a substantial and material issue as to who "Jo Valentine" is, and who employed him. The failure of the Media Bureau to look into this highlights why we need a full and fair hearing before an independent Administrative Law Judge to find out.

17. **Fairness and Compliance with the Statute Requires a Hearing.** A fair review of the facts of this case can only lead to one conclusion—that, at least between February 16, 2003 and mid-January, 2004, after WJZD filed its "Petition to Deny" with the Commission, a prima facie case

has been made out that Golden engaged in a "wholesale abdication of control" of WQYZ to Capstar/Clear Channel without the prior consent of the FCC. That is all that is required to compel the Commission to designate for hearing. See e.g. **Citizens for Jazz on WRVR, Inc. v. FCC**, 775 F.2d 392 (D. C. Cir. 1985); 47 USC §309(a-e) (hearing required when Commission cannot find that the public interest, convenience and necessity would be served by a grant).

18. The Media Bureau indicates that it will not designate a hearing "simply to resume a debate as to whether an unauthorized transfer took place" (Order on Reconsideration at p. 3). It is interesting that the Commission would not have any kind of investigation, after prima facie facts that Golden abdicated WQYZ to Capstar/Clear Channel emerged. A hearing would not be a "debate"—it would be the kind of fact finding exercise contemplated by Section 309 of the Communications Act to determine whether a grant of the above-captioned applications would be in the public interest, convenience and necessity. After all, if a renewal applicant has violated the Communications Act and its basic qualifications are in question, it has nothing to sell. **Jefferson Radio, Inc. v. FCC**, 340 F.2d 781 (D. C. Cir. 1964).

19. In light of the erroneous factual finding that no unauthorized transfer of control took place (Order on Reconsideration at pp. 3-5), a hearing needs to be held on the following issues:

To determine whether an unauthorized transfer of control of station WQYZ(FM), Ocean Springs, Mississippi from Golden Gulf Coast Broadcasting, Inc. to Capstar TX Limited Partnership (or another third party) has taken place, and if so, what effect that would have on the basic character qualifications of Golden to be or remain an FCC licensee.

To determine whether Golden's violations of the Communications Act and the FCC's Rules, particularly 47 USC §310(d) and 47 CFR §73.1125(d)(1), 73.3540 and 74.24(d), have an effect on Golden's basic character qualifications to be a Commission licensee.

To determine whether any of Golden's violations of the aforesaid rule sections rise to the level of misrepresentations and/or lack of candor, and, if so, what effect that would have on Golden's basic character qualifications to be a Commission licensee.

To determine, in light of the evidence to be presented in the hearing, whether the public interest, convenience and necessity would be served by the grant of the above-captioned applications for assignment of license (BALH-20031125ALX) and/or for renewal of license (File No. BRH-20040202AHI).

20. Clear Channel's Illegal Ex Parte Contact. At pages 6-7 of the Initial Ruling, the Audio Division disposes of WJZD's request that the Commission hold a hearing on the effect of Clear Channel's serial recidivist violations of 18 U.S.C. §1464 and 73 CFR §73.3999 on its basic character qualifications to be a licensee anywhere, including but not limited to its proposed ownership of WJZD. The Audio Division ruled that the "June 4, 2004

adoption of a Consent Decree between the Commission and Clear Channel" resolved these matters "and will not be further addressed".

21. As it turned out, WJZD raised these matters relative to WQYZ in the following: (a) in the pending assignment of license case involving WQYZ(FM), Ocean Springs, Mississippi, in a "Consolidated Reply" pleading filed February 3, 2004, just one week after the Commission had announced a \$755,000.00 fine against Clear Channel for the "Bubba the Love Sponge" programs on its various radio stations; and (b) in an "Informal Objection" filed against three of Clear Channel's radio licenses in southern Mississippi, against which WZJD(FM) competes for audiences and revenues, on May 25, 2004.

22. Despite the fact that these things were pending, it would appear that there were impermissible *ex parte* contacts between Capstar/Clear Channel and the Commission's staff relative to the resolution of the 18 U.S.C. §1464 and 73 CFR §73.3999. It is WJZD's position that once it raised these matters before the Commission, Capstar/Clear Channel could not speak to any members of the Commission's decision making authorities on the merits without WJZD or its counsel present. It is simply not credible that, subsequent to February 3, 2004, Capstar/Clear Channel did


not speak to the Commission on the merits of these matters; given the "consent decree" which was issued on June 4, 2004. Section 1.1200 *et seq.* of the Commission's Rules must have been violated. The public interest, convenience and necessity are simply not served by back room deals; a full and fair public hearing, conducted in the sunshine by an independent administrative law judge, is required.

Conclusion

WHEREFORE, WJZD, Inc. urges that this Application for Review BE GRANTED and that the above-captioned applications relative to FM Broadcast Station WQYZ, Ocean Springs, Mississippi filed by Golden Gulf Coast Broadcasting, Inc. and/or Capstar TX Limited Partnership **BE DENIED OR DESIGNATED FOR HEARING.**

Respectfully submitted,

WJZD, INC.

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DATED AND FILED: April 11, 2007


CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing "Application for Review" were served by first-class United States mail, postage prepaid, on this 11th day of April, 2007 upon each of the following:

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