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In re: **DKTDK(FM), Sanger, TX**
Facility ID No. 26146
File No. BALH-20130701ADA
File No. BLH-20050309AAI

Application for Assignment of License

Cancellation of License

Petitions for Reconsideration

Dear Counsel:

We have before us an October 21, 2013, Petition for Reconsideration (“Assignment Petition”)¹ jointly filed by Whitley Media, LLC (“Whitley”) and North Texas Radio Group, L.P. (“North Texas”) seeking reconsideration of a September 19, 2013, staff decision² dismissing the referenced application (“Assignment Application”) which sought approval for a proposed assignment of license for Station KTDK(FM), Sanger, Texas (“Station”) from Susquehanna Radio Corp., a subsidiary of Cumulus Media, Inc. (“Susquehanna” or “Cumulus”), to Whitley. We also have before us a November 22, 2013, Petition for Reconsideration (“License Petition”)³ filed by Whitley and North Texas seeking reconsideration of the staff’s October 18,

¹ Whitley and North Texas filed a Supplement to the Assignment Petition (“Supplement”) on November 12, 2013. We note that on October 31, 2013, First IV Media, Inc. (“First IV”), licensee of Station KGAF(AM), Gainesville, Texas, filed a Motion to Dismiss the Petition (“Motion”), which, on November 13, 2013, Whitley and North Texas opposed (“Opposition to Motion”). On November 25, 2013, First IV replied (“Reply”) to the Opposition to Motion.

² See *Lewis J. Paper, Esq., and Larry Perry, Esq.*, Letter, DA 13-1938 (MB rel. Sep. 19, 2013) (“*Staff Decision*”).

³ On November 25, 2013, Whitley and North Texas filed a Supplement to the License Petition (“License Petition Supplement”).

2013, cancellation of the Station's license, per licensee Cumulus' request.⁴ For the reasons stated below, we dismiss the Supplements, dismiss the License Petition, and dismiss the Assignment Petition.

Background. The Station was located on the fringe of the Dallas-Ft. Worth, Texas, radio market, the fifth-largest radio market in the country.⁵ In that market, a party may own or hold attributable interests in up to eight radio stations, no more than five of which may be in the same service.⁶ Cumulus, through subsidiaries such as Susquehanna, owned five FM stations and three AM stations in the market.⁷ Whitley is wholly owned by Mr. William Whitley, an experienced media broker working for the Media Services Group, a nationally recognized media brokerage firm.

On July 1, 2013, Susquehanna filed the Assignment Application proposing to assign the Station to Whitley. The Assignment Application included an amended Asset Purchase Agreement ("APA") submitted by the parties. The stated consideration for the sale was: (1) one hundred dollars (\$100) in cash at Closing and (2) all proceeds which Buyer receives from the subsequent sale of the Station Assets, less (a) fifty thousand dollars (\$50,000); (b) all reasonable expenses incurred by Whitley from the operation of the Station and the ownership and holding of the Station Assets after Closing; and (c) all reasonable expenses incurred by Buyer in the marketing and subsequent sale of the Station. Further, Whitley was to "use commercially reasonable efforts to sell the Station Assets for the maximum amount of consideration available in the market."⁸

On August 7, 2013, Cumulus announced that it had reached a long-term Local Marketing Agreement ("LMA") for it to program Station KESN(FM), Dallas, Texas, effective upon the closing of the Station's sale.⁹ But for consummation of the Assignment Application, the LMA would result in Cumulus having an attributable interest in nine radio stations, six of which were FM stations in the Dallas-Ft. Worth market, in violation of the local radio ownership provisions in Section 73.3555(a)(1)(i) of the Commission's Rules (the "Rules").

On September 19, 2013, the staff dismissed the Assignment Application, finding that Cumulus' and Whitley's characterization of the transaction was untenable. The staff found that, in fact, the transaction was a brokerage agreement in which Whitley was tasked with finding a buyer for the Station

⁴ See *Letter to Marlene H. Dortch, Secretary, FCC*, filed September 30, 2013, by Susquehanna, giving notice that the Station would permanently discontinue operations as of 11:59 p.m. on Sunday, October 6, 2013, in accordance with 47 C.F.R. § 73.1750 and that the license and all other instruments of authorization would be forwarded to the Commission on Monday, October 7, 2013. See *Broadcast Actions*, Public Notice, Report No. 48100 (rel. Oct. 23, 2013).

⁵ See Arbitron Commission Radio Market Rankings: Spring 2013.

⁶ 47 C.F.R. § 73.3555(a)(1)(i).

⁷ WBAP(AM), Fort Worth (Fac. ID No. 71200); WBAP-FM, Flower Mound (Fac. ID No. 26468); KSCS(FM), Fort Worth (Fac. ID No. 71201); KLIF(AM), Dallas (Fac. ID No. 35061); KPLX(FM), Fort Worth (Fac. ID No. 54675); KLIF-FM, Haltom (Fac. ID No. 27299); and KTCK(AM), Dallas (Fac. ID No. 8773).

⁸ See Assignment Application, Exhibit 5 and Attachment 5 (emphasis in original).

⁹ See Motion at Attachments 1 and 2 (*ESPN Audio Restructures Operations in the Dallas Market*, ESPN Media Zone, Aug. 7, 2013 and *Cumulus to LMA ESPN 103.3 Dallas*, Radio Insight, Oct. 4, 2013); see also LMA executed October 8, 2013, and filed by Cumulus and KESN Assets, LLC, an ESPN affiliate, on January 28, 2014.

and was to be compensated for doing so by the payment of a \$50,000 flat fee when that transaction closed.

On September 24, 2013, Cumulus filed a petition for reconsideration of the staff's dismissal of the Assignment Application. On September 27, 2013, Cumulus and Whitley further amended the Assignment Application's APA to modify the purchase price of the Station to an amount slightly greater than market value and to confirm that Cumulus would no longer have an attributable interest in the Station upon assignment to Whitley. However, on September 30, 2013, Cumulus surrendered the Station's license for cancellation and shortly afterward requested withdrawal of its petition for reconsideration.¹⁰ On October 21 and November 22, 2013, respectively, Whitley and North Texas timely filed the Assignment Petition and License Petition.

In the Assignment Petition, Whitley and North Texas state that Whitley and North Texas had entered into a "letter of intent" pursuant to which North Texas agreed to purchase the Station from Whitley once Whitley acquired it from Cumulus.¹¹ Whitley and North Texas contend that the Assignment Application, with the September 27, 2013, amendment to the APA, should be reinstated and immediately granted, "conditioned upon an immediate consummation of the assignment to Whitley," so that the Station may be further assigned to North Texas.¹² Whitley and North Texas argue that this outcome would be in the public interest because it would advance the Commission's goal of localism, and the residents of Sanger, Texas, would thus retain a commercial station to serve their needs and interests.¹³ In the Supplement, Whitley and North Texas acknowledge that, due to the LMA with Station KESN(FM), grant of the Assignment Petition would cause Cumulus briefly to have attributable interests in excess of the local market caps in Section 73.3555(a) of the Rules until the Station is assigned to Whitley.¹⁴ Therefore, they request a waiver of the Rules so that the silent Station could resume providing local service to the residents of Sanger, Texas, rather than allowing the frequency to remain vacant for "several years" until an allotment proceeding concludes.¹⁵

In the License Petition, Whitley and North Texas seek reinstatement of the cancellation of the Station's license. They reiterate the arguments made in the Petition, stressing that a brief, temporary waiver of the local radio ownership caps until Cumulus can assign the Station to Whitley would be in the public interest. In the License Petition Supplement, Whitley and North Texas attach a Declaration made under penalty of perjury by Susquehanna's Senior Vice President and General Counsel Richard S. Denning stating that Cumulus' subsidiary Susquehanna has no objection to the relief sought by Whitley and North Texas "if the grant of such relief will not have any adverse effect on Susquehanna or its affiliates, including any non-compliance with the FCC's multiple ownership rules which has not been waived."¹⁶

¹⁰ See Notice of Withdrawal of Petition for Reconsideration filed October 17, 2013. See also n.4, *supra*. Cumulus' long-term LMA with Station KESN(FM), Dallas, took effect on October 8, 2013.

¹¹ Assignment Petition at 2.

¹² *Id.* at 2 and 5. Commission records indicate that Whitley and North Texas never filed an application for consent to the assignment of the Station from Whitley to North Texas.

¹³ *Id.* at 5, 6.

¹⁴ Supplement at 2.

¹⁵ *Id.* at 6.

¹⁶ See License Petition Supplement at Attachment ("Declaration of Richard S. Denning").

Discussion. Section 405(a) of the Communications Act of 1934, as amended (the “Act”), states that any party to an order, decision, report, or action, or any other person aggrieved or whose interests are adversely affected, may petition for reconsideration.¹⁷ In order to show standing, a petitioner who is not a party to the proceeding must: (1) state with particularity the manner in which its interests are adversely affected by the action taken, and (2) show good reason why it was not possible to participate in the earlier stages of the proceeding.¹⁸ To determine if a party's interests have been adversely affected, the Commission frequently relies upon a three-pronged standing test under which a party must establish: (1) a distinct and palpable injury-in-fact that is (2) traceable to the respondent's conduct and (3) redressable by the relief requested.

Initially, we note that Section 1.45 of the Rules¹⁹ specifies that only a petition, an opposition, and a reply may be filed unless additional pleadings are specifically requested or authorized by the Commission. In this case, the Commission has neither requested nor authorized the filing of additional pleadings, and they add no decisionally significant facts to the record here. Such unauthorized pleadings are subject to dismissal without consideration,²⁰ and we will dismiss Whitley’s and North Texas’ supplemental pleadings below.²¹

In the License Petition, Whitley and North Texas assert that they have standing to petition for reconsideration as potential assignees adversely affected by the cancelled license.²² We disagree. Whitley and North Texas have no rights with regard to the Station’s license and therefore no interest which could be adversely affected by the surrender and cancellation of the Station license.²³ Also, as a mere applicant and potential licensee, Whitley and North Texas fail to demonstrate that their interests have been “adversely affected” by the voluntary cancellation of the Station’s license.²⁴ Accordingly, we will dismiss the License Petition.²⁵

Assuming *arguendo* that Whitley and North Texas had standing to file the License Petition, we are unable to provide the relief requested, namely, reinstatement of the Station’s license to Cumulus and

¹⁷ 47 C.F.R. § 405(a).

¹⁸ 47 C.F.R. § 1.106(b)(1).

¹⁹ 47 C.F.R. § 1.45.

²⁰ See, e.g., *Lee. G. Petro, Esq.*, Letter, 25 FCC Rcd 4486, 4488 (MB 2010) (dismissing pleadings not authorized by Section 1.45).

²¹ See, e.g., *John Garziglia, Esq., Peter Guttman, Esq., John S. Neely, Esq.*, Letter, 20 FCC Rcd 12105, 12107 (MB 2005) (unauthorized pleadings provide the record no decisionally significant facts that are required to be considered in our determination of the public interest).

²² License Petition at 1.

²³ See *Scott R. Flick, Esq.*, Letter, 24 FCC Rcd 9064, 9065 (MB 2009) *recon. denied*, 25 FCC Rcd 13725 (MB 2010) (“*Flick*”) (“[P]otential licensee . . . has no rights with regard to assignment or disposal of this license and therefore no interest which could be adversely affected by its cancellation.”).

²⁴ See, e.g., *Jose A. Ortiz Lozada*, Hearing Designation Order, 3 FCC Rcd 3943 n.2 (MMB 1988) (in a short-spacing proceeding, a “mere applicant” for a channel is not a party to the proceeding and lacks standing).

²⁵ See, e.g., *Benedek Broadcasting of the Virgin Islands, Inc.*, Letter, 14 FCC Rcd 13554, 13555 (MMB 1999) (“*Benedek*”) (petition for reconsideration, seeking review of staff decision cancelling station’s license, deleting call letters and dismissing application for assignment of license, dismissed).

subsequent waiver of the Commission's radio ownership rules. The Commission has no authority to require any party to hold or, as is the case here, to reacquire a license and to accept the corresponding duties and responsibilities of a licensee.²⁶ Moreover, in order to affect the potential assignment Whitley and North Texas seek, we would be required to return the Station license to Cumulus, which would cause Cumulus to be in violation of the local radio ownership rules.

With the dismissal of the License Petition, the cancellation of the Station's license remains in effect. Therefore, there is nothing to assign.²⁷ Accordingly the Assignment Petition also will be dismissed as moot.

Conclusion/Actions. Accordingly, IT IS ORDERED, that the Supplements filed on November 12 and 25, 2013, by Whitley Media, LLC, and North Texas Radio Group, L.P., ARE DISMISSED.

IT IS FURTHER ORDERED, that the October 21, 2013, and November 22, 2013, Petitions for Reconsideration filed by Whitley Media, LLC, and North Texas Radio Group, L.P., ARE DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

²⁶ See *Flick*, 24 FCC Rcd at 9066 (Commission cannot force a license upon a party).

²⁷ See *Jefferson Radio Corp. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964) ("It is the recognized policy of the Commission that assignment of broadcast authorization will not be considered until the Commission has determined that the assignor has not forfeited the authorization."); see also *A-1-A Repeater Company*, Memorandum Opinion and Order, 16 FCC Rcd 9748 ¶ 7 (2001) (grant of assignment application set aside; Commission holds there was no authorization to assign because license had automatically cancelled).