



Federal Communications Commission
Washington, D.C. 20554

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DA 07-1240

In Reply Refer To:

1800B3-RDH

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Mr. Lawrence E. Steelman
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Capstar TX Limited Partnership
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Mr. Stanley Daniels
WJZD, Inc.
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In Re: Capstar TX Limited Partnership
WQYZ(FM), Ocean Springs, MS
Facility ID No. 24513
File No. BALH-20031125ALX

**Application for Consent to
Assignment of License
Petition for Reconsideration**

Gentlemen:

This letter concerns the captioned application (the "Application") of Golden Gulf Coast Broadcasting, Inc. ("Golden Gulf") and Capstar TX Limited Partnership ("Capstar") for consent to the assignment of the license of Station WQYZ(FM), Ocean Springs, Mississippi, from Golden Gulf to Capstar. The Application was granted by the Media Bureau (the "Bureau") on May 26, 2005.¹ WJZD, Inc. ("WJZD"), which had petitioned to deny that application, has now filed a Petition for Reconsideration ("Petition") of the *Staff Ruling*.² For the reasons set forth below, we dismiss the Petition.

¹ See *WJZD, Inc.*, Letter, 20 FCC Rcd 9941 (MB 2005) ("Staff Ruling").

² Golden Gulf filed an Opposition to the Petition on July 12, 2005, to which WJZD replied on July 22, 2005.

Background. On November 25, 2003, Golden Gulf and Capstar filed the Application,³ to which WJZD filed a Petition to Deny.⁴ WJZD argued that Golden Gulf had engaged in an unauthorized transfer of control of Station WQYZ(FM) to Capstar, in violation of Section 310(d) of the Communications Act of 1934, as amended (the “Act”).⁵ It also contended that grant of the Application would give Capstar, a subsidiary of Clear Channel Communications, Inc. (“Clear Channel”), undue concentration of market power in the Biloxi Metro. Finally, it argued that the Commission was required to hold a hearing on Clear Channel’s basic character qualifications before making a determination whether grant of the Application would serve the public interest. In the *Staff Ruling*, the Bureau rejected these arguments and granted the Application.⁶ It also, however, issued a Notice of Apparent Liability for Forfeiture, proposing a \$7,000 forfeiture to Golden Gulf for its apparent violation of the main studio rule, Section 73.1125 of the Commission’s Rules (the “Rules”).⁷

Discussion. Reconsideration in this case is governed by Section 1.106 of the Rules. Under that section, as interpreted by established case law, “reconsideration is appropriate only when the petitioner either shows a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner’s last opportunity to present such matters.”⁸ Petitioner has failed to make such a showing.

In its Petition for Reconsideration, WJZD first concedes that the *Staff Ruling* correctly articulated the standard by which the Commission determines whether an unauthorized transfer of control has occurred.⁹ It objects, however, that the staff incorrectly concluded that WJZD had not raised a substantial and material question of fact regarding the alleged unauthorized transfer of control. WJZD states that the *Staff Ruling* fails to distinguish the facts in this case with those in the cases which WJZD cites in its Petition. Specifically, WJZD relies on *Citizens for Jazz on WRVR, Inc. v. FCC*,¹⁰ and states that the Bureau’s decision failed to adequately discuss this and the other cases cited by WJZD.¹¹

³ The parties had originally filed an application for consent to assign that license on December 24, 2002. Before the Bureau acted on that application, the staff, pursuant to Golden Gulf’s request, dismissed the application. Golden Gulf resubmitted the application on November 25, 2003.

⁴ In addition, an informal objection was filed by Douglas A. Hutchenson.

⁵ 47 U.S.C. § 310(d).

⁶ See n.1 *supra*.

⁷ 47 C.F.R. § 73.1125 (the “Main Studio Rule”).

⁸ *WWIZ, Inc.*, Memorandum Opinion and Order, 37 F.C.C. 685, 686 (1964), *aff’d sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966). See also *National Association of Broadcasters*, Memorandum Opinion and Order, 18 FCC Rcd 24414, 24415 (2003). See also 47 C.F.R. § 1.106(c).

⁹ See *Staff Ruling*, 20 FCC Rcd at 9943-44.

¹⁰ 775 F.2d 392 (D.C. Cir. 1985)(“*Citizens*”).

¹¹ WJZD cited the following cases: *Ronald Brasher et al.*, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing, 15 FCC Rcd 16326 (2000); *William L. Zawila*, Order to Show Cause, Notice of Opportunity for Hearing, and Hearing Designation Order, 18 FCC Rcd 14938 (2003); *Reading Broadcasting, Inc.*, Hearing Designation Order, 14 FCC Rcd 7176 (Video Ser. Div. 1999); *Hicks Broadcasting of Indiana, LLC*, Order

(footnote continued)

WJZD is incorrect. In the *Staff Ruling*, the Bureau considered and rejected WJZD's contention that Golden Gulf and Capstar had engaged in an unauthorized transfer of control.¹² WJZD presented no evidence demonstrating that Capstar had control over WQYZ's programming or finances.¹³ With respect to personnel, we found that, at all pertinent times, Lawrence Edward Steelman ("Steelman"), the President and 50 percent stockholder in Golden Gulf, was the licensee's "primary contact" with Clear Channel and that Debra Sanford, the other 50 percent stockholder of Golden Gulf, lived near the studio and monitored the station's operations on a regular basis.¹⁴ While we did find that, from February 16, 2003, to March 22, 2004, the station had no other employees than these two individuals,¹⁵ we determined that this fact was pertinent to a Main Studio Rule violation, for which we proposed a forfeiture,¹⁶ but did not evidence a wholesale abdication of control in violation of Section 310(d) of the Act.

Additionally, while Capstar provided the programming broadcast by WQYZ(FM), WJZD has not rebutted Golden Gulf's assertion that, at all times, Golden Gulf retained ultimate control over programming decisions, including the station's format.¹⁷ We will not grant WJZD's Petition simply to resume a debate as to whether an unauthorized transfer took place, an issue correctly resolved in the *Staff Ruling*.¹⁸ Furthermore, it is axiomatic that a licensee's participation in a time brokerage or local

to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing, 13 FCC Rcd 10662 (1998); *Gerard A. Turro*, Hearing Designation Order, Order to Show Cause, and Notice of Opportunity for Hearing, 12 FCC Rcd 6264 (1997); *Pine Tree Media, Inc.*, Hearing Designation Order and Notice of Forfeiture, 8 FCC Rcd 7591 (1993); *Petroleum V. Nasby Corporation*, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, 8 FCC Rcd 4035 (1993); *Center for Study and Application of Black Economic Development*, Hearing Designation Order, 6 FCC Rcd 4622 (1991); *Bennett Gilbert Gaines, Interlocutory Receiver*, Initial Decision, 7 FCC Rcd 1976 (ALJ 1990); *Black Television Workshop of Los Angeles, Inc.*, Order to Show Cause, Hearing Designation Order, and Notice of Apparent Liability, 3 FCC Rcd 5443 (1988); *Oyate, Inc.*, Order to Show Cause, Hearing Designation Order, and Notice of Apparent Liability, 2 FCC Rcd 4528 (1987).

¹² *Staff Ruling*, 20 FCC Rcd at 9944-45.

¹³ In cases involving allegations of unauthorized transfer or reversion of control, the Commission looks to whether a licensee continues to have ultimate control over the station, including its programming, personnel, and finances. *See, e.g., Radio Moultrie, Inc.*, Order to Show Cause and Notice of Opportunity for Hearing, 17 FCC Rcd 24304, 24306 (2002).

¹⁴ *Staff Ruling*, 20 FCC Rcd at 9944.

¹⁵ During the period January 19 to March 22, 2004, Sanford's spouse also worked for the station on an undetermined schedule. 20 FCC Rcd at 9949. Additionally, beginning on January 21, 2004, Golden Gulf had available to it on a "shared-use" basis a Clear Channel employee, Beth Broussard. Nevertheless, Golden Gulf concedes that it did not employ any employees at the station's main studio between February 16, 2003, and March 22, 2004, a concession that firmly supports the finding of an apparent violation of the Main Studio Rule in the *Staff Ruling*. *See* "Opposition to Petition for Reconsideration" at 4.

¹⁶ *Staff Ruling*, 20 FCC Rcd at 9947-49.

¹⁷ *Id.* at 9944.

¹⁸ "Reconsideration will not be granted to debate matters upon which the Commission has already deliberated and spoken." *WWIZ, Inc.*, 37 FCC at 686. *See also William L. Carroll*, Order, 8 FCC Rcd 6279 (1993).

marketing agreement (“LMA”) does not *per se* constitute an unauthorized transfer of control or a violation of the Act or any Rule or Commission policy.¹⁹ Rather, we look to whether the licensee continues to retain *ultimate* control over the station. Licensees are permitted under Section 310(d) of the Act to delegate day-to-day operations relating to the areas of programming, personnel, and finances, as long as they continue to set the policies guiding those operations.²⁰ “[I]n making a determination, the Commission looks not only to who executes the programming, personnel, and finance responsibilities, but also to who establishes the policies governing those three areas.”²¹ As discussed in more detail below, WJZD failed to present persuasive evidence that this standard was breached.

We also reject WJZD’s claim that we must designate the Application for evidentiary hearing under the standards enunciated in *Citizens*. In that case and in *Astroline Communications Co. v. FCC*,²² the court directed the Commission, in assessing the merits of a petition to deny under Section 309(d) of the Act, to determine first whether the petitioner makes specific allegations of fact that, if true, would demonstrate that grant of the application would be *prima facie* inconsistent with the public interest.²³ If the Commission determines that the petitioner has satisfied the threshold determination, it proceeds to determine whether, on the basis of the application, the pleadings filed, or other matters which [the Commission] may officially notice, the petitioner has presented a “substantial and material question of fact.”²⁴ If the Commission determines that the totality of the evidence arouses sufficient doubt as to whether grant of the application would serve the public interest such that further inquiry is warranted, the Commission must designate the application for evidentiary hearing.

Arguably, WJZD’s Petition made allegations, including that Golden Gulf had abdicated control over WQYZ(FM), that, if true, could demonstrate that a grant of the Application would be inconsistent with the public interest. However, WJZD did not raise a substantial and material question of fact, as it did not present evidence supporting its allegations. Rather, its Petition was an amalgam of conclusion, speculation, supposition, trade press articles, and other material that did not raise a substantial and material question of fact. Thus, no evidentiary hearing is required under *Citizens*.

¹⁹ See *WGPR, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 8141 (1995); *Roy R. Russo, Esquire*, Letter Decision, 5 FCC Rcd 7586 (MMB 1990); *Joseph A. Belisle, Esq.*, Letter Decision, 5 FCC Rcd 7585 (MMB 1990); *Radio Moultrie, Inc.*, 17 FCC Rcd at 24306.

²⁰ See *Southwest Texas Public Broadcasting Council*, Letter, 85 FCC 2d 713, 715 (1981); *The Alabama Educational Television Commission*, Memorandum Opinion and Order, 33 FCC 2d 495, 508 (1972); *Radio Moultrie, Inc.*, 17 FCC Rcd at 24306.

²¹ *Radio Moultrie, Inc.*, 17 FCC Rcd at 24306, 24307(citations omitted).

²² 857 F.2d 1556 (D.C. Cir. 1988).

²³ The Commission determines whether a petitioner has met this threshold inquiry in a manner similar to a trial judge’s consideration of a motion for directed verdict: “if all the supporting facts alleged in the affidavits were true, could a reasonable fact finder conclude that the ultimate fact in dispute had been established.” *Gencom Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987), cited in *Edwin L. Edwards*, Memorandum Opinion and Order and Notice of Apparent Liability, 16 FCC Rcd 22236, 22248 (2001).

²⁴ *Id.* See also 47 U.S. C. § 309(d)(2).

Moreover, we are not required to discuss and distinguish each of the cases cited by WJZD in support of its contention that hearing designation is appropriate where an unauthorized transfer of control appears to have occurred because, once again, we did not find that such a transfer occurred in this case.²⁵ WJZD acknowledges that, in the *Staff Ruling*, we applied the correct legal standard and it has not shown that our application of that standard to the facts in this case was erroneous.

WJZD next asserts that the Bureau placed “blind faith” in the language of the Golden Gulf/Capstar LMA and failed to consider the actual operation of WQYZ(FM).²⁶ It contends the Main Studio Rule violation that the Bureau found and a claimed studio-transmitter link rule violation were *prima facie* evidence of Golden Gulf’s abdication of control over the station on a “wholesale” basis. This allegation is without merit. In the *Staff Ruling*, we looked behind the terms of the LMA to actual station operations. We specifically found that, at all times pertinent hereto, Steelman served as the primary contact with Clear Channel regarding management of the station, handled the accounting and bookkeeping for the licensee, and wrote checks to cover station expenses.²⁷ Moreover, we found that he was personally involved in station programming issues and ultimately approved a change in the station’s format.²⁸ We concluded that, notwithstanding the Main Studio Rule violation, for which we proposed a forfeiture, Steelman retained ultimate control on behalf of Golden Gulf over station finances and programming.²⁹

WJZD also argues that the Bureau failed to consider its May 25, 2004, filing which was styled as a “Consolidated Reply.” This “reply” was an unauthorized pleading responding to Golden Gulf’s answer to the Bureau’s April 23, 2004, letter of inquiry. Furthermore, WJZD’s filing was not accompanied by a petition for leave to file the unauthorized pleading. As such, it was not entitled to substantive consideration by the Bureau.³⁰ Nevertheless, we have reviewed WJZD’s allegations and the response of Golden Gulf. Chiefly, in its response, WJZD disputes Golden Gulf’s assertion that it hired an individual named Brian Rust as a management-level person to work at WQYZ(FM) on the Capstar premises, beginning on March 22, 2004. WJZD notes that the WQYZ(FM) website indicated that an individual named Joe Valentine was the station’s Program Director. It asserts that Mr. Valentine’s e-mail address is a Clear Channel address, that he performs a weekend air shift for Clear Channel station WXXM(FM), Sun Prairie, Wisconsin, and that he is clearly an employee of Clear Channel. Golden Gulf replies that it

²⁵ Additionally, those cases are inapposite as virtually all involve unauthorized transfer of control coupled with other substantive serious misconduct such as misrepresentation to the Commission or criminal convictions that affected an applicant or licensee’s basic qualifications. There is no allegation or indication that the parties to the assignment application in this case engaged in such misconduct.

²⁶ Petition at 7.

²⁷ *Staff Ruling*, 20 FCC Rcd at 9944.

²⁸ *Id.*

²⁹ See note 15 *supra*.

³⁰ See 47 C.F.R. § 1.45; see also *Discussion Radio, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability, 19 FCC Rcd 7433, 7435 (2004); *Secret Communications II, LLC*, Memorandum Opinion and Order, 18 FCC Rcd 9139, 9139 n. 1 (2003); *Kin Shaw Wong*, Memorandum Opinion and Order, 11 FCC Rcd 11928, 11930 (1996).

employed Mr. Rust (who uses the name Joe Valentine as his on-air moniker) as General Manager of WQYZ(FM) and that he was replaced in that position by another individual from September 1, 2004, until the closing on the sale of the station to Capstar.³¹

There would be nothing violative of Commission regulations or necessarily indicative of an unauthorized transfer of control if Mr. Rust was employed by Clear Channel/Capstar as a part-time announcer and by Golden Gulf as a General Manager. The Commission eliminated the “key employee” element of its former “cross interest” policy in 1999.³² Indeed, even prior to that policy change, the Commission determined that such arrangements do not necessarily demonstrate an abdication of control.³³ We find that, even if we were to consider WJZD’s unauthorized “Consolidated Reply,” it provides no evidence that Golden Gulf ceded ultimate control of WQYZ(FM) to Capstar in violation of Section 310(d) of the Act.

Finally, WJZD argues that it had raised the issue of WQYZ(FM)’s alleged broadcast of indecent matter in its “Consolidated Reply” and in informal objections filed against three Clear Channel renewal applications for radio stations in southern Mississippi with which WJZD(FM) competes. Additionally, it asserts that subsequent to raising this issue in the above-described manner, the Commission entered into a consent decree with Clear Channel. It speculates that there were impermissible *ex parte* contacts between Clear Channel and the Commission’s staff relative to the broadcast of indecent material. It states that, “once it [WJZD] 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.” Accordingly, it asserts that a hearing is required.

WJZD’s arguments are without legal merit. Section 1.1204(a)(10) of the Commission’s Rules specifically exempts from the *ex parte* prohibitions those presentations “requested by (or made with the advance approval of) the Commission or staff for the clarification or adduction of evidence, *or for the resolution of issues, including possible settlement*, subject to” certain limitations not present here.³⁴ Any discussions that led to the consent decree with Clear Channel fell within this exception.

³¹ Golden Gulf claims to also have employed other, non-managerial, staff at WQYZ(FM).

³² See *Review of the Commission’s Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission’s Regulations and Policies Affecting Investment in the Broadcast Industry; and Reexamination of the Commission’s Cross-Interest Policy*, Report and Order, 14 FCC Rcd 12559, 12609-10 (1999).

³³ See, e.g., *Choctaw Broadcasting Corp.*, Memorandum Opinion and Order, 12 FCC Rcd 8534, 8540 (1997) (Chief Operator of assignor also an employee of assignee brokering assignor’s radio station).

³⁴ 47 C.F.R. § 1.1204(a)(10) (emphasis added).

Conclusion/Actions. WJZD's Petition fails to meet the standard set forth in Section 1.106(c) of the Rules. Accordingly, for the reasons set forth above, WJZD, Inc.'s Petition for Reconsideration IS DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau