



Federal Communications Commission
Washington, D.C. 20554

December 19, 2016

In Reply Refer to:
1800B3-SS

Mr. Wiely Boswell
1857 S. Hall Street
Montgomery, AL 36104

Mr. John Knight
c/o Taylor Broadcasting, LLC
P.O. Box 6300
Montgomery, AL 36106

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In re: **FM Translator Station W268BH,
Montgomery, AL**
Facility ID No. 150894
File No. BPFT-20130328ALP

Minor Modification Application

Informal Objection

Dear Counsel, Mr. Boswell and Mr. Knight:

We have before us a May 3, 2013, Informal Objection (Objection), filed by Wiely Boswell (Boswell), to the referenced application (Application)¹ for a minor modification of the facilities of Taylor Broadcasting, LLC's (Taylor) FM Translator Station W268BH, Montgomery, Alabama, (Translator).² For the reasons stated below, we deny the Objection and grant the Application.

Background. On March 28, 2013, Taylor filed the Application to modify the Translator's facilities. In the Application, Taylor indicated an intention to rebroadcast, as a "fill-in" translator, the HD-2 signal of Bluewater Broadcasting, LLC's (Bluewater) Station WBAM(FM), Montgomery, Alabama, certifying that it "is not the licensee or permittee of the commercial primary station being

¹ The Application was amended on May 10, 2013, to clarify that Taylor is not proposing a channel change to Channel 267.

² Boswell is Chief Engineer of Faith Radio, Inc.'s competing Station WLBF(FM), Montgomery, Alabama. On May 24, 2013, Taylor and Back Door Broadcasting, LLC (Back Door), licensee of Station WVRV(FM), Pine Level, Alabama, the current primary station rebroadcast by the Translator, filed a Joint Opposition to the Objection (Opposition). Our records indicate that Boswell has not replied.

rebroadcast and that neither [Taylor] nor any parties to the application have any interest in or connection with the commercial primary station being rebroadcast.”³

In the Objection, Boswell argues that: (1) the Translator’s proposed rebroadcast of Bluewater’s Station WBAM(FM)’s HD-2 signal is not in the public interest and is anti-competitive because Bluewater currently controls 9 FM signals (four FM stations and five FM translators⁴), and one AM signal, “not counting HD sub-channels,” in the Montgomery, Alabama, Nielsen radio market;⁵ (2) Allan G. Stroh (Stroh), president of Back Door’s Station WVRV(FM), Montgomery, Alabama, the Translator’s current primary station, and assignor of the Translator to Taylor in 2008, maintains *de facto* control over the Translator because “the sale contract contained a provision that it [the Translator] could be repurchased by Stroh at any time in the future;”⁶ (3) Stroh controls the Translator because its facilities are “combined” at the same location as Stroh’s FM translator Station W298BC, Montgomery, Alabama;⁷ and (4) because the Translator is currently acting as a “non fill-in” translator for WVRV(FM), Stroh’s alleged “control” of both the Translator and the primary station are in violation of Section 74.1232(d) of the FCC’s rules (Rules).⁸

In the Joint Opposition, Taylor and Back Door contend that even if all of Boswell’s allegations were true, he has not provided any evidence of any violation of any Commission rule or policy.⁹ Specifically, they argue that: (1) Bluewater’s attributable interests are in compliance with the Commission’s radio ownership rules;¹⁰ (2) even if Bluewater were the licensee of the FM translators cited by Boswell – and it is not -- there would be no violation of any Commission rule;¹¹ (3) Boswell has provided no evidence that Bluewater intends to “lease” Edgewater’s FM translator Station W280EI, and because that facility has proposed to operate on a fill-in basis, Bluewater could “legally own it”;¹² (4) the Translator’s current rebroadcast of Stroh’s primary station does not give Stroh control over the Translator¹³ and that Stroh’s option to repurchase the Translator conveys no attributable interest in the

³ Application at Section III, Item 11(a).

Application at Exhibits 10 and 13.

⁴ Boswell claims that besides having its programs rebroadcast by the Translator if the Application is granted, Bluewater also “operates” three FM translators in the market and “has an arrangement to lease” Edgewater Broadcasting, Inc.’s (Edgewater) FM translator Station W280EI, Montgomery, Alabama. See Objection at 1, 2.

⁵ *Id.* at 2.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 2; see also 47 CFR § 74.1232(d).

⁹ Opposition at 2

¹⁰ *Id.*; see also 47 CFR § 73.3555(a)(1)(iii). Taylor and Back Door note that HD sub-channels and FM translators are not attributable for the purposes of Section 73.3555 of the Rules. Opposition at 2, 3.

¹¹ Opposition at 3.

¹² *Id.*

¹³ Taylor and Back Door also note that the Application to change the rebroadcasting from WVRV to WBAM further evidences lack of control by Stroh. Opposition at 5.

Translator;¹⁴ and (5) the Translator's sharing of equipment; *i.e.*, "duplexing," with Stroh's FM translator Station W298BC in no way implies that Stroh has control over the Translator.¹⁵

Discussion. Pursuant to Section 309(e) of the Communications Act of 1934, as amended (Act),¹⁶ informal objections must provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with Section 309(a) of the Act.¹⁷ For the reasons set forth below, we find that Boswell has failed to raise a substantial and material question of fact calling into question Taylor's proposal to rebroadcast the HD-2 signal of WBAM(FM).

Local Radio Ownership Limits. Regarding Boswell's argument that the Translator's proposal to rebroadcast the HD-2 signal of primary station WBAM(FM) is anti-competitive and would allow Bluewater to circumvent the local radio ownership rules, we disagree. First, FM translators are not counted as FM stations for the purpose of Section 73.3555, concerning multiple ownership.¹⁸ Second, in a radio market with between 30 and 44 commercial radio stations, such as the Montgomery, Alabama, Nielsen-rated, radio market, a party may own, operate, or control up to seven (7) commercial radio stations, not more than four (4) of which are in the same service (AM or FM).¹⁹ Bluewater is licensee of four (4) FM stations and one (1) AM station.²⁰ Thus, it is in compliance with the radio ownership rules. Boswell provides no evidence to support his contention that the arrangement is anti-competitive and not in the public interest.

Concerning Boswell's unsupported and vague claim that Bluewater has entered into a "lease" of Edgewater's FM translator station W280EI, we find no evidence of any ties between Edgewater and

¹⁴ *Id.* at 4, 5.

¹⁵ *Id.* at 6.

¹⁶ 47 U.S.C. § 309(e).

¹⁷ 47 U.S.C. § 309(a). *See, e.g., WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff'd sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *rehearing denied* (Sep. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 para. 6 (1986) (informal objections, like petitions to deny, must contain adequate and specific factual allegations sufficient to warrant the relief requested).

¹⁸ 47 CFR § 72.1232(b). *See also Oversight of the Radio and TV Broadcast Rules*, Order, 2 FCC Rcd 1545, 1548 (MB 1987).

¹⁹ *See* 47 CFR § 73.3555(a)(1)(ii); *see also* 2002 Biennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13711 para. 236 (2003), *aff'd in part and remanded in part sub nom., Prometheus Radio Project v. FCC*, 373 F.3d 372 (2004), *cert. denied*, 545 U.S. 1123 (2005).

²⁰ *See* BIA Media Access Pro database, viewed October 25, 2016. Bluewater is licensee of Montgomery, Alabama, FM stations WACV (per Bluewater's subsidiary, Liberty Acquisitions 825, LLC), WBAM, WQKS, and WJWZ, as well as AM station WGMP. The FM translators which Boswell claims are controlled by Bluewater are, in fact, licensed to Katherine Timmerman Hagler (W263BX; W285AJ; W296AI), Edgewater (W280EI), and Taylor (W268BH), respectively.

Bluewater and, in any event, because W280EI operates on a fill-in basis, Bluewater could hold its authorization pursuant to the Rules.²¹ Thus, further discussion of this matter is unwarranted.

Real-Party-In-Interest. Regarding Boswell's allegations that Stroh maintains *de facto* control of the Translator, we disagree. The 2008 Purchase Agreement²² provides Stroh with "an option to acquire the FCC Authorization and FM Translator assets in the future, pursuant to prior FCC consent"²³ There is no language in the document stating that Taylor *shall* assign the Translator back to Stroh in the future; only, as part of the consideration, that Stroh may exercise an "option" to reacquire the authorization in the future.²⁴ Boswell's allegation is not supported by citation to any Commission decision or other authority and provides no probable evidence that Stroh has any influence over the personnel, programming and finances of the Translator.²⁵

We also reject Boswell's allegation that Stroh continues to control the Translator because its technical facilities are diplexed with an FM translator licensed to Stroh. Boswell provides no evidence that the diplexing arrangement is anything other than a contractual arrangement to share transmission facilities. He provides no authority, and we are aware of none, that the simple fact of several stations diplexing their antennas is relevant to a determination of "control" of those stations, as they do not call into question Taylor's ultimate control over the Translator's personnel, programming, and finances.²⁶

Conclusion/Actions. For the reasons set forth above, we find that Boswell has not raised a substantial and material question of fact calling for further inquiry regarding the Application. Additionally, we have evaluated the Application, and we find that it complies with all pertinent statutory and regulatory requirements and that the public interest, convenience, and necessity will be served by its grant. Accordingly, IT IS ORDERED, that the May 3, 2013, Informal Objection filed by Wiely Boswell, IS DENIED.

²¹ See *Sister Grace, Inc.*, Letter Order, 22 FCC Rcd 19107, 19108 (MB 2007) (entity connected to primary station is not disqualified from acquiring properly classified fill-in translator).

²² See 2008 Assignment Application at Exhibit 4, Attachment 4 (2008 Purchase Agreement).

²³ See 2008 Purchase Agreement at 4.

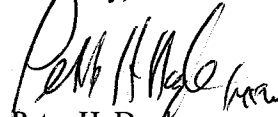
²⁴ See, e.g., *Chelsey Broadcasting Company of Youngstown, LLC*, Letter Order, 22 FCC Rcd 13905, 13908 (MB 2007) citing *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd 1097, 1112 para. 31 (2001) (options are not attributable until exercised, and such relationships do not provide the interest holder with the incentive and means to exert influence over the core operations of a licensee); see also, e.g., *Dan J. Alpert, Esq., Lewis J. Paper, Esq., and Nancy A. Ory, Esq.*, Letter Order, 26 FCC Rcd 10328, 10332 (MB 2011) (use of the word, "shall [assign]," creates a mandatory right to reassignment of the license in the future to assignor whereas use of the word, "may [assign]," does not).

²⁵ See, e.g., *Solar Broadcasting Co., Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 5467, 5486 para. 71 (2002) (question of *de facto* control is fact specific and must be considered on a case-by-case basis; *i.e.*, licensee has ultimate responsibility for essential station matters, such as personnel, programming and finances).

²⁶ See *MBC Grand Broadcasting, Inc.*, Letter Order, 20 FCC Rcd 8817, 8819 (MB 2005); see also *Hicks Broadcasting of Indiana, LLC*, Hearing Designation Order, 13 FCC Rcd 10662, 10677 paras. 46-8 (1998) ("Control over any one of the areas of personnel, programming and finances would be sufficient for a finding of *de facto* control.").

IT IS FURTHER ORDERED, that, the Application (File No. BPFT-20130328ALP) for a minor modification of facilities filed by Taylor Broadcasting, LLC, for FM Translator Station W268BH, Montgomery, Alabama, IS GRANTED.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter H. Doyle", is written over the printed name.

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Back Door Broadcasting, LLC
Bluewater Broadcasting, LLC