

Federal Communications Commission

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| Federal Communications Commission Washington, D.C. 20554 | Approved by OMB 3060-0423 (November 2005) | FOR FCC USE ONLY |
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Section I - General Information

| | | | |
|----|--|---|--|
| 1. | Party Filing Pleading or Appeal DELMARVA EDUCATIONAL ASSOCIATION | | |
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| | City WINSTON-SALEM | State or Country (if foreign address) NC | Zip Code 27104 - |
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| 2. | Contact Representative DAVINA SASHKIN, ESQ. | | Firm or Company Name FLETCHER, HEALD & HILDRETH, P.L.C. |
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| 3. | Purpose: <input type="radio"/> Informal Objection <input type="radio"/> Petition to Deny <input type="radio"/> Petition for Reconsideration <input type="radio"/> Application for Review <input checked="" type="radio"/> Opposition <input type="radio"/> Reply <input type="radio"/> Supplement | | |
| 4. | [Enter File Number] File Number: BAL - 20200317AAB | Pleading Filed Date : | Pleading Filer Name: |
| 5. | Attach pleadings | | [Exhibit 1] |

I hereby certify that the statements in this application are true, complete, and correct to the best of my knowledge and belief, and are made in good faith. I acknowledge that all certifications and attached Exhibits are considered material representations.

| | |
|--|---|
| Typed or Printed Name of Person Signing NANCY A. EPPERSON | Typed or Printed Title of Person Signing PRESIDENT |
| Signature | Date 4/28/2020 |

WILLFUL FALSE STATEMENTS ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001), AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. CODE, TITLE 47, SECTION 312(a)(1)), AND/OR FORFEITURE (U.S. CODE, TITLE 47, SECTION 503).

Exhibits

Exhibit 1

Description: PLEADING

Attachment 1

| Description |
|---|
| Opposition to Petitions to Deny |

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

| | | |
|---|---|------------------------------|
| In the Matter of |) | |
| |) | |
| Application of Delmarva Educational Association |) | FCC File No. BAL-20200317AAB |
| |) | |
| For Consent to Assignment of Broadcast Licenses |) | |
| for AM station WNTW, Chester, VA and |) | Facility ID No. 27440 |
| FM Translator station W224EB, Chester, VA |) | Facility ID No. 202858 |

To: The Commission
Attn: Audio Division, Media Bureau

JOINT OPPOSITION TO PETITIONS TO DENY

Delmarva Educational Association (“Delmarva”) and Disruptor Radio, LLC (“Disruptor”, and together with Delmarva, the “Applicants”), by their attorneys and pursuant to pursuant to Section 309(d)(1) of the Communications Act,¹ and Section 73.3584(b) of the Commission’s Rules,² hereby oppose the Petitions to Deny filed by Donna Kunde and William Eastman (together, the “Petitioners”) in reference to the above-captioned application (“Application”) for consent to the assignment of the licenses for AM station WNTW (Facility ID No. 24440) and FM translator station W224EB (Facility ID 202858) (the “Stations”).

It is the understanding of the Applicants that the Petitioners intend to voluntarily withdraw their Petitions. Nevertheless, because the Petitioners allege misrepresentations by the Applicants in the Application and have raised public interest concerns about the proposed transaction, the Applicants are compelled to oppose the Petitions on the record. As will be demonstrated herein, the Petitioners lacked candor and misrepresented their interests in the Stations. Moreover, the Petitioners have not achieved the high hurdle of making a *prima facie* case that the Application is

¹ 47 U.S.C. § 309(d)(1).

² 47 C.F.R. § 73.3584(b).

not in the public interest. For these reasons, the Audio Division must deny and dismiss the Petitions and grant the Application expeditiously.

Petitioners Misrepresented, Lacked Candor and Have Unclean Hands

Section 1.17(a)(2) of the Commission’s Rules prohibits any person before the Commission from providing “material factual information that is incorrect or omit[ting] material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading without a reasonable basis for believing that any such material factual statement is correct and not misleading.”³ Petitioners portray themselves as unrelated third-party regular listeners of the Stations, omitting from their Petitions that they in fact are current on-air personalities on the Stations. Thus, Petitioners omitted factual information that was necessary to prevent their petitions and affidavits from being misleading.

Petitioners also lacked candor in their pleadings, as they engaged in “a concealment, evasion, or other failure to be fully informative, accompanied by an intent to deceive the Commission.”⁴ An essential element of a lack of candor is the intent to deceive,⁵ which can be derived from motive or a logical desire to deceive.⁶ Petitioners failed to disclose that they have a

³ 47 CFR § 1.17(a)(2). See also *See Amendment of Section 1.17 of the Commission’s Rules Concerning Truthful Statements to the Commission*, Report and Order, 18 FCC Rcd 4016 (2003), recon. denied, Memorandum Opinion and Order, 19 FCC Rcd 5790, further recons. denied, Memorandum Opinion and Order, 20 FCC Rcd 1250 (2004).

⁴ *Entertainment Media Trust*, Hearing Designation Order, FCC 19-506 at para. 58 (MB 2019) (citing *Fox River Broadcasting, Inc.*, Order, 93 FCC 2d 127, 129 (1983); *Discussion Radio, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability, 19 FCC Rcd 7433, 7435 (2004) (*Discussion Radio*)).

⁵ *Id.* (citing *Swan Creek Communications, Inc. v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994); *Discussion Radio*, 19 FCC Rcd at 7435).

⁶ *Id.* (citing *Discussion Radio*, 19 FCC Rcd at 7435; *Black Television Workshop of Los Angeles, Inc.*, Decision, 8 FCC Rcd 4192, 4198, n.41 (1993) (citing *California Public Broadcasting Forum v. FCC*, 752 F.2d 670, 679 (D.C. Cir. 1985); *Joseph Bahr*, Memorandum Opinion and Order, 10 FCC Rcd 32, 33 (Rev. Bd. 1994); *Scott & Davis Enterprises, Inc.*, Decision, 88 FCC 2d 1090,

material interest in maintaining the *status quo*, because they host the *Sales 2020* radio program which is produced by Delmarva, is recorded live in the WNTW studio, and airs on the Stations. In addition, Mr. Eastman is a recent general manager of WNTW, which may help explain how he has access to detailed information about the programming of competitor station WJFN. In failing to disclose these material facts to the Commission, the Petitioners engaged in deceit and concealment of their true agenda: to maintain their show on the current station programming line-up. Because Petitioners have come to the Commission in bad faith and have engaged in misrepresentation and a lack of candor, the doctrine of unclean hands directs that the Petitions be denied and dismissed.

Petitioners Fail to Establish that the Application is Inconsistent with the Public Interest

Pursuant to Section 309(d)(1) of the Communications Act, any party in interest may file a petition to deny an application, but the petitioner must make specific allegations of fact sufficient to demonstrate that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity.⁷ As demonstrated below, Petitioners have not met this burden.

Petitioners allege that grant to the Application will be contrary to the goals of the Commission to maintain “diverse and open distribution of information.” Petitioners base this allegation on their assumption that the proposed transaction will reduce the number of news/talk-formatted stations in the market from three to two (because of the expected rebroadcast of certain of WJFN(FM) programming on WNTW(AM)). First, the primary community contours of WJFN(FM) and WNTW(AM) largely do not overlap, with WJFN as a rimshot signal situated to

1100 (Rev. Bd. 1982)). Intent to deceive can also be inferred when the surrounding circumstances clearly show the existence of an intent to deceive. *See Commercial Radio Service, Inc.*, Order to Show Cause, 21 FCC Rcd 9983, 9986 (2006) (citing *American International Development, Inc.*, Memorandum Opinion and Order, 86 FCC 2d 808, 816, n.39 (1981), *aff’d sub nom. KXIV, Inc. v. FCC*, 704 F.2d 1294 (D.C. Cir. 1983))).

⁷ 47 U.S.C. § 309(d)(1); *see also Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

the northwest of Richmond, and WNTW transmitting from a tower south of Richmond. Thus, the audience that would be served with the proposed rebroadcast of WJFN programming on WNTW does not currently have access to a 3rd news/talk station to begin with. Moreover, it is well-established that the FCC does not, nor can it, make licensing decisions as a result of, or that that would tend to influence, a station's programming.⁸ "Because the Commission cannot dictate to licensees what programming they air, each individual radio and TV station licensee generally has discretion to select what its station broadcasts and to otherwise determine how it can best serve its community of license."⁹ Therefore, this allegation fails.

Petitioners further alleged that the expected programming on the Stations after the transaction will frustrate the Commission's localism goals. Again, the Commission does not and must not pick winners and losers when it comes to programming decisions by broadcast licensees. The market and the listeners will determine whether a broadcaster's chosen format is supported by the community. Moreover, the Petitioners imply that, because Disruptor's current programming on WJFN lacks locally produced and locally-focused programming (which is patently false), that WNTW will also suffer from a lack of such programming. Nothing could be further from reality.

The proposed programming on WNTW will include *The John Fredericks Show*, which is a locally-produced news talk show that covers local Virginia political news as well as national political news, and is the *only* show in the Richmond market that covers the Virginia General Assembly LIVE from the state capitol when it is in session. Petitioners conveniently neglect to

⁸ The First Amendment to the Constitution and Section 326 of the Communications Act prohibit the Commission from exercising any power of censorship over broadcast station programming. U.S. CONST. amend. I; 47 U.S.C. § 326 ("Nothing in [the] Act shall be understood or construed to give the Commission the power of censorship over radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated ... by the Commission which shall interfere with the right of free speech by means of radio communication").

⁹ "The Public and Broadcasting," rev. Aug. 2019, *available at* <https://www.fcc.gov/media/radio/public-and-broadcasting> (last visited April 27, 2020).

mention that *The John Fredericks Show* is already simulcast on WNTW because current licensee Delmarva finds it of interest to the WNTW audience (again, because the WJFN signal does not reach most of the WNTW listeners). Disruptor proposes to continue to air *The John Fredericks Show* on WNTW in addition to two other live, locally-produced news talk programs focused on Virginia and local Richmond political and civic issues that currently air daily during the week on WJFN. WJFN also airs local high school football, basketball, and (soon) baseball games, as well as sports from local universities. Disruptor hopes that, with the addition of WNTW, it will be able to add even more local sports and create a well-known brand in the market for local sports programming. And, of course, Disruptor intends to continue to provide weather updates each hour on the Stations, as well as national and local news updates. Thus, even if the Commission were to consider the programming proposed to be offered by the assignee post-closing (which it should not), it would find that the Stations will continue to offer Chester, VA, and the greater Richmond DMA with high-quality local programming that serves the needs and interests of the community.

Petitioners further argue that the Application should be denied because it will result in one fewer woman-owned station as well as the transfer of ownership to non-local individuals. While the promotion of woman- and minority-owned radio stations is a laudable public interest goal, in light of *Prometheus Radio Project v. FCC*, there is currently no Commission policy in effect that requires, nor even allows, the Audio Division to take into consideration any ownership criteria other than the 2016 multiple ownership limitations.¹⁰ As stated in the Application, the proposed assignment will result in the assignee, Disruptor, owning an FM-AM combo in the Richmond

¹⁰ *Prometheus Radio Project v. FCC*, 939 F.3d 567 (3rd Cir. 2019), *pet. for writ of cert. pending*, *FCC v. Prometheus Radio Project*, __ US __ (2020); *In the Matter of 2014 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Order, DA 19-1303 (MB 2019).

market, which is permitted in all instances under the Commission's multiple ownership rules.¹¹ Moreover, Petitioners argument against non-local ownership of a commercial radio station is inapposite; there are no Commission rules or policies that a commercial radio station's ownership be held by local residents.

Petitioners' further allegations that Disruptor made a false certification on the Application as to its financial qualifications are also ludicrous and must be rejected. The fact that the Applicants agreed in a negotiated contract to proceed with a proposed transaction without a down payment has no bearing on nor is reflective of the financial qualifications of Disruptor to become the FCC licensee of the Stations. The Applicants determined that their long business relationship made a down payment unnecessary. In addition, Disruptor has been approved for full financing of the purchase price of the Stations, and has sufficient revenue and/or investment from its members to operate the Stations for three months after the proposed transaction. The Audio Division must therefore reject these unsubstantiated allegations of financial disqualification and misrepresentation.

In yet another unfounded allegation, Petitioners suggest the assignment Application should be denied because they perceive the principal of Disruptor, John Fredericks, to be ignorant of or flagrantly in violation of the FCC's rules because, they assert, he "claimed ownership" of the Stations in a broadcast. With all due respect, Petitioners again have their facts wrong. Mr. Fredericks confirms that the day after the Application was filed with the Commission, he read on the air on the John Fredericks Show, *verbatim*, a trade press article that said, inartfully, that Disruptor had purchased the Stations. Mr. Fredericks was not making that claim, nor has he made such a claim on the air (or in any other context, for that matter), and he rejects the allegation that he is not aware of or is in any way flouting the rules or regulations of the FCC.

¹¹ 47 C.F.R. § 73.3555(a)(1).

Lastly, the Petitioners' argument that Disruptor should not be permitted assignment of the Stations' licenses because of alleged problems with the WJFN online public file are also ridiculous. Undersigned counsel has reviewed the WJFN public file and cannot find the references to the prior owner indicated by the Petitioners, nor did she find any missing files or other violations.

Conclusion

Petitioners have failed to make a *prima facie* case that the Application is not in the public interest. In addition, Petitioners lacked candor and misrepresented their interests in the Stations, coming to the Commission in bad faith and with unclean hands. For these reasons, the Audio Division must deny and dismiss the Petitions and grant the Application expeditiously.

April 28, 2020

Respectfully submitted,

DELMARVA EDUCATIONAL ASSOCIATION

AND

DISRUPTOR RADIO, LLC

By: _____/s/_____

Davina Sashkin, Esq.
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Arlington, VA 22209
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AFFIDAVIT OF
NANCY EPPERSON

I, Nancy Epperson, declare under penalty of perjury, that:

1. I am president of Delmarva Educational Association, the assignor of Stations WNTW and W224EB.
2. I have read the attached "Joint Opposition to Petitions to Deny" and attest that the facts and information contained therein are true and accurate to the best of my knowledge and belief.
3. No consideration has been or promised to be paid by me individually or by Delmarva, to Donna Kunde or William Eastman for the withdrawal of their Petitions.

Executed this 27th day of April 2020.

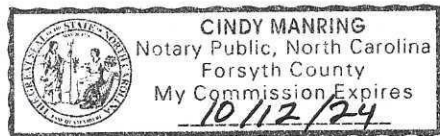

Nancy Epperson

Subscribed and sworn to before me

This 27 day of April, 2020.


Notary Public

My Commission expires: 10/12/24



AFFIDAVIT OF
JOHN FREDERICKS

I, John Fredericks, declare under penalty of perjury, that:

1. I am managing member of Disruptor Radio, LLC (“Disruptor”), the proposed assignee of Stations WNTW and W224EB.
2. Disruptor is the FCC licensee of WJFN(FM), Goochland, VA.
3. I have read the attached “Joint Opposition to Petitions to Deny” and attest that the facts and information contained therein are true and accurate to the best of my knowledge and belief.
4. No consideration has been or promised to be paid by me individually or Disruptor Media, LLC, to Donna Kunde or William Eastman for the withdrawal of their Petitions.

Executed this 27th day of April 2020.



John Fredericks

Subscribed and sworn to before me

This 28 day of April, 2020.

Jared Helmick

Notary Public

My Commission expires: 05/07/2023



CERTIFICATE OF SERVICE

I, Davina Sashkin, a member of the law firm of Fletcher, Heald & Hildreth, PLC, hereby state that a true copy of the JOINT OPPOSITION TO PETITION TO DENY was served by email this 28th day of April, 2020, to the following:

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/s/

Davina Sashkin