DUPLICATE

COPY

RECEIVED

MAY 1 - 1991

Federal Communications Commission
Office of the Secretary

Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of the Application of	)	
	)	File No.
GAF BROADCASTING COMPANY, INC.,	)	BRH-910201WL
	)	
For Renewal of License of Station WNCN (FM), New York, New York	)	

To: The Commission

PETITION TO DENY

Listeners' Guild, Inc. ("Guild" or "Petitioner"), by its attorney, hereby respectfully petitions, pursuant to Section 309(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(d)(1), and pursuant to Section 73.3584 of the Commission's Rules, 47 C.F.R. § 73.3584, to deny the application of GAF Broadcasting Company, Inc. ("GAF Broadcasting" or "Licensee") for renewal of its license to operate station WNCN(FM), New York, New York, on the grounds that such renewal would be inconsistent with the public interest, convenience, and necessity for the reasons hereinafter set forth. A hearing on said renewal application, as provided in Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(e), is hereby requested.

I

THE GUILD AND ITS INTEREST IN THIS PROCEEDING

The Guild is a not-for-profit corporation organized and existing under the laws of the State of New York, with an office at Carnegie Hall, 881 Seventh Avenue, New York, New York 10019. It was organized under the name

"WNCN Listeners' Guild, Inc." in 1974, in order to represent the interests of listeners in connection with a change of WNCN's classical music format. The Guild adopted its present name in 1984. The Guild has no economic or financial stake in any broadcast licensee or applicant, nor in the operation of any broadcasting station.

The Guild's numerous members, as well as its directors and officers, are listeners who reside in the areas of New York, New Jersey and Connecticut where the signal of station WNCN(FM) is heard. As such, they individually and collectively have an interest in assuring that WNCN is owned and operated consistently with the public interest, convenience and necessity, and it is to protect and further that interest that the Guild's Board of Directors has authorized the filing of this *Petition to Deny*. The Guild thus is a party in interest herein, 47 U.S.C. § 309(a), and has standing to file and maintain this *Petition to Deny* and to participate fully in the proceedings before the Commission in connection with the Licensee's renewal application for WNCN. *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (1966). The Guild's status as a party in interest more fully appears from the accompanying affidavits of its President, David Malamud (Exhibit A hereto), and its former Chairman, T'ing Pei (Exhibit B hereto).

II

PENDING PROCEEDINGS

On April 27, 1988, the Guild petitioned the Commission to deny the applications (File Nos. BTCH-880322GF & BTCH-880322GG) of the Licensee and the controlling shareholders of its corporate parent, GAF Corporation ("GAF"), for consent to the transfer of control of Licensee in connection with a leveraged buy-out of GAF by a management group led by its Chairman and Chief Executive Officer, Samuel J. Heyman ("Heyman"). The Guild's *1988 Petition to Deny*, as later supplemented, asserted several grounds for denial of consent to the requested transfer of control. These included several issues that

call into question whether the applicants, and most particularly Heyman himself, possess the requisite character to hold a Commission license.[1]

Specifically, the Guild has alleged: (i) that GAF, under Heyman's Chairmanship, had breached commitments — and representations to the Commission — that it would maintain the classical music format that the Guild has been fighting to preserve since 1974[2]; (ii) that Heyman applied prematurely for Commission consent to transfer control of GAF Broadcasting.

defendants were charged — and of which GAF and Sherwin ultimately were convicted.[6]

On November 14, 1988, the Chief, Mass Media Bureau, issued a decision, No. 8920-JO, (the *"Decision"*), granting the above-referenced applications for consent to transfer of control of WNCN, and denying the Guild's *Petition to Deny* said applications. A timely *Petition for Reconsideration* of the *Decision* was filed by the Guild on December 14, 1988, and is presently pending.

Notwithstanding the pendency of the *Petition for Reconsideration,* the leveraged buy-out of GAF was consummated on March 29, 1989, and with it the transfer of control of the Licensee from the former shareholders of the publicly-held GAF to the Heyman-led management group took effect. Heyman thereupon became the holder of a majority of the stock of the Licensee.

On December 19, 1990, the Chief, Mass Media Bureau wrote to Licensee's counsel, posing several questions relating to GAF's and Sherwin's convictions[7] as well as to several civil fraud cases that the Licensee had reported to the Commission. GAF Broadcasting filed responses to the Commission's questions on January 22, 1991, and on February 19, 1991, the Guild filed a reply to the Licensee's filing.

---

6. Letter from David M. Rice to Hon. Dennis R. Patrick, Aug. 12, 1988, at 2-3; *Petition for Reconsideration,* at 6-7; *Reply to Opposition to Petition for Reconsideration,* at 3-5; *Supplement to Petition for Reconsideration,* at 3-5.

7. Subsequently, on March 18, 1991, the Second Circuit reversed the convictions and remanded the case to the District Court. *GAF Corp. v. United States,* ___ F.2d ___ (2d Cir. Mar. 18, 1991).

III

GROUNDS FOR DENIAL OF RENEWAL OF WNCN'S LICENSE

A. Previously Pleaded Issues

The Guild hereby incorporates by reference, with the same force and effect as if here set forth at length, each of its prior pleadings and other filings before the Commission in the above-described proceeedings involving the Licensee's application for consent to transfer of control of WNCN. A list of said pleadings and filings is annexed as Exhibit C hereto.

Based upon the facts therein contained, and for the reasons therein stated, the Commission should designate the Licensee's renewal application for a hearing on each of the issues raised by the Guild. Specifically, but not exclusively, those facts cast sufficient doubt upon the character and fitness of Heyman — and hence GAF Broadcasting — to continue as a licensee of the Commission, so as to necessitate a hearing and, ultimately, denial of such renewal.

The recent reversal of the convictions of GAF and Sherwin by no means obviates the need for a hearing. The sworn evidence in the criminal trials of GAF and Sherwin raise questions that bear so directly and cogently on the question of the Licensee's fitness, and the fitness of Heyman himself to be a Commission licensee, that resolution of those questions in a Commission hearing is essential before a finding that renewal would serve the public interest could possibly be made. Such a hearing is the sole forum in which Heyman's fitness can be determined, regardless of what further developments there may be in the criminal case. Besides, the present status of that case does not represent a finding of the defendants' innocence, but only a reversal of the finding of guilt. It is surely proper for the Commission to consider the record in the criminal proceeding in the course of its hearing, so as to enable it to determine basis of both the convictions and the reversals, and thereby to

reach conclusions as to the proper effect thereof on the Licensee's trustworthiness and fitness to serve the public interest.

B. Additional Matters Bearing Upon the Licensee's Character and Fitness

In or about April, 1990, Licensee announced and began to promote heavily over the air on WNCN as well as through direct mail, a so-called "WNCN Listeners' Club." The club offered listeners, for a $10 membership fee, a newsletter with information about the station, participation in "Club" activities such as trips to concerts, and discounts from participating merchants.

These functions bear a striking similarity to many of the Guild's typical activities over the years since its founding as the "WNCN Listeners' Guild, Inc." in 1974. Obviously, they are designed to appeal to the very same group of listeners from which the Guild has drawn its own membership. Moreover, the name for the station's new group is not only very similar to the Guild's present name, but even more so to the Guild's original name. Although the Guild's voluntary deletion of "WNCN" from its corporate name was done, at least in part, to minimize confusion between it and the Licensee,[8] many members, former members and potential members still remember it by its original name.

Under these circumstances, the Guild rightly feared that confusion would ensue, and that the Guild would suffer loss of members and financial support as a result of listeners joining the "Club" in the belief that they were joining the Guild. Given the Licensee's ability and willingness to devote substantial airtime to promoting its "Club," that effect could be quite significant, although it is difficult to quantify precisely the impact thereof on the Guild's membership and financial support.

---

8. In fact, although the station's call letters predate the Guild's founding, the Guild was known as the "WNCN Listeners' Guild, Inc." *before* the Licensee acquired the license for WNCN(FM) pursuant to an Agreement to which the Guild was a party.

The Guild, acting through its then-Chairman, T'ing Pei, made its concerns and objections known to Carl Eckardt, a senior official of GAF, who initially professed GAF's ignorance of the matter, and later acknowledged and sympathized with the Guild's concerns, and advised Mr. Pei that GAF Broadcasting's "innocent" use of a name confusingly similar to the Guild's could be reversed and a new name adopted for the "Club." Indeed, he invited the Guild to suggest such a new name, an invitation which the Guild declined; eventually Mr. Eckardt suggested the name "WNCN Club" and Mr. Pei advised him that the Guild would not object thereto.

Despite Mr. Eckart's encouraging words, the only concrete offer to change the Club's name came in the form of a proposed *quid pro quo* for the Guild's waiving certain of its rights under the Commission's *ex parte* rules in the still-pending proceeding before the Commission concerning the application for consent to transfer of control of the Licensee. (See Letter from Carl Eckardt to T'ing Pei, Sept. 5, 1990, Attachment 1 to Affidavit of T'ing Pei, Exhibit B hereto.) That proposal was rejected and strongly objected to by Mr. Pei on the Guild's behalf. (See Letter from T'ing Pei to Carl Eckardt, Sept. 19, 1990,[9] Attachment 2 to Affidavit of T'ing Pei, Exhibit B hereto.)

In fact, the name of the "Club" has never been changed, and the Licensee continues to promote it heavily over its facilities. The Guild believes that the cumulative effect of a full year of such on-air and other promotion — which

---

9. As explained in Mr. Pei's affidavit, his Sept. 19, 1990 letter to Mr. Eckart is attached in redacted form by reason of the existence of a confidentiality agreement which, on its face, would prohibit disclosure of other portions of that letter. The Guild believes and contends that the imposition of that confidentiality requirement, as well as other conduct of GAF in

may be equivalent to an advertising purchase in the hundreds of thousands of dollars — has in fact caused significant harm to the Guild, the net effect of which could have been intended by GAF to be a weakening of the Guild's capability of sustaining its attack upon the transfer of control of the Licensee to Mr. Heyman.

The Guild respectfully submits that its rights have been violated, and the

benefit upon its audience and community of service. It is quite clear that the Licensee has merely attempted to create the *appearance* of compliance with the Commission's policies and its public interest responsibilities under the Communications Act while actually seeking only to minimize the impact upon its own profits of whatever public affairs programming it does carry.

In short, the Licensee's showing of purported compliance with Commission policies on public affairs programming is a sham. The Licensee's true policy is to avoid any meaningful contribution to its audience and community by engaging in only minimal ascertainment efforts, carrying very little issue-oriented programming, and relegating that which it does carry to "graveyard" hours. These deficiencies in the Licensee's performance require a hearing and justify denial of renewal of its license

D. Employment Practices

The Licensee's annual employment reports for the present license term disclose serious deficiencies in its compliance with applicable law and policies with regard to equal employment opportunity. Most serious among the shortcomings revealed by the Licensee's reports are its failure over the entire license period to employ any Hispanics whatsoever in any of the top four job categories, despite the very substantial proportion of Hispanics in the New York area population and workforce, and its failure to employ any minority persons in the top category of "officials and managers."

Despite these (and other) serious failures, the Licensee continues to follow what has obviously proved an extremely ineffective equal employment opportunity program, at least insofar as minority recruitment is concerned. The Equal Employment Opportunity Program Report annexed to Licensee's renewal application discloses that the Licensee failed to secure even a single referral from its advertisements in minority-oriented media (including a Spanish-language newspaper and one aimed principally at the Black community) from such organizations as the NAACP and the National Association of Black Journalists, or through present employees, and only one minority referral each from two local colleges listed in the Report. Not surprisingly, of six total hires in 1990 (including one in the upper four categories), *none* were minorities!

Both the Licensee's lame efforts and its poor results show a failure to discharge its responsibilities to observe the Commission's policies and the law

of the land with respect to equal employment oppportunity.[12] That failure

Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of the Application of	)	
	)	File No.
GAF BROADCASTING COMPANY, INC.,	)	BRH-910201WL
	)	
For Renewal of License of Station WNCN (FM), New York, New York	)	

STATE OF NEW YORK)
: Ss:
COUNTY OF QUEENS)

DAVID MALAMUD, being duly sworn, deposes and says:

1. I am the President of Listeners' Guild, Inc. ("Guild"), the Petitioner herein, and I submit this affidavit in support of the Guild's *Petition to Deny* the above-captioned application for the renewal of the license for WNCN(FM), New York, New York.

2. The Guild is a not-for-profit corporation organized and existing under the laws of the State of New York. It was organized under the name "WNCN Listeners' Guild, Inc." in 1974, in order to represent the interests of listeners in connection with a change of WNCN's classical music format. The Guild adopted its present name in 1984.

3. I and virtually all of the Guild's numerous other members, as well as all of its directors and officers, are listeners who reside in the areas of New York, New Jersey and Connecticut where the signal of station WNCN(FM) is heard. The Guild presently has approximately 1,800 paid-up members and receives contributions from several thousand additional individuals. In its

contributions from members and other supporters which has enabled it to maintain its office in the Carnegie Hall Building, 881 Seventh Avenue, New York, New York 10019, and to carry on its activities, focused primarily on the preservation and restoration of high-quality classical music broadcasting on WNCN, but also encompassing broader issues of concern to the listening public.

4. No part of the assets, income or profit of the Guild is distributable to or enures to the benefit of its members, directors or officers. The Guild has no economic or financial stake in any broadcast licensee or applicant, nor in the operation of any broadcasting station.

5. The filing of the *Petition to Deny* has been duly authorized by the Guild's Board of Directors. I am familiar with the contents thereof and to the best of my knowledge, information and belief, the allegations thereof are true and correct and the *Petition* is being submitted for the purposes stated therein.

6. I share with my fellow members, directors and officers of the Guild a strong interest in assuring that WNCN is owned and operated consistently with the public interest, convenience and necessity. To protect and further that interest, I respectfully submit that the Guild's *Petition to Deny* should be granted in all respects.

David Malamud

David Malamud

Sworn to before me this
1st day of May, 1991

Notary Public

DAVID M. RICE
Notary Public, State of New York
No. 41-4952457
Qualified in Queens County
Commission Expires June 19, 1991

Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of the Application of	)	
	)	File No.
GAF BROADCASTING COMPANY, INC.,	)	BRH-910201WL
	)	
For Renewal of License of Station	)	
WNCN (FM), New York, New York	)	
	)	

STATE OF NEW YORK)
: Ss:
COUNTY OF QUEENS)

T'ING PEI, being duly sworn, deposes and says:

1. I was, until today, the Chairman of the Board of Directors of Listeners' Guild, Inc., a position which I held for over three years. I had been a director of the Guild for ~~over~~ nearly a decade. I have resigned my positions with the Guild as of this date in order to form a new company, The Fidelio Group, Inc., which plans to file an application with the Commission today for a permit to construct a new FM station on the frequency now licensed to WNCN.

TOP

2. During my tenure, and in my capacity as Chairman, I participated personally in and was fully familiar with all of the Guild's activities in connection with proceedings before the Commission and in its direct dealings with GAF. I am thus fully familiar with all of the matters and issues described and raised in the Guild's *Petition to Deny*, and confirm that the allegations therein are, to the best of my knowledge, information and belief, true and correct, and that the *Petition to Deny* is being filed for the purposes stated therein.

EXHIBIT B

3. Among the numerous matters in which I was involved was the conduct of discussions with GAF concerning its formation and promotion of an entity called the "WNCN Listeners' Club," a name which is confusingly similar to the Guild's original name, "WNCN Listeners' Guild, Inc." and which clearly continues to cause confusion for listeners who may not realize that the "Club" and the Guild are not one and the same. This is quite ironic, since the Guild had taken the initiative in *avoiding* any such confusion by deleting "WNCN" from its name in 1984.

4. The description in the *Petition to Deny* of my dealings with GAF concerning this matter are accurate, as the letters attached hereto as Attachments 1 and 2 further demonstrate. As the latter of the two letters is attached in redacted form, some words of explanation are in order.

5. The thrust of the exchange of correspondence between myself and Carl Eckardt of GAF is that GAF, after creating harmful confusion that could — and may have been intended to — undermine the Guild's ability to maintain its challenge to the application for consent to transfer control of WNCN to Mr. Heyman, sought to use the promise of alleviating that confusion in order to induce the Guild to forego its legal rights in the pending Commission proceeding. I can attest that other similar attempts were made by GAF to cause the Guild to forego its rights, and in the final analysis I have concluded that they were done deceitfully and for precisely that wrongful purpose.

6. Nevertheless, as a part of that course of conduct, the Guild was induced to execute a certain confidentiality agreement which, on its face, forbids disclosure of the nature of the events to which I have adverted. Rather than risk violating the agreement — which I now believe constituted a part of GAF's course of wrongful conduct — I have redacted portions of my September 19, 1990 letter from Attachment 2.

7. I believe, however, that the public interest requires that the Commission ultimately scrutinize GAF's conduct in its entirety, and that any barrier to such scrutiny must be set aside by the Commission in the proper

discharge of its responsibilities to the public. I trust, therefore, that upon appropriate application by the Guild, it and I will be permitted to make full disclosure of our relevant knowledge.

Ting Pei

Sworn to before me this
1st day of May, 1991

Notary Public

DAVID M. RICE
Notary Public, State of New York
No. 41-4952457
Qualified in Queens County
Commission Expires June 19, 1991

WAIVER

Listeners' Guild, Inc. has no objection to officials or representatives of GAF Corporation, GAF Broadcasting Company, Inc., or WNCN(FM) making oral, ex parte presentations to Commission decision-making personnel. Listeners' Guild expressly waives its rights to advance notice of or the opportunity to be present at any such presentation.

_____ (Signature)

_____ (Title)

_____ (Date)

GAF CORPORATION
1361 ALPS ROAD
WAYNE, NEW JERSEY 07470

CARL R. ECKARDT
EXECUTIVE VICE PRESIDENT

September 5, 1990

Mr. T'ing C. Pei
Chairman, Listeners' Guild
Pei/Galvin Holdings Limited
444 Madison Avenue
New York, New York

Dear T'ing:

As discussed, we would appreciate if Listeners' Guild would execute the attached waiver as soon as possible and return it to my attention. As soon as we have received the executed copy of the waiver, we will proceed to change the name of the WNCN Listeners' Club to WNCN Club.

As you suggested, I am also faxing a copy of the waiver to David Rice.

Sincerely,

Att.
CRE/alk

P E I / G A L V I N H O L D I N G S, L T D.

19 September 1990

Mr. Carl R. Eckardt
Executive Vice President
GAF Corporation
1361 Alps Road
Wayne, New Jersey 07470 BY FACSIMILE TRANSMISSION

Dear Carl:

The Board of Directors of the Listeners' Guild, Inc. (the "Guild"), held its regular monthly meeting a week ago today. After reviewing your letter dated 5 September and accompanying attachment with our counsel, and considering that the board meeting would be coming up within a matter of days, it was decided that the subject matter deserved board discussion. This accordingly took place, in executive session, last week. The comments which follow, concerning your request that I execute on behalf of the Guild a waiver as submitted by you, reflect a consensus of the board through that discussion.

It is the view of the board that the Guild has demonstrated on numerous occasions, especially beginning last May, that it is willing to forbear voluntarily from taking actions publicly which could be construed as being hostile to the interests of GAF. We have done so under the assumption that there is a good faith effort, on the part of both the Guild and GAF,

the preservation of a quality classical music format, which has been the Guild's long-standing and unambiguous objective.

Following a series of intermittent contacts with you, we had a meeting on 9 May

In the course of that meeting, I brought up the question of the creation of the so-called "WNCN Listeners Club" and made clear that we considered this to be inappropriate to the extent that it fosters a confusion with the Listeners' Guild (formerly, the "WNCN Listeners' Guild") and potentially siphons off members and attendant dues from the Guild. You indicated a lack of awareness of this new entity and promised to investigate and report back to me. Subsequently, you called to say that the intent had been

101 West 79th Street, New York, NY 10024-6401 Telephone (212) 769-0360 Fax (212) 421-5612

innocent but also to recognize that the effect could be the confusion (not to mention diversion of funds) we feared and to assure me that some solution would be possible. You said this had been promulgated by station management without the prior knowledge of corporate headquarters and could be reversed. You asked me to suggest an alternate name.

On 10 May, the FCC adopted a new policy statement [illegible]

Your position regarding the name change of the WNCN Listeners Club and the requested waiver is being evaluated by the board of the Guild in the context of the foregoing chronology. Our initial response follows:

- Firstly, we deem it inappropriate that there be any linkage, expressed or implied, between change of the name of the so-called WNCN Listeners Club to something less in conflict with the Guild's name and identity and the provision by the Guild of any waiver for any oral, ex parte, presentations by GAF to FCC decision-making personnel.

  We had previously advised you that we did not consider it our role or responsibility to suggest another name and, later, indicated that we would not oppose changing the name to WNCN Club, although we reserved the right to demand other remedial or redressive actions such as promotional announcements explaining the change, the lack of linkage between the Guild and the club, and potentially other measures. In other words, we consider the institution of the so-called club to be wrongful on its face and requiring a name

change, apart from any other considerations.

- Secondly, your proposal to link a change in the name of the club to execution by the Guild of a waiver with respect to certain FCC proceedings comes against a backdrop of much talk but little or no substantive progress on the other matters which obtain.

In this context, the requested waiver is highly objectionable. The Guild, by its relative quiescence (which may threaten the loss of some of its rights in certain FCC proceedings if allowed to persist), has been demonstrably cooperative with GAF. We cannot continue this posture, much less affirmatively cooperate with GAF, in the absence of concrete positive steps on your part.

As to the waiver you have explicitly requested, this is overly broad and unacceptable to us. We are asked to buy a pig in a poke. We may, however, assuming some progress on other issues already on the table and discussed above, be willing to consider a more limited waiver, but we are simply not prepared to sign away everything on the basis of the present loose expressions of good will. We cannot accept the notion, implicit in your requests, that the Guild would be best served by assisting GAF in confirming its right to the license for WNCN.

I will be abroad for one week beginning later today. I will attempt to remain in close touch with my office while in Europe, but in my absence it may be easier for you to discuss matters with David Rice, our counsel, whose numbers you have. We will, in any case, be unable to take formal action without at least Executive Committee approval, but I desire for you to know that we are engaged in this dialogue with the utmost seriousness of purpose and expectations of success. The tone of this letter may seem formal, but this can hardly be surprising in view of

the troubled history of relationships between the Guild and GAF. Notwithstanding, we are prepared to proceed in good faith.

Sincerely,

T'ing C. Pei
Chairman
Listeners' Guild, Inc.

TCP:id

cc: Joel Schwartz, President and Executive Committee Member
Victoria Mastrobuono, Treasurer and Executive Committee Member
David M. Rice, Esq.

Pleadings and Other Filings By The Listeners' Guild, Inc.
(File Nos. BTCH-880322GF & BTCH-880322GG)

1. *Petition to Deny*, Apr. 27, 1988

2. *Reply to Opposition to Petition to Deny*, May 19, 1988

3. Letter from David M. Rice to Hon. Dennis R. Patrick, Aug. 12, 1988

4. *Petition for Reconsideration*, Dec. 14, 1988